

2015-000316

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Beaufort County
Roger M. Young, Circuit Court Judge

S.C. Supreme Court

Opinion No. 5283 (S.C. Ct. App. filed 12/17/2014)

03-GS-07-1756

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

PETITIONER,

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Arthur Smith, Appellant.

Appellate Case No. 2011-200306

Appeal From Beaufort County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5283
Heard February 4, 2014 – Filed December 17, 2014

AFFIRMED

Breen Richard Stevens, of Orangeburg, and Appellate
Defender Benjamin John Tripp, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Christina J. Catoe Bigelow, both of
Columbia, for Respondent.

SHORT, J.: Arthur Smith appeals his conviction for criminal sexual conduct with a minor in the first degree. He contends the trial court erred in: (1) admitting testimony of the forensic interviewer regarding Smith's identity; (2) allowing the State's expert to testify regarding the relationship between the length of delay in disclosure of sexual abuse and the credibility of the disclosure; and (3) permitting the victim to refresh his recollection by reading his testimony from Smith's previous trial. We affirm.

I. The First Trial

Smith was first tried for this crime in November 2004. After the jury found Smith guilty, the trial court granted him a new trial "on the ground he was denied a fair trial, because the testimony of the victim . . . was corrupted . . . by the coaching of [his] aunt." *State v. Smith*, 372 S.C. 404, 406, 642 S.E.2d 627, 628-29 (Ct. App. 2007), *vacated on other grounds*, 383 S.C. 159, 679 S.E.2d 176 (2009). This court affirmed. *Id.* at 406, 642 S.E.2d at 629. On writ of certiorari, the supreme court agreed the trial judge did not abuse his discretion or commit an error of law and remanded the case for a new trial. *Id.*

II. The Second Trial

The second trial began on September 19, 2011. The State presented evidence that in approximately 1997, when the victim was five years old, his family moved from Buffalo, New York, to Bluffton, in Beaufort County. The parents separated in 1999. Mrs. Smith retained primary custody of the children, and Smith had generous visitation. The alleged sexual assaults occurred while the victim visited his father during this period of separation. The victim, who was nineteen at the time of the second trial, was six years old when Smith began abusing him and eight when the abuse ended.

The victim testified that on "[m]ore than three" occasions during 1999 and 2000, his father "would make me do things to him and do things to me." He testified his father "would suck my penis and stick his penis in my butt. . . . He made me suck his penis too and try to put my penis in his butt also." On cross-examination, the victim admitted he did not "have a good recall of everything that happened in 2000," and that in a pretrial hearing the previous day he "didn't remember . . . that there was oral sex until [he] read a transcript" from the first trial to refresh his memory.

The victim's two siblings¹ testified Smith also sexually abused them. The victim's brother testified that "multiple times" while the family was living in Buffalo, Smith performed oral and anal sex on him and forced him to reciprocate. This abuse occurred when the brother was between the ages of six and eight. The brother

¹ The victim is the middle of three children with an older brother and a younger sister. In 2001, the brother was eleven, the victim was eight, and the sister was seven.

testified Smith threatened to hurt Mrs. Smith if he told anyone about the abuse. The victim's sister testified Smith abused her after the family moved to Bluffton. She testified that on "countless" occasions when she was six and seven years old, Smith forced her to perform oral sex on him and would "touch" her vagina and "butt" with his hands. She also testified Smith told her not to tell anybody.

Beginning in November 2001, the victim and his two siblings lived in the custody of their aunt and her husband. Soon after moving in with the aunt, the victim exhibited poor behavior, began counseling, and was placed in a SOAP² program.

The victim first reported his father's sexual assaults to his aunt in January 2002, but no one reported the crimes to law enforcement until May 2003. The victim testified he did not tell anyone earlier because "[Smith] told me that he would kill me or break my bones if I told anybody" and "I was scared." The victim's brother and sister also did not disclose to anyone that their father had abused them. The victim's aunt admitted she learned in January 2002 that Smith sexually abused the victim, but she did not disclose this to anyone until May 2003. She explained her delay in disclosure was because, "We were still working on taking care of [the victim's] health issues."

Andres Florencio, a criminal investigator for the Beaufort County Sheriff's Office (BCSO), testified the BCSO used forensic interviewers from Hope Cottage, a children's advocacy center, to interview child victims of crime. Florencio testified without objection that in May 2003, the victim and his aunt came to the BCSO and reported that the victim's father sexually assaulted the victim in 1999 and 2000.

Kendra McIlveen Twitty, a forensic interviewer and counselor at Hope Cottage, explained in detail the techniques and procedures a forensic interviewer uses to interview a child, and testified the victim disclosed he had been abused. She testified, "[The victim] disclosed that he had to suck his dad's penis" Smith's counsel immediately objected, and the trial court sustained the objection on the basis that any testimony quoting the victim's statements must be limited to "the time and place" of the incident. Twitty then testified, "When I asked about time frame, he said that it happened since he was, like, six or seven years old, . . . I'm not exactly sure of the number, but he said it had been happening for a number of years." As to place, the forensic interviewer testified the victim told her "it happened in South Carolina in a trailer and they would be in his dad's bedroom."

² SOAP is the acronym for a Sex Offender and Addiction Program, which specializes in children who act out in a sexual manner.

The trial court overruled Smith's objection to this last statement. Immediately thereafter, the assistant solicitor showed the forensic interviewer a copy of her report to "refresh your recollection as to the time frame of the abuse." She then testified, "I had written [the victim] reported that he was about six or seven years old when his dad started to do these things to him." The trial court overruled Smith's immediate objection to this statement.

The State's final witness was Tod Lynch-Stanley, a licensed clinical social worker and director of Family Reconstructions and SOAP, a private practice in Georgia. The trial court found Lynch-Stanley qualified as an expert in sexual deviancy. Lynch-Stanley explained he began treating the victim sometime after 2000. When Lynch-Stanley began treatment, the victim had not revealed he was sexually abused.

The State asked Lynch-Stanley to explain "a little bit about what is delayed disclosure in a sexual abuse setting. Lynch-Stanley explained there are "many reasons for [delayed disclosure]." On cross-examination, Smith's counsel asked, "What did you mean by a long period of delayed disclosure?" Lynch-Stanley answered, "I would say a long disclosure in general might be anything longer than two or three months. . . . Some disclosures occur after two or three months. Some occur after two years or 20 years." Counsel asked, "What about three years?" Lynch-Stanley replied, "That would be a fairly long delayed disclosure." The following dialogue occurred at the beginning of the State's redirect examination:

Q: Does the length of the delay in the disclosure have any -- in your opinion, does it erode the credibility of the disclosure?

Smith: Objection, Your Honor.

Court: Overruled.

A: No, it really doesn't. People disclose at different times. Different things, . . . triggers and things like that, can come up that cause people more symptoms, . . . the symptoms come up . . . and . . . occur[] at different times

So, you might have someone who doesn't show symptoms of sexual abuse for a year, six months, eighteen months, and then all of a sudden, something triggers them and reminds them of the abuse

So that's why you have disclosures that occur at different times as well, so I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure.

The jury convicted Smith, and the court sentenced him to thirty years of imprisonment. This appeal follows.

III. STANDARD OF REVIEW

In criminal cases, this court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial court abused its discretion. *Id.* at 6, 545 S.E.2d at 829. A trial court abuses its discretion when its ruling is unsupported by the evidence or controlled by an error of law. *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002). "In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. Halcomb*, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009).

IV. LAW/ANALYSIS

A. The Forensic Interviewer

Smith argues the trial court erred in overruling his objection to Twitty's testimony that identified Smith as the perpetrator after previously limiting the testimony to time and place. We find no reversible error.

In a criminal sexual conduct case, the testimony of a witness regarding a victim's out-of-court statement is governed by the South Carolina Rules of Evidence, which provide that a statement is not hearsay if:

The declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . (D) consistent with the declarant's testimony in a criminal sexual conduct case or attempted criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to the time and place of the incident.

Rule 801(d)(1), SCRE. This corroborative testimony is limited to the time and place of the alleged assault and cannot include details regarding the assault. *Smith v. State*, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010). "Among the details which must be excluded under the rule is the identity of the alleged perpetrator." *State v. Jeffcoat*, 350 S.C. 392, 396, 565 S.E.2d 321, 323 (Ct. App. 2002).

The trial court limited Twitty's testimony to time and place after she disclosed that the victim had reported "he had to suck his dad's penis." The trial court sustained the objection and gave a curative instruction to the jury. Smith did not object to the curative instruction and has accordingly waived any objection. See *State v. Wilson*, 389 S.C. 579, 583, 698 S.E.2d 862, 864 (Ct. App. 2010) ("[A]s the law assumes a curative instruction will remedy an error, failure to accept such a charge when offered, or failure to object to the sufficiency of that charge, renders the issue waived and unpreserved for appellate review."); *State v. White*, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (stating a curative charge is generally deemed to cure an allegation of error).

However, when Twitty identified the perpetrator by testifying the victim reported he was about six or seven years old "when his dad started to do these things to him," the trial court overruled Smith's objection to Twitty's testimony. We agree with Smith this constituted error because it went beyond time and place. However, we find the testimony was cumulative to other testimony; thus, it was not reversible error.

Florencio testified without objection that the aunt and the victim reported to him that the victim had been sexually assaulted by his father. Thus, Smith was previously identified as the perpetrator without objection, rendering Twitty's testimony harmless because it was cumulative. See *State v. Jennings*, 394 S.C. 473, 478-79, 716 S.E.2d 91, 93-94 (2011) (distinguishing between harmlessness of improperly admitted hearsay merely cumulative to other evidence and prejudice of improper corroboration testimony that is merely cumulative to the victim's

testimony); *State v. Schumpert*, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding where a counselor's testimony exceeded the time and place limitation by stating the defendant's name during testimony, any error was harmless because two other witnesses testified without objection in the same manner).

B. Expert Testimony Regarding the Length of Delay in Disclosure

Smith next argues the trial court erred in permitting Lynch-Stanley to testify regarding the relationship between the length of delay of disclosure of sexual abuse and the credibility of such disclosure, maintaining the testimony bolstered the victim's testimony. We find no reversible error.

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) (citing *State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)). Therefore, a witness may not give an opinion on whether he or she believes another witness is telling the truth or comment on another witness' veracity. *State v. Kromah*, 401 S.C. 340, 358-59, 737 S.E.2d 490, 499-500 (2013). This rule applies to experts, prohibiting them from commenting on the credibility of child witnesses in sexual abuse cases. See *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 ("For an expert to comment on the veracity of a child's accusations of sexual abuse is improper.").

In both *Kromah* and *Jennings*, our supreme court found improper bolstering in the admission of expert evidence indicating a child witness gave a "compelling" indication of abuse. See *Kromah*, 401 S.C. at 359, 737 S.E.2d at 500 (finding expert testimony about a compelling finding of child abuse was inappropriate); *Jennings*, 394 S.C. at 480, 716 S.E.2d at 94 (finding error in the admission of a forensic interviewer's written reports that concluded each of three child victims had provided a compelling disclosure of abuse); see also *State v. Dawkins*, 297 S.C. 386, 393-94, 377 S.E.2d 298, 302 (1989) (noting treating psychiatrist's indication he believed victim's allegations concerning symptoms were genuine was improper); *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) (stating it is improper "when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth"), *cert. denied*, Aug. 21, 2014.

However, our supreme court has found an expert did not vouch for a victim's veracity where the expert never stated she believed the victim and gave no other indication concerning the victim's truthfulness. See *State v. Douglas*, 380 S.C. 499, 503-04, 671 S.E.2d 606, 609 (2009) (concluding a forensic interviewer did

not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity). This court has likewise found no improper bolstering where the expert did not address the veracity of the victim. *See State v. Hill*, 394 S.C. 280, 295, 715 S.E.2d 368, 376-77 (Ct. App. 2011) (finding the expert did not vouch for the victim's truthfulness where the expert testified only that he saw the types of details in the victim's interview that he would look for in determining whether a child had been coached).

In this case, we likewise find no improper vouching because Lynch-Stanley gave no indication of his belief of the victim's truthfulness. During direct examination, Lynch-Stanley explained a lengthy delay in a victim's disclosure of sexual abuse is consistent with, if not necessitated by, the trauma the victim has suffered. When sexual abuse occurs, particularly if the victim is a child, the victim may not be able to immediately disclose the abuse for numerous reasons, including the victim's feelings of shame over what happened and the victim's fear of or intimidation by the perpetrator. We find this was an appropriately general explanation of the medical or scientific reasons a child might not immediately disclose sexual trauma.

During cross-examination, Smith's counsel questioned Lynch-Stanley regarding his specialization of treating symptoms of victims and questioning whether typical symptoms of sexual abuse could arise from other triggers. Counsel next questioned Lynch-Stanley as follows:

Counsel: The delayed disclosure that you spoke of, isn't it true that there are - when you spoke about delayed disclosure, you spoke of a long period. What did you mean by a long period of delayed disclosure?

Lynch-Stanley: [I]t's somewhat relative in terms of what long disclosure is. I would say a long disclosure in general might be anything longer than two or three months. . . . [S]ome disclosures occur within minutes. Some disclosures occur after two or three months. Some occur after two years or 20 years.

...

Counsel: What about three years?

Lynch-Stanley: That would be a fairly long delayed disclosure.

On redirect examination, the State asked, "Does the length of the delay in the disclosure have any - in your opinion, does it erode the credibility of the disclosure? Lynch-Stanley testified, "No, it really doesn't."

We recognize the State's question was inappropriate because it invited vouching by Lynch-Stanley. We also recognize Lynch-Stanley's initial response, standing alone, would constitute vouching for the victim's credibility. Lynch-Stanley continued his response, however, by stressing that credibility and delayed reporting are unrelated. He qualified his initial response, "I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure."

Despite the State's inappropriate question, we find no reversible error. In conjunction with Lynch-Stanley's direct and cross-examination testimony, we find the redirect testimony did not improperly bolster the victim because Lynch-Stanley qualified his initial response and never gave an opinion regarding whether the victim was telling the truth. *See State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror."). Accordingly, we find no reversible error.

C. Refreshing Recollection Using Previous Trial Transcript

Smith lastly argues the trial court erred in allowing the victim to refresh his recollection at the pretrial hearing with the trial transcript from the previous trial, which was tainted by coaching. We disagree.

In a pretrial hearing, the victim testified Smith anally molested him and forced him to perform anal sex on Smith. The victim could not remember if there was any oral contact. The State wanted to allow the victim to refresh his memory by reviewing a transcript from the previous trial. Smith objected, stating,

I object to the form which you are showing him the transcript. . . . I don't think he can read it over and then testify. So that would then just remind him of the things

that he's not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from.

Smith also argued the transcript from the previous trial could be used to impeach the victim, but not to refresh his memory. Smith maintained it could not be used to "refresh his recollection when [there was] a problem with the tenor of the prior case." The State argued Smith was objecting "to the very procedure by which you refresh [a] witness's recollection."

The trial court ruled the victim could review the transcript at the *in limine* hearing to refresh his recollection. Out of "fairness," the court ruled Smith could impeach the victim by cross-examining him during his testimony before the jury on his inability to remember if there was any oral contact during the *in limine* hearing. During cross-examination, Smith impeached the victim regarding his lack of memory at the pretrial hearing of the oral molestation and his need to have his memory refreshed.

"[T]he trial court has discretion to allow or refuse examination by an adverse party of writings used by a witness prior to trial to refresh his or her memory." *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001) (citing Rule 612, SCRE). "[A] witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at a previous trial, or from a copy of the same." *State v. Dean*, 72 S.C. 74, 81, 51 S.E. 524, 526 (1905) (quoting 2 *Elliott on Evidence* § 866); see *U.S. v. Thompson*, 708 F.2d 1294, 1299 (8th Cir. 1983) (finding no error in permitting a witness to refresh memory with the transcript from an earlier trial where the transcript was available to the defendant, and the defendant was given the right to cross-examine the witness); *Sullivan v. State*, 386 S.W.3d 507, 521 (Ark. 2012) (finding no abuse of discretion by the trial judge in allowing an eleven-year-old witness to refresh her memory by reviewing the trial transcript of her testimony given five years earlier at the trial of the appellant's co-defendant); *State v. Smith*, 231 S.E.2d 663, 670-672 (N.C. 1977) (finding no abuse of discretion by the trial judge who denied defendant's request to strike the entire testimony of a witness who refreshed her memory prior to trial by reviewing the transcript of her testimony at a previous trial).

In this case, the trial court permitted Smith great latitude on cross-examination, stating he would "get about as much leeway as [he] want[ed]." Smith impeached the victim by cross-examining him regarding his need to refresh his recollection at the *in limine* hearing. We find no abuse of discretion by the trial court in

permitting the victim to refresh his recollection by reviewing the transcript from the previous trial.

V. CONCLUSION

Based on the foregoing, Smith's conviction is

AFFIRMED.

FEW, C.J., concurs.

GEATHERS, J., concurs in part and dissents in part in a separate opinion.

GEATHERS, J., concurring in part, dissenting in part:

I agree with the majority that there was no reversible error in overruling Smith's objection to the testimony that identified him as the perpetrator. However, I respectfully dissent from the remainder of the majority's opinion for the following reasons: (1) the State elicited a response from an expert in this case that amounted to an improper comment on the victim's credibility; and (2) it was a fundamental error of law to allow the victim to refresh his memory with the coached testimony from the first trial that prompted the grant of a new trial.

I. Improper Bolstering and Vouching

In this case, there was a three-year delay in disclosure from the time the victim was first allegedly abused to the time of disclosing the abuse. On cross-examination, Smith's counsel asked Tod Lynch-Stanley, the State's forensic interviewer, whether a three-year delay in disclosure would be considered a short or long delay in disclosure. Lynch-Stanley responded, "That would be a fairly long delayed disclosure." Immediately on redirect, the State then asked Lynch-Stanley, "Does the length of the delay in the disclosure have any - in your opinion, does it erode the credibility of the disclosure?" Smith objected, but the trial court overruled the objection. Lynch-Stanley then responded, "[I]t really doesn't [erode the credibility]" and "[W]hen you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure."

By coaxing a response from Lynch-Stanley that inherently implicated the credibility of the victim's three-year delay in disclosure, the State was able to present a comment on the victim's veracity—a comment that has been expressly prohibited by our supreme court in *State v. Jennings*. See 394 S.C. 473, 480, 716

S.E.2d 91, 94 (2011) (holding that it is improper for an expert "to comment on the veracity of a child's accusations of sexual abuse" (citations omitted)); *id.* at 480, 716 S.E.2d at 94–95 (noting there was no physical evidence presented, finding the victims' credibility was the most critical determination of the case, and holding the error in the admission of evidence that vouched for the victims' veracity was not harmless); *see also State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013) (holding "even though experts are permitted to give an opinion, they may not offer an opinion regarding the credibility of others"); *State v. Whitner*, 399 S.C. 547, 559, 732 S.E.2d 861, 867 (2012) (stating it is improper "to have the forensic interviewer, improperly imbued with the imprimatur of an expert witness, invade the province of the jury by vouching for the credibility of the alleged victim"); *Smith v. State*, 386 S.C. 562, 569, 689 S.E.2d 629, 633 (2010) (finding the forensic interviewer's opinion testimony improperly bolstered the victim's credibility); *State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding it was error to allow an expert to offer an opinion as to whether the victim's allegations were "genuine," although trial court's curative instruction rendered error harmless); *State v. Taylor*, 404 S.C. 506, 514, 745 S.E.2d 124, 128 (Ct. App. 2013) ("Improper bolstering occurs when an expert witness is allowed to give his or her opinion as to whether the complaining witness is telling the truth, because that is an ultimate issue of fact and the inference to be drawn is not beyond the ken of the average juror." (quoting *State v. Douglas*, 367 S.C. 498, 521, 626 S.E.2d 59, 71 (Ct. App. 2006), *rev'd in part on other grounds*, 380 S.C. 499, 671 S.E.2d 606 (2009))); *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012) ("[W]itnesses are generally not allowed to testify whether another witness is telling the truth."); *State v. Hill*, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011) (stating "it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sexual abuse matter" (citations omitted)); *State v. Dempsey*, 340 S.C. 565, 569–71, 532 S.E.2d 306, 308–10 (Ct. App. 2000) (finding an expert improperly vouched for the victim's credibility by testifying that children, in general, are being truthful when they disclose that they have been sexually abused).

Although Lynch-Stanley did not explicitly say, "The victim is credible," the State's question and Lynch-Stanley's response necessarily suggested the victim's three-year delay in disclosure should not erode the credibility of the disclosure. Furthermore, I disagree with the majority that Lynch-Stanley's clarification—that delayed disclosure was not a "credibility or non-credibility thing"—alleviated the initial comment's impact on the victim's veracity. Unlike in *Dawkins*, where the trial court gave a curative instruction to mitigate the improper comment's prejudicial influence, no such instruction was given here. *See* 297 S.C. at 393–94,

377 S.E.2d at 302. Accordingly, I find that this question and answer "invade[d] the province of the jury by vouching for the credibility of the alleged victim." *Whitner*, 399 S.C. at 559, 732 S.E.2d at 867. Based on the prior holdings of our appellate courts, this testimony was impermissible and, therefore, the trial court erred by not excluding this portion of Lynch-Stanley's testimony.

II. Refreshing Memory and Tainted Testimony

As to the victim refreshing his memory with the coached testimony from the prior trial transcript, the prejudicial admission of this tainted testimony in the first trial was the precise reason for granting the retrial. Such "refreshing" effectively resurrected the victim's coached testimony. On appeal from the first trial, our supreme court found the trial court's grant of a new trial was proper based on the admission of the tainted testimony that was the direct product of "the clearly improper 'coaching' by [an aunt] of the minor victim." *State v. Smith*, 383 S.C. 159, 168, 679 S.E.2d 176, 181 (2009). Our supreme court went on to explain that, "[b]ecause [the victim] was the key witness in the prosecution's case, we cannot disregard the trial [court's] conclusion concerning the prejudicial impact on [Smith's] right to a fair trial." *Id.* (citing *Sharp v. Commonwealth of Ky.*, 849 S.W.2d 542, 546–47 (Ky. 1993)); *Sharp*, 849 S.W.2d at 546–47 (stating the coaching of a child witness by a family friend was "so egregious and inimical to the concept of a fair trial" that it could not be "disregarded in the name of trial court discretion").

Because the coached testimony in the first instance had such a "prejudicial impact on [Smith's] right to a fair trial," *Smith*, 383 S.C. at 168, 679 S.E.2d at 181, I believe the reintroduction of this tainted testimony under the guise of refreshing the victim's memory is a fundamental error of law. *See generally Harrison v. United States*, 392 U.S. 219, 220–22 (1968) (noting inadmissible evidence from the first trial should be excluded on retrial and should not be used for any other purpose (citation omitted)); *State v. McCreven*, 284 P.3d 793, 809 (Wash. Ct. App. 2012) ("It should not be necessary for us to state that an attorney, including a prosecutor, may not 'coach' a witness, i.e., urge a witness to create testimony, under the guise of refreshing the witness's recollection"); *People v. Spencer*, 641 N.Y.S.2d 910, 912 (N.Y. App. Div. 1996) (finding the trial court erred in the retrial by allowing the testimony from the first trial that had been obtained in an improper manner); *State v. Little*, 358 P.2d 120, 122 (Wash. 1961) (addressing the criteria for the use of a writing to refresh a witness's recollection and acknowledging that the trial court should "be satisfied that the witness is not being coached—that the witness is using the notes to aid, and not to supplant, his own

memory"); *People v. Duncan*, 527 N.E.2d 1060, 1062 (Ill. App. Ct. 1988) (finding ineffective assistance of counsel from first trial "colored the entire proceeding" and, therefore, the defendant's prior tainted testimony could not be readmitted in the second trial in the State's case in chief).

Based on the foregoing reasons, I would reverse.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

Appeal from Beaufort County

Roger M. Young, Circuit Court Judge

Opinion No.

PETITION FOR REHEARING

Appellant respectfully petitions the Court for a rehearing of its Opinion No. 5283 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court.

I. The Opinion states that Lynch-Stanley's testimony on redirect examination was not an improper comment on the complaining witness's credibility "because Lynch-Stanley qualified his initial response [that was an improper comment on credibility] and never gave an opinion regarding whether the victim was telling the truth." Specifically, he qualified responses that delayed reporting

does not "erode the credibility of the disclosure" and that credibility and delayed reporting are unrelated by saying, "I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure."

"The assessment of witness credibility is within the exclusive province of the jury." *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012). Lynch-Stanley's initial response on redirect was improper because he told the jury that the delayed report was not a factor to consider in assessing the complaining witness's credibility. The so-called qualification in no way cured the former statement because it also told the jury not to consider delayed reporting in assessing credibility. *But c.f.* Rule 801(d)(1), SCRE (addressing the use of a witness's prior statement to rebut a charge against her of recent fabrication and setting forth special rules when the witness is an alleged victim of criminal sexual conduct); *State v. Lee*, 360 S.C. 530, 538, 602 S.E.2d 113, 118 (Ct. App. 2004), *aff'd*, 375 S.C. 394, 653 S.E.2d 259 (2007) (finding substantial, actual prejudice from defense counsel's inability to refute delayed disclosure evidence presented by the State through its expert witness).

II. The use of prior sworn testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. *State v. Hughes*, 346 S.C. 339, 342, 552 S.E.2d 35, 36 (Ct. App. 2001). The Opinion cites *State v. Dean*, 72 S.C. 74, 81, 51 S.E. 524, 526 (1905) for the proposition that the trial court judge not abuse his discretion in allowing the complaining witness to read his prior testimony before re-testifying because "a witness may refresh his memory from . . . his own testimony at a previous trial."

However, the trial judge abused his discretion because an abuse of discretion occurs when a trial court's ruling "reveals no discretion was exercised." *State v. Allen*, 370 S.C. 88, 94,

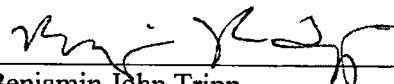
634 S.E.2d 653,656 (2006). *See also United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007) (“A district court abuses its discretion when it . . . fails to consider judicially recognized factors constraining its exercise of discretion [or] relies on erroneous factual or legal premises.”). In *James v. Jacobsen*, the Court of Appeals for the Fourth Circuit explicated abuses of discretion by “failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule” and “by failure, in attempting to exercise discretion, adequately to take into account judicially recognized factors constraining its exercise.” *James v. Jacobsen*, 6 F.3d 233, 239 (4th Cir. 1993). The court explained that an abuse of discretion occurs when a “conclusion [is] based upon a general rather than a particularized assessment of the equities involved,” and particularly when the conclusion “announces itself as a flat rule of general application based upon strongly felt personal predilection.” *Id.* at 240-41.

Here, counsel objected below that allowing the witness to read the former testimony “would just remind him of the things that he’s not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from.” R. 27, lines 5-11. Additionally, counsel objected that “if he didn’t remember, I don’t understand why we’re trying to refresh his recollection when we had a problem with the tenor of the prior case.” R. 29, lines 6-99.

Thus, the issue for the trial judge to handle in his discretion was whether “there would be error where under the pretext of refreshing a witness’ recollection, the prior testimony was introduced as evidence.” *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 234 (1940). *See also, e.g., State v. Little*, 358 P.2d 120, 122 (Wash. 1961) (explaining in determining to allow refreshment, trial judge must “be satisfied that the witness is not being coached—that the witness is using the notes to aid, and not to supplant, his own testimony”). However, the trial judge never examined the prejudicial impact of the complaining witness’s wrongfully elicited testimony in the

former trial. *See State v. Smith*, 383 S.C. 159, 167-68, 679 S.E.2d 176, 181 (2009). Instead, the trial judge decided the refreshment was permissible as a matter of law under the general rule of Rule 612, SCRE. App. 27, lines 19-24; App. 29, lines 10-23; App. 31, line 24—App. 33, line 22.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

This 23rd day of December, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

CERTIFICATE OF SERVICE

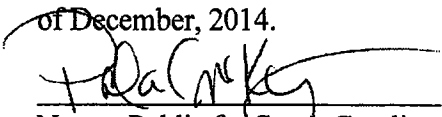
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of December, 2014.



Benjamin John Tupp
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 23rd day
of December, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County
The Honorable Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed 12/17/14)
Appellate Case No. 2011-200306

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR SMITH,

APPELLANT.

RETURN TO PETITION FOR REHEARING

On December 17, 2014, this Court affirmed Appellant's conviction for criminal sexual conduct with a minor in the first degree. Appellant submitted a Petition for Rehearing on December 23, 2014, arguing that this Court overlooked or misapprehended several points. To the contrary, this Court properly affirmed Appellant's conviction for the reasons discussed below.

I.

In his Petition for Rehearing, Appellant first contends that this Court erred in finding that the expert's redirect testimony was not an improper comment on the victim's credibility where the expert qualified his response and never gave an opinion regarding whether or not the victim was telling the truth. Specifically, Appellant asserts that the expert's "so-called qualification" of his response did not cure his former "improper"

statement because “it also told the jury not to consider delayed reporting in assessing credibility.” (Petition for Rehearing, p. 2). Initially, the State maintains its position that no issue regarding the expert’s redirect testimony was preserved for appellate review because trial counsel stated no grounds for his objection. (See Final Brief of Respondent, p. 9-10). The State also maintains its position that Appellant opened the door to the expert’s explanation on redirect because he clearly insinuated on cross-examination that the length of the victim’s delay in disclosing the abuse was correlated with his credibility. (See Final Brief of Respondent, p. 10-12).

Regardless, this Court correctly found no reversible error. The statements this Court found to be problematic are as follows:

The solicitor: “Does the length of the delay in the disclosure have any – in your opinion, does it erode the credibility of the disclosure?”

Expert: “No, it really doesn’t.”

The problem was that the phrasing of the State’s question could have been misinterpreted to invite vouching regarding *this particular victim’s credibility* by the expert. Likewise, the expert’s response, standing alone, could have been construed as vouching for this particular victim’s credibility. However, the expert continued his response by stating that generally people disclose sexual abuse at different times for different reasons, and he went on to explain how post-traumatic stress disorder could generally play into this process. (R. p. p. 197). His response, as a whole, properly conveyed that - in general - the length of delay in a person’s disclosure is not necessarily related to credibility, a fact about which the jury might have been confused especially

considering defense counsel's insinuations on cross-examination.¹ See John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children.") (citations omitted); see also State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed."'). Considering the totality of the expert's direct and redirect testimony, in addition to the fact that he never gave an opinion that the victim in this case was telling the truth, the expert did not improperly bolster the victim's credibility. See State v. Douglas, 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009); State v. Hill, 394 S.C. 280, 295, 715 S.E.2d 368, 376-77 (Ct. App. 2011). Appellant's request for rehearing on this ground should be denied.

II.

Appellant also contends that this Court erred in finding that the trial judge did not abuse his discretion by allowing the victim to refresh his memory using a prior trial

¹ Notably, the jury was thoroughly instructed that it should not accord extra weight to an expert's testimony simply because of his or her qualification as an expert (R. p. 181-82; p. 215, line 17 – p. 216, line 15), and defense counsel was still free to argue that the jury should discount the expert's testimony and consider the victim's delayed disclosure when evaluating his credibility. (See R. p. 202-203).

transcript, asserting that the trial judge failed to exercise any discretion at all where he failed to “examine[] the prejudicial impact of the complaining witness’s wrongfully elicited testimony in the former trial.” (Petition for Rehearing, p. 3-4). Initially, the State maintains its position that the whole issue was not properly preserved for appellate review because Appellant argued a specific ground on appeal that was not argued below. (See Final Brief of Respondent, p. 15-16). Note also that the specific argument raised in the Petition for Rehearing (failure to exercise any discretion) was not raised in Appellant’s Final Brief. (See Final Brief of Appellant, p. 15-19). See Kennedy v. South Carolina Retirement System, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.”) (citation omitted). Regardless, the trial judge clearly did exercise his discretion - and did consider the potential prejudice to the defense - where he, out of “fairness,” permitted defense counsel great leeway on cross-examination of the victim regarding the refreshing of his memory with the prior trial transcript. (R. p. 29-34; p. 62-63). The trial judge plainly did exercise discretion in this matter, and he did not abuse his discretion by allowing the victim to refresh his recollection using the transcript from the previous trial. Moreover, the State maintains its position that Appellant was not prejudiced by the fact that the victim used the prior trial transcript to refresh his memory where the victim could have used any number of other prior statements - at least one of which was made *before* Appellant’s first trial - to refresh his memory. (See Final Brief of Respondent, p. 18-19). Accordingly, assuming the trial judge erred in this regard, any error was harmless.

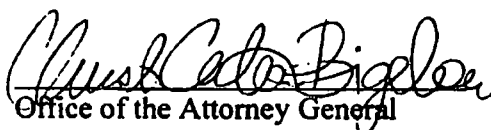
CONCLUSION

Based upon the foregoing, Respondent submits that this Court did not misapprehend or overlook any issues of fact or law. Therefore, this Court should deny Appellant's Petition for Rehearing.

Respectfully submitted,

ALAN WILSON
Attorney General

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ATTORNEYS FOR RESPONDENT

January 9, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County
The Honorable Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5283 (S.C. Ct. App. filed 12/17/14)
Appellate Case No. 2011-200306

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

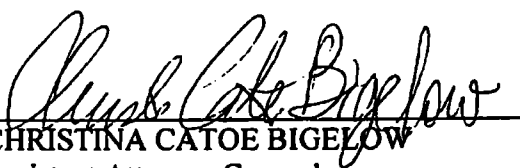
v.

ARTHUR SMITH,

APPELLANT.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of Respondent's **Return to Petition for Rehearing** in the above-referenced matter has been served upon **Benjamin John Tripp**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this 9th day of **January, 2015**.


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The South Carolina Court of Appeals

The State, Respondent,

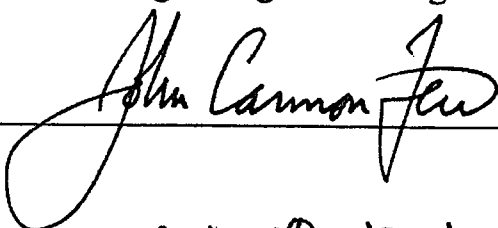
v.

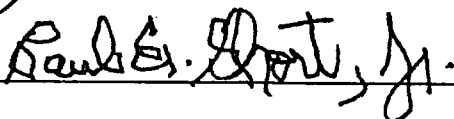
Arthur Smith, Appellant.

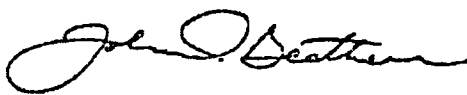
Appellate Case No. 2011-200306

ORDER

After 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. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc:

Breen Richard Stevens, Esquire
Benjamin John Tripp, Esquire
Christina Catoe Bigelow, Esquire

FILED

January 23, 2015

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS
COUNTY OF BEAUFORT 2003-GS-07-1756

STATE OF SOUTH CAROLINA	)	
	)	TRANSCRIPT OF RECORD
-VS-	)	
	)	September 19, 2012
ARTHUR SMITH,	)	
	)	Charleston, South Carolina
Defendant.	)	

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Brother	19	--	--	--
Child	23	--	--	--
Sister	34	--	--	--
Kendra Twitty	40	--	--	--

1 (September 19, 2011.)

2 THE COURT: All right. Let's get on then to
3 the State vs. Smith.

4 So we have two issues, child victim's out of
5 court statement and then Lyle testimony. So let's deal
6 with this child victim's out of court statement issue
7 first, under 17-23-175.

8 MR. BANNON: Your Honor, we certainly can,
9 but I don't believe she's going to be here until 3:00. I
10 was just anticipate taking the Lyle motions up first.

11 THE COURT: Let's just talk about it first.
12 My thoughts are, you know, the purpose of having those
13 kind of statements are if you have young witnesses to
14 kind of, I suppose, say, well, what they're saying now is
15 consistent with what they're saying at or about the time
16 shortly after it took place to sort of solidify a child
17 of tender year's testimony, because they might get
18 intimidated on the stand, get a little scared, be a
19 little nervous, and you want to sort of, I suppose,
20 bolster what they're saying and fill in some gaps.

21 As I understand it, though, the victim is
22 now you say 19 years old?

23 MR. BANNON: Yes, sir. He's now 19 years
24 old.

25 THE COURT: So it's not like we're going to

1 need to worry so much about filling in the gap. He's a
2 man. He's an adult.

3 MR. BANNON: Yes, Your Honor, he is.

4 THE COURT: So what would be the point then
5 of that testimony?

6 MR. BANNON: Well, Your Honor, the concern
7 that the state has is because of the long passage of time
8 in this particular instance, I believe that it would be
9 relevant to the jury to hear that these were his
10 accusations at the time, and essentially it's neither the
11 state's fault for the delay in the trial of this matter,
12 nor the defendant's fault in delaying the trial of this
13 matter, but I think it certainly is something that the
14 jury might have questions about, and I think it would be
15 relevant and proper as I believe the state can meet its
16 burden under the statute to be able to admit what he said
17 some eight years ago about what happened.

18 THE COURT: Yeah, but he's going to be here
19 to testify.

20 MR. BANNON: Yes, Your Honor.

21 THE COURT: And, normally, you don't have
22 hearsay being allowed -- if somebody is available to
23 testify, you swear them in, you put them up. If they
24 made prior inconsistent statements, then you can
25 cross-examine them about that, but if somebody is

1 available to testify, the general rule is you bring them
2 in, you let them testify, and if it's consistent with
3 what they said otherwise, their other out of court
4 statements aren't coming into evidence, only if they're
5 inconsistent --

6 MR. BANNON: Yes, Your Honor, that is
7 typically --

8 THE COURT: So let me finish my thought. But
9 we make a special rule for child sex abuse cases, and
10 that is 17-23-175, and the purpose of that would be to
11 say, well, our witness slash victim is of tender years
12 and because of the circumstances of bringing them into
13 court and placing them in a stressful situation and the
14 children, it's a very odd environment for them, they
15 might not be able to come in and just testify and relate
16 to things that took place, even a fairly short period of
17 time before, because, you know, their minds are
18 developing, their memories are somewhat, you know, under
19 question about things like that, and so we'll allow --
20 the legislatures decide we'll make a special exception
21 for out of court statements for young children, and they
22 lay out what has to take place in the environment which
23 it takes place, presumably, to enhance its reliability.

24 But the reason for having -- or one of the
25 main reasons, I would think, for having that special

1 exception is your witness is going to be of tender years
2 at the time they're testifying. Here you've got a
3 grownup, an adult who can testify, so there is really not
4 that reason to kind of fill in his gaps and bolster his
5 credibility so much because he's here and he can testify,
6 and, you know, it's stressful for everyone to come
7 testify, but why should we treat him, now that he's a
8 grownup, any different than we would any other witness
9 who was the victim of a crime?

10 MR. BANNON: Well, Your Honor, because he was
11 a child at the time when the crime occurred, I think that
12 we're entitled to bring certain evidence in.

13 Now, I understand that the Court's opinion is
14 that, you know, it's when the child victim testifies to
15 give sort of almost the jury a more clear picture about
16 what the child had to say and sort of a less intimidating
17 environment; however, the way that the statute reads it
18 simply requires that the statement would be made by a
19 child under 12, and he, as memory serves, was either not
20 quite 11 or not quite 12 at the time when he did make
21 these disclosures to a forensic interviewer.

22 And so while I don't necessarily disagree
23 with the Court as to, you know, the overall intention of
24 the legislature, I think it's clear from the actual
25 language of the legislation that as long as it is a child

1 victim who made a statement when they were under 12 years
2 of age that this statement can be admitted in certain
3 circumstances.

4 THE COURT: All right. Just to lay a little
5 bit of background and seeing if any of these 17-23-175
6 factors are -- what the facts are that apply to those
7 factors, I see in your memo it says that he had been in
8 counselling in Richmond Hill, Georgia. Is that where
9 this Hope Cottage is?

10 MR. BANNON: No, sir. Hope Cottage is
11 located here in Beaufort.

12 THE COURT: So why was he going to Hope
13 Cottage? What is Hope Cottage?

14 MR. BANNON: Hope Cottage is sort of the
15 local sexual abuse counselling center. Typically, it's
16 used by members of law enforcement. They conduct, I
17 would say, all of the child forensic interviews on cases
18 that come in in Beaufort County.

19 So what happened was that when the mother and
20 child, or when Ms. Solak and Child came and reported the
21 incident to Investigator Florencio, he set up an
22 interview date and time at Hope Cottage for the child to
23 be interviewed.

24 THE COURT: So Hope Cottage was doing an
25 investigation or they were just counselling him?

1 MR. BANNON: Well, it was investigative in
2 nature. Investigator Florencio was there. He observed
3 the questioning of the child, but it's in a more sort of
4 therapeutic setting, so to speak, but Ms. McIlvee did not
5 counsel the victim at all.

6 THE COURT: And as I understand it, this was
7 not videotaped or audiotaped?

8 MR. BANNON: It was not.

9 THE COURT: All right. Well, I guess we'll
10 need to hear some testimony from her before we proceed a
11 little bit further. Did you say she won't be here for a
12 little bit?

13 MR. BANNON: Yes, sir. She said she would be
14 here by 3:00.

15 THE COURT: All right. Well, let's talk
16 about the Lyle testimony then that you want to present.

17 MR. BANNON: Yes, Your Honor. Essentially,
18 there is two different witnesses who we would ask to be
19 admitted pursuant to Lyle. There is Brother and
20 Sister Brother is the victim's older brother,
21 and Sister is the victim's younger sister. I would be
22 happy to take them up one at a time if that pleases the
23 Court.

24 THE COURT: That's fine.

25 MR. BANNON: Your Honor, Brother just

1 to give you a little bit of a background, I believe, is
2 two to three years older than ^{Child} the primary victim.
3 His testimony the first time in disclosures involved that
4 his abuse occurred in Buffalo, New York and that the
5 defendant -- the person who abused him was his father,
6 and he would have him come into his bedroom, that they
7 were alone, he would get him undressed in some way, and
8 then his father would perform oral sex on him and perform
9 anal sex on him and then have the victim perform oral sex
10 on the father as well as anal sex on the father.

11 This is essentially -- and then afterwards,
12 in order to secure his silence, the defendant told ^{Brother}
13 that he would hurt his mother should he disclose these
14 activities.

15 Essentially, Your Honor, the only difference
16 is that essentially the boys were the same age. They
17 were between the ages of six and nine. This occurred in
18 Buffalo, New York, but, essentially, what ^{Brother} says as
19 soon as the family moves from Buffalo, New York to
20 Bluffton, South Carolina, that's when his abuse stops,
21 and it's my understanding is when ^{Child} says that his
22 abuse begins.

23 THE COURT: What are the years? 1990 what to
24 what, roughly?

25 MR. BANNON: It probably would have been, for

1 Brother between 1996 and 1997, which is when the family
2 moves to Bluffton, and then Child the primary victim,
3 discloses that his abuse goes essentially from six to
4 nine, or just before he turns nine, so that would have
5 been from 1998 through 2000.

6 THE COURT: Okay. And what is his testimony
7 going to be about, the nature of abuse and the
8 circumstances that make it look like a common scheme or
9 plan?

10 MR. BANNON: Well, Your Honor, at least
11 previously, he's testified and in his disclosures he said
12 that his father would take him into the bedroom, he would
13 get him into a state of undress, he would perform sex on
14 the child, perform anal sex on the child, and then have
15 the child reciprocate it with him. Then afterwards he
16 would threaten the child. He said -- he would threaten
17 him with physical harm should he tell anyone, and that's
18 essentially the extent of it.

19 So my argument would be, Your Honor, that
20 it's a common scheme or plan because they involve very
21 similar acts done in -- you know, while they're in
22 different locations, they're always in the master bedroom
23 of Mr. Smith's home. The sex acts are the same. The
24 relationship between the victims and the defendant are
25 both the same. They're both father and son, as well as

1 the use of the threats in order to maintain the
2 children's silence, Your Honor, as well as the fact that
3 the victims are of virtually the same age ranges as when
4 these abuses occurred, which it looks to me, Your Honor,
5 that those are all of the five instances required in
6 State v. Wallace.

7 THE COURT: All right. What is the testimony
8 of Sister That's the sister?

9 MR. BANNON: Yes, sir, the younger sister.
10 She says essentially that the abuse occurred in her
11 father's bedroom.

12 Now, her abuse occurred here in South
13 Carolina as well. She said that she and her father would
14 be alone in the bedroom. He would take her clothes off.
15 He would penetrate her vagina digitally, penetrate her
16 anus digitally. He would have her perform oral sex on
17 him, and then she also described essentially that she
18 would manually stimulate him with her hand as well.

19 And now this abuse was reported to law
20 enforcement in the year 2000, and Mr. Smith was charged
21 with CSC with a minor and he ultimately pled guilty to
22 assault and battery of a high and aggravated nature.

23 THE COURT: And you're just seeking to get in
24 the acts, not the convictions; is that right?

25 MR. BANNON: Yes, Your Honor. And my

1 arguments would be virtually the same for Brother and
2 Sister essentially engages in sexual intercourse, both
3 with their genitalia and with their anuses. This occurs
4 in the bedroom. You know, again, it's a father-child
5 relationship.

6 THE COURT: Well, the identity of the
7 defendant is not in question. What is the probative
8 value that you seek to establish through this evidence?
9 What is it that you want to prove? Why is it probative
10 to your case? What element of the crime are you trying
11 to say can be proved through this common scheme? What is
12 the question that is missing that this fills in the link?

13 MR. BANNON: This essentially fills in --
14 well, one thing that I think is going to be at least
15 somewhat difficult is proving the jurisdiction here in
16 South Carolina, and I think the fact that at least for
17 Sister and for Child the abuses occurred both here in
18 South Carolina, as well as the fact that, well, Your
19 Honor, this is his common scheme and plan. He is a
20 molester of children, and this is the way in which he
21 chooses to do it.

22 THE COURT: Well, I'm not sure that is
23 exactly why we want to -- you're allowed to get in
24 404(b), that is kind of the reason why you don't let it
25 in, is to say, well, this is the kind of stuff that he

1 does. He's a bad person. You know, because he's
2 charged -- because other people have said it doesn't
3 necessarily mean that, in fact, it heightens the danger
4 of letting it in, so you got to have something that's an
5 issue to say, well, this is why we need to have this in,
6 other than to create this aura of what he said,
7 exceptionally bad character, and therefore we must let
8 the jury know that he is a bad person.

9 This is an exception to that rule, to say,
10 well, throw enough mud up against the defendant that
11 hopefully they'll convict him because he's a bad guy
12 because he's been accused of that. What is at issue in
13 this case that you need before the jury this information
14 about how he -- what's his MO?

15 MR. BANNON: Right. Well, Your Honor, I
16 think what is going to be an issue is -- I don't know
17 exactly what the defense is going to be, but I suspect
18 that it might be that if these children were molested, it
19 wasn't by the defendant. You know, I think that the
20 identity is straight, that he is their father. I don't
21 think there is any problem with that identity, but I
22 think there is certainly going to be a dispute as to
23 whether or not this is the abuse that took place, was
24 from the defendant to the child.

25 And also, Your Honor, I suspect from my

1 conversations with Ms. Lovell that another part of the
2 defense is going to be that this kid is essentially lying
3 and that the abuse never took place, because there is
4 some evidence on the record, which from the prior trial
5 regarding coaching, so I think that that is going to be
6 an avenue for the defense to take up whereas there isn't
7 any evidence that Sister or Brother were ever coached.
8 I think there is going to be a defense of, well, this boy
9 was coached and therefore he's making it all up.

10 THE COURT: Okay. Anything else?

11 MR. BANNON: No, sir. Nothing further.

12 THE COURT: Okay. Mrs. Lovell?

13 MS. LOVELL: I believe you should exclude the
14 evidence under Lyle of Brother testimony because
15 the state has not shown relevancy or anything to do with
16 the logical connection. It's merely an attempt by the
17 state to show these things happened; therefore, if they
18 happened, then his character is such that he's acting in
19 conformity.

20 The defense doesn't question if Child or Brothe
21 or Sister were abused. The child definitely acts out.
22 There could definitely be argument that he was. Our
23 contention was it was not Mr. Smith. Now, these Lyle
24 testimonies do not address that issue directly, only in
25 the character of prior bad acts. The bad acts that the

1 state wishes to include with Brother are over 18 years
2 old, nor has the state shown any clear and convincing
3 evidence that they actually occurred.

4 I heard Mr. Bannon speak about the acts that
5 were perpetrated on Brothe by Mr. Smith. He said he went
6 into more detail than I had known. I read the
7 transcript, of course, to find out what would be
8 testimony by Brother possibly in this trial, and from that
9 I learned he testified that he put his penis in my butt
10 and was undressed, and that was the only testimony that
11 was similar in the instant case as to what Child had done
12 to him.

13 So I don't see where there's any connection
14 between the acts. They're dissimilar, and for that
15 reason, I think the testimony should be excluded.

16 There is a dissimilarity also of the
17 different place that the time which the state contends
18 Brother abused was '96, '97. He is three years older than
19 Child abuse was '99 to 2000. Even then it's
20 part of 2000. It's very auspicious as to actually when
21 this happened because he was visiting his father when his
22 parents were separated.

23 They moved to South Carolina in '97, which is
24 about the time when Brother allegations occurred, but
25 Brothe -- he was born in '89. He was five or six years

1 old, so there is overlapping age groups, and it's very
2 vague as to the actual age, and even though Sister --
3 I'll stay with Brother -- also, there was delayed reporting
4 by both brothers. One brother reported it at the trial,
5 the other brother took three years to report it, and that
6 was while -- also, that was done while they were living
7 in the home of their aunt.

8 They had been removed from their home, the
9 parents, DSS had been involved, so I ask the Court to
10 evaluation those items as well and to take into
11 consideration that these are very dissimilar. They are
12 18 years apart in time, and I don't think the state has
13 shown clear and convincing evidence which should even
14 bring it into the analysis of Lyle at this point.

15 There's also -- we believe that its sole
16 purpose is to infer guilt from the defendant's prior act.
17 There is no logical connection. The evidence is highly
18 prejudicial, and certainly the state has not shown it's
19 probative, and we ask that the testimony of Brothe be
20 excluded.

21 And as to Sister testimony, we also feel
22 similar arguments to that as well, the fact that the
23 conviction won't be used directly; nevertheless, there's
24 a high chance that that would be disclosed or released
25 correctly. In any event, that happened ten years ago.

1 In fact, ten years was the conviction, but it was 11
2 years when the actual act was to have occurred, sometime
3 in 2000. There were some times when she visited and
4 there was no abuse, so there certainly were times of
5 which nothing was happening that she had visited and
6 things were fine, so it's not a continuous pattern of
7 hers throughout a year or more.

8 There was testimony -- the testimony does not
9 show any further common scheme or plan to elicit conduct
10 but, again, to infer guilt from the defendant's
11 propensity to commit a crime, which is highly prejudicial
12 to my client. There was no showing of how the testimony
13 would have helped the judge or the jury in understanding
14 some material issue in this case, as under Wesley --
15 State vs. Wesley Smith.

16 State vs. Danny Tuten, the appellate court
17 reversed the trial Court's admission of victim's
18 testimony of prior uncharged assault under common scheme
19 because they were visits by the victim without assaults,
20 which I mentioned also in my argument against Brother
21 testimony.

22 And this case overlapped the time frame of
23 the current case. The ABHAN time was '97 to 2000. This
24 current case is '99 to 2000, Child case. Because of
25 the inability of the state to actually give us a time, or

1 a closer timing period, which I understand is not
2 required, but would be helpful, since we have a series of
3 allegations that all seem to be part of the common
4 scheme, which we believe are not.

5 She was interviewed -- well, I guess -- she
6 didn't -- well, Sister was living at that time --
7 Sister was living with her mother and her boyfriend,
8 her mother's boyfriend, and another child in the house,
9 so she was removed from the father's house when she was
10 living with her mother, and that case was under
11 investigation by DSS.

12 She was removed, as were the two boys, and
13 when they were all removed, nobody reported any sexual
14 abuse except for the girl. And, like I said, it is an
15 11-year-old event and I ask that you evaluate this
16 evidence in light of the fact it's highly prejudicial,
17 it's not probative, and under 402 its prejudicial
18 probative value outweighs its probative value.

19 THE COURT: Did Brother and Sister testify
20 in the first trial?

21 MR. BANNON: Just Brother testified in the
22 first trial.

23 THE COURT: Do you have a transcript of that?

24 MR. BANNON: Of Brother testimony?

25 THE COURT: Yes.

1 MR. BANNON: Yes, Your Honor.

2 THE COURT: Could I see that?

3 MR. BANNON: Yes, sir.

4 THE COURT: I noticed on my notes that I was
5 writing down, what you told me Brother was going to
6 testify about, you said that defendant performed oral and
7 anal sex on him and then reversed that and made him do it
8 on him, but that's not what he testified to at trial.

9 MR. BANNON: No, Your Honor. I was just
10 looking back through the record as well, and I don't
11 believe that's in the record. It might have just been my
12 mistake, but I would certainly rely on -- I don't have
13 any dispute with the record and, I would certainly just
14 ask for him to be able to testify today.

15 THE COURT: I guess we'll need to hear from
16 Brother and Sister so I can determine whether or not
17 what exactly happened. I guess Child as well, to see if
18 there is sufficient clear and convincing evidence to let
19 it in.

20 So do you want to call one of them?

21 MR. BANNON: Yes, sir. The state will call
22 Brother

23 THE COURT: Okay. I'll give you this
24 transcript back.
25

1 Brother

2 having been first duly sworn,
3 was examined and testified as follows:

4 DIRECT EXAMINATION

5 THE WITNESS: Brother

6
7 BY MR. BANNON:

8 Q. Is your name Brother

9 A. It is.

10 Q. And where do you live, sir?

11 A. Right now I live in Woodbridge, Virginia.

12 Q. What do you do?

13 A. There I'm stationed in the Marine Corps. I'm
14 stationed in Washington, DC.

15 Q. And when were you born?

16 A. I was born

17 Q. Okay. And where were you born?

18 A. Buffalo, New York.

19 Q. And do you have any brothers and sisters?

20 A. I have one biological brother and one biological
21 sister.

22 Q. What are their names?

23 A. Sister and Child

24 Q. I guess -- could you describe your their relation
25 to you in age. Are you the oldest or the youngest?

1 A. I'm the oldest, Child in the middle, and Sister
2 would be the youngest.

3 Q. And who is your biological mother?

4 A. Kelly Black.

5 Q. Okay. And who is your biological father?

6 A. Arthur Smith.

7 Q. Do you have people in your life that you call mom
8 and dad?

9 A. Yes. That would be Mark and Cindy Solak.

10 Q. And you said you biological father is Arthur
11 Smith. Do you see him in the courtroom?

12 A. Yes. He's right there.

13 Q. Okay. And did anything happen between you and
14 Mr. Smith while you were living in New York?

15 A. Yes. He sexually molested me.

16 Q. Okay. And could you please tell us how that
17 occurred.

18 THE COURT: How old were you when it
19 happened?

20 THE WITNESS: I was probably about six or
21 seven, sir.

22 THE COURT: Okay.

23 BY MR. BANNON:

24 Q. And so would that have been in 1995, 1996?

25 A. Right around there.

1 Q. Okay. And could you please tell us about it.

2 A. You want details?

3 Q. Well, let me ask you this: Where did it occur?

4 A. It would have been -- I remember it was in my
5 bedroom a few times. It was a really long time ago.

6 Q. Okay. Did it happen more than once?

7 A. Yes.

8 Q. Okay. And you said that it happened in your
9 bedroom on some occasions?

10 A. Yes.

11 Q. Did it ever happen anywhere else?

12 A. I remember his bedroom, or it was actually their
13 bedroom at the time. I think that's about it.

14 Q. Okay. Were the two of you alone in the bedroom?

15 A. Yes.

16 Q. Okay. And what occurred?

17 A. Well, he -- there were a couple times where he
18 would insert his penis into my butt. He would fondle me.
19 I mean, I guess that's about it.

20 Q. Okay. Was there any oral sex?

21 A. Yes.

22 Q. Okay. Was it you performing it on him or him
23 performing it on you?

24 A. Both.

25 Q. Okay. And do you remember about how old you were

1 when the abuse stopped?

2 A. Probably eight or nine.

3 Q. And do you remember -- did you ever move to
4 Bluffton, South Carolina?

5 A. Yes.

6 Q. And how old were you when you moved to Bluffton?

7 A. I was probably around nine or ten -- no, I was
8 about eight, because one of the first years we moved to
9 Bluffton was the first year I played football.

10 Q. And did the abuse occur in South Carolina?

11 A. Not as much. It kind of dwindled down, I guess.

12 Q. Just to go back for a second, you said there was
13 anal sex as well.

14 A. Yes.

15 Q. Was it just -- was is just him performing anal sex
16 on you or was --

17 A. Him on me.

18 Q. Okay. So -- okay.

19 MR. BANNON: No further questions, Your
20 Honor.

21 THE COURT: Cross?

22 MS. LOVELL: No, Your Honor.

23 THE COURT: All right. You can step down.

24 MR. BANNON: All right. Now, Your Honor, the
25 state would call Child

1 MS. LOVELL: Your Honor, may I have a moment?

2 THE COURT: Yes.

3 Child

4 having been first duly sworn,
5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. BANNON:

8 Q. Could you please state and spell your name for the
9 record.

10 A. My name is Child .

11 Q. And did you ever go by another name?

12 A. Yes.

13 Q. What was that?

14 A. Child

15 Q. Where were you born, Child

16 A. Buffalo, New York.

17 Q. Okay. Do you have any brothers and sisters?

18 A. Yes.

19 Q. Okay. Do you have biological brothers and
20 sisters?

21 A. Yes.

22 Q. What are their names?

23 A. Brother Roy Smith and Sister

24 Q. Okay. And who are your biological parents?

25 A. Arthur Smith and Kelly Black Smith?

1 Q. Okay. And do you see your biological father here
2 in the courtroom today?

3 A. Yes.

4 Q. Okay. And did you all live in Buffalo?

5 A. No.

6 Q. Okay. When did you move?

7 A. When I was five, six.

8 Q. Okay. Do you know where you moved to?

9 A. Beaufort, here.

10 Q. It was down here in Beaufort County?

11 A. I believe so, yeah.

12 Q. And while you were here, did you ever see your
13 father, or your biological father?

14 A. Down here, yeah.

15 Q. Yeah. And were you ever alone with him?

16 A. Yes.

17 Q. Okay. And did anything occur while you were alone
18 with him?

19 A. Yes.

20 Q. And do you know -- well, where did this occur?
21 Was it in, like, his house, his mom's house?

22 A. His house.

23 Q. And is that, like, a freestanding house or could
24 you describe it briefly?

25 A. It looks like an old dump.

1 Q. And these things that happened, did they happen
2 inside the house?

3 A. Yes.

4 Q. Okay. Where inside the house?

5 A. In his room.

6 Q. Okay. And what happened inside the room?

7 A. He would make me touch him or he would touch me.

8 Q. Okay.

9 A. Inappropriately.

10 Q. Were you alone in the room when this was
11 happening?

12 A. Yes.

13 Q. Now, when you say -- you said that he touched you
14 inappropriately and you touched him inappropriately.
15 Could you describe those -- could you describe that for
16 us.

17 A. He would have me put his -- have me put my penis
18 in his butt and have him put his penis in my butt.

19 Q. Was there ever any oral contact between the two of
20 you?

21 A. I don't remember.

22 Q. Now, ^{Child} do you remember testifying in a
23 hearing prior to this one?

24 A. Yes.

25 Q. Okay. Would seeing a transcript of that hearing

1 refresh your recollection as to what might have occurred?

2 A. Yeah.

3 MR. BANNON: Permission to approach the
4 witness.

5 MS. LOVELL: Objection, Your Honor. I object
6 to the form which you are showing him the transcript. I
7 believe that he is -- I don't think he can read it over
8 and then testify. So that would then just remind him of
9 the things that he's not testifying to now, which would
10 then go back to our underlying issue of which we are
11 trying to separate out this trial from.

12 MR. BANNON: Well, Your Honor, if I may, I
13 think she's objecting to the very procedure by which you
14 refresh your witness's recollection. I asked him if he
15 recalled whether any oral conduct occurred and he said he
16 didn't remember, so I asked him if he testified
17 previously and if looking at a transcript of that would
18 refresh his recollection, and essentially he said yes.

19 THE COURT: Well, if you look at 612 on
20 refreshing the memory, it's talking about using a
21 writing, which asking anybody to refresh their memory by
22 looking at a prior transcript, it's usually -- it's a
23 prior statement that the witness has given, which was
24 written down and then shown to them. They wrote it down.
25 A lot of times you see the police write it down, but they

1 sign it in some respect. It's not just giving them a
2 transcript of a prior history and saying, Read this.
3 Will this refresh your recollection?

4 It's not been used in my court that way, but
5 it keeps talking about it in terms of writing. I just
6 don't think it's proper if you give him a copy of a
7 transcript from a prior hearing in a hearing and ask him
8 to refresh their memory that way. Only way you could use
9 a prior statement would be to impeach him with a prior
10 inconsistent statement that he gave at a hearing.

11 But 612, just using a writing to refresh
12 their memory, it seems to me the way the rule is designed
13 it has to be something that they produced.

14 MR. BANNON: Well, Your Honor, I'm sorry. It
15 was my understanding that it was a writing, not
16 necessarily the witness's writing.

17 THE COURT: I'm not aware of a case on it. I
18 don't know if I'm going to find one at this point, but I
19 guess that it could be used to refresh his memory. For
20 that matter, this is a pretrial motion, and before we get
21 started for trial, I don't suppose there is anything to
22 stop him from looking at a prior transcript to refresh
23 his memory at that point anyway.

24 MS. LOVELL: Your Honor, I see it under 613
25 as impeaching the witness. I would use it to impeach.

1 He's not testifying the same way.

2 THE COURT: But if it's --

3 MS. LOVELL: But then it's a new trial, so --

4 THE COURT: He's using it to refresh his
5 memory where he said he didn't remember.

6 MS. LOVELL: But then if he didn't remember,
7 I don't understand why we're trying to refresh his
8 recollection when we had a problem with the tenor of the
9 prior case.

10 THE COURT: Here is the problem that we're
11 going to have as I see it: Presumably there is testimony
12 that supports what you're saying, and so if I let him
13 refresh his memory with it today and then he testifies to
14 refresh his memory, then tomorrow he comes in and
15 testifies without the need to appearing to refresh his
16 memory, it seems to me then the defense is going to be
17 hampered with making him look like he's got a much better
18 memory of it tomorrow than he has about it today without
19 the defense being able to bring out, Hey, you didn't
20 remember any of this yesterday afternoon, and it wasn't
21 until the prosecutor showed you a copy of your transcript
22 at a hearing eight years ago that you actually remembered
23 it; isn't that right?

24 So it's kind of hampering them to be able to
25 refresh their memory on it today without being allowed to

1 cross-examine him about the circumstances of refreshing
2 it when he comes in tomorrow and appears to say, oh, yes,
3 I have a memory of it now, without the need to refresh
4 tomorrow.

5 MR. BANNON: I suppose I understand what
6 you're getting at, Your Honor, but I'm afraid I'm at a
7 bit of a loss. The witness testified that he didn't
8 remember, and he said that looking at the prior
9 transcript, would it please Court if he looked at one of
10 the many other different statements that he said that
11 this happened?

12 THE COURT: Well, I'm thinking out loud right
13 now, and I'm going to have to fashion one way if he
14 comes -- if you're allowed to show him that transcript
15 now and he remembers, Oh, yes, I do now remember that we
16 did have oral sex, all right? Tomorrow you ask him that
17 same question. His memory is refreshed. He answers that
18 question without the need to look at the transcript.

19 Well, it makes it look like something that he
20 remembers vividly. Today he couldn't remember it
21 vividly. I don't know what's in that transcript, but he
22 doesn't remember it vividly, so tomorrow when we put him
23 up in front of a jury, it's not going to come out the
24 same way that it's coming out today.

25 And so if I allow you to refresh his memory

1 today, there ought to be some mechanism out of fairness,
2 if nothing else, that she gets to come in and say,
3 Yesterday afternoon we had a hearing and you testified
4 today that you remember having oral sex, but yesterday
5 your memory wasn't quite so clear, was it?

6 So it seems to me in fairness she's going to
7 be able at least to come back and talk about this,
8 because otherwise it makes it look like it's fresh in his
9 memory tomorrow when it's not fresh in his memory today,
10 and that's unfair.

11 If you're going to get to refresh his memory,
12 then you should have either done it before we had this
13 hearing or you do it in front of a jury so that the jury
14 gets the flavor of the fact that it's now eight, nine,
15 years later and he doesn't remember. It's not fair for
16 you to refresh his memory today and then make it look
17 like he has a vivid memory tomorrow.

18 MR. BANNON: Could I have just a second, Your
19 Honor?

20 THE COURT: Sure.

21 MR. BANNON: Your Honor, I suppose I would
22 just live with the fact that she could ask him about the
23 fact he couldn't recall today until he saw a transcript.

24 THE COURT: Well, ultimately one way or
25 another, he's going to get a chance to refresh his

1 memory, whether it's at this hearing today or it's after
2 the hearing today or in front of the jury for the first
3 time tomorrow. As long as the defense gets the
4 opportunity to talk about how his memory of this incident
5 was not so clear before he had it refreshed, and I
6 suppose that's the way to cure that.

7 So I'll let him go ahead and look at this
8 transcript, which I will deem to be a writing. Frankly,
9 I suppose I'll have to hit the books a little bit tonight
10 on it, because I have not come across the use of a
11 deposition, a prior deposition, used to refresh a memory,
12 whether or not that qualifies as a writing for the
13 purposes of 612.

14 MR. BANNON: Well, I suppose to my mind, Your
15 Honor, it would be virtually the same thing if the
16 witness had been telling the police officer what happened
17 and hadn't made a writing at the time and the police
18 officer was taking notes and said, well, he said that the
19 car was green and they went through and then later on he
20 says, Well, I don't remember what color the car was, and
21 he said, Well, if you take a look at this statement, it's
22 still a writing, it's just not necessarily his --

23 THE COURT: But at some point -- and we're
24 not talking about -- we're talking about the same thing,
25 but we're not talking about the same thing, and that

1 prior statement given to a police officer at some point,
2 he's going to have to -- he either wrote it or the police
3 officer wrote it and he signed it, so he adopted it as
4 his statement.

5 He testified under oath at trial, so that is
6 an adoption of whatever he said at his statement, so that
7 kind of helps me feel better about it would qualify as a
8 writing under 612, but as is often the case when I'm
9 looking at a novel issue, it's a lot clearer when I see
10 there is a Court somewhere that says I agree or disagree
11 and it's clear on point and you go, oh, I feel a little
12 better that somebody else said it as opposed to me
13 quoting my favorite source, which is me.

14 I haven't come across it, so I'm going to let
15 him do it today with the understanding that, you know,
16 she's obviously going to get the opportunity to come back
17 and say we had a hearing on this yesterday afternoon, and
18 at that hearing you didn't remember that quite as vividly
19 as you're remembering it today. In fact, you had to read
20 a transcript from another hearing in order to get your
21 memory refreshed. That just seems to me to be a matter
22 of fairness. Okay?

23 MR. BANNON: Yes, Your Honor.

24 MS. LOVELL: I do object giving that to him
25 to refresh. I don't agree. I believe it's more for me

1 to impeach him with at the trial than it is for this type
2 of hearing.

3 THE COURT: All right. Your objections are
4 noted on the record.

5 MS. LOVELL: Thank you.

6 MR. BANNON: Permission to approach the
7 witness, Your Honor?

8 BY MR. BANNON:

9 Q. Child I would like you to take a look at this.
10 Would you go ahead and read through it and then look up
11 at me when you're done.

12 Okay. So now that you've had a chance to look
13 through that statement, do you remember, was there any
14 oral sex involved?

15 A. Yes.

16 Q. Okay. And what was the -- could you tell us -- or
17 could you describe it for us.

18 A. Well, he made me suck his penis.

19 Q. And did he ever suck your penis?

20 A. Yes.

21 Q. Okay. And I believe you said previously that he
22 had you perform anal sex on him?

23 A. Yeah.

24 Q. Okay. And that he had anal sex with you.

25 A. Right.

1 Q. All right. And when it was over, did he make any
2 threats to you?

3 A. Yes.

4 Q. Do you remember what he told you?

5 A. He would kill me or break all my bones in my body.

6 Q. And the person who did this, do you see him in the
7 courtroom?

8 A. Yes, sir.

9 Q. Could you point him out?

10 A. There (indicating).

11 MR. BANNON: No further questions, Your
12 Honor.

13 THE COURT: Ms. Lovell?

14 MS. LOVELL: No questions, Your Honor.

15 THE COURT: You can step down.

16 THE WITNESS: Yes, sir.

17 MR. BANNON: The state would call Sister

18
19 Sister

20 having been first duly sworn,
21 was examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BANNON:

24 Q. And have you ever gone by another name?

25 A. I did. It used to be .

1 Q. Okay. And do you have any brothers and sisters?

2 A. I do. I have two brothers.

3 Q. And are they your biological siblings?

4 A. Uh-huh.

5 Q. Okay. And what are their names?

6 A. There is Child and there is Brother

7 Q. Where were you born?

8 A. I was born in Buffalo, New York.

9 Q. Did you ever leave Buffalo?

10 A. I did.

11 Q. Where did you go?

12 A. I moved to South Carolina.

13 Q. And do you -- well, who are your biological
14 parents?

15 A. Arthur Smith and Kelly Black, or Smith.

16 Q. All right. And are those the people who you call
17 mom and dad?

18 A. No.

19 Q. Who do you call mom and dad?

20 A. I call Cindy and Mark Solak my mom and dad.

21 Q. And how are they related to you?

22 A. They're my aunt and uncle.

23 Q. And when you were living here in South Carolina,
24 were you ever alone with your dad?

25 A. I was.

1 Q. And by dad, I mean biological father.

2 A. Uh-huh.

3 Q. And do you see that person in the courtroom today?

4 A. I do.

5 Q. And could you point him out for us.

6 A. He's right there (indicating).

7 Q. And when you were alone with him, did anything
8 happen?

9 A. Yes.

10 Q. Could you tell us about that.

11 A. Sure. He would take me into his bedroom when we
12 were by ourselves. We would lay on his bed, and he would
13 touch me in places that shouldn't be touched. We would
14 take baths together. He would always try to get us
15 alone, so things could happen.

16 Q. Okay. And when you said that he touched you,
17 where did he touch you?

18 A. He touched me in -- he touched my vagina and he
19 touched my butt.

20 Q. And did you ever touch him?

21 A. Yes, I did.

22 Q. Could you tell us about that, please.

23 A. He would always get me to -- well, I know the term
24 now, it's masturbation, but he would get me to do that
25 for him, or with him.

1 Q. And was there ever any oral contact?

2 A. There was. Yes, there was.

3 Q. And could you please tell us about that.

4 A. Uh-huh. He would orally -- he would do that to
5 me, down there, in the vaginal area.

6 Q. Okay. And did you perform that on him?

7 A. Uh-huh.

8 Q. Okay. And was that on his penis?

9 A. Yes, it was.

10 Q. And how old were you when this occurred?

11 A. I think I was six, something like that.

12 Q. And did he ever say anything after it was over?

13 A. He told me not to tell anybody.

14 Q. Did he threaten you?

15 A. Not that I can remember no.

16 Q. But he just told you not to say anything?

17 A. Uh-huh.

18 MR. BANNON: No further questions.

19 THE COURT: Do you have any you want to ask
20 of her, Ms. Lovell?

21 MS. LOVELL: No, Your Honor.

22 THE COURT: All right. You can step down.

23 Thank you. Okay. What do you want to argue now, based
24 on this?

25 MR. BANNON: Well, Your Honor, I don't really

1 have anything additional to add to my written motions,
2 but I just feel that the state has fulfilled the
3 requirements in order for Lyle testimony to be admitted
4 in this matter. I think that it's clear that the age of
5 the victims were similar when this occurred. The
6 relationship between the victim and the perpetrator were
7 the same, the location. I think Brother was the one that
8 would say it happened in different bedrooms at different
9 times.

10 Both of the boys were threatened. He told
11 her not to say anything and coerced her into silence.
12 The manner and occurrence of the type of sexual battery
13 was essentially the same for all the children. All the
14 children's -- there was contact with their genitals as
15 well as their anus, and I believe that the testimony was
16 that there was oral sex involved with all of the
17 children, and, Your Honor, just based on that, the state
18 believes that it's met its burden under Wallace, and we
19 feel that both the testimony of Brother and Sister
20 should be admitted in the state's case.

21 THE COURT: Ms. Lovell?

22 MS. LOVELL: Your Honor, the defendant renews
23 its objection to allowing the Lyle testimony of Brother or
24 Sister for the reasons before that I said, and I
25 reiterate those and I add that the child doesn't

1 remember, Child doesn't even remember what happened to
2 him, so the fact that it would appear to be similar isn't
3 not similar, it's dissimilar.

4 The locations were more than one. It
5 happened a few times. Sister didn't say how many
6 times. It appears only once. I don't know. The
7 locations were different in that Brother said it was in his
8 bedroom and also in the father's bedroom. It was in New
9 York. The other ones happened in South Carolina.

10 The passage of time, also, I think,
11 especially on Brother and there has been no clear and
12 convincing evidence from the state that the prior bad
13 acts actually did happen with respect to testimony with
14 Brother For those reasons and the ones I previously
15 said, I believe this is highly prejudicial. We ask that
16 it not be allowed in, that the testimony be excluded.

17 Thank you.

18 THE COURT: All right. Well, I find that the
19 ages of the victims are all roughly in the same age
20 group, the places that the activities took place inside
21 the home, inside the bedroom are the same. In each of
22 the victim's attacks, the types of sex are remarkably
23 similar through each of the three children.

24 Those are all issues that clearly show that
25 there is a common thread of types of victims that the

1 defendant preferred and the types of places, the types of
2 sex. The same modus operandi, if you would, are all
3 remarkable I similar. The identity of the defendant
4 being in question is also an issue in the case, and each
5 of the defendants, or each of the children, were able to
6 testify that the father was, in fact, the perpetrator of
7 the acts.

8 So I find that there is clear and convincing
9 evidence that this prior conduct took place and that
10 there is a probative value to it, which is outweighed by
11 any prejudicial effect, so I would allow those children
12 to testify.

13 All right. Is your counselor here now?

14 MR. BANNON: Yes, Your Honor, I believe she
15 is.

16 THE COURT: All right. Let's move on to that
17 one then.

18 MR. BANNON: The state would call Kendra
19 McIlvee. I believe we've already gone through some of
20 the other ones.

21 KENDRA TWITTY,
22 having been first duly sworn,
23 was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BANNON:

1 Q. And, Ms. Twitty, have you ever gone by another
2 name?

3 A. I'm sorry. Kendra McIlvee Twitty.

4 Q. And what do you do, Ms. McIlvee?

5 A. I'm a counselor.

6 Q. Who do you counsel?

7 A. I counsel children, adults, and families.

8 Q. Okay. And back in 2003, what were you doing?

9 A. I was working at Hope Haven of the Lowcountry as a
10 forensic interviewer and counselor.

11 Q. What does a forensic interviewer do?

12 A. Forensic interviewer is a person that is trained
13 to talk to children that have been in a situation where
14 law enforcement or the Department of Social Services is
15 somehow involved, and basically they do an objective,
16 unbiased interview to assist in the next step of that
17 child's treatment or intervention or --

18 Q. Okay. Do you work for the sheriff's office as a
19 forensic interviewer?

20 A. No.

21 Q. But I guess how do you get these children -- or,
22 like, how do you find out about them in order to perform
23 these forensic interview?

24 A. Well, Hope Haven is a nonprofit. It's a
25 children's advocacy center.

1 Q. When you say Hope Haven, is that the same as Hope
2 Cottage?

3 A. I'm sorry. Hope Cottage. They had changed names
4 quite a bit.

5 Q. But they basically serve the same function?

6 A. Yes. So Hope Cottage of the Lowcountry. Sorry.
7 It's been a while. What was the question? How do the
8 children get to us?

9 Q. Yes. Sort of how do you find out about these
10 children in order to perform a forensic interview?

11 A. Well, as an employee of Hope Cottage, they --
12 either DSS or law enforcement agency would contact the
13 agency to schedule the appointment.

14 Q. Okay. And back in 2003, did you have an
15 opportunity to talk with a boy named Child

16 A. I did.

17 Q. Okay. And was that in a forensic interview
18 setting, or how was that conducted?

19 A. It was a forensic interview.

20 Q. Okay. And when you conduct forensic interviews,
21 who is in the room?

22 A. The child and myself.

23 Q. Okay.

24 THE COURT: What do you mean when you say a
25 forensic interview? What do you mean by that?

1 THE WITNESS: A forensic interview is
2 basically a neutral, child friendly room set up to ask
3 open ended, free recall questions to assist investigative
4 agencies in their process of identifying information.

5 THE COURT: Okay. As opposed to what other
6 kind of interviews do you do?

7 THE WITNESS: As a forensic interview that's
8 all I did. I mean, there was the national corner house
9 training investigative service, or whatnot, with a
10 national protocol that forensic interviewers, which I
11 guess is just the title of that specific job created so
12 that law enforcement officers and DSS workers or
13 CPS workers, I'm not sure what they're called, were
14 interviewing children properly.

15 THE COURT: Okay.

16 THE WITNESS: Or maybe in a childhood based
17 form, for appropriate interviews.

18 BY MR. BANNON:

19 Q. And when you talked with ^{Child} what did you talk
20 about?

21 A. Well, whenever a child comes to Hope Cottage,
22 there is usually a referral, so I'm assuming he had some
23 sort of an abuse scenario, and I would have to look at
24 something, because I don't recall the exact -- most of
25 the time it was child sexual abuse, so I'm assuming his

1 case is child sexual abuse.

2 Q. Okay. Based on these forensic interviews, do you
3 make reports?

4 A. Yes.

5 Q. Would taking a look at your report be able to
6 refresh your recollection?

7 A. That would be greatly appreciated.

8 MR. BANNON: Permission to approach?

9 MS. LOVELL: Here we go again, but, I guess,
10 it just -- I don't understand if she's going to testify
11 to something, then we need to know what she's going to
12 testify to.

13 I can read the report. We don't want the
14 report brought in as evidence. We just want her it.

15 MR. BANNON: Right.

16 MS. LOVELL: Well, she has no testimony.

17 MR. BANNON: Well, there is testimony that
18 she interviewed with the Child and apparently now
19 she needs the aid of her report in order to help her
20 recollect exactly what they spoke about.

21 THE COURT: This is a lot less troublesome
22 than the prior one. It's her notes, her report. She can
23 use those to refresh her testimony.

24 THE WITNESS: Okay.

25 BY MR. BANNON:

1 Q. Okay. Well, when you met with Child what did you
2 talk about with him?

3 A. Child sexual abuse allegations.

4 Q. And what did Child say to you about that?

5 A. First, when we interview a child, we're assuming
6 that nothing happened. We're trying to figure out what's
7 going on, so there's a protocol which we would use, which
8 is called a RATAC, which is where you build rapport with
9 a child and then you make them feel comfortable. Then
10 you go through anatomy identification so you can
11 understand the common language that you're talking about
12 as far as private body parts and then you go through
13 touch inquiry, which goes over different types of healthy
14 touching and unhealthy touching or inappropriate
15 touching, and then there is the abuse scenario, which is
16 when you would ask a question of has anyone ever touched
17 you there, or wherever you would have said that was
18 inappropriate.

19 And then your next is your conclusion where you
20 would sum up, basically, personal safety with the child
21 to let them know that that wasn't their fault and these
22 places are not supposed to be touched, and you send them
23 on their way. So that is what I did with every child
24 that came into my office, and that is what I did with
25 Child

1 Q. Okay. And so what did Child tell you about the
2 abuse that he suffered?

3 A. Okay. Well, I have in quotes that he said he
4 couldn't see his dad anymore because he sucked my penis
5 and I sucked his penis.

6 Q. Okay. And did he say anything else about the
7 abuse?

8 A. Well, I mean, I can read my report, but he was
9 basically -- his dad told him that he would break my
10 bones and he would slam me up against the wall if I
11 didn't do what he told me to do. He said when his dad
12 sucked his penis it felt nasty and kind of good.

13 He described his dad's penis as you can see in the
14 report. He would -- he used -- he was having sexual
15 problems, as I remember him saying in -- one thing I
16 didn't mention about forensic interviewing is when you're
17 doing the rapport section, you evaluate the child's
18 credibility, the ability to tell the difference between a
19 truth and a lie, and I had Child being marked as
20 credible, that he was able to understand the difference
21 between the truth and a lie.

22 Q. Did he seem to be medicated in any way when you
23 spoke with him?

24 A. He did. And I vividly remember having an issue
25 with that. I was very concerned with that, and I see

1 that in my report as well that he seemed to be very slow
2 and having some, I put zombie-like affect, maybe auditory
3 processing when I asked him a question. He seemed to
4 kind of take a while to process it, and it was an
5 abnormal affect for a child of that age.

6 Q. Okay. And did he tell you anything about his dad
7 having anal sex with him?

8 A. If you can give me one second. When asked to talk
9 about sex, Child said his dad, after clothes would be off
10 and his clothes would be off and his dad would get on top
11 of him and hump. When asked what hump meant, he stated
12 dad's body would go up and down. He reported that his
13 dad put his penis in his butt and it hurt, and Child
14 stated that he too put his penis in his dad's butt and it
15 felt icky, end quotes.

16 Q. And was this interview recorded, either via audio
17 or video recording?

18 A. No.

19 Q. And was it the policy of Hope Haven or Hope
20 Cottage at the time to record interviews with children?

21 A. No, not at the time.

22 Q. Okay. And do you remember the date that you spoke
23 with Child

24 A. It was June 5th, 2003.

25 MR. BANNON: No further questions, Your

1 Honor.

2 THE COURT: Do you have any, Ms. Lovell?

3 MS. LOVELL: No. I have arguments against
4 the testimony.

5 THE COURT: Let me ask you this: The
6 interview was not videotaped or audiotaped.

7 THE WITNESS: No, they weren't -- from my
8 understanding we were not videoing at that time, so I did
9 not -- I personally did not video.

10 THE COURT: All right. Did anybody?

11 THE WITNESS: No.

12 THE COURT: And why not?

13 THE WITNESS: To be honest, I'm not really
14 sure why. I think there was something that videos were
15 not admissible in court so there was no reason to be --
16 that was more of an administrative issue, and I was the
17 employee, so I am just trying to answer as honestly as
18 possible, so I was doing what I was told by my director.

19 THE COURT: Had you ever met ^{Child} before
20 this?

21 THE WITNESS: No, sir.

22 THE COURT: And how long did the interview
23 take?

24 THE WITNESS: Interviews usually last around
25 45 minutes.

1 THE COURT: So when y'all ask questions, what
2 kind of questions do you ask?

3 THE WITNESS: Which part?

4 THE COURT: Give me an example.

5 THE WITNESS: Free recall. So he told me
6 that it's not okay for someone to touch your butt. Has
7 anybody ever touched your butt? Yes. Okay. So tell me
8 about that. And then the child usually talks, and if
9 they do, well, tell me where you were when that happened.

10 THE COURT: And what kind of training did you
11 receive prior to that, at that time, on interviewing
12 children?

13 THE WITNESS: I went to Alabama to the
14 National Children's Advocacy Center for a week-long
15 training, and that training was a yearly training that I
16 would go to, and then at that same time I was finishing
17 up my master's in clinical psychology, so -- the
18 children's law office hosted bimonthly trainings on
19 forensic interviews, so I made sure I was taking
20 advantage of all the education I could get, but I have
21 been out of it for seven years, or six years.

22 THE COURT: All right. And tell me about the
23 surroundings of the area where. Were you the only person
24 in the interview room with Child

25 THE WITNESS: Yes, sir.

1 THE COURT: All right. And this Hope
2 Cottage, whereabouts is that?

3 THE WITNESS: I believe -- it's in Beaufort,
4 and I believe it might still be in the Regions Bank
5 Building on Ribaut Road. I'm not sure.

6 THE COURT: And how did Child come to your
7 attention?

8 THE WITNESS: He was honestly just another
9 kid to interview. He was referred to our center and he
10 was on my appointment, and --

11 THE COURT: So were you asking him these
12 questions to, like, aid the investigation as to whether
13 or not it took place and what took place, or were you
14 asking him about other just kind of counselling because
15 he was a troubled child and this just happened to be
16 elicited?

17 THE WITNESS: Okay. I have in my referral
18 question or presenting need, I said that Cynthia Solak is
19 concerned about the behavior of her adopted nephew Child

20 Child has been acting out sexually and has been
21 touching people inappropriately, so that was what --
22 that's all I knew about Child when he got there.

23 THE COURT: All right. You didn't know his
24 father had been accused --

25 THE WITNESS: I didn't know who the

1 perpetrator was.

2 THE COURT: Did you know at that time that
3 other children in the family had made any allegations
4 about that?

5 THE WITNESS: I did -- I knew that he had --
6 I mean, I don't remember, but I have what's in my report.
7 Would you like me to read it?

8 THE COURT: That's the only time you talked
9 to Child

10 THE WITNESS: Yes.

11 THE COURT: All right. When you say he acted
12 a little bit slow, are you talking about maybe
13 developmentally slow or just, like --

14 THE WITNESS: Altered. Developmentally, he
15 was able to answer appropriately, like cognitively. I
16 wasn't doing an IQ test with him, but I felt like he
17 cognitively understood, was on a ten-year-old level.

18 There was just something altered about his
19 affect, and, as a psychologist, it seemed like it was
20 mood altering medicines so --

21 THE COURT: So you were of the impression
22 that he was taking medicine at the time?

23 THE WITNESS: Yes, and I have in my report
24 that he had been diagnosed with bipolar and was currently
25 taking three different medications to control his

1 disorder.

2 THE COURT: At ten years old he was?

3 THE WITNESS: Yes.

4 THE COURT: Did you find out what he was
5 taking or that he was just taking --

6 THE WITNESS: That he was just taking
7 medicine.

8 THE COURT: You didn't know what the
9 prescriptions were for?

10 THE WITNESS: Uh-huh. I remember being -- a
11 big red flag went off for the diagnosis of bipolar at ten
12 and being on medicine.

13 THE COURT: That is a little bit young.

14 THE WITNESS: Very.

15 THE COURT: Do you know who made that
16 diagnosis?

17 THE WITNESS: I do not know.

18 THE COURT: All right. Does anybody have any
19 questions based on what I asked?

20 BY MS. LOVELL:

21 Q. Just one or two. Did you ever find or often find
22 somebody came to you as a referral that wasn't credible?

23 A. Absolutely.

24 Q. Or didn't have any -- and the information you
25 received regarding Child is from his aunt?

1 A. That is correct.

2 Q. That's what you said in your report?

3 A. Uh-huh.

4 Q. Because all the people that you see anyway are all
5 abuse allegations, right?

6 A. Either physical, sexual, or witness to a homicide
7 or something like that.

8 Q. So isn't a forensic interview -- aren't one of the
9 purposes that is to determine if medical treatment is
10 needed and whether it's safe for the child to return
11 home?

12 A. That sounds exactly --

13 Q. So that's really the only reason for a forensic
14 interview, is because testimony of who did it really
15 can't be admitted into court.

16 A. Right. To find the next -- like I said earlier,
17 to find the best treatment or intervention for that child
18 when they leave.

19 Q. And did you determine they needed medical
20 treatment?

21 A. Let me look in my record for that. He was not --
22 I have he -- has he been examined by a physician, and I
23 have no. So --

24 Q. As a result of your interview, did you feel he
25 should have medical attention, meaning you didn't have it

1 before you, but did you recommend it?

2 A. I did not recommend it in my recommendations.

3 Q. Okay. And did you determine that it was safe for
4 the child to return to his environment?

5 A. I said that Child is to have no contact with his
6 biological father and that he is to be supervised at all
7 times when around other children. So I --

8 MS. LOVELL: Thanks.

9 THE COURT: Okay. You can step down. Thank
10 you.

11 Oh, one last thing. When did these
12 allegations of the abuse actually take place? You talked
13 to him in 2003?

14 THE WITNESS: I don't know when that
15 initial --

16 MS. LOVELL: It was between 1999 and 2000.

17 THE COURT: All right. Thank you.

18 MR. BANNON: That's -- that's the indictment.
19 When it was reported was in May of 2003, and then Child
20 was seen a short time after that.

21 THE COURT: All right. You want to make an
22 argument or do you have anything else on this issue
23 before you make argument?

24 MR. BANNON: The state doesn't have any more
25 evidence to present, Your Honor.

1 Your Honor, just to sort of reiterate what we
2 said before, I believe that the state's shown the
3 necessary requirements in order for the contents of a
4 forensic interview to be admitted into trial, and I
5 understand there is a strong preference given to
6 interviews that are recorded, but I believe the testimony
7 was that at that particular time they certainly weren't
8 doing recorded interviews, and so this isn't sort of a
9 special circumstance where, you know, this one was
10 omitted or anything like that.

11 So I think it's clear this is an interview
12 that is taking place in a forensic setting and that she
13 was trained and qualified to do so and because of that,
14 the statement should be admitted into evidence.

15 THE COURT: Well, what are your thoughts on
16 that case that just came out today and how it applies the
17 Jennings case?

18 MR. BANNON: Well, Your Honor, I think that
19 that particular case is just a little bit different, is
20 they sought to admit the actual report, but now I
21 certainly understand that Ms. McIlvee had to rely on her
22 report, but this is something which occurred over eight
23 years ago, and so this is essentially -- I think that we
24 avoid the error of admitting the document itself, seeing
25 as how it -- I don't believe the Court had ruled on

1 whether or not it was proper to play the video that was
2 offered into evidence in that case, but I believe in this
3 case, as we just have per the testimony that it would be
4 proper to admit her testimony, and, you know, I'm not
5 seeking to admit the report. I think certainly based on
6 this new ruling it would be improper to do so.

7 THE COURT: All right. You just want her to
8 be able to testify to what she testified today, about
9 this is what he told me happened?

10 MR. BANNON: Yes, Your Honor.

11 THE COURT: And you would agree that it would
12 be improper for her to give any indication about how she
13 felt about his credibility?

14 MR. BANNON: Yes, Your Honor, and I don't
15 think it would be proper for her to, you know, just
16 straight bolster his credibility.

17 THE COURT: Because she did mention that she
18 marked he's credible.

19 MR. BANNON: She did, but I don't believe
20 that was -- I don't think I asked her whether or not she
21 found him credible.

22 THE COURT: She volunteered it.

23 MR. BANNON: Yeah. She volunteered it, and
24 it was under sort of whether or not --

25 THE COURT: In fact, I put it in quotes,

1 marked as credible, so that I think would be an improper
2 bolstering, or vouching.

3 All right. Ms. Lovell, you want to --

4 MS. LOVELL: I would briefly, Your Honor. I
5 don't see where she to adds any information that the jury
6 won't already hear from ^{Child} and she is only
7 corroborating, which really would only allow her to speak
8 to time and place, no identification, no credibility.
9 The information she gives is just almost cumulative to
10 what the jury is going to hear now from the other
11 witnesses that the state is bringing up.

12 The state is also asking that two Georgia
13 counselling agencies that ^{Child} went to prior to seeing
14 Hope Haven, they're asking that evidence be admitted, and
15 I have a motion to exclude that evidence.

16 THE COURT: Have you seen that?

17 MR. BANNON: Yes, Your Honor.

18 THE COURT: I haven't seen that.

19 MS. LOVELL: That's my motion. It's on the
20 witness list, but I have a motion to exclude it. We
21 haven't gotten to my motions yet, and it just seems to be
22 more information on the same thing; plus, hers is after
23 the Georgia sexual abuse counselor's, so the issue, the
24 specter of fabrication coaching comes up again, because
25 he was with the Solaks and it took three years for the

1 abuse to be disclosed, and he goes to Hope Haven after he
2 had been to sex abuse counselling in Georgia. Since
3 2001, he's been to a therapeutic foster home. I believe
4 on the heels of all that Hope Haven testimony is
5 extremely prejudicial and cumulative.

6 THE COURT: What are you planning on
7 introducing with Georgia?

8 MR. BANNON: Well, essentially, Your Honor,
9 it's my understanding, and I've never been able to get my
10 hands on their records, but it's my understanding that
11 based on Officer Florencio's report that Ms. Cruz was
12 counselling ^{Child} at the time when he sort of initially
13 disclosed, and it's my understanding that when he
14 finally -- or when the Solaks finally brought him forward
15 that it was sort of based on her counselling that she
16 thought he was stable enough in order to go forward and
17 present this evidence to law enforcement.

18 So sort of what I'm offering her for is just
19 sort of talk about delayed disclosure, and, in
20 particular, ^{Child} condition and what she was helping to
21 treat him for.

22 THE COURT: You don't know what she's going
23 to say?

24 MR. BANNON: I haven't seen it yet. To be
25 honest with you, she hasn't been able to see the report.

1 She told me that she was able to pick it up this
2 afternoon, and I'm waiting to talk to her as soon as
3 we're done with this.

4 THE COURT: Well, I guess I need to hear what
5 they're going to say as well. If you intend to offer
6 them, I don't really -- I don't know how I can rule on
7 that. You don't even know what they're going to say yet,
8 so I guess you need to get them in here at 9:30 in the
9 morning and we'll deal with that then.

10 MR. BANNON: Would it be acceptable --
11 because I've been in talks with these people, and part of
12 the problem -- I certainly recognize it's a problem, you
13 want to know exactly what they're going to say. Part of
14 it is that they're so busy they do all this counselling
15 and testimony in Savannah, and it has been incredibly
16 tough getting ahold of them. Would it be acceptable to
17 hold in camera hearings as they arrive?

18 THE COURT: As long as you don't intend to
19 call them first without me having the opportunity to have
20 that --

21 MR. BANNON: No. Im not going to sort of let
22 the cat out of the bag during opening statements, and so
23 I figure when we get to them, we can just take an
24 opportunity to break.

25 THE COURT: As long as you don't talk about

1 it during opening statement, that would be acceptable.

2 MR. BANNON: I think that would be the best
3 use of the Court's time.

4 THE COURT: All right. Well, I want to study
5 this case that came out this morning on this issue and
6 kind of think this thing through with Ms. Twitty's
7 testimony, and I'll let you know in the morning whether
8 or not I'll let you call her and under what limitations.

9 If I do allow her to call, obviously, you're
10 going to need to tell her she's not allowed -- I don't
11 think you were intending to ask her but certainly you're
12 not allowed to give her thoughts on whether or not he was
13 a credible witness, telling the truth, that sort of thing
14 opinion she's not going to be entitled to volunteer that,
15 but I just want to, you know, since we got a new case out
16 on it, I want to study it since it just popped up a
17 couple hours ago, so I'll let y'all know in the morning
18 my thoughts on that before I make a final ruling, but
19 very ruled on the Brother and Sister can testify.

20 MR. BANNON: Thank you, Your Honor.

21 THE COURT: Okay. Anything else we need to
22 deal with before I get on the road here?

23 MR. BANNON: Not from the state, Your Honor.

24 THE COURT: Okay.

25 MS. LOVELL: Your Honor, I have motions that

1 I want to ask you to consider excluding Child testimony
2 and --

3 THE COURT: I haven't seen any of your
4 motions.

5 MS. LOVELL: I didn't know exactly what I
6 would need to make a motion for, so I got -- now that I
7 have the witness list, I was able to determine -- I
8 didn't know Kendra was coming and I assumed -- I got the
9 witness list this morning. I assumed Georgia -- he would
10 bring in one person from Georgia, but I didn't know for
11 sure, and I didn't know about Sister until he disclosed
12 it last week.

13 THE COURT: What other motions do you need to
14 bring to my attention?

15 MS. LOVELL: I would like to make a motion to
16 have Child testimony excluded.

17 THE COURT: He's the victim?

18 MS. LOVELL: Yes.

19 THE COURT: And you want to have him
20 excluded?

21 MS. LOVELL: Yes.

22 THE COURT: Well, I'm all ears.

23 MS. LOVELL: I believe under the history of
24 his testimony that under the prior testimony that he gave
25 that he has -- and even today's hearing that you saw, he

1 doesn't remember. He has no vivid recollection of what
2 happened to him, and I believe that he's also spent a
3 great deal of time and years, along with these same
4 people that he was living with at the time he disclosed
5 this information, so his testimony isn't cleaned, or
6 cleansed, in any way by time. He still has been unable
7 to remove himself from the influences of anybody else to
8 remind him to continue what he said in the past.

9 The safeguards --

10 THE COURT: Those are the kinds of things
11 you're free to argue to the jury, but I don't think
12 that's the basis for excluding them, and you'll get free
13 reign on cross-examination by prior statements and even
14 to refresh his recollection as I indicated earlier,
15 you'll get to -- if you feel like it, as a matter of
16 tactics to talk about, you know, you seem certain about
17 what happened today, but, you know, yesterday afternoon
18 we had a hearing and you weren't quite so certain.

19 I'll let you figure out exactly how you want
20 to do that, but you'll get about as much leeway as you
21 want.

22 MS. LOVELL: And then on this motion I
23 understand you would deny that motion?

24 THE COURT: Correct.

25 MS. LOVELL: And then for the motion to

1 exclude Cindy Solak under Rule 602, 601, and 403, under
2 the same -- similar arguments in that she was accused of
3 and was determined that she had fabricated this and had
4 coached the child, and for her to testify in the new
5 trial would appear to also have that same concern that
6 the defense has, that he will not be receiving a fair
7 trial.

8 She -- under 602, she has no lack -- she has
9 a lack of personal knowledge. She didn't see anything
10 happen. This happened between 1999 and 2000 when the
11 victim was living with his mother and his mother's
12 boyfriend.

13 She would have no direct knowledge of that,
14 so the information that she would give she could not
15 testify. We would ask that she not be allowed to testify
16 to identity because she, under the hearsay that the out
17 of court statement should only be as to time and place
18 and she could not testify to the identity of what -- or
19 the statement that Child told her of who abused him.

20 So we would ask that if she were allowed that
21 she would be restricted on the amount, what she could
22 testify to as well.

23 The child lived with her, attended years of
24 counselling. The child has also been under the subject
25 of two DSS investigations, and under 403, as I explained,

1 prejudice because she had lied in the past.

2 THE COURT: What is it that you would be
3 calling her for?

4 MR. BANNON: Well, Your Honor, she is the
5 victim's maternal aunt. I was going to be calling her
6 essentially to testify a little bit about the family,
7 where they were living at the time, when they came to
8 Bluffton, if she knows where the defendant was living at
9 the time when he had custody of the children and these
10 acts were occurring. Short of the relationship -- I'm
11 not going to be asking her about, you know, what Child
12 ever told her.

13 THE COURT: Okay.

14 MR. BANNON: I'm going to be asking her sort
15 of about the situation at the time and her knowledge
16 about where people were living and what their
17 relationships are between one another.

18 I mean, she knows Mr. Smith, as he was her
19 brother-in-law, but I don't plan on having her identify
20 him as the abuser of Child if that makes sense.

21 THE COURT: So you're not going to try to get
22 any, Child told me this is what happened to him evidence
23 in?

24 MR. BANNON: No.

25 MS. LOVELL: Or location of where it

1 happened.

2 MR. BANNON: Yeah. I'm not claiming to have
3 her testify about where it happened. I am planning on
4 asking her where he lived at the time when the children
5 are reporting the abuse, but I'm not having her say where
6 the children said this happened.

7 THE COURT: You can say where was he living
8 at between the years of such and such, not when the abuse
9 happened.

10 MR. BANNON: Yes, sir.

11 THE COURT: Okay. As long as you frame the
12 question that way, I don't think it's improper. Does
13 that satisfy your concern, Ms. Lovell?

14 MS. LOVELL: Yes.

15 THE COURT: Okay.

16 MS. LOVELL: I guess I could also leave the
17 other motion or argument when we hear about Georgia and
18 you hear from Hope Haven to restrict any expert testimony
19 or any type of testimony from her to the time and place
20 and not to credibility and to truth --

21 THE COURT: It sounds like we're all a little
22 bit dark on what this expert from Georgia might be
23 testifying about.

24 MS. LOVELL: I am kind of bouncing around,
25 and I do apologize.

1 THE COURT: All right. We'll hold those in
2 abeyance until we got a clear idea as to what she's going
3 to testify about.

4 MS. LOVELL: So you denied my motion on
5 excluding Mrs. Solak?

6 THE COURT: Yes. Ms. Solak will be allowed
7 to testify, but only about general living conditions and
8 who lived, where when during time frames.

9 MS. LOVELL: Thank you, Your Honor.

10 THE COURT: Anything else? Okay. All right.
11 Well, I'll see y'all at 9:30 in the morning.

12 - - -

13 (Whereupon, the proceedings were concluded.)

14 - - -

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS.
COUNTY OF BEAUFORT 2003-GS-07-01756

STATE OF SOUTH CAROLINA)
) TRANSCRIPT OF RECORD
) September 19-21, 2011
ARTHUR SMITH,)
) Beaufort, South Carolina
) Defendant.)

B E F O R E:

The Honorable Roger M. Young, Sr., Judge, and Jury.

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

James Bannon, Assistant Solicitor
Attorney for the State

Gail Lovell, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1	I N D E X				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Andres Florencio	53	59	60	--
4	Cynthia Solak	61	74	77	--
5	Child	78	86	88	--
6	Brother	89	95	96	--
7	Sister	97	103	--	--
8	Kendra McIlvee	116	123	--	--
9	Tod Lynch-Stanley	125	129	131	142
10		152	167	145	--
11		--	--	170	--
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E X H I B I T S

NO.	DESCRIPTION	ID.	EV.
State's 1	Handwritten note	58	58
State's 2	Photograph	70	70
State's 3	Photograph	70	70
State's 4	Photograph	72	72
State's 5	Photograph	72	72

1 a little bit more privately about this, and by private I
2 mean we still got to be in front of the court reporter
3 and the lawyers will have the opportunity to listen in,
4 but it won't be in front of a whole group of strangers.

5 So let me tell you a little bit about the
6 case that we are getting ready to start. The case is the
7 State of South Carolina versus Arthur Franklin Smith, and
8 Mr. Smith was charged with criminal sexual conduct with a
9 minor under the age of 11 years in the first degree in
10 violation of South Carolina code section 16-03-06-55.

11 He has pled not guilty to this charge, and so
12 the State of South Carolina must now afford him a jury
13 trial and also attempt to prove to 12 of you that he is
14 guilty of this charge beyond a reasonable doubt.

15 Mr. Smith is not required to prove that he is innocent of
16 this charge. The state must prove his guilt. He doesn't
17 have to do anything other than show up for trial, and
18 that he's done, so as far as the procedure that we
19 follow, they have to prove what they have alleged, and
20 they have alleged in this indictment that in Beaufort
21 County between May the 1st, 1999 and May the 31st of
22 2000, he did willfully and unlawfully perform oral and
23 anal sex on his son ^{Child} who is a minor between
24 the ages of seven and nine. He also said he forced his
25 son to perform oral and anal sex on him and that he

1 threatened to break his bones and other physical abuse in
2 order to force him to comply.

3 Again, I tell you this solely for the purpose
4 of telling you what Mr. Smith is on trial for. The fact
5 that he has been indicted on this charge is not evidence
6 at all, is not to be considered by you as evidence in
7 this case. The fact that a person has been arrested and
8 indicted for a crime is to be given no evidentiary value
9 at all.

10 Every citizen of this state and of this
11 country is presumed to be innocent of the crime for which
12 they have been charged. That is a right. That is a
13 substantial constitutional right that he has and every
14 single one of us have, and it accompanies him from the
15 time of his arrest up through the time that you become
16 convinced the state has provided you with sufficient
17 evidence of his guilt beyond a reasonable doubt.

18 Now, I've been talking about an indictment.
19 An indictment is simply a charging instrument. For all
20 practical purposes, it just puts him on notice of what he
21 has been charged with, and it affords this Court or
22 confers upon this Court jurisdiction to hear the matter.
23 An indictment, again, is not to be considered by you as
24 evidence at all in this case. Again, it's simply to let
25 him know what he is charged with and is to stand trial

1 let them study it for a few minutes, but criminal I'm
2 sort of we do it a little bit different.

3 We have -- the clerk will call out your name
4 and your number, and then you will come through those
5 little doors right behind Mr. Bannon, come, stand, turn
6 around, face. The state will get first opportunity to
7 say present the juror or strike the juror, and if they
8 say strike, then you go have a seat. If they say
9 present, then the defense will have the opportunity to
10 say strike or present.

11 If both sides say present, then you're on the
12 jury. If either side basically says strike the jurors,
13 then you'll go back and have a seat. All right? So, if
14 y'all are ready, is there anything further from the
15 state?

16 MR. BANNON: No, Your Honor.

17 THE COURT: Anything further from the
18 defense?

19 MS. LOVELL: No, Your Honor.

20 THE COURT: All right. Madame clerk, if
21 you're ready then.

22 THE CLERK: All right. Five strikes for the
23 state, ten for the defense.

24 Juror number 122, Greg Langford.

25 (The juror, a white male, approaches.)

1 THE COURT: All right. Thank you.

2 A PROSPECTIVE JUROR: You're welcome.

3 THE COURT: Anything else we need to bring up
4 before we bring the jury in?

5 MR. BANNON: Nothing from the state.

6 MS. LOVELL: No, Your Honor.

7 THE COURT: So we'll go into opening
8 statements, and you'll have your first witness ready?

9 MS. BANNON: Yes, Your Honor.

10 MS. LOVELL: You had mentioned earlier at the
11 time you read the indictment it would be an opportunity
12 for my client to plead not guilty to the jury. Would
13 that be now?

14 THE COURT: That was really something I had
15 done before --

16 MS. LOVELL: I thought you had already.
17 Thank you.

18 THE COURT: Okay. Let's bring the jury in
19 then.

20 (In open court, jury present.)

21 THE COURT: Welcome back, folks. We're going
22 to get started here in a minute, but before we do, I need
23 to have the clerk administer the oath to you, so if you
24 would, stand and raise your right hand while the clerk
25 administers your oath.

1 needed to leave by 5:00. That's no problem. We'll break
2 no later than 5:00 today.

3 If we need to finish up tomorrow -- in fact,
4 under our best case scenario, we might get all of the
5 evidence in today, and we'll probably come back for
6 closings in the morning anyway, so that's not a problem.
7 We'll finish up by 5:00 today, so whoever needed to go
8 can go.

9 If, however, you need to take a break a
10 little bit before I do, you know, just kind of send word
11 down to the bailiff, and they'll get my attention and
12 we'll take a break, but don't hesitate if nature calls.

13 Having said all that, I'll now turn it over
14 to the solicitor, so, Mr. Bannon, if you're ready, you
15 may begin your opening.

16 MR. BANNON: Thank you, Your Honor. May it
17 please the Court, counsel: Silence. Silence is the
18 sound of molestation and sexual abuse. Silence is the
19 sound of a crime that takes place behind closed doors.
20 Silence is the sound of a crime that occurs where no one
21 can hear, no one can see, and no one can help.

22 Silence is for a crime where a father forces
23 his son to perform sex acts on him and to have his son
24 perform sex acts back. That's what we're here to talk
25 about today.

1 Today the victim in this case, Child a
2 very brave young man, is going to break that silence.
3 He's going to come in here today and talk to you about
4 how back in 1999, 2000, this man, his father, Arthur
5 Smith, molested him. Today is when the silence ends.

6 Now, back in 1999 and 2000, Mr. Smith was
7 preying on Child silence, a silence which he guaranteed
8 through threats and shame and fear. At the time this was
9 occurring, Child was just a little boy. He wasn't
10 even ten. He certainly wasn't 11. Now, some ten years
11 later, that scared little boy is a man, and he's going to
12 be here and he's going to be able to tell you about what
13 this man did to him.

14 Arthur Smith forced his own flesh and blood
15 to perform sex acts for him on demand. Now, just as the
16 defendant was banking on Child silence, he continued to
17 bank on our discomfort, our unwillingness to talk about
18 these horrible things that occurred, because they are
19 horrible and they are unsettling, and they are difficult
20 to talk about. But we, just like Child need to find the
21 strength to shine a light into what was done to him.

22 Now, the judge at some point is going to tell
23 you that Mr. Smith sits here an innocent man. He's been
24 accused of a crime, and what some say is the defendant
25 sits cloaked in a robe of righteousness, and that is how

1 the defendant currently sits before you.

2 But what we are going to do here through the
3 course of this trial is show you that that cloak of
4 righteousness is nothing more than a cloak of shadows,
5 fear, and shame, because just like Child we cannot shy
6 away from what happened.

7 Child will get up here and he will take the
8 stand, and he will tell you about what happened to him,
9 and together, all of us, will have to take a journey into
10 that world of what happened to him, and at the end of
11 this trial, you will be firmly convinced that it is not a
12 robe of righteousness, but rather a cloak of shadow.

13 At the end of this trial, you will be firmly
14 convinced that Arthur Smith is guilty of molesting his
15 son. Thank you.

16 THE COURT: Ms. Lovell, would you like to
17 make an opening?

18 MS. LOVELL: Yes, I would, assistant
19 solicitor, ladies and gentlemen of the jury: My name is
20 Gail Lovell and I represent Mr. Arthur Smith, and as you
21 have heard, the state has accused him of sexually
22 assaulting his son over 11 years ago.

23 This is a distasteful and dark crime for so
24 many reasons, the sort of crime that most people want to
25 shy away from because they are uncomfortable and the

1 state accuses Mr. Smith of committing this crime, but he
2 is innocent of this crime until the state has proven it
3 to you beyond a reasonable doubt. Under the
4 constitution, he is innocent until proven guilty.

5 In other words, the state must prove he's
6 guilty by providing you with credible evidence in the
7 form of testimony that proves to you beyond a reasonable
8 doubt that he committed the crime as charged.

9 The state will call witnesses to shed a light
10 on this charge, but keep a watch on the state to be sure
11 that it proves the charge beyond a reasonable doubt.

12 You may wish to use your common sense and
13 your logic when listening to these witnesses to gauge
14 whether they are truthful or not. Shine that light into
15 the corners to find the truth. You, the jury, can decide
16 to believe some, all, one, or none of the witnesses. You
17 may get to hear from an expert witness. Listen carefully
18 to what they say and ask whether their testimony helped
19 illuminate the corners, the dark corners, for you to see
20 the truth.

21 Please be mindful of the shadows and use your
22 intuition, your impartiality to light your way to the
23 truth. Be alert to the evidence you get and the evidence
24 you don't get. Is something missing that you would
25 expect to see in a case like this? Are there gaps or

1 inconsistencies in the evidence presented? Through
2 questions and cross-examination, you will determine
3 whether or not you have found the truth. We are
4 confident that after state has presented this case to
5 you, you will see the light and find my client not
6 guilty. Thank you.

7 THE COURT: All right. Mr. Solicitor, call
8 your first witness.

9 MR. BANNON: Thank you, Your Honor. The
10 state calls Deputy Florencio.

11 ANDRES FLORENCIO,
12 having been first duly sworn,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BANNON:

16 Q. Could you tell us where you work.

17 A. I'm employed by the Beaufort County sheriff's
18 office.

19 Q. How long have you been working for the sheriff's
20 office?

21 A. It will be 14 years the 6th of October of this
22 year.

23 Q. And what do you do there for the sheriff's office?

24 A. I'm currently assigned as a staff sergeant
25 supervisor of the Beaufort Jasper Multi-Agency Drug Task

1 Force.

2 Q. Have you ever performed any other functions for
3 the sheriff's office?

4 A. Yes. I was assigned to the drug task force in
5 June of 2004. Prior to that from December 1999 to 2004 I
6 served as a criminal investigator.

7 Q. And so what was your job function in 2003?

8 A. I was a criminal investigator assigned to the
9 southern division of Beaufort County, which encompasses
10 Hilton Head and the Bluffton area.

11 Q. And when you say you're a criminal investigator,
12 what exactly does that mean?

13 A. It means I investigated sexual crimes, murders
14 assaults, financial crimes.

15 Q. Is this a situation where you're on the road,
16 patrolling?

17 A. No, I am not.

18 Q. Okay. And could you tell us, what was Hope
19 Cottage?

20 A. Hope Cottage. Like I explained earlier, I was
21 assigned as a criminal investigator, and as a criminal
22 investigator I did receive interview interrogation
23 training, but whenever we had children we needed to
24 interview, whether they be children that had committed
25 crimes or children that were victims, we use Hope

1 Cottage. They were trained to do specific forensic
2 interviews that dealt mostly with children.

3 They had an environment interview room that was
4 set up for children, and the reason for that is because
5 if we had a child that was a victim of a crime instead of
6 us interviewing him with less training or in the police
7 department, which is not really gauged for an atmosphere
8 for children, we did it at Hope Cottage, and they
9 provided the forensic interviewers that had training.
10 And it was pretty much meant to less traumatize or have
11 less trauma on the child so they don't have to be
12 interviewed more than once, or multiple times.

13 Q. In May of 2003, did you have an opportunity to
14 meet with a Child

15 A. Yes, I did.

16 Q. And at the time that you met with him, was he by
17 himself or was he with one else?

18 A. He was with a guardian, Cindy Solak.

19 Q. And did you meet with him face to face?

20 A. Yes, I did. I met with him face to face. They
21 actually came to the Hilton Head office where my office
22 is.

23 Q. Okay. When you saw Child do you know how old he
24 was?

25 A. I didn't know initially how old he was. I knew

1 that he was a young child.

2 Q. Okay. How tall was he?

3 A. Well, I don't remember exactly. I know at the
4 time -- I'm about six foot. He was a lot smaller than
5 me. I would say maybe my best guess four foot tall,
6 maybe a little bit taller.

7 Q. And how much did -- you didn't put him on a scale,
8 did you?

9 A. No, I did not.

10 Q. About how much would you say he weighed?

11 A. I would say probably less than 100 pounds.

12 Q. And when you met with Ms. Solak and Child what
13 did -- well, what did they report to you, in very general
14 terms?

15 A. They were there to report that sometime during the
16 time between May, I believe it was 2009 and June of the
17 year 2000, that Child had been sexually assaulted by his
18 father.

19 Q. And what I would like to ask you is, I think that
20 you said 2009, in the year 2000?

21 A. I'm sorry, 1999 and the year 2000.

22 Q. Okay. And so when you get a report like this and
23 you have a child, what do you do -- what is sort of your
24 next step?

25 A. Well, normally, if it wouldn't have been the

1 child, I would have put them in an interview room and got
2 a full statement from them, but because it was a child
3 victim, what I did was I contacted Hope Cottage and made
4 the next appointment possible, which I believe was about
5 a month later, sometime in June, scheduled an appointment
6 to have ^{Child} interviewed, and I also questioned the
7 aunt.

8 Q. Okay.

9 A. Mrs. Solak.

10 Q. Is that the guardian?

11 A. Yes, the guardian, yes.

12 Q. And so to your knowledge, was this interview at
13 Hope Cottage ever conducted?

14 A. Yes, it was.

15 Q. Were you present when the interview was conducted?

16 A. Yes, I was.

17 Q. Were you inside the room where the interview was
18 conducted?

19 A. No. The only person in the room was the forensic
20 interviewer. I sat outside the room where I could
21 observe.

22 Q. Okay. So were you able to observe the entire
23 interview?

24 A. Yes, I was.

25 Q. And based on your investigation, were you able to

1 determine where Mr. Smith was residing during, you know,
2 the time period of 1999 and 2000?

3 A. Yes. It was in Shady Glen mobile home park, which
4 is the Bluffton area of Beaufort County, and I believe it
5 was trailer number or lot number 419.

6 Q. And is that located in Beaufort County?

7 A. Yes, it is.

8 MR. BANNON: Permission to approach the
9 witness, Judge?

10 THE COURT: You may.

11 (Handwritten note marked for identification
12 and admitted into evidence as State's Exhibit No. 1.)

13 BY MR. BANNON:

14 Q. And during your interview with Child and his
15 guardian, did they provide you with anything?

16 A. Yes, they did.

17 MS. LOVELL: Objection.

18 THE COURT: What is your objection?

19 MS. LOVELL: The item -- I saw the paper that
20 the state has, but I don't know what it is or where it's
21 from and how he's going to be using it, and my concern is
22 it's inadmissible.

23 MR. BANNON: At this point I haven't asked
24 for it to be admitted. I am just asking him to identify
25 it.

1 THE COURT: All right.

2 BY MR. BANNON:

3 Q. I show you what has been marked State's Exhibit
4 No. 1. Take a look at it and tell me if you recognize
5 this.

6 A. Yes, I do recognize it.

7 Q. How do you recognize it?

8 A. I remember the paper, but also what I wrote on the
9 evidence bag once I collected it and turned it into
10 evidence.

11 Q. Okay. And so is this a piece of paper that was --
12 well, how did you come to see this piece of paper?

13 A. When I first met with Cindy Solak and Child my
14 first initial meeting with them, Ms. Solak provided this
15 piece of paper to me.

16 Q. Okay. Thank you. Did you ever have any contact
17 with Mr. Smith?

18 A. No, I did not.

19 MR. BANNON: Thank you, Your Honor. No
20 further questions for Deputy Florencio.

21 THE COURT: Cross?

22 MS. LOVELL: Yes, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. LOVELL:

25 Q. Did you follow up on any investigation of this

1 incident that was reported to you?

2 A. Yes, I did.

3 Q. What did you do?

4 A. I had ^{Child} do a forensic interview.

5 Q. And after that, did you follow up on any other
6 aspects of this investigation, or did -- did it just end
7 right there, didn't it?

8 A. After the forensic interview and the arrest, yes.

9 Q. And did you -- when they came to you, did you
10 refer them to a doctor?

11 A. No, I did not.

12 Q. Did you take any DNA evidence?

13 A. I didn't take any DNA evidence because the
14 incident that was alleged happened about three years
15 prior to when it was reported.

16 MS. LOVELL: No further questions.

17 THE COURT: Redirect?

18 MR. BANNON: Just briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. BANNON:

21 Q. She had asked you about collecting any
22 DNA evidence.

23 A. Yes.

24 Q. Did you collect any physical evidence in this
25 particular investigation?

1 A. Besides the note that was given to me, no.

2 Q. Okay. And why is that?

3 A. Well, in a normal case, in a sexual assault that
4 has just occurred or occurred even within a week, we
5 normally would take the victim to the hospital and have a
6 forensic examination done, but at this point, the
7 incident had occurred over three years ago and there was
8 no evidence, no evidence to be collected.

9 MR. BANNON: Thank you. No further
10 questions.

11 THE COURT: Recross?

12 MS. LOVELL: No, Your Honor.

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

14 MR. BANNON: The state calls Cynthia Solak.

15 CYNTHIA SOLAK,

16 having been first duly sworn,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BANNON:

20 Q. Good morning, Ms. Solak.

21 A. Good morning.

22 Q. Where do you live?

23 A. Currently Lewisburg, West Virginia.

24 Q. What do you do for a living?

25 A. Long-term substitute teacher, teaching eighth

1 grade math right now.

2 Q. Do you have any children?

3 A. I have six.

4 Q. Are all of them your biological children?

5 A. No, sir. Three of them are my biological
6 children.

7 Q. Okay. And are you related to your nonbiological
8 children?

9 A. Yes.

10 Q. How are you related to them?

11 A. They are my niece and two nephews.

12 Q. Okay. And I guess -- is it your brother's child
13 or your sister's children?

14 A. They are my sister's.

15 Q. Okay. So you would be the maternal aunt?

16 A. Yes.

17 Q. Okay. And what are the names of these three
18 children?

19 A. Brother Sister and Child

20 Q. Okay. At any point did Child and Sister go by a
21 different last name?

22 A. Yes.

23 Q. Okay. And what last name did they go by?

24 A. Smith.

25 Q. And who are, to your knowledge, the parents of

1 Child Sister and Brother

2 A. Kelly Smith and Arthur Smith.

3 Q. Okay. And is Kelly your sister?

4 A. Yes.

5 Q. Okay. And so Arthur Smith would be your
6 brother-in-law?

7 A. Yes.

8 Q. Do you see Arthur Smith in the courtroom here
9 today?

10 A. I do. He's sitting right there.

11 MR. BANNON: Your Honor, let the record
12 reflect that the witness identified the defendant.

13 THE COURT: So ordered.

14 BY MR. BANNON:

15 Q. Where were Child Sister and Brother born?

16 A. They were born in New York.

17 Q. Now, I guess -- let's talk about each kid just
18 individually for a moment, if that's all right. When was
19 Child born?

20 A. Child was born .

21 Q. Okay. And you said that he was born in New York?

22 A. Yes.

23 Q. When was Brother born?

24 A. .

25 Q. Okay. And when was Sister born?

1 A. September 2, 1993.

2 Q. Okay. So I guess -- could you tell us sort of
3 then in descending chronological order. Who is the
4 oldest, who is the middle, who is the youngest?

5 A. Brother is the oldest, Child is next, and Sister
6 is third.

7 Q. And at any point did the family leave New York?

8 A. Yes.

9 Q. Okay. Do you know where they moved to?

10 A. They moved to Bluffton, South Carolina.

11 Q. Okay. And when was that?

12 A. I believe around the summer of 1997.

13 Q. Okay. And were you living in West Virginia at
14 that point?

15 A. No.

16 Q. Where were you living?

17 A. We were also living in Bluffton, South Carolina.

18 Q. Okay. And were -- well, to your knowledge, are
19 Arthur and Kelly Smith still married?

20 A. They are not.

21 Q. Okay. And to the best of your knowledge, when did
22 sort of their separation begin?

23 A. Fall of 1999.

24 Q. Okay. And during the separation, what was the
25 custodial situation of Brother Child and Sister

1 A. Kelly had primary custody. Art had visitation, to
2 best of my knowledge, Wednesday evenings, Friday,
3 Saturday, and Sunday, every week.

4 Q. So Wednesday and the weekends?

5 A. Wednesday and weekends.

6 Q. And were Kelly and Mr. Smith living in the same
7 location or were they separate?

8 A. They were separate.

9 Q. And were they living in different towns or the
10 same town?

11 A. Same town.

12 Q. What town was that?

13 A. Bluffton, South Carolina.

14 Q. Where is Kelly now? Where is the mother of Child
15 Brother and Sister

16 A. Kelly is living in Buffalo, New York.

17 Q. Okay. And who has custody of the children at this
18 point?

19 A. My husband and I do.

20 Q. Now, when did you first take custody of Child
21 Brother and Sister

22 A. November 15th, 2001.

23 Q. 2001, did you say?

24 A. Yes.

25 Q. Now, what was Child condition when you first

1 got -- when you first took him in?

2 A. He was acting out as a child, behavior in school
3 was poor. Behavior at home was concerning.

4 Q. Okay. When you say that he was acting out, can
5 you tell us some of the things that he was doing.

6 A. He would urinate in the corners of his bedroom, he
7 wiped feces on the wall in school, bathroom wall at
8 school, after our custody, he was physically aggressive,
9 and destruction of property.

10 Q. Was there ever any incidents regarding sort of
11 Child teeth?

12 A. Yes. Before we received custody, he had pulled
13 out a permanent tooth in school, in September 2001.

14 Q. Okay. And was this a baby tooth to your
15 knowledge?

16 A. No, it was permanent. We had it checked out by
17 the dentist.

18 Q. Okay. And during your custody, did he ever start
19 to have sexual issues?

20 A. Yes.

21 Q. And could you tell us about those, to the best of
22 your knowledge.

23 A. He -- in the beginning, he was on a bus going to
24 Gateway, which was a place where he went for counselling.

25 Q. Let me interrupt you for just a second. When he

1 was going to Gateway, at this point, was he being given
2 any sort of, you know, therapy related to --

3 A. Yes.

4 Q. Okay. Was this for sexual problems or was this
5 for the acting out that you described?

6 A. This was for the behavior, acting out.

7 Q. Okay. And so -- I'm sorry to have interrupted
8 you. Please continue.

9 A. On the bus to Gateway, he fondled a young lady in
10 the back of the bus.

11 Q. Okay. And so based off of -- well, how old was he
12 when this occurred?

13 A. I would say maybe eight or nine.

14 Q. Okay. And how old was he when you took custody of
15 him?

16 A. Eight, turning nine.

17 Q. And based off of the problems on the school bus,
18 did you seek any other counselling for Child

19 A. We continued with Gateway, and then if I remember
20 correctly, he was put into a program called SOAP, which
21 was also in Savannah.

22 Q. And to your knowledge, did SOAP specialize their
23 counseling in any way?

24 A. They specialized in children who acted out
25 sexually.

1 Q. Okay. And once he was getting the counting at
2 Gateway, he was getting the counselling at SOAP, did you
3 see any improvement in Child behavior?

4 A. Not initially, no.

5 Q. And when you say not initially, when would that
6 have been?

7 A. We did not see a significant amount of
8 improvement -- probably until his first -- I couldn't
9 tell you.

10 Q. Okay. When you -- I believe you said you first
11 took custody of Child and the other children in 2001.

12 A. Yes.

13 Q. What was your priority with Child when you took
14 custody of him?

15 A. Our priority, at that time, was to take care of
16 his health issues.

17 Q. Okay. At some point, did you take Child to file a
18 police report?

19 A. Yes.

20 Q. Okay. And was that for sexual abuse?

21 A. Yes.

22 Q. Okay. And now when did you take Child to file
23 this report?

24 A. May -- it's hard not having pen and paper and
25 trying to remember things. Hold on. 2003.

1 Q. And so how old was Child when you filed the police
2 report?

3 A. Nine. No. He was born in 1992, 2003 -- 11.

4 Q. Well, before you filed the police report, when did
5 you learn of him having been potentially sexually abused?

6 A. January of 2002.

7 Q. Okay. So why the delay in taking him to file a
8 police report?

9 A. We were still working on taking care of his health
10 issues.

11 MR. BANNON: Permission to approach the
12 witness, Your Honor?

13 THE COURT: Okay.

14 BY MR. BANNON:

15 Q. I would like you to take a look at States Exhibits
16 2 and 3. Could you identify them?

17 A. That's Child

18 Q. Both pictures?

19 A. Yes.

20 Q. And how old is he in those photographs?

21 A. In No. 3, it was the spring before he moved in, so
22 he moved in 2001, spring of 2001 -- born in '99, I would
23 say he was eight.

24 Q. Okay. And how about the other one?

25 A. The other one was the following year after we had

1 had him for a few months, so he would have been nine.

2 Q. And are they a fair and accurate depiction of
3 Child at that age?

4 A. Yes.

5 MR. BANNON: At this point, the state would
6 move to admit State's 2 and 3 into evidence.

7 MS. LOVELL: Objection under rule 402 and
8 403.

9 THE COURT: Overruled. They're admitted.

10 (Photographs marked for identification and
11 admitted into evidence as State's Exhibit Nos. 2 and 3.)

12 BY MR. BANNON:

13 Q. And those pictures of Child I think you just said
14 he was eight and nine in those photographs? I honestly
15 just don't recall.

16 A. Yeah, I'm -- eight, yeah, eight for the first one
17 and nine for the second one.

18 Q. And do you remember about how big Child was back
19 then?

20 A. He wasn't very big at all.

21 Q. Okay. Would you say he weighed 100 pounds?

22 A. No. I don't even think he weighed 100; 70, 80
23 pounds maybe.

24 Q. Was he five feet tall?

25 A. No.

1 Q. So he was less than five feet tall?

2 A. Less than five foot.

3 Q. I would like to show you what has been marked as
4 State's Exhibit No. 5, and tell me, do you recognize
5 that?

6 A. That one is Brother

7 Q. And when was that taken?

8 A. That was taken also the spring after we received
9 custody.

10 Q. So 2002?

11 A. 2002.

12 Q. So how old would Brother have been in that photo?

13 A. He was 12.

14 Q. And how big was Brother at that point?

15 A. Brother was over five foot, and I want to say
16 weighed about 120.

17 Q. Okay. And you say he would have been 12 at that
18 point?

19 A. Yes.

20 MR. BANNON: At this time the state would
21 move to admit State's Exhibit No. 5.

22 MS. LOVELL: Objection, Your Honor, under 402
23 and 403.

24 THE COURT: Okay. Overruled. Admitted.

25 (Photograph marked for identification and

1 admitted into evidence as State's Exhibit No. 5.)

2 BY MR. BANNON:

3 Q. And I would like to show you what has been marked
4 as State's Exhibit No. 4. And do you recognize that?

5 A. That is Sister

6 Q. And when was that photograph taken?

7 A. Spring before Sister moved in with us, so spring
8 of 2001.

9 Q. Okay. And so how old would Sister have been
10 when that photograph was taken?

11 A. Seven.

12 Q. And is it a fair and accurate depiction of her at
13 that time?

14 A. Yes.

15 MR. BANNON: The state would move State's
16 Exhibit No. 4 into evidence.

17 MS. LOVELL: Objection under 402 and 403.

18 THE COURT: Overruled. Admitted.

19 (Photograph marked for identification and
20 admitted into evidence as State's Exhibit No. 4.)

21 BY MR. BANNON:

22 Q. And same question as the others. How big was
23 Sister

24 A. Sister was smaller. She maybe was 60 pounds,
25 definitely under 5 foot.

1 Q. Okay.

2 MR. BANNON: I beg the Court's indulgence,
3 Your Honor.

4 BY MR. BANNON:

5 Q. I would also like to show you what has been marked
6 as State's Exhibit No. 1. And do you recognize that?

7 A. I do.

8 Q. And without telling me what's written in it, sort
9 of what is it?

10 A. It's a journal entry that Child had made.

11 Q. Okay. And when was the last time that you saw it?
12 Well, let me ask it another way. Did you ever give that
13 item to investigator Florencio?

14 A. I did.

15 Q. And where did you get that letter from?

16 A. I took it out of Child journal.

17 Q. Okay. And how do you know that it was Child
18 journal?

19 A. He was writing a journal for the counselling that
20 he was in; number two, this is his handwriting.

21 Q. Okay.

22 A. And it's got his name on it.

23 Q. Okay. Thanks. I'll take that back.

24 MR. BANNON: Permission to publish the
25 photographs to the jury, Your Honor?

1 THE COURT: You may.

2 MR. BANNON: No further questions for
3 Ms. Solak.

4 THE COURT: Cross?

5 MS. LOVELL: Yes, Your Honor. Thank you.

6 CROSS-EXAMINATION

7 BY MS. LOVELL:

8 Q. Good morning, Mrs. Solak. You have known the
9 children all their lives; is that true?

10 A. Yes, ma'am.

11 Q. Did you know them when they were in Buffalo?

12 A. Yes, ma'am.

13 Q. And did you observe them having any -- well, we'll
14 speak of ^{Child} first. You mentioned that ^{Child} had some
15 problems. Had he had problems all his life, behavioral
16 acting out?

17 A. No.

18 Q. Isn't it true he had some learning disabilities
19 when he was in Buffalo?

20 A. I couldn't answer that.

21 Q. When did you get to know these children better?
22 Was it when your sister was going through a divorce?

23 A. It was when they moved to Bluffton, South
24 Carolina.

25 Q. At the time that you had received custody of

1 Child isn't it true that he was living with his mother?

2 A. Yes.

3 Q. And that his mother also was living with her
4 boyfriend?

5 A. No.

6 Q. So the time that you received Child was in what
7 year?

8 A. 2001.

9 Q. And where was Child living in 2000?

10 A. In 2000? With his mother, and then with his
11 mother and then her boyfriend.

12 Q. So at the time these allegations happened, he was
13 living with his mother and his mother's boyfriend in
14 Bluffton; isn't that correct?

15 A. Allegations --

16 Q. That we're here for today.

17 A. No -- wait. I'm sorry. Yeah, go ahead.

18 Q. Let me get this straight. In 2002, where was
19 Child living?

20 A. In 2002, we had custody of Child

21 Q. Your testimony now is that in 2000 you had Child
22 not --

23 A. I'm sorry. I thought you said 2002.

24 THE COURT: That's what the record indicates.
25 You asked 2002. It may have been a mistake.

1 BY MS. LOVELL:

2 Q. I apologize. In the year 2000?

3 A. Child was living with his mom, and then his mom
4 moved the children into their boyfriend's home in
5 Beaufort.

6 Q. And at that time, were you close to Child

7 A. Yes.

8 Q. And was Child -- wasn't it true that Child was
9 having problems at that time as well?

10 A. Yes.

11 Q. And was anyone, to your knowledge, did you ever --
12 were you ever involved in any of the visitation that
13 occurred during the time that the parents were separated?
14 Did you have any involvement with visitation when Child
15 went to visit?

16 A. His dad?

17 Q. Uh-huh.

18 A. Not to my knowledge.

19 Q. So you weren't involved in doing that or
20 relocating them or anything, transporting them, anything
21 like that?

22 A. I don't remember. If I did, I maybe dropped them
23 off.

24 MS. LOVELL: One moment, Your Honor. Thank
25 you. No further questions.

1 THE COURT: Redirect?

2 MR. BANNON: Yes, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. BANNON:

5 Q. Was Mr. Smith still visiting with his children
6 between May of 1999 and the end of May of the year 2000,
7 to the best of your knowledge?

8 A. Yes.

9 Q. And you didn't get custody of them until late
10 2001?

11 A. June 2001.

12 Q. Okay.

13 A. Yeah.

14 Q. Okay. So that would have been -- okay. No
15 further questions.

16 THE COURT: Recross?

17 MS. LOVELL: No, thank you.

18 THE COURT: All right. You can step down.

19 All right, folks. It's 11:00. Let's go
20 ahead and take a mid-morning break, give you a few
21 minutes to use the rest room. Let's take about ten
22 minutes, about 15 minutes. We'll have you back at 11:15.
23 Don't begin deliberations or discussions about the case,
24 and we'll see you back in about 15 minutes.

25 (Recess taken.)

1 (In open court, jury present.)

2 THE COURT: We'll resume with the state
3 calling the next witness.

4 MR. BANNON: Your Honor, the state calls
5 Child

6 Child

7 having been first duly sworn,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BANNON:

11 Q. Good month, Child And where do you live?

12 A. Lewisburg, West Virginia.

13 Q. Have you ever gone by any other name other than
14 ?

15 A. .

16 Q. And how old are you, Child

17 A. Nineteen.

18 Q. When were you born?

19 A. When or where?

20 Q. When?

21 A. When?

22 Q. Okay. And where were you born?

23 A. Buffalo, New York.

24 Q. And do you have any brothers and sisters?

25 A. Yes.

1 Q. How many brothers and sisters do you have?

2 A. One biological brother and one biological sister.

3 Q. Okay. And what are their names?

4 A. Brother and Sister

5 Q. And did Sister used to be Sister

6 A. Correct.

7 Q. And who is the oldest?

8 A. Brother

9 Q. Okay. Who is the youngest?

10 A. Sister

11 Q. So you're the middle kid?

12 A. Right.

13 Q. Okay. And do you have someone in your life who
14 you call mom?

15 A. Yes.

16 Q. Who is that?

17 A. My aunt.

18 Q. Okay. And what is her name?

19 A. Cynthia Solak.

20 Q. And is she your biological mother?

21 A. No.

22 Q. Who is your biological mother?

23 A. Kelly Black.

24 Q. Okay. And is she the biological mom of Brother and
25 Sister also?

1 A. Yes.

2 Q. Is there someone in your life who you call dad?

3 A. Yes.

4 Q. Who is that?

5 A. Mark Solak.

6 Q. Okay. And is he your biological father?

7 A. No.

8 Q. Who is your biological father?

9 A. Arthur Smith.

10 Q. Do you see Mr. Smith in the courtroom here today?

11 A. Yes.

12 Q. Could you point him out for us?

13 A. (Indicating.)

14 MR. BANNON: Your Honor, let the record
15 reflect that he's identified the defendant.

16 THE COURT: So ordered.

17 BY MR. BANNON:

18 Q. When you were still living in Buffalo, were your
19 biological parents still together?

20 A. Yes.

21 Q. Okay. And how long did you live in New York?

22 A. Since I was born up to five years old.

23 Q. And where did you go after that?

24 A. Beaufort.

25 Q. Okay. Beaufort County?

1 A. Yeah.

2 Q. Do you know exactly where you lived when you were
3 living down here?

4 A. No.

5 Q. At some point did your biological parents
6 separate?

7 A. Yes.

8 Q. Okay. And who were you living with mainly at that
9 time?

10 A. My mom.

11 Q. And did you ever get to see your dad?

12 A. Yes.

13 Q. And do you remember, where was he living at that
14 time?

15 A. Beaufort.

16 Q. Okay. Do you know exactly where?

17 A. No.

18 Q. Do you know the name of the town?

19 A. No.

20 Q. Okay.

21 THE COURT: I need you to speak out loud.

22 THE WITNESS: No, sir.

23 THE COURT: Thank you.

24 BY MR. BANNON:

25 Q. When you went to go visit your dad, did anything

1 happen?

2 A. Yes.

3 Q. What happened?

4 A. He would make me do things to him and do things to
5 me.

6 Q. Okay. How old were you when this started?

7 A. Six years old.

8 Q. Okay. Is that microphone working okay now?

9 A. Yeah.

10 Q. It sounds like it.

11 A. Yeah.

12 Q. So I think that you said that he did things to you
13 and he made you do things to him, right?

14 A. Right.

15 Q. What did he do to you?

16 A. He would suck my penis and stick his penis in my
17 butt.

18 Q. Okay. Where did this occur?

19 A. At his house.

20 Q. And do you remember where inside of his house it
21 took place?

22 A. In his bedroom.

23 Q. And were there -- was there anyone else inside of
24 the room?

25 A. No.

1 Q. So it was just you and him?

2 A. Right.

3 Q. Were you fully clothed?

4 A. No.

5 Q. Was he fully clothed?

6 A. No.

7 Q. How did you get unclothed?

8 A. I undressed.

9 Q. Okay. Did he tell you to undress?

10 A. Yes.

11 Q. And now you said that he would perform oral sex on
12 you?

13 A. Yes.

14 Q. And you said that he would stick his penis in your
15 butt, right?

16 A. Right.

17 Q. How did that make you feel?

18 A. Terrible, angry.

19 Q. Did it hurt?

20 A. Yeah.

21 Q. Did he have you -- well, you said earlier that he
22 had you do things to him as well.

23 A. Yeah.

24 Q. What did he have you do to him?

25 A. He made me suck his penis too and try to put my

1 penis in his butt also.

2 Q. And did this happen more than once?

3 A. Yes.

4 Q. Do you remember how long it went on for?

5 A. Almost two years.

6 Q. And so you said that it started when you were
7 about six?

8 A. Correct.

9 Q. And you said it went on for two years. So how old
10 were you when the abuse stopped?

11 A. Eight.

12 Q. Do you know how many times over that two years
13 that happened?

14 A. More than three times, I know.

15 Q. Did he ever speak to you when it was over?

16 A. No.

17 Q. Did he ever speak to you about whether or not you
18 should tell anyone about what had happened?

19 A. No.

20 Q. Did he ever threaten you?

21 A. He did if I tell anybody.

22 Q. What did he tell you?

23 A. He told me that he would kill me or break my bones
24 if I told anybody.

25 Q. Okay. And did you tell anyone what was

1 happening -- while this was going on, did you tell anyone
2 what was happening?

3 A. No.

4 Q. Why not?

5 A. I was scared.

6 Q. Eventually were you able to tell somebody what was
7 happening?

8 A. Yes.

9 Q. Were you living with your dad when you were able
10 to finally say what had happened?

11 A. Biological father?

12 Q. With Mr. Smith.

13 A. I was not living with him.

14 Q. Were you -- did you still have contact with
15 Mr. Smith?

16 A. No.

17 Q. Okay. Do you see the person in the room who did
18 these things to you?

19 A. Yes.

20 Q. Could you point him out for us.

21 A. Right there.

22 MR. BANNON: Thank you, Your Honor. No
23 further questions.

24 THE COURT: Cross?

25 MS. LOVELL: Yes. Thank you.

CROSS-EXAMINATION

BY MS. LOVELL:

Q. Good morning, ^{Child} . Who did you live with when you -- who did you live with when you were six?

A. My mom and her boyfriend at the time.

Q. And was there anybody else in that household with you?

A. My siblings and his stepson.

Q. Were you parents going through a divorce about that time?

A. I believe so. I don't recall.

Q. They were separated, weren't they?

A. They were separated.

Q. And you were on visitation, weren't you?

A. I was what?

Q. You were going on visitation sessions at that time.

A. Right.

Q. And was -- wasn't your visitation with your brother and sister also to visit your dad?

A. Correct.

Q. Didn't all three of you go at one time; isn't that correct?

A. We all went at one time, yes.

Q. Did anyone else live in your father's home at that

1 time?

2 A. My grandfather.

3 Q. Did you go see a doctor at any time for these --
4 for this -- for what happened to you?

5 A. Many counselors afterwards, yeah.

6 Q. And isn't your testimony that you didn't tell
7 anyone about this?

8 A. No, not during that time.

9 Q. How is your memory of the events that happened
10 back in 2000? Is that a pretty good memory?

11 A. Yes, ma'am.

12 Q. But you really don't have a good recall of
13 everything that happened in 2000, do you?

14 A. That's correct.

15 Q. Yesterday's hearing, you didn't remember that you
16 had -- that there was oral sex until you read a
17 transcript from another hearing; isn't that correct?

18 A. Correct.

19 Q. Your memory is better than it was yesterday; isn't
20 that correct?

21 A. Correct.

22 MS. LOVELL: No further questions.

23 THE COURT: Redirect?

24 REDIRECT EXAMINATION

25 BY MR. BANNON:

1 Q. When you took a look at that transcript from
2 yesterday, were those your words that you took a look at?

3 A. Yeah.

4 Q. And so based on -- so what you looked at was what
5 you had said previously.

6 A. Right.

7 Q. And has anyone told you to say that it was
8 Mr. Smith who abused you?

9 A. No.

10 Q. And Ms. Lovell asked you about your brother and
11 sister and your grandfather.

12 A. Correct.

13 Q. When you were -- or when you went to visit
14 Mr. Smith's home, did you go with -- you went with your
15 siblings, right?

16 A. Right.

17 Q. And was your grandfather there also?

18 A. Yeah.

19 Q. Okay. Were any of them inside of the bedroom when
20 these things happened?

21 A. No.

22 Q. Did you ever tell any of them about what happened
23 inside the bedroom at that time?

24 A. No.

25 Q. Thank you.

1 MR. BANNON: No further questions.

2 THE COURT: Recross?

3 MS. LOVELL: No questions.

4 THE COURT: You may step down. Next witness.

5 MR. BANNON: State calls Brother

6 Brother

7 having been first duly sworn,

8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BANNON:

11 Q. Good morning. Could you please just state and
12 spell your name for the record.

13 A. Brother

14 Q. How old are you?

15 A. I'm 22.

16 Q. What do you do for a living?

17 A. I'm in the Marine Corps.

18 Q. How long have you been in the Corps?

19 A. Three-and-a-half years.

20 Q. Do you have any brothers and sisters?

21 A. I do.

22 Q. What are their names?

23 A. Sister and Child

24 Q. And did they ever go by anything else before they
25 were Solak?

1 A. Smith.

2 Q. And do you have a woman in your life who you call
3 mom?

4 A. Yes, Cindy.

5 Q. Okay. And is she your biological mother?

6 A. No.

7 Q. Are you related to her?

8 A. She's my aunt.

9 Q. Okay. Is she your mom's sister?

10 A. Yes.

11 Q. And do you have a person in your life who you call
12 dad?

13 A. Yes, Mark.

14 Q. And is he your biological father?

15 A. No.

16 Q. What is the name of your biological mother?

17 A. Kelly Black.

18 Q. And what is the named of your biological father?

19 A. Arthur Smith.

20 Q. Do you see Mr. Smith in the room here today?

21 A. Yes, he's over there.

22 MR. BANNON: Your Honor, let the record
23 reflect the witness identified the defendant.

24 THE COURT: So ordered.

25 BY MR. BANNON:

1 Q. And is Child and Sister -- are they the children
2 of Arthur Smith and Kelly Black as well?

3 A. They are.

4 Q. And where were you born?

5 A. I was born in Buffalo, New York.

6 Q. And how long did you live there?

7 A. Till I was about seven.

8 Q. Okay. And when you moved, where did you move to?

9 A. Bluffton, South Carolina.

10 Q. And were you with your brother and sister when you
11 moved to South Carolina?

12 A. Yes.

13 Q. And were you with your biological mother and
14 father at that time too?

15 A. Yes.

16 Q. And are your biological parents still married?

17 A. No.

18 Q. So while you were living in South Carolina, at
19 some point did they start to sort of separate and
20 divorce?

21 A. Yes.

22 Q. Okay. And were they always living together during
23 this whole period?

24 A. What do you mean?

25 Q. Once the separation started, did they live in one

1 house together with all of you or were they in different
2 locations?

3 A. They were in different locations.

4 Q. Okay. And where did your dad live -- excuse me,
5 where did Mr. Smith, your biological father, live?

6 A. He lived in a trailer park in Bluffton.

7 Q. And did you still see him?

8 A. Yes.

9 Q. Even while he was living at that other place?

10 A. Yes.

11 Q. And did you go alone or did you go with your
12 brother and sister?

13 A. It was the three of us.

14 Q. And do you recall how often you would go to visit?

15 A. It was usually, like, every weekend and one night
16 during the week.

17 Q. And now, I would like to go back to New York.

18 While you were living in Buffalo, New York, did anything
19 happen with your father?

20 A. Yes. He sexually abused me.

21 Q. And where did this sexual abuse occur?

22 A. It was in Buffalo. It would be either in my room
23 or his room. It was multiple times.

24 Q. And so this was in the house where the family was
25 living together?

1 A. Yes.

2 Q. And you said that he sexually abused you.

3 A. Yes.

4 Q. What did he do to you?

5 A. He sodomized me. There was oral sex. Just --
6 yeah.

7 Q. Was there anal sex as well?

8 A. Yes.

9 Q. And did he ever make you do things to him?

10 A. Yes.

11 Q. Okay. And what were those things?

12 A. Oral sex.

13 Q. Was there anal sex as well?

14 A. No.

15 Q. And were you clothed when this occurred?

16 A. No. He would take off my clothes.

17 Q. Was he clothed when this occurred?

18 A. No.

19 Q. Did you ever say no?

20 A. At first, but I don't think Art knows the
21 definition of no.

22 Q. Did Mr. Smith ever threaten you?

23 A. Yes. He threatened to hurt my mother.

24 Q. When you say no, did he ever hurt you?

25 A. No. He didn't hit me or anything, he just -- I

1 just gave in.

2 Q. Okay. And did this happen just one time or more
3 than once?

4 A. It was multiple times.

5 Q. How old were you when it started?

6 A. I was probably around six.

7 Q. Okay. And how long did the abuse go on for?

8 A. Right up until when we moved to South Carolina, so
9 I would have been just turning eight.

10 Q. Okay. So -- so it happened roughly between the
11 ages of when you were six and when you were eight years
12 old?

13 A. Yes.

14 Q. And how much older than Child are you?

15 A. Right now I'm 22, Child is 19, so three years.

16 MR. BANNON: Beg the Court's indulgence for
17 one moment.

18 BY MR. BANNON:

19 Q. Do you remember testifying at a hearing before
20 this one we have today?

21 A. Yes.

22 Q. And do you remember in that hearing saying that
23 your father put his penis in your butt?

24 A. Yes.

25 Q. Is that what occurred?

1 A. Yes.

2 MR. BANNON: No further questions, Your
3 Honor.

4 THE COURT: Cross?

5 CROSS-EXAMINATION

6 BY MS. LOVELL:

7 Q. Thank you. Good morning, Brother .

8 A. Good morning.

9 Q. This happened over 18 years ago? It happened when
10 you were six, right?

11 A. Yes. A little while ago.

12 Q. So you're 22, so a while ago, and your memory of
13 that time doesn't seem as good as it could be, does it?

14 A. I don't forget much.

15 Q. But you needed to have a record refresh your
16 recollection from the prior hearing; isn't that correct?

17 A. Yes.

18 Q. And those incidents that occurred that you said
19 happened, they must have hurt, didn't they?

20 A. Yes, ma'am.

21 Q. But did you seek any medical attention?

22 A. No, ma'am.

23 Q. Did you tell anyone that they hurt?

24 A. No, ma'am.

25 Q. And did you -- when you visited with your father,

1 did you also see your grandfather there?

2 A. Yes, ma'am.

3 Q. Now, when you visited, did you -- you lived with
4 your mother at this time because of the separation; is
5 that correct?

6 A. Yes, ma'am.

7 Q. And who else was in that household with you?

8 A. John Roach, I believe his name was.

9 Q. And who was John Roach?

10 A. He was my mother's boyfriend at that time.

11 Q. And was there also any other children living in
12 the household?

13 A. A.R. his son.

14 MS. LOVELL: No further questions.

15 THE COURT: Redirect?

16 MR. BANNON: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. BANNON:

19 Q. You said that you had a good memory of these
20 things that occurred.

21 A. Yes.

22 Q. Does this sort of thing tend to sort of stick out
23 in your mind?

24 A. I try to put it behind me.

25 Q. I understand. Now, Ms. Lovell asked you if you

1 told anyone at the time this was occurring. Why didn't
2 you tell anyone?

3 A. Because my -- Art threatened to hurt my mother.

4 Q. And you said you were six to eight years old at
5 that point in time, right?

6 A. Yes.

7 Q. Was he bigger than you were?

8 A. Yes.

9 Q. Were you afraid of him too?

10 A. Yes.

11 MR. BANNON: Thank you. No further
12 questions.

13 THE COURT: Recross?

14 MS. LOVELL: No, Your Honor.

15 THE COURT: You may step down. Next witness.

16 MR. BANNON: State calls Sister

17 Sister

18 having been first duly sworn,
19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. BANNON:

22 Q. Good morning, Sister

23 A. Good morning.

24 Q. Have you ever gone by any other name other than
25 Solak?

1 A. I have.

2 Q. And what name is that?

3 A. It was Sister

4 Q. And do you have any brothers and sisters?

5 A. I do.

6 Q. And who are they?

7 A. Their names are Brother and Child

8 Q. Okay. Do you have someone in your life who you
9 call mom?

10 A. I do.

11 Q. And who is that?

12 A. Her name is Cynthia Solak.

13 Q. And is she your biological mom?

14 A. She is not.

15 Q. Okay. And is there someone in your life who you
16 call dad?

17 A. Yes.

18 Q. And who is that?

19 A. His name is Mark Solak.

20 Q. And is he your biological father?

21 A. No, he is not.

22 Q. I'm sorry, Sister Right now what are you
23 doing? Are you working or --

24 A. Currently attending Marshall University.

25 Q. Okay. What are you studying?

1 A. I'm studying nursing. I want to be a nurse
2 practitioner.

3 Q. And do you know who your biological parents are?

4 A. I do.

5 Q. And who are they?

6 A. Kelly Smith and Arthur Smith.

7 Q. And do you see Arthur Smith in the courtroom here
8 today?

9 A. I do.

10 Q. And could you point him out for us?

11 A. He's right there.

12 MR. BANNON: Your Honor, let the record
13 reflect she's identified the defendant.

14 THE COURT: So ordered.

15 BY MR. BANNON:

16 Q. And where were you born?

17 A. I was born in Buffalo, New York.

18 Q. And what is your birthday?

19 A. My birth date is

20 Q. And how old were you -- well, how long did you
21 live in New York?

22 A. I'm not for sure how long I lived in New York.

23 Q. Okay. Well, where did you go after New York?

24 A. I moved to Bluffton, South Carolina.

25 Q. Okay. And do you know about how old you were when

1 you were living in Bluffton?

2 A. I was about six or seven.

3 Q. And at that time, were your biological parents --
4 well, were you with your biological parents at that
5 point?

6 A. Yes, I was.

7 Q. Okay. And were they still married?

8 A. Not that I can remember. I'm pretty sure they
9 were split up.

10 Q. Okay. And at some point during this, were you --
11 were they living in two different places?

12 A. Yes.

13 Q. And who were you living with mainly?

14 A. I was mainly living with my mom, or Kelly. I was
15 living with Kelly.

16 Q. And did you ever visit Mr. Smith?

17 A. I did.

18 Q. And did you visit him alone or was it with your
19 two brothers?

20 A. It was with my brothers.

21 Q. Okay. And did anything happen with your father
22 while you were in Bluffton, South Carolina?

23 A. Yes.

24 Q. What happened?

25 A. He sexually molested me.

1 Q. Okay. How old were you when this started?

2 A. I believe I was six when it started.

3 Q. And when you say sexually molested, what do you
4 mean?

5 A. He would get me to touch his penis and he would
6 touch me. He would touch my vagina.

7 Q. Would he touch you anywhere else?

8 A. He would touch my butt.

9 Q. Where did these things occur?

10 A. They occurred in his trailer, but mostly it was in
11 his bedroom.

12 Q. Okay. So it was in the bedroom inside of his
13 trailer?

14 A. Uh-huh, yes, sir.

15 Q. And you said that you touched him and that he
16 touched you?

17 A. Uh-huh.

18 Q. Okay. Did you touch him just with your hand?

19 A. No.

20 Q. How else did he have you touch him?

21 A. He had me touch him with my mouth as well.

22 Q. Where did he have you touch him with your mouth?

23 A. His penis.

24 Q. And you said that he touched you on the vagina.
25 Was that with his hand or another part of his body?

1 A. I believe that was with his hand.

2 Q. How did that feel?

3 A. That hurt.

4 Q. And you said he touched you on the butt. Was that
5 with his hand or another --

6 A. It was with his hands.

7 Q. And how did that feel?

8 A. That hurt too.

9 Q. And did this happen only one time?

10 A. No.

11 Q. Do -- can you remember how many times it happened?

12 A. No. It was countless.

13 Q. And do you remember how old you were the last time
14 that it happened?

15 A. I'm pretty sure I was seven. It was March 2000.

16 Q. So when you said it started when you were six, was
17 it between when you were six and seven?

18 A. Yes, uh-huh.

19 Q. And did Mr. Smith ever talk to you about whether
20 or not you should tell anyone about what happened?

21 A. Yes, he did.

22 Q. What did he tell you about that?

23 A. He told me that I shouldn't tell anybody.

24 Q. Okay. And do you see the person in the courtroom
25 today who did these things to you?

1 A. Uh-huh.

2 Q. Can you point him out for us?

3 A. (Indicating.)

4 MR. BANNON: No further questions, Your
5 Honor.

6 THE COURT: Cross?

7 MS. LOVELL: Yes, thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. LOVELL:

10 Q. Good morning, Sister . Are you close to your
11 brothers?

12 A. I am.

13 Q. Are you, like, a little sister to your big
14 brothers?

15 A. I am.

16 Q. And when this was happening, you didn't tell your
17 brothers, did you?

18 A. No.

19 Q. Why didn't you tell them?

20 A. Because I was scared.

21 Q. And at the time -- did you know that they also
22 accused your father of the same thing?

23 A. At the time, no, I did not.

24 Q. So your brothers didn't tell you anything either?

25 A. Right, correct.

1 Q. Thank you.

2 MS. LOVELL: No further questions.

3 THE COURT: Redirect?

4 MR. BANNON: No redirect, Your Honor.

5 THE COURT: You can step down. Did you have
6 anybody else you wanted to call before we broke?

7 MR. BANNON: No. I think this would be an
8 appropriate time to break for lunch.

9 THE COURT: We've got a couple more
10 witnesses, but they won't be here before 2:00, so we're
11 going to take kind of a little bit of a long lunch break,
12 so you can go to lunch anywhere you want.

13 You can go to lunch with anybody on the jury,
14 if you want, but I want to caution you, do not talk to
15 anybody about the case outside or amongst yourselves.
16 Don't discuss the testimony, don't discuss demeanor,
17 don't discuss anything about the case with or without
18 anybody else, and if anybody approaches you about talking
19 about the case, please report that when we get back.

20 Again, it will be 2:00 before we get started
21 back, so you get a little bit of extra time for lunch
22 today, but please be back in the jury room by 2:00, and
23 we should get started about then. Thank you for your
24 patience.

25 (Jury excused.)

1 THE COURT: I'll be back in here by 1:30 at
2 the latest, so if you've got anybody here earlier and we
3 need to talk about any of these pretrial matters, let's
4 reconvene at 1:30 with the aim of getting back on track
5 at 2:00. All right? And if you have any charges that
6 you want to hand up, be sure to get them to Mary. And
7 other than that, I guess we'll see y'all about 1:30.
8 Okay? Thank you.

9 (Recess taken.)

10 A F T E R N O O N S E S S I O N

11 (In open court, jury not present.)

12 THE COURT: You have your expert?

13 MR. BANNON: Ms. McIlvee is back.

14 Mr. Stanley is not here. She's not here yet.

15 THE COURT: That is Ms. Twitty?

16 MR. BANNON: Yes, sir.

17 THE COURT: So I had told y'all in chambers
18 that I would limit her testimony to 801(d)1(D), the time
19 and place, so --

20 MR. BANNON: And I discussed it with, Your
21 Honor, and what she told me -- what I specifically told
22 her is I said when we talk about the forensic interview
23 of the child, you can say whether or not he was sexual --
24 or whether he told you he was sexually abused. You can
25 say the source of the sexual abuse, and I'm allowed to

1 ask you where the abuse occurred. She told me her answer
2 to the abuse would be in the bedroom of his father's
3 house.

4 THE COURT: All right. Well, you want to
5 respond to that?

6 MS. LOVELL: Your Honor, that kind of goes
7 outside of the boundaries of the accepted -- the
8 non-hearsay rule of having an out of court statement.

9 THE COURT: How so?

10 MS. LOVELL: Well, it will -- well, it
11 bolsters. It then allows her to give credibility to the
12 testimony of Child and Brother and Sister We've got
13 another person who is an independent forensic interviewer
14 who says Child told me he did this to my butt, I did that
15 to his penis, exactly the same things, and then he's
16 going to say that it was at the daddy's house.

17 So we have not a child saying it anymore, now
18 we have an expert, if you will, saying it, and I believe
19 that lends credence and bolsters.

20 THE COURT: Well, I think that's just the
21 defendant's bad luck that -- it is entirely designed to
22 bolster the witness -- the testimony of the children.
23 There is no question about that, but that is where it
24 took place, was in the bedroom, at the father's trailer.
25 That is what 801(d)1(D) says that they can do, is bring

1 in a witness who can state that the -- that Child who
2 would be the declarant, testified that he was abused as
3 long as it is limited to the time and the place of the
4 incident, so she can testify as to the time frame that he
5 said the abuse took place and where it took place. It
6 just happened to be that it took place in the father's
7 bedroom. If it had taken place someplace outside of the
8 father's bedroom, then that would be the testimony, but
9 it just so happens that that is where she told him the
10 abuse took place and it happens to coincide with where
11 three other people consider -- or two other people said
12 it took place as well.

13 So I think it's entirely within the
14 parameters of 801(d)1(D), so as long as she limits it to
15 the time frame that he said it took place and where he
16 said it took place, that's the limitation on that
17 testimony.

18 All right?

19 MR. BANNON: And, Your Honor, would you like
20 me to go check and see if Mr. Stanley is here?

21 THE COURT: That's fine, but let me ask you
22 this before you bring him in.

23 MR. BANNON: Sure.

24 THE COURT: In looking through the case law
25 real quick that you just submitted, the cases clearly

1 indicate that rape trauma testimony can come in where it
2 is probative of a fact in issue. As I understand, the
3 defense is they're not disputing that abuse took place
4 but that it was the defendant who did commit the acts of
5 abuse, so testimony that an expert coming in to say,
6 look, this is why children act out at that age and it's
7 consistent with somebody who has alleged child abuse, is
8 it really an issue at this point in the trial? Because
9 they're not contending that it didn't happen.

10 I'm gathering at some point in this trial
11 they're going to point the finger at either the
12 defendant's father or the mother's boyfriend as being the
13 actual perpetrator, but not that any abuse took place.
14 That's what I understood Ms. Lovell's defense argument
15 made earlier in chambers this morning, is that we're not
16 suggesting that it didn't take place, we're going to
17 argue identity.

18 MR. BANNON: Okay.

19 THE COURT: So what is it probative of?

20 MR. BANNON: Well, to be honest with you, I
21 think it's probative as to answer the question, which I
22 think is very relevant in this particular trial, as to
23 why there was a delay in the disclosure of this case
24 as -- you know, and that has been mentioned on a number
25 of occasions.

1 In this particular instance, we are talking
2 about something that happened several years ago, and I
3 think that particularly the delayed disclosure of victims
4 of abuse, and that being a common occurrence, is
5 something that will help the jury understand the nature
6 of sexual abuse and why it wasn't reported the instant
7 that it occurred, in Child case.

8 THE COURT: Okay.

9 MR. BANNON: I do understand, you know, the
10 Court's position on sort of the, I guess, the probative
11 nature, of sort of the source of the abuse, but I still
12 think that it would help the jury understand that he -- I
13 mean, I understand that they may be almost conceding the
14 fact that he was abused by someone, but I'm also still
15 entitled to prove that he was abused. Does that make
16 sense?

17 THE COURT: And you've put up testimony to
18 that, so there is no question he was abused, and it
19 sounds like there is no question the other children were
20 abused. They are all, of course, pointing the finger at
21 the father, so identity is an issue, but -- so I guess
22 I'm just trying to get clear in my head that if the
23 defense in fact, is, we're not claiming that no abuse
24 took place or they're not going to argue, delay, draw
25 suspicion as to whether or not it actually occurred, but

1 the sole defense is whether or not the defendant did it,
2 then how does that expert answer -- what do they add to
3 that testimony? What do they add to the evidence to
4 clarify it is the father, because they're not going to be
5 able to argue -- or is this expert going to offer that it
6 was the father is -- were you intending to elicit that
7 from your expert?

8 MR. BANNON: No, I was not.

9 THE COURT: So what is the point of the
10 testimony then?

11 MR. BANNON: Well, like I said before, even
12 though they're arguing that it could have occurred from
13 another source, I think I'm still entitled to show that
14 this behavior which Child is engaged in is consistent
15 with his being abused. One of the elements I certainly
16 have to prove is that he was abused, and I certainly
17 think the emotional and physical manifestations he
18 displayed because of that abuse, I think the expert is
19 going to say I think that helps the jury decide abuse was
20 found.

21 I understand the children did testify and
22 Child testified that he was abused, but I think that like
23 it says in the case law, that the trauma, even if it's
24 emotional trauma, which is based on that, is properly
25 admissible, and I think that that is almost sort of

1 regardless of exactly what Mr. Smith's defense is.

2 THE COURT: Well, it's not admissible per se.
3 It's admissible subject to a 403 analysis that the
4 probative value exceeds the prejudicial effect, so that
5 is kind of where I'm at in this analysis. As long as
6 you're not trying to elicit from the expert the identity
7 of the perpetrator, and if they're conceding that abuse
8 took place and you have proven that abuse took place
9 through other witnesses, then what exactly is the point
10 of offering this witness that makes it relevant as to a
11 probative issue and that does not exceed any prejudicial
12 effect to the defendant?

13 MR. BANNON: Well, I understand --

14 THE COURT: Or it does exceed any prejudicial
15 effect?

16 MR. BANNON: Where I think Ms. Lovell is
17 going may be a defense of someone else molesting the
18 child, but mainly what I've heard so far is, well, this
19 happened a long time ago. It's difficult to remember,
20 that sort of thing, so I think that it's -- and that
21 wasn't relative solely to the identity of the person. I
22 thought that was relative to their entire testimony, so I
23 think that essentially it's been put out there already
24 that we're challenging that this happened a long time
25 ago, so it's difficult to remember, and so I think that

1 it's still at issue, whether or not the child was abused.

2 I mean, I haven't heard any concessions yet.

3 I simply have heard just this has happened a long time
4 ago. She might stand up --

5 THE COURT: Well, we're still early in the
6 case, so I guess -- I'm going to give Ms. Lovell a chance
7 to argue in a minute, but --

8 MR. BANNON: And I'm sorry, Your Honor, I
9 didn't mean to cut you off, but relative to your 403
10 argument, I think it's certainly probative to try to
11 establish that the behavioral problems that Child was
12 displaying is consistent with abuse, and I think that
13 that probative nature definitely outweighs any potential
14 prejudice, because if the doctor isn't going to be
15 testifying as to the source of the abuse, I don't see how
16 that particularly prejudices the defendant, particularly
17 if -- and, again, I'll say I haven't heard it quite yet.

18 If the argument is going to be, well, I
19 concede that, you know, he was abused, you know, I think
20 that's something she could say and that would just sort
21 of, I suppose, ultimately neuter that testimony, but we
22 haven't gotten there yet.

23 THE COURT: Okay. Ms. Lovell?

24 MS. LOVELL: And I don't have any intention
25 of probably admitting that anyway, because that would be

1 something that I would want to be able to use if I needed
2 to. I can't restrict my defense, based on whether or not
3 we're getting testimony in. My argument against the
4 testimony is that it's not probative. It's cumulative.
5 It adds nothing. It doesn't help the jury. The abuse
6 did happen a long time ago. You can't hide that.

7 You can't continue to try to show people,
8 well, but for the fact that this trial is happening in
9 2011 and all this happened in '96 and 2000, that's the
10 facts, and I have to take them the way they are with the
11 testimony and so does the state, so I feel that the
12 evidence that --

13 THE COURT: Well, is your argument going to
14 be, one, identity, and, two, that it may not have taken
15 place?

16 MS. LOVELL: Yes.

17 THE COURT: All right. Then it's probative
18 as to whether or not his post-abuse actions are
19 consistent with somebody who has been abused, and it
20 becomes probative.

21 MS. LOVELL: I can't concede that he was
22 abused because that is part of their proof, so I would be
23 not -- I would be doing a disservice if I agreed. That
24 would then be saying that my client is guilty, and I
25 can't --

1 THE COURT: All right. Well, then it becomes
2 a probative issue and then we go to the question of
3 whether or not the probative value outweighs the
4 prejudicial effect to your client, so what is the
5 prejudicial effect to your client?

6 MS. LOVELL: There was testimony that he went
7 to Gateway, that he went to several counselors. Cindy
8 Solak kind of documented his counselling and he went to
9 Hope Haven {sic}. It's a cumulative effect. We had
10 Cindy's testimony that he had a problem and he gave a
11 note. That note is sort of sitting out there. Then we
12 have Hope Haven, who is going to come in and say, yeah,
13 the police referred Child to me, and Child told me X, Y,
14 Z, and it was not in his father's bedroom.

15 And then we're going to have SOAP come in and
16 say, This is what we do. They're going to track it went
17 from here to here to here. Well, of course, there was
18 sexual abuse it. Was something done on a bus that Cindy
19 said she found and felt that he needed more than health
20 counselling, and so he was referred to SOAP, and SOAP
21 comes in, who I believe Todd Lynch-Stanley is with, is
22 then going to testify, yeah, we see his pattern and we,
23 again, say yes, it is sexual abuse.

24 So I feel it's cumulative and it is
25 bolstered.

1 THE COURT: Well, if you're not conceding the
2 issue of whether or not the abuse actually took place,
3 then the testimony would be probative of -- on that
4 issue. I'm inclined to agree that the probative value
5 outweighs any prejudicial effect, but we're going to need
6 to probably put that witness up, hear what he has to say
7 before I make a final decision on that, but let's go
8 ahead and get Ms. Twitty on the stand and then presumably
9 the other witness will be here and ready to go. We can
10 take a break in between witnesses then.

11 How many witnesses are you going to have,
12 just these two more?

13 MR. BANNON: Just these two more.

14 THE COURT: Do you know how many you're going
15 to have?

16 MS. LOVELL: I'm going to need to discuss
17 that, and I need to discuss this recent -- about the
18 testimony. I'll ask my client. Should he instruct me --

19 THE COURT: You don't have to tell me right
20 now. We'll give you an opportunity.

21 MS. LOVELL: And I also need to put something
22 on the record that I wanted to bring out and reinforce
23 that I had made objections in limine, motions in limine,
24 objecting to the testimony of Brother Sister Cindy, and
25 Child and I wanted to be sure that that was an ongoing

1 objection. While I may not have mentioned at the time
2 they were coming in, I wanted to make sure the record was
3 preserved that I did object. I do want a continuing
4 objection to their testimony.

5 THE COURT: All right.

6 MS. LOVELL: And if that would be part of the
7 record, I would appreciate it.

8 THE COURT: So noted. Okay. So you have
9 Ms. Twitty ready then?

10 (In open court, jury present.)

11 THE COURT: All right. Welcome back, folks.
12 We're going to resume now with the state calling the next
13 witness.

14 MR. BANNON: The state calls Kendra McIlvee
15 Twitty.

16 KENDRA MCILVEE TWITTY

17 having been first duly sworn,
18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. BANNON:

21 Q. Do you prefer McIlvee or Twitty?

22 A. Twitty.

23 Q. Where do you work?

24 A. I am in private practice, part-time, and I also
25 work at a boarding school in Bluffton, called Mindstream

1 Academy.

2 Q. When you say private practice, what sort of
3 practice are you in?

4 A. I'm a licensed professional counselor.

5 Q. Okay. And do you have any education that relates
6 to being a counselor?

7 A. I do. I have a bachelor's of science and then a
8 master's of clinical psychology, and I've worked in the
9 field of child abuse and child trauma, childhood trauma,
10 for the past 15 years.

11 Q. Okay. And what were you doing back in May of
12 2003?

13 A. I was working at a place called Hope Cottage.

14 Q. And what is Hope Cottage?

15 A. Hope Cottage is a children's advocacy center,
16 which is a place for a multi-disciplinary team of law
17 enforcement or Department of Social Services, counselors,
18 victim advocates that help children in need to make sure
19 there -- if is any allegations of any type of abuse or
20 neglect the child is brought there for a forensic
21 interview.

22 Q. Okay. And when you say a forensic interview, what
23 exactly does that entail?

24 A. The forensic interview is an unbiased, objective
25 interview that is designed or -- sorry.

1 Q. That's okay. Take your time.

2 A. I'm nervous. It's an interview that as a
3 professional that interviews these children, you're
4 trained in child development and you understand children
5 and their needs, as opposed to someone that is not
6 trained in either law enforcement or DSS. So you come
7 together as a group, and there is one person that is
8 certified as an interviewer to talk to the child in hopes
9 that you find that that child is healthy and there is no
10 need for an intervention or further treatment.

11 Q. Okay. And were you certified as a forensic
12 interviewer, I guess a child forensic interviewer, at the
13 time in 2003?

14 A. Yes, I was.

15 Q. And how long had you -- or how long were you a
16 child forensic interviewer?

17 A. I worked as an interviewer for, I believe, six
18 years. I had two roles, that I was child advocate at
19 some point and then -- so I'm not exactly sure of how
20 long I was an interviewer, but I have interviewed over
21 700 children.

22 Q. Okay. And besides your experience, did you have
23 any specialized training to help you be a forensic
24 interviewer?

25 A. Absolutely. Before I was put in the room with the

1 child to do these types of interviews, I went to
2 Huntsville, Alabama to the National Children's Alliance
3 training, and that was a week long training I would do
4 every other year, and then the children's law office in
5 Columbia, South Carolina, hosts week long advanced
6 training for interviewers, and I was required to do that
7 twice a year as well to make sure I was up to date on all
8 the research and changing -- changes of interview
9 procedures and things like that.

10 Q. Okay. And could you tell us, what are some of the
11 techniques that you use when you're interviewing a child?

12 A. Okay. Well, it's not a personal technique, but
13 the way you're trained, it's a nationally -- it's a
14 national protocol, so the way I interview a child is the
15 way the children's advocate center in Arizona interviews
16 the child, which evens the playing field for how we as
17 professionals do things.

18 And you start out with building rapport with the
19 child, which is called the RATAC protocol. It's a
20 CornerHouse national protocol. You start out with the R.
21 You build rapport with the child, make the child feel
22 comfortable, and you're meeting the child developmentally
23 where they're at.

24 Then you go into anatomy identification, so you
25 usually will bring out, depending on the age of the

1 child, a picture of a boy or a girl with age appropriate
2 body parts on it so that you can identify a common
3 language of what they call the private body parts, and so
4 you try not to make a big deal about the private body
5 parts.

6 You start with the eyes, ears, nose, and you go
7 down the body for what they call things. And once you
8 establish what they call the private body parts, then you
9 go into a touch inquiry which means you talk to them
10 about what are appropriate touches, what are good
11 touches, what are maybe not appropriate, what are bad
12 touches and see if the child understands the difference
13 between different kinds of touches.

14 And then you go into the abuse scenario which you
15 ask questions, has anyone ever touched you in that place,
16 and that is usually when the child, if something has
17 happened, they'll usually disclose, sometimes not,
18 sometimes they will. And after they disclose, you make
19 sure that you're asking open ended, free recall questions
20 so they're not leading or suggestive or anything like
21 that, and then you go into your conclusion, which is kind
22 of wrapping up with the child that that is not okay that
23 that happened to you and the next time, you know, you can
24 go tell a grownup, and the interview is ended.

25 Q. Okay.

1 MR. BANNON: Your Honor, at this time I would
2 ask that Ms. Twitty be certified as an expert in the
3 field of the forensic interviewing of children.

4 THE COURT: Any objection or do you want to
5 voir dire?

6 MS. LOVELL: I -- yes, I do want to voir
7 dire. I don't know that there is an expert level of the
8 forensic interviewing that I would have a standard by
9 which to gauge that.

10 THE COURT: Let me ask you this: Are you
11 going to elicit an opinion?

12 MR. BANNON: No, Your Honor.

13 THE COURT: Okay. Then she doesn't really to
14 be qualified as an expert. I'm not saying she isn't,
15 sounds like she probably is, but since we're not
16 eliciting an opinion, it's really not necessary to go
17 through that.

18 MR. BANNON: That would be fine, Your Honor.

19 BY MR. BANNON:

20 Q. Ms. Twitty, back in May of 2003, did you have an
21 opportunity to interview a boy named Child

22 A. I did.

23 Q. Okay. And where did you interview him?

24 A. I interviewed him at Hope Cottage.

25 Q. And did you use the sort of RATAAC that you just

1 described when you interviewed him?

2 A. I did.

3 Q. So had you ever met ^{Child} before?

4 A. I have not.

5 Q. And during this interview, did he disclose to you
6 any abuse?

7 A. He did.

8 Q. Okay. What abuse did he disclose to you?

9 A. He disclosed that he had to suck his dad's penis
10 and that --

11 MS. LOVELL: Objection.

12 THE COURT: Sustained. The limitation on the
13 equipment -- or of the question was the time and place.
14 I instruct the jury to disregard that last answer.

15 BY MR. BANNON:

16 Q. Okay. Ms. Twitty, so he disclosed that he was
17 abused?

18 A. Yes.

19 Q. Was he able to give you a time frame in which this
20 abuse occurred?

21 A. When I asked about time frame, he had said that it
22 happened since he was, like, six or seven years old,
23 or -- I don't have my report in front of me. I'm not
24 exactly sure of the number, but he said it had been
25 happening for a number of years. He was ten at the time

1 I interviewed him and it happened in South Carolina in a
2 trailer and they would be in his dad's bedroom.

3 MS. LOVELL: Objection.

4 THE COURT: Overruled.

5 BY MR. BANNON:

6 Q. If I would show you a copy of your report, would
7 it refresh your recollection as to the time frame of the
8 abuse?

9 A. Absolutely.

10 MR. BANNON: Permission to approach, Your
11 Honor?

12 THE COURT: You may.

13 THE WITNESS: Okay. I had written Child
14 reported that he was about six or seven years old when
15 his dad started to do these things to him.

16 MS. LOVELL: Objection.

17 THE COURT: Overruled.

18 MR. BANNON: No further questions.

19 THE COURT: Do you have any questions of the
20 witness, Ms. Lovell?

21 CROSS-EXAMINATION

22 BY MS. LOVELL:

23 Q. Ms. Twitty, did you determine that he needed any
24 medical treatment?

25 A. I did not.

1 Q. Did you refer him in any way or allow him to
2 return to his environment?

3 A. I made a recommendation that he not have contact
4 with his biological father and that he be supervised at
5 all times when he's around other children.

6 MS. LOVELL: Nothing further.

7 THE COURT: Any redirect?

8 MR. BANNON: Nothing further.

9 THE COURT: Folks, we need to take up a legal
10 matter, and I'll send you back to the jury room for a few
11 minutes while we discuss this. Don't begin deliberations
12 or discussions, and we'll have you back here in a minute.
13 We need to take up another matter with another witness
14 before he testifies, and I'm not sure he's here yet, all
15 right?

16 (In open court, jury not present.)

17 MR. BANNON: I've been informed that he is
18 here, so --

19 THE COURT: Let's go ahead and bring him in
20 and go through and see what he's got to say.

21 MR. BANNON: All right. Thank you, sir.

22 And, Your Honor, before we get started, I
23 would just like to inquire, would you like me to run
24 through his credentials as part of this or would you
25 just like to hear the meat and potatoes?

1 THE COURT: Are you going to challenge his
2 expertise?

3 MS. LOVELL: Are you going to do an expert?

4 MR. BANNON: Yes.

5 MS. LOVELL: So this is an opinion as an
6 expert so we -- on the generalities.

7 THE COURT: So why don't we run through his
8 qualifications, and if she wants to voir dire him on that
9 we'll take that up.

10 MR. BANNON: That would be fine.

11 TOD LYNCH-STANLEY,

12 having been first duly sworn,

13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BANNON:

16 Q. Could you please state and spell your name for the
17 record.

18 A. My name is Tod Lynch-Stanley, T-o-d, one D, last
19 name is two words, L-y-n-c-h, hyphen, Stanley,
20 S-t-a-n-l-e-y.

21 Q. What do you do for a living?

22 A. I'm director of a private practice called Family
23 Reconstructions and SOAP. Basically, SOAP stands for sex
24 offender and addiction program, so I have a specialty in
25 working with sexual deviancy, many different forms of

1 that, including a sex offender program, an adult sex
2 offender program, that is being sanctioned by the state
3 of Georgia. I'm a certified treatment provider for
4 Georgia Department of Corrections, as well as providing
5 sex offender treatment for adolescents and various
6 juvenile courts throughout southeast Georgia. That's the
7 SOAP program. We go to different communities and run our
8 program.

9 In my private practice, I do some general work
10 with behavior problems with kids, but also probably
11 specialize more in sexual deviancy in terms of sexual
12 acting out, molestation of people who have been
13 victimized and may be acting out in some form, as well as
14 working with affairs, things like that.

15 Q. Okay. And do you deal, as part of your practice,
16 with the victims of sexual abuse?

17 A. Yes, in various ways. There's been times that
18 I've just treated victimization directly, but typically
19 I'm really treating victimization more indirectly, in
20 terms of they're been victimized and they're acting out
21 in different forms, which, actually, is quite common for
22 most victims of sexual abuse, that they will act out in
23 different forms, whether it be sexual acting out or, you
24 know, struggling in a relationship or sexual addiction or
25 whatever it may be.

1 Q. And do you have any education which helps you to,
2 you know, participate in this kind of counselling and
3 practice?

4 A. Well, actually, I have education, I have specific
5 training. I think that is what you're meaning.

6 Q. If you could first start with your education and
7 then move to the training.

8 A. My basic education, I have a master's degree from
9 the University of Georgia back in 1986, and I have a
10 clinical license to practice independently for therapy,
11 therapeutic services, which I received an LCSW in 1991.
12 I have received specialized training around sexual abuse,
13 in particular with Jan Hindman, very intensive weeklong
14 training with her, which dealt with both victimization
15 and victimizing others, as well as specific sex offender
16 treatment through Jonathan Ross, working with him on very
17 extensive programmatic stuff, and then, obviously, over
18 the years, continuing educations.

19 I'm required to have 12 hours per year of specific
20 sexual abuse training to keep up my certification and
21 provider, being able to be a provider for the Georgia
22 Department of Corrections, for adult sex offenders.

23 Q. Okay. And have you had any -- have you ever been
24 qualified as an expert witness in a criminal matter
25 regarding sexual abuse, sexual victimization, sexual

1 deviancy -- sexual deviancy?

2 A. Countless times. I probably testify from one to
3 three times a month regarding sex offender cases but also
4 cases where there's different levels of deviancy as well,
5 and I'm helping to explain to the Court how the deviancy
6 came about and usually explaining sexual trauma in some
7 way as it relates to the acting out.

8 Q. And is that -- was that just in Georgia or is it
9 in more states than Georgia?

10 A. I have testified in South Carolina several times.
11 I've testified, I believe, in this court, not for this
12 particular court, but I know in Beaufort, I believe I've
13 testified two or three times over 20 years. I couldn't
14 specifically tell you when, but I know that I have done
15 that. I have testified in Florida several times.

16 Q. Okay.

17 MR. BANNON: Your Honor, at this time the
18 state would ask that he be qualified as an expert witness
19 in the field of sexual trauma, sexual victimization, and
20 sexual deviancy.

21 THE COURT: That sounds kind of almost more
22 like an adjective than a field. What would your field of
23 expertise be?

24 THE WITNESS: I would probably say sexual
25 deviancy is where it comes from. I'm a clinical member

1 of ATSA, which is the association for the treatment of
2 sexual abusers, which is a very extensive clinical
3 membership with over 3,000 hours of certified working and
4 training with offenders, but, again, we always go back to
5 working with the initial victimization on some level.

6 So victimization becomes a part of working
7 with sexual deviancy, and I would say that my most
8 significant expertise would be sexual deviancy.

9 THE COURT: Okay. Do you wish to voir dire
10 the witness?

11 MS. LOVELL: Yes, Your Honor, I do.

12 CROSS-EXAMINATION

13 BY MS. LOVELL:

14 Q. So you then your specialty is treating the
15 offenders, sex offenders?

16 A. That's what I'm most known for and that is
17 probably what I do the most.

18 Q. And that is your most --

19 THE COURT: Let him finish the answer.

20 THE WITNESS: But, in reality, every person
21 who sexually acts out, you're dealing with their
22 victimization. If you don't understand and don't have
23 specific training in sexual victimization, you truly
24 can't treat victims, so that term of that is called
25 victim to victimizers, which I have been in extensive

1 training with Nicholas Groth, and that direct type of --
2 offending type treatment as well.

3 BY MS. LOVELL:

4 Q. Have you published any papers on this?

5 A. No, I'm too busy in my practice. I've considered
6 actually writing a book on juvenile offending; however, I
7 have not done that at this time.

8 Q. So that would also include journals as well?

9 A. No, I haven't.

10 Q. You said you have an education, master's of social
11 work. What is LSCW?

12 A. Licensed clinical social worker. I believe here
13 they're called LASWs, but in Georgia they're called LCSW,
14 so that's the advanced certification one gets as a social
15 worker, to practice independently, where you can practice
16 without being under the supervision of someone and bill
17 insurances on your own without being under a doctor.

18 Q. Is that through a college or university?

19 A. It's through the state, through the state
20 composite board that issues the clinical license.

21 Q. So when it's a license, it's that you attend
22 classes once a year and you have a continuing --

23 A. Right. You have to keep up with the continuing
24 education for the LCSW. We have to have 40 hours of
25 continuing education every two years and that

1 certification is reissued every two years.

2 THE COURT: All right. Do you challenge his
3 expertise in that field?

4 MS. LOVELL: I challenge his expertise in the
5 field of the victimization of what he has -- what he
6 would be able to say with respect to the acting out, not
7 all that the acting out would -- he would fashion the
8 acting out to be a sexual victimization because he goes
9 from the offender to the victim to treat the offender. I
10 believe his expertise is in more offender related than it
11 is in the child or the victim side. That's my --

12 THE COURT: Sounds like he's got a good bit
13 of experience in treating both offenders and people that
14 have been abused, so I think he's certainly qualified as
15 an expert in the field of sexual deviancy. Despite the
16 fact that the degree is from Georgia, we'll let it go.
17 All right. I find that he is qualified as an expert
18 then.

19 So let's go ahead and talk about what he
20 wants to tell the jury.

21 REDIRECT EXAMINATION

22 BY MR. BANNON:

23 Q. Well, sir, can you tell us what some of the things
24 one might find in -- what behaviors one might see in
25 someone who has been sexually abused.

1 A. Okay. I'm a little confused about just in
2 terms -- so are we getting right into my testimony and --

3 THE COURT: We're just kind of getting a
4 preview of what you want to tell the jury so I can see if
5 it's okay.

6 THE WITNESS: That's what I thought. That's
7 not really how I work. That's not really what I do. I
8 don't look for behaviors. I take what behaviors I see.
9 Whatever behaviors are there, I look for those -- and I
10 do this with any part of my practice. So I work with
11 tough behavior problems all the way around with tough
12 kids, so whatever behaviors I see, I try to work to make
13 meaning of those.

14 There may be some behaviors that generally
15 indicate sexual abuse; however, as anyone will tell you,
16 especially a defense attorney, there are a zillion types
17 of behaviors that are sexualized that could mean many
18 things besides being sexually abused, so the reality is
19 that I treat the behaviors that I see and then if they
20 turn out to be that a person has been abused and we work
21 on that level, then that's what comes out, but that's not
22 a game plan. It's not a ball park. It's kind of how it
23 evolves.

24 Q. I understand. Would the early sexualization of a
25 child, would you consider that a sign that the child

1 could have been potentially sexually abused?

2 A. I would, but, again, the way the treatment goes,
3 I'm going to treat the behavior. My first thing is if I
4 have a kid who is sexually acting out, you know, who is
5 rubbing against people, touching people, touching his
6 penis in a public place, making sexual gestures, you
7 know, masturbating in public, those types of things, I'm
8 going to look at that behavior.

9 Now, I may start to look more and more to see
10 where he learned that behavior, and that behavior can be
11 learned in many different aspects, so that is what I
12 would speak to.

13 Q. What about behavior involving sort of like
14 inappropriate peeing or --

15 THE COURT: You're sort of putting the cart
16 before the horse. Did you actually interview ^{Child} the
17 victim in this case?

18 THE WITNESS: Are you speaking to me, sir?

19 THE COURT: Yes. What is he here to talk
20 about? Did he interview or review records, or what is
21 his relation to this case?

22 MR. BANNON: It's my understanding that
23 Mr. Stanley's practice treated ^{Child} for some
24 period of time. It wasn't always necessarily Mr. Stanley
25 who was treating him, but it was his -- he also had an

1 opportunity to review the records of that treatment and
2 is familiar with Mr. Smith's case. Is that an accurate
3 depiction?

4 THE WITNESS: Fairly accurate.

5 THE COURT: Why don't you testify as to what
6 he found out about his behavior and then what, in his
7 opinion, that is consistent with.

8 MR. BANNON: Okay. That would be fine, Your
9 Honor.

10 BY MR. BANNON:

11 Q. Mr. Stanley --

12 A. Lynch-Stanley.

13 Q. Mr. Lynch-Stanley, did you in your practice have
14 an opportunity to treat Child

15 A. Yes.

16 Q. And when did that occur?

17 A. Looking back on my records, it looks like that
18 treatment began in August of 2002 and lasted somewhere
19 until 2005. He was --

20 Q. Go ahead. How did he come to be referred to you?

21 A. He was referred to us through the community mental
22 health because of me specializing so much in sexual
23 deviancy and sexually acting out, so I actually had a
24 contract with the Gateway mental health, so they sent him
25 over to me because of acting out, sexual behaviors, so I

1 had other therapists primarily treat him.

2 I had met with the family several times to find
3 out more about, you know, behaviors and symptoms. I
4 did -- I looked back under my notes. There were several
5 sessions that I sat in on or participated in in terms of
6 supervising. To be completely honest, I don't recall a
7 lot of those sessions, but I do recall -- actually, I do
8 recall conversations with the mother and also discussion
9 about his behaviors that he was doing.

10 Q. What information was provided to you or that you
11 observed in Child regarding -- or what behaviors did you
12 observe in him or were related to you that you would
13 consider signs of sexual trauma?

14 A. Well, again, I treat the symptoms. So the
15 symptoms that I was aware of were -- I think masturbating
16 in public, touching other children inappropriately.
17 There were some -- I believe there are some fire setting,
18 very aggressive types of behaviors. Those behaviors,
19 again, in investigating origins of those behaviors, I
20 believe it was disclosed somewhere in that process that
21 he had been molested by his biological father.

22 That was my understanding of that, but that's
23 not -- again, I wasn't -- that wasn't my goal to try to
24 find that out. My goal was to treat the symptoms and
25 reduce the symptoms of the sexual acting out.

1 Q. Okay. And --

2 A. The therapists were doing more -- the therapists
3 may have dealt more with the origins of whatever may or
4 may not have happened in terms of being molested, but
5 specifically we're most concerned with the symptoms.

6 Q. Let's talk a little bit about post-traumatic
7 stress disorder and how it regards to the victims of
8 sexual abuse. Could you tell us more about that?

9 A. Well, it's called PTSD. There are many different
10 aspects of PTSD. There will be a lot of disassociation,
11 which is tuning out. Kids will tune out and kind of not
12 be aware of one behavior moving to the next, so they end
13 up -- like, for instance, I've seen many an offender who
14 is tuned out because of their own molestation where they
15 are really not thinking, supposedly, of what they're
16 doing in terms of sexually acting out or touching.
17 There's certainly not an excuse. The tuning out is a
18 defense mechanism that's used, and that has to be
19 confronted and dealt with, and so the more you talk about
20 what the people are doing in their acting out or more
21 about their history of them being traumatized will help
22 them to get more connected to the realities of what has
23 happened to them and then to the realities of what
24 they've done.

25 But the PTSD can come in various forms of tuning

1 out. Other symptoms would be nightmares. There would be
2 explosive behaviors. There would be some variability as
3 to being very depressed and being volatile, those types
4 of things.

5 Q. Through your contact and Child and information
6 that was related to you about Child are you of the
7 opinion that he was suffering from post-traumatic stress
8 disorder?

9 A. To the best of my recollection, it did seem like
10 he had some PTSD symptoms, and this is also in our code
11 of ethics as social workers. We are far more concerned
12 in treating the symptoms than trying to treat the
13 diagnosis. I look at diagnostic things to help me
14 understand how to deal with symptoms, but I'm really
15 going to focus on the symptoms. So, yeah, there were
16 some PTSD things, but I wasn't concerned whether it was
17 PTSD. I was more concerned with what he was doing.

18 Q. What was he doing that concerned you?

19 A. I would have to look back more specifically, but
20 in general it was the sexual acting out; again, what we
21 call compulsive sexual behaviors. One of the things we
22 recognize when there is a lot of sexually compulsive
23 behavior at a young age, the higher likelihood that
24 they've been molested themselves, or victimized
25 themselves.

1 If they're at a young age, say, six, seven, eight
2 years old, in terms if they're acting out sexually, then
3 more likely they've been taught that, and that is really
4 kind of common sense, but we also know that is something
5 to maybe explore or look for, because you want to learn
6 how did a person first find out about sex, and how they
7 first found out really has a lot to do with their
8 deviancy.

9 So they may have found out through pornography,
10 they may have found out by poor boundaries in the family
11 or they could have found out by being molested or they
12 could have found out by observing or watching
13 molestation. Those are things we put together in terms
14 of understanding the sexually acting out.

15 Q. Okay. What is delayed disclosure in children?

16 A. Exactly what it says. It's when they don't
17 disclose right away.

18 Q. Okay. And is that behavior that is -- well, how
19 typical is delayed disclosures of abuse when you're
20 dealing with child victims?

21 A. Well, I'm not sure -- I don't know what the
22 statistics are on that. I do know that every child
23 discloses in different ways, different forms, different
24 times. Sometimes the more delayed the disclosure it
25 means the more severe the abuse.

1 Typically, if someone can disclose immediately,
2 then they're not feeling as ashamed. They're not feeling
3 as intimidated or scared so they're able to disclose
4 early, so at times a delayed disclosure can mean more
5 traumatic of an event.

6 You could say that is a general rule. I don't
7 think you can say it as an absolute. There are many
8 reasons why people disclose in different times in
9 different way. Also, there is family dynamics involved
10 that could be involved with delayed disclosure, so that
11 is a part of it.

12 Q. Okay. And you mentioned that sometimes increased
13 feeling of shame can contribute to -- or shame or fear
14 can contribute to a delay in disclosure. Now, I want to
15 ask you, you know, when you're dealing with molestation,
16 sort of, you know, how does the shame and fear sort of
17 work? How does that kind of come about and work on the
18 child?

19 A. In many ways, it's probably the most -- in some
20 ways, it's the most crucial aspect of it. One of the
21 things that I really focus on in the treatment of working
22 with victims and victimization, it's not so much the act
23 itself, it's everything around the act. It's the results
24 of the act. So, for instance, the ways -- there is many
25 ways that a molestation is able to occur.

1 One of the most common ways of child molestation
2 is that the offender will level themselves with the
3 victim so they come down on the same level so it seems
4 like they're buddies. They're pals. And in that
5 participation -- and this can be in the sexual act
6 itself, so in that sexual act there is this, like, we're
7 in this together. We're doing this together, and there
8 may be comments such as, Well, do you want me to stop, or
9 does that feel okay?

10 So the kid is feeling a comfort that goes along,
11 but what is really happening is that they're starting to
12 participate, and so the offender uses that participation
13 as a way to have that child feel ashamed that they're
14 participating, so if they tell, they're going to get in
15 trouble too.

16 Now, what often happens at the same time that
17 there is this levelling that goes on in the sexual
18 relationship, there may be very stern types of behaviors
19 by the perpetrator in the parent or the adult
20 relationship, so that they may be harsh. They may
21 intimidate other people, maybe not even the victim
22 themselves. They may hit the wife, for instance, and
23 then that would be very fearful for the victim because
24 they would say, oh, my gosh, if he does this to my mom
25 and she hasn't even been abused, what is he going to do

1 to me if I tell? So there can be intimidation in that
2 regard too.

3 To make a long story short here, and I could go on
4 for days about this, the reality there is it creates a
5 confusion. The confusion that happens with a victim is
6 the worst part -- I keep saying the worst part, there are
7 many worst parts -- one of the worst parts is the
8 confusion. He's mean to me. I'm afraid of him, but at
9 the same time he's nice to me and he gives me these
10 things and he's caring about me.

11 And then the other part that confuses that
12 typically in molestation the act feels good, it feels
13 pleasurable, so there is so much shame that goes on in
14 the pleasure. That is one of the things I learned from
15 Jan Hindman in particular, that you have to treat the
16 pleasure that goes on in victimization. That is the
17 greatest area of shame, and that is where the kids end up
18 getting suicidal, regarding the shame of the pleasure and
19 then -- I could go on and on and on.

20 And there is pleasure that remains in the brain,
21 and they start to act out that pleasure with somebody
22 else. Now they're confused again. They're getting in
23 trouble for something that they participated in on an
24 equal level, so it's massively confusing, massively
25 overwhelming for a child, and at some point they might

1 just kind of blow, you know, in terms of getting angry,
2 freaking out, or getting so depressed. The behaviors can
3 really go all over the place.

4 Q. Okay. And did you see -- or was ^{Child} referred to
5 you for some of these behaviors which could be a
6 byproduct of sexual abuse?

7 A. Yes. He was referred for the acting out
8 behaviors.

9 MR. BANNON: I don't have any further
10 questions, Your Honor.

11 THE COURT: Ms. Lovell?

12 MS. LOVELL: Thank you, Your Honor.

13 RECROSS EXAMINATION

14 BY MS. LOVELL:

15 Q. So you really -- your focus is on treating the
16 symptoms.

17 A. Yes, ma'am.

18 Q. You don't care about disclosures, so delayed
19 disclosure to you is really of no consequence because
20 you're looking at the child, right?

21 A. Well, it's meaningful. There is information in
22 disclosure and there is information in how the disclosure
23 is made; in other words, when I get a delayed disclosure,
24 I'm looking to see, why is this a delayed disclosure?
25 What does that mean? So, again, I look at the behavior

1 and say what is the meaning of this behavior.

2 Q. In ^{Child} case, did you know there was a delayed
3 disclosure?

4 A. I don't recall -- I wouldn't have known that
5 unless that was asked of me right now. I wouldn't have
6 known that.

7 Q. Was ^{Child} -- do you do diagnoses of your patients?
8 Do you say they have PTSD or do you say they were abused?
9 Is that --

10 A. I try not to. There's times I'm required to in
11 terms of maybe a treatment plan. I'm required to for
12 insurance purposes. My belief and even our training as
13 social workers is to treat symptoms and not try to
14 diagnose or treat diagnosis. It is helpful to have some
15 idea of a diagnostic criteria to know the symptoms are
16 clustered or whatever, but as a general rule, I'm not
17 there to try to diagnosis.

18 Q. Do you prescribe medications?

19 A. Absolutely not. That's a psychiatrist's job.

20 Q. Are you affiliated with a psychiatrist?

21 A. I have been. I'm not currently, or I haven't
22 been -- while I have many that I refer to and talk to
23 back and forth regarding medications, but no, I'm not
24 directly affiliated.

25 Q. So if a child comes to you, you would determine

1 whether or not they were on medication before you --

2 A. I would know that. In fact, in this case, looking
3 back through my notes, he was -- Child was actually
4 referred to by Dr. Clure from Gateway. She was actually
5 very supportive of our work and working with the kids who
6 were acting out, so I'm sure he was on a number of
7 medications being in community mental health. That kind
8 of goes along with that.

9 Q. You had said there was a symptom in masturbating
10 in public and fire setting. Was that particular to this
11 case here or just the general symptoms?

12 A. I believe both, I believe both. I believe there
13 was some fire setting, looking back at some notes and
14 also -- but, generally, they're considered one of the
15 symptoms of sexual abuse. But, again, if I have a kid
16 that comes in with some of those behaviors, I don't
17 automatically say, Oh, my God, he's been sexually abused.

18 I'm going to look at the symptoms try to get the
19 meaning of symptoms and try to go back and determine
20 where those symptoms originated from.

21 MS. LOVELL: Thank you.

22 MR. BANNON: There is one part which I left
23 out which I intend to bring in on direct examination, so
24 if I may, one more subject matter.

25 THE COURT: Go ahead.

FURTHER REDIRECT EXAMINATION

BY MR. BANNON:

Q. Doctor --

A. I'm not a doctor. I'm a clinical social worker.

Q. Sorry. When you're talking about someone who is a molester of children, is that considered a form of sexual deviancy?

A. Oh, yes.

Q. And in your treatment of sexual abusers, do you find that some of these abusers have sexual preferences, whether it's age or gender?

A. There are some. There are some that have preferences. Probably most are through opportunity, but there are sometimes -- especially if someone is pedophilic and they're more attracted to younger children. Typically pedophilic will be younger boys.

Q. And is it at all common in your practice, evaluating sex abusers, for the abusers to molest their own children?

A. I don't know the statistics on that. I do know how it's rated and evaluated in terms of risk, which is somewhat bizarre, but not necessarily that there is a greater prevalence. It's actually not considered a more deviant act to molest your own child than a stranger child, which is what the research has told us, which

1 boggles me, but that's actually what the research says.

2 So if I'm here being honest, I'm going to say
3 that. So that is a part of that, but not necessarily --
4 there is really -- the numbers are not strong about how
5 many are intrafamilial or extrafamilial.

6 We do know most molestations occur with people who
7 know the victims, but in terms of how much or intra or
8 extrafamilial, I'm not aware of the statistics for that.

9 Q. Let me ask you, what is grooming of a victim by an
10 abuser?

11 A. Grooming is the way in which the offense is
12 started. The steps that are taken, and the grooming
13 process is very crucial, really, for the victim to
14 understand because then the victim can see that later on
15 and get back into their steps, also to make sure they
16 don't go through those same steps themselves to molest
17 someone else.

18 So grooming in those steps, those would be things
19 like coming down on the same level as a younger person.
20 It would be starting to cross boundaries, such as
21 discussing sexual issues, so, for instance, if someone
22 was trying to, let's say, molest a 12-year-old girl or
23 13-year-old girl, they might start to talk about their
24 boyfriends and how much do you like to kiss and does it
25 feel good if a boy ever touches you between the legs, so

1 they would ask questions that are inappropriate in
2 breaking that boundary line.

3 So, typically, the grooming process will be where
4 boundaries are being broken little by little and the
5 victim does not realize that these boundaries are being
6 broken, so things start to feel natural in a progression,
7 so the grooming process is crucial to the treatment of
8 victim and also as the victimizers as well.

9 Q. Is isolation a form of grooming that you have seen
10 in abusers? I suppose isolation of the victim by the
11 abuser.

12 THE COURT: Let me stop you because this
13 questioning that you've done on your redirect, it seems
14 to me to be more focussed on the abuser than the victim.

15 The first part I really didn't have a problem
16 with, consistent with the victim's actions, consistent
17 with post-traumatic stress, that's really what he can
18 testify to in the context of this trial.

19 MR. BANNON: Yes, Your Honor.

20 THE COURT: This is, I don't think,
21 consistent with what he's allowed to testify to, and I
22 realize I haven't given Ms. Lovell a chance to object to
23 that, but I'm just kind of anticipating that she will. I
24 think we're straying from where he can go with his
25 testimony on this.

1 MR. BANNON: That's fine, Your Honor. I just
2 wanted to -- it's something I realized I had left out.

3 THE COURT: I don't think it's something you
4 can get into, so let's go ahead and leave it out.

5 MR. BANNON: I will, Your Honor, and that
6 would conclude my, I guess, in camera examination of
7 Mr. Lynch-Stanley.

8 THE COURT: All right. Well, I'm going to
9 find -- well, let me hear from Ms. Lovell first.

10 MS. LOVELL: Will he be testifying to
11 specifics of Child or generalities of his opinion of
12 children similarly situated that have been abused?

13 THE COURT: Well, it will be essentially what
14 he testified to just a few minutes ago, and that was
15 there was a combination of some clinical observations,
16 but it was mainly a generalized forensic evaluation. It
17 was more than just him treating him, but there was
18 records of indications of, well, he masturbated in public
19 or he urinated in public. Those are things that he would
20 not have observed. Those are things he would have
21 determined from other sources.

22 And then he can testify those things, if he
23 feels it's appropriate, are indicative of somebody who
24 has been sexually abused, if it's consistent with other
25 things. As he said, just because somebody masturbates in

1 public doesn't mean that they've been abused, okay?

2 MS. LOVELL: It was just that the testimony
3 from Cindy Solak had not brought that point out. She
4 said that she sent the child to Gateway for purposes of
5 health issues first. Then he was fondling a child on the
6 bus, and that prompted her to send him, and other than
7 that, the urinating in school, but there was no fire.
8 There were no other -- I was confused as to whether you
9 were testifying to the generalities of what symptoms can
10 be seen versus what was actually in this case.

11 THE COURT: Where did you get that
12 information, about the masturbating in public? I don't
13 recall that being brought out in testimony.

14 THE WITNESS: I'll look back through my
15 notes. I'll look through the notes. I recall that that
16 was in there, and, again, the masturbating could have
17 been self-stimulation, touching themselves, things like
18 that. That might not have been pulling out a penis and
19 masturbating to ejaculation. It could be
20 self-stimulation as well, masturbating types of
21 behaviors.

22 MS. LOVELL: My concern was there was no
23 testimony that came in that ^{Child} had accused anybody of
24 that. That was my concern.

25 THE COURT: As an expert, he can base his

1 opinion on things that are not necessarily in the record
2 up to that point, but he has to tell us what he found
3 out, what his basis for that observation is, and how he
4 relied on it in forming his opinion. I would caution
5 you, again, that first part of the direct examination I
6 thought was proper.

7 Scope of examination, I wanted to caution you
8 not to say that it was disclosed to you that he had been
9 molested by his biological father. I think that is
10 something that you can't testify to. We're just talking
11 about what you had observed his conduct to be or was
12 brought to your attention that his conduct would be and
13 whether or not that sort of conduct was consistent with
14 basically rape trauma, post-traumatic stress disorder
15 victim.

16 MS. LOVELL: Okay.

17 THE COURT: You could testify that it had
18 been brought to his attention that he had been sexually
19 abused or sexually molested. The troublesome part would
20 be with you identifying that as it having been his
21 biological father, and that is where we kind of, I think,
22 step over the line a little bit.

23 MR. BANNON: Okay.

24 THE COURT: So the whole point of him
25 testifying is to whether or not him having been molested

1 was -- if that took place and was it consistent with his
2 acting out, unless you can tell us why it would be any
3 different to have been molested by his biological father.
4 That would change your opinion in any way.

5 THE WITNESS: There may be specific -- there
6 may be specific types of symptomatology that would come
7 from being molested by your father as compared to being
8 molested by someone else.

9 THE COURT: Is there any in this case?

10 THE WITNESS: I wouldn't recall that.

11 THE COURT: All right. Then it's kind of
12 gratuitous to throw it in there, so if you can't point
13 with your finger and say, well, this particular
14 symptomatology is consistent with having been molested by
15 a parent, then I think that probably is prejudicial
16 without there being a foundation for it.

17 MR. BANNON: Just to be clear, we won't talk
18 about the source of any of the abuse, but we will talk
19 sort of in broad generalities that he can testify that he
20 is aware that Child said he was abused.

21 THE COURT: Yes.

22 MR. BANNON: Okay.

23 THE COURT: And what he heard or observed
24 that --

25 MR. BANNON: Okay. The symptoms of that

1 abuse, and then we can talk about PTSD and delayed
2 disclosure but none of the things about treating abusers.

3 THE WITNESS: Correct.

4 MR. BANNON: And I just wanted to clarify.

5 THE COURT: Okay. There we go. So within
6 those parameters, I'll qualify him as an expert, and you
7 can testify, in essence, to you what just said.

8 Before we bring the jury back in, unless you
9 have something else, why don't we take a quick ten-minute
10 bathroom break, and then we'll come back and put him up
11 on the stand.

12 Thank you.

13 (Recess taken.)

14 (In open court, jury present.)

15 MR. BANNON: All right, Judge. The state is
16 ready.

17 THE COURT: All right. Call your next
18 witness.

19 MR. BANNON: All right. The state calls
20 Mr. Tod Lynch-Stanley.

21 TOD LYNCH-STANLEY,

22 having been first duly sworn,

23 was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BANNON:

1 Q. Where do you work?

2 A. I am the director of family reconstruction at
3 SOAP, which is a private practice based in Brunswick, but
4 I also have programs up in Savannah, Waycross, other
5 areas.

6 Q. Okay. And what do you do there at SOAP?

7 A. Primarily what I do is -- SOAP is a program, is an
8 acronym for Sex Offender and Addiction Program, so to
9 that program, I'm treating sexual deviancy, specifically
10 sexual offenders and people who have acted out sexually
11 against other people.

12 In the rest of my practice, I deal with various
13 behaviors, but one of which is dealing with, again,
14 sexual deviancy and acting out, sexual addiction,
15 affairs, that type of thing.

16 Q. Okay. And how long have you been doing this kind
17 of work?

18 A. I graduated with my master's degree in 1986 and
19 was working with difficult kids, with difficult behaviors
20 at that point. I got my clinical license in 1991, which
21 enabled me to practice independently, to be able to
22 utilize insurance and practice without direct
23 supervision.

24 At that point I went into private practice in
25 1992, so I've been in private practice since 1992.

1 Q. Okay. So in the nearly 20 years that you've been
2 in private practice, how many children would you say that
3 you've counselled, roughly?

4 A. Golly, 500, 700. That's hard to say.

5 Q. And have you ever been certified as an expert
6 witness in any courts?

7 A. Yes. In fact, I testify typically between one to
8 three times a month in juvenile courts and superior
9 courts in Georgia for the area of sexual deviancy and
10 sexual offending. I also have testified in South
11 Carolina several times as well as in Florida, one or two
12 times.

13 Q. Okay.

14 A. As an expert witness, yes.

15 Q. And have you had any training outside of your
16 experience in order to treat victims of sexual abuse and
17 sexual abusers?

18 A. Yes. I received specific training, week-long
19 intensive training through Jan Hindman, which had to do
20 with sexual victimization and treating symptoms of sexual
21 victimization as well as victimizers treating victims to
22 victimizers by Nicholas Groth, specific sexual offender
23 training, intensive, with Jonathan Ross, which, again,
24 dealt with acting out behaviors in terms of children and
25 adolescents.

1 I could go on. I'm required to have 12 hours per
2 year of specific sexual abuse training, some of which I
3 direct -- my most recent one was actually symptoms and
4 treating boys who have been sexually abused.

5 MR. BANNON: Okay. Your Honor, at this time
6 state would move that Mr. Lynch-Stanley be certified as
7 an expert witness in the field of sexual trauma, sexual
8 victimization, and sexual deviancy.

9 THE COURT: Do you wish to voir dire?

10 MS. LOVELL: No, sir. Just renew my
11 objection.

12 THE COURT: All right. Over the defense's
13 objection, I'm going to qualify the witness as an expert
14 in the field of sexual deviancy.

15 Folks, normally when we have somebody
16 testify, we let them testify about things that they saw,
17 they heard, they touched, they felt, they smelt, their
18 observations, all right? We don't let somebody get up
19 and tell you what their opinion is about what they saw.
20 Sometimes the law says, though, because of specialized
21 training or experience in a field, the law will recognize
22 a type of a witness as a type of expert and will allow
23 them to not only testify about what it is that they saw
24 or observed, but they can testify in the form of an
25 opinion. In other words, they can tell you what they saw

1 and give you their opinion about its significance. All
2 right?

3 This witness has now been qualified as an
4 expert in this field and will be qualified to give you his
5 opinion as well. The fact that somebody is qualified as
6 an expert doesn't necessarily mean you have to give his
7 testimony any greater weight than any other witness that
8 you hear in this case. You listen to what he has to say
9 and you give his testimony as much weight or as little
10 weight as you think it deserves, based on all of the
11 evidence that you have heard and will hear throughout the
12 trial. All right? You may resume.

13 MR. BANNON: Thank you, Your Honor.

14 BY MR. BANNON:

15 Q. Mr. Lynch-Stanley, in the early 2000s as a part of
16 your practice, were you part of the team that treated
17 Child

18 A. Yes. I was director of the program. It was my
19 program, so I was supervising people who directly treated
20 him as well as sitting in on several sessions and
21 participating in some family sessions.

22 Q. Okay. To your knowledge, why was Child
23 referred to your counselling services?

24 A. To the best of my recollection, what I recall is
25 that he was participating in a lot of sexual acting out

1 behavior. He had been touching other children. There
2 was some other aggressive behavior, such as lying and
3 stealing. I also believe that there was some fire
4 setting that had gone on too at some point that I
5 actually have in my notes.

6 And so there -- and, again, there is more of the
7 sexual compulsive nature of why he was sent to me, and so
8 that is what we specialized in in my agency.

9 Q. Okay. Do you recall whether there was
10 inappropriate urinating as part of the reason he was
11 referred to you for treatment, or feces?

12 A. I don't recall that. I don't have that in my
13 notes or past testimony, so I'm not aware of that,
14 specifically.

15 Q. Okay. And --

16 A. I am aware of feces. I was aware that he was
17 spreading some feces, though, in the school bathroom.

18 Q. And in your counselling and your group's
19 counselling of ^{Child} did you come to learn that he had
20 been sexually abused?

21 A. It's my understanding that he disclosed that, yes.

22 Q. Okay. And when you're treating the victim of
23 sexual abuse, sort of how do you attack the victim of
24 sexual abuse? What do you do to try to get to the bottom
25 of the treatment?

1 A. The first thing I do is I really look at the
2 symptoms. I'm not there to -- I don't go into a case
3 looking to say, well, is there sexual abuse, is there not
4 sexual abuse? I go into the case saying, what are the
5 symptoms? What are the behaviors? I treat the
6 behaviors. It's what I do in my practice. It's what my
7 training is.

8 So I look for what the symptoms are, and so as I
9 look at symptoms, I try to make meaning of symptoms, what
10 is the meaning of the behavior, so in trying to make
11 meaning of it, we look to see where the origins of it
12 came from. As we break down to where maybe the origins
13 came from, that is when we may find out that the person
14 has been sexually victimized, but I'm really not looking
15 for sexual victimization. It may be a number of
16 different things that have caused the origin of sexual
17 acting out.

18 There can be poor sexual boundaries in the home.
19 There can be -- such as viewing pornography or a father's
20 pornography. They could be observing explicit sexual
21 behaviors on a regular basis, you know, between family
22 members. There could be molestation that has gone on
23 somewhere else in the family that they have observed or
24 they may have been molested themselves, but I'm looking
25 for some type of sexual boundary type issues that could

1 have occurred, so I want to be clear that I'm not on the
2 hunt looking for sexual abuse.

3 Q. Okay. And so you said you're looking for
4 symptoms.

5 A. Right.

6 Q. Okay.

7 A. Treating symptoms.

8 Q. So in the treatment of Child what symptoms
9 did you and your team observe?

10 A. The biggest thing that I remember that we tried to
11 treat was the sexually compulsive behavior, again, which
12 was the touching other kids and some more of the
13 aggressive lying and stealing type of behaviors.
14 Stealing is -- especially when you start to suspect or
15 find out that there has been molestations, they have been
16 victimized sexually, stealing is very metaphoric of
17 sexual abuse.

18 So what happens is when someone is molested,
19 something has been stolen from them, they've stolen their
20 innocence, so often you'll see kids, especially females
21 will actually do much more stealing and shoplifting as
22 adolescents who have been molested, but you'll see it in
23 boys as well.

24 Q. Sort of based on what you observed, the symptoms
25 as you recalled them in Child and the knowledge

1 that he disclosed sexual abuse, is it your opinion that
2 Child was sexually abused?

3 A. It appeared that way, and, basically, it fit, in
4 terms of his behaviors of what he was doing and how he
5 was acting out, and they seems to be consistent with the
6 disclosure he was making about that and discussing about
7 that, but I don't -- I was probably more involved in
8 treating the symptoms and focussing on the symptoms more
9 than I was about trying to uncover sexual abuse.

10 Q. Okay. And can you tell me a little bit about what
11 post-traumatic stress disorder is.

12 A. Post-traumatic stress disorder is the reaction of
13 a victim to the trauma, and it's an extreme reaction.
14 Typically the most common type of reaction to that is
15 disassociation. That is where someone will actually
16 completely tune out to what is around them.

17 Initially PTSD came from war veterans, so they
18 tuned out what was around them or somehow something would
19 trigger them and remind them of that traumatic event, so
20 one of the things that is important is to understand
21 maybe what triggers are for people in terms of how they
22 might react. So a trigger, for instance, of someone who
23 might be molested would be that they may smell a cologne
24 that was similar to the person who molested them, or a
25 person might make a saying that would be similar to what

1 the perpetrator had said to them, so then there might be
2 a behavior that would be associated with that trauma,
3 such as extreme anger, depression, withdrawal, things
4 like that.

5 It's important to recognize sometimes where those
6 behaviors would come from, because, obviously, things
7 like withdrawal, explosive behaviors can come from any
8 number of things, so what we try to do is when we get
9 those behaviors is figure out, well, what was your
10 thought prior to you screaming at your teacher, you know,
11 swearing, you know, indiscriminately as a ten-year-old or
12 11-year-old boy, something like that, so you would find
13 out what the trigger is. It might be, well, at that
14 point I was thinking about -- I was thinking about tennis
15 shoes. And then you say, Well, tennis shoes?

16 And then they might say, Yes, and I was
17 remembering, and they might actually describe tennis
18 shoes that a perpetrator was wearing. So those are the
19 types of things that could be a trigger that would cause
20 some types of behavior.

21 Q. And so what you seem to be saying, which I know
22 you said sometimes it can be sort of dissociative
23 reaction, but can it also be a violent reaction?

24 A. That is what I'm explaining right there. You have
25 the disassociation when you're tuned out, but also you

1 kind of get woken up. A trigger will come, and that
2 trigger reminds you of the traumatic event, and at that
3 point there may be explosive behavior. There would be,
4 like I said, an anger outburst or some cussing or
5 yelling, something that is what we call labile. You go
6 from a very low level to a very high level very quickly,
7 and sometimes that is misdiagnosed as bipolar in a manic
8 swing, but often it's labile behavior in terms of being
9 triggered by an event that would cause someone to have an
10 extreme reaction in a very short period of time.

11 Q. Okay. So based on you and your team's treatment
12 of Child do you have any opinion as to whether or
13 not Child was suffering from post-traumatic stress
14 disorder?

15 A. He appeared to have some symptoms of that. It's
16 really not under my realm to make diagnoses. I have to
17 make diagnostic impressions sometimes.

18 As far as a clinical social worker, I make a
19 diagnostic impression. Psychologists and psychiatrists
20 are more clearly trained in making a definitive
21 diagnosis, so anyway, in our training as clinical social
22 workers, we're trained to treat symptoms.

23 So I can take a general idea and have an
24 impression of a general diagnosis and then try to treat
25 some aspects of that, but I try to be careful to say,

1 This is definitely PTSD, or, This is definitely a major
2 depressive disorder. I have opinions on that, but I
3 don't make them to be ironclad. That is really position
4 of psychologist or psychiatrist.

5 Q. Thank you, sir. And could you just tell me a
6 little bit about what is delayed disclosure in a sexual
7 abuse setting?

8 A. Delayed disclosure is exactly as it says. It's
9 when someone delays disclosing what occurred to them, and
10 there's many reasons for that.

11 Q. Could you tell us some of those reasons.

12 A. Well, there's different reasons. One of the --
13 this is where it gets into all the different aspects of
14 sexual abuse, so I guess this is rather lengthy.

15 One of the things that causes delayed disclosure
16 is shame. People are ashamed of what has happened, and
17 one of the reasons they feel so ashamed is because in
18 atypical -- there is no real clear typical, but if you
19 were to take a generalization of child molestation, the
20 child molester basically comes down on the same level as
21 the victim.

22 And what they do is they create a relationship
23 where they feel that the two of them are in there
24 together, so to speak, so what happens is the child
25 starts to feel that they're participating in the sexual

1 act to the same level and to the same responsibility as
2 the perpetrator. This is done with comments such as, Do
3 you want me to stop, or, Does this feel good, or, Am I
4 hurting you?

5 And, of course, the kid would sit there and be
6 confused, not know what to say, and typically they
7 wouldn't say stop. They are fearful to say stop. They
8 want the approval of this person, so it's typically not
9 always a very violent act, so on one level there is much
10 shame.

11 There's also shame coming because in the
12 molestation there is typical physical gratifications.
13 This is probably one of the most important aspects I
14 learned from Jan Hindman. The physical pleasure, there
15 is so much guilt that comes from that. You feel
16 responsible, Gosh, I liked it. I didn't stop it, so it
17 must be my fault too, so that shame keeps people from
18 disclosing. Probably the other area of nondisclosure
19 that goes on is intimidation.

20 Now, that sounds strange because I just said we
21 talked about a cooperative type of event; however, what
22 often happens is there will be a difference between how
23 the perpetrator is with the child sexually, which will be
24 very much on the same level, but then they'll be very
25 different on an adult level, whether they're a parent, a

1 relative, a neighbor. They may be very authoritarian.
2 They may be very harsh. They may actually hit people, so
3 the child will see this person has the ability to hurt
4 someone, and so at that point -- or intimidate, so at
5 that point they're fearful to tell as well.

6 So the things that typically cause delayed
7 disclosure will be either the sexual shame, or it can be
8 some type of intimidation or fear of what is going on,
9 whether it's physical or even emotional such as, you
10 know, if you tell, then this happens typically in
11 families. If you tell, then your mother won't have any
12 money, and I'll leave and then you wouldn't be able to
13 live, those types of things, and this is how dependency
14 gets created.

15 Q. Okay. And is there any correlation in your
16 opinion between sort of the length of the delay and the
17 disclosure and sort of shame felt by the child?

18 A. Well, typically the longer there is in the delay
19 of disclosure, typically it's more extensive abuse. It's
20 always a better sign if someone has been molested and
21 they come out five minutes after it's occurred and say,
22 you know, Mommy, so and so was just touching my bottom or
23 playing with my vagina. Obviously, that shows the child
24 is not intimidated. The child knows it's wrong. The
25 child is not as confused, so obviously they're disclosing

1 it right away and it's not usually as severe.

2 Again, the most severe part of molestation is
3 typically not the touching act itself, it's all of the
4 things around it, the shame, the intimidation, those
5 types of things. So the longer it takes to disclose,
6 that typically means there has been more shame, that
7 there has been no intimidation, that there is more
8 coercion in different forms, so, again, you can't say
9 that in every single case, but by and large, that would
10 be the way that I would look at that or treat that.

11 Q. Okay. Could an interfamilial relationship between
12 the victim and the abuser cause a heightened sense of
13 shame in the victim?

14 A. It could cause a heightened sense of shame and a
15 heightened sense of fear; again, the fear of losing a
16 father or, again, a family member. It could be a
17 brother, uncle, aunt, that type of thing. It could be
18 the fear of income. It could be the loss of approval.
19 You know, typically with a parental figure, you know, you
20 want to look up to them and do that, and then there is
21 confusion as to why did someone do something wrong,
22 they're loving me and doing that? So there is shame and
23 confusion on that. Confusion is the other aspects of
24 shame that creates so much trauma within the children.

25 Q. All right. Thank you.

1 MR. BANNON: Beg the Court's indulgence.
2 Your Honor, no further questions for
3 Mr. Lynch-Stanley at this point.

4 THE COURT: Cross?

5 MS. LOVELL: Yes, thank you.

6 CROSS-EXAMINATION

7 BY MS. LOVELL:

8 Q. Good afternoon. You have spoken that you treat
9 symptoms; isn't that correct?

10 A. Basically, that is where I start off, by treating
11 symptomatology, yes.

12 Q. And you treat those symptoms with an eye towards
13 helping the child overcome; isn't that correct?

14 A. My goal is to reduce symptoms, reduce symptoms and
15 have the child become more healthy in general as a child.

16 Q. And by treating symptoms, you're then looking to
17 determine the root of them so that you can help the child
18 become healthy; isn't that correct?

19 A. At times. I'm looking for the roots of those.
20 Sometimes we get to the root of it, symptom we don't. It
21 just depends on how far you go back each time.

22 Q. Have you found many roots to not always be a
23 sexual assault?

24 A. There has been times. Yes, there are different
25 types -- like I say, there is typically a boundary

1 violation somewhere in there. If there is sexual
2 symptoms of acting out, then typically there will be a
3 sexual boundary that has been violated, so it may not be
4 sexual abuse, per se. It could be another sexual
5 boundary, you know, such as viewing -- like, maybe there
6 is pornography being viewed, some type of other symptom
7 that maybe would be abusive but not particularly a
8 molestation abuse.

9 Q. Would that also follow that it could happen
10 because of contention in a divorce?

11 A. Typically not. Typically, there are other
12 symptoms of that. There might be more anger. There
13 might be more depression, taking sides and that type of a
14 thing. I wouldn't necessarily see sexual acting out
15 coming from -- especially, again, the younger the child,
16 the more likely there has been a sexual victimization in
17 the acting out. So you don't always see young divorced
18 kids sexually acting out unless there has been sexual
19 boundaries violated. That would be fair. It's possible,
20 but it would be rare.

21 Q. And some of these behaviors, is it true that some
22 of these behaviors or symptoms as you see them -- they
23 overlap in their causes as you've just explained; isn't
24 that correct?

25 A. Oh, sure. As you have a child that is depressed,

1 you know, that depression could come from any number of
2 things. It's certainly an element of sexual abuse, but
3 it could be an element of divorce or other things as
4 well.

5 Q. And PTSD that you spoke of, you spoke of it being
6 the result of a trauma; isn't that correct?

7 A. Yes.

8 Q. And would one person's trauma not be another
9 person's trauma; isn't that correct?

10 A. Yes. Something that may be traumatic, extremely
11 traumatic, for one person may not be as traumatic to
12 someone else. That would be accurate.

13 Q. The delayed disclosure that you spoke of, isn't it
14 true that there are -- when you spoke about delayed
15 disclosure, you spoke of a long period. What did you
16 mean by a long period of delayed disclosure?

17 A. Well, really, the general rule for me in working
18 with a child and they're disclosing is that it's never
19 too late to disclose. If they're disclosing to me at
20 that point, I'm glad they're disclosing at that point
21 because that's better than them waiting until the next
22 day.

23 So it's somewhat relative in terms of what a long
24 disclosure is. I would say a long disclosure in general
25 might be anything longer than two or three months. I

1 mean, some disclosures -- like, some disclosures occur
2 within minutes. Some disclosures occur after two or
3 three months. Some occur after two years or 20 years.

4 Q. Wouldn't you agree that won't be a delayed
5 disclosure?

6 A. After 20 years?

7 Q. After two or three minutes.

8 A. No, that would not be a delayed disclosure.

9 Typically, in general, I would think of a delayed
10 disclosure, that would be probably -- two or three months
11 would be a fairly long delayed disclosure. Maybe a month
12 would be a shorter delayed disclosure.

13 Q. What about three years?

14 A. That would be a fairly long delayed disclosure.

15 Q. Okay.

16 MS. LOVELL: No further questions.

17 THE COURT: Redirect?

18 MR. BANNON: Just briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. BANNON:

21 Q. Does the length of the delay in the disclosure
22 have any -- in your opinion, does it erode the
23 credibility of the disclosure?

24 MS. LOVELL: Objection, Your Honor.

25 THE COURT: Overruled.

1 THE WITNESS: No, it really doesn't. People
2 disclose at different times. Different things, again,
3 triggers and things like that, can come up that cause
4 people more symptoms, so -- and the other part of PTSD,
5 the symptoms come up and PTSD occurs at different times
6 when the trauma gets reenacted in some way and starts to
7 overtake the person.

8 PTSD is really the body's efforts to try and
9 cope with the trauma that's occurred, and then the body
10 isn't coping anymore. And so what happens is that's when
11 you see these more outlandish types of behaviors. So you
12 might have someone who doesn't show symptoms of sexual
13 abuse for a year, six months, eighteen months, and then
14 all of a sudden, something triggers them and reminds them
15 of the abuse and helps to reenact it in some way, and
16 then they start to act out and do those things.

17 So that's why you have disclosures that occur
18 at different times as well, so I never see it as a
19 credibility or non-credibility thing. I think when
20 you're looking at credibility, you're looking for other
21 types of things, but not necessarily the length of
22 disclosure.

23 MR. BANNON: Thank you. No further
24 questions.

25 THE COURT: Recross?

1 MS. LOVELL: No, Your Honor.

2 THE COURT: All right. You may step down.
3 Any further witnesses from the state?

4 MR. BANNON: No, Your Honor. At this time
5 the state rests.

6 THE COURT: All right. All right.

7 Folks, we are going to take a break right now
8 while we take up a matter of law, and we're going to
9 discuss what our time frame is for the rest of the
10 afternoon. Again, you've heard the state's evidence now
11 but it's still improper for you to begin your
12 deliberations or discussions about the case, so go back
13 to the jury room and we'll have you back here in a few
14 minutes for a plan for where we're going the rest of the
15 afternoon. Thank you.

16 (In open court, jury not present.)

17 THE COURT: All right. Mr. Smith, you need
18 to stand up a second.

19 We're at the point in the trial now where the
20 state has presented their evidence. In a second your
21 lawyer is going to make a motion for a directed verdict,
22 but I can tell you, based on the evidence that we've
23 heard, it will more than likely be denied, but I wanted
24 to give you a little heads up so you can be thinking
25 about the answer to my question that I'm going to talk

1 allowed to cross-examine you about that as well, or
2 mention that on cross-examination.

3 If you don't want to testify, you don't have
4 to. That's a constitutional right that you have, and you
5 also have the constitutional right, if you don't want to
6 testify, to have me instruct the jury that they are not
7 to consider that in any way, shape, or form during their
8 deliberations. They're not even to discuss that matter
9 during their deliberations.

10 So having said that, we are at the point now
11 where you have to make some decisions. And so first you
12 have to make the decision as to whether or not you want
13 to call any witnesses and then, second, you have to make
14 a decision as to whether or not you want to be one of
15 those witnesses.

16 So why don't you have a seat there for a
17 second and talk to your lawyer here in a minute. I'm
18 going to give her the opportunity to make a directed
19 verdict motion, and then we'll see where we're at after
20 that, so Ms. Lovell?

21 MS. LOVELL: Thank you, Your Honor.

22 Yes, Your Honor, the defense makes a motion
23 for directed verdict in that the state did not prove its
24 case in general and the support for that is they were --
25 they did not show the location by testimony of Child of

1 Beaufort County for the location of where the assault
2 allegedly occurred and that the battery that the state
3 alleges occurred, there was no further proof of that
4 other than the testimony.

5 THE COURT: All right. Well, there was
6 testimony, I recall, that the alleged assault did take
7 place in the father's trailer, which there was testimony
8 that that trailer was in Beaufort County. So there is
9 also evidence that there was an assault that took place
10 and it was a sexual assault and it was of a minor under
11 the age of 11, so they have met their burden on directed
12 verdict, so your motion is denied.

13 MS. LOVELL: Thank you. I also renew all
14 objections I have made up to this point.

15 THE COURT: All right. Have you talked to
16 your client about calling any witnesses and whether or
17 not he wants to testify?

18 MS. LOVELL: We have spoken for the past
19 several months about our defense, and I understand he
20 does not wish to testify, and we will not be calling any
21 witnesses.

22 THE COURT: All right. Well, then I will
23 bring the jury back in, and tell them that you have
24 decided not to call any witnesses on -- in your defense
25 and that we will -- because one of them needs to be gone

1 MR. BANNON: Probably 15, 10, 15.

2 THE COURT: You want him to open on the law
3 or just allow him to close?

4 MS. LOVELL: He can waive it.

5 THE COURT: All right. We'll see y'all at
6 9:30 then.

7 (Recess taken.)

8 (September 21, 2011.)

9 THE COURT: Did y'all have a chance to look
10 at the jury charges? Just the addition on the Lyle I
11 think is the only charge from yesterday.

12 MR. BANNON: Yes, Your Honor. There is no
13 objection.

14 THE COURT: Anything from the defense?

15 MS. LOVELL: No, Your Honor.

16 THE COURT: We were set to go with the
17 defense arguing first, and then the state, and I think we
18 all agreed that this copy of this indictment was all
19 ready to send back. It's the one with no charge.

20 MR. BANNON: Yes, sir.

21 THE COURT: All right. Well, if we're ready
22 to go then, let's bring the jury in.

23 MR. BANNON: Your Honor, we were just
24 wondering -- it was my impression I was going to go
25 first.

1 MS. LOVELL: Thank you. May it please the
2 Court, assistant solicitor Mr. Bannon, ladies and
3 gentlemen of the jury: In my opening yesterday, I asked
4 you to look for a light to find the truth, and you looked
5 for that light in the testimony of the state's witnesses.
6 Did you find it? Has the testimony illuminated the
7 shadows and the dark corners? No. The state did not
8 meet its burden of proving Mr. Smith committed this
9 crime. Did the state fill in the gaps in any
10 inconsistencies in the evidence? No light here. Did you
11 see or hear about any physical evidence on Child No.
12 He testified that he was penetrated anally and that it
13 hurt, yet he did not seek any medical attention by
14 telling his aunt or anyone else.

15 Mrs. Cindy Solak testified that her first
16 priority was dealing with Child health when he moved in
17 with her in 2001, yet she didn't document any medical
18 injuries, and he didn't tell anyone for three years,
19 until 2003. That's a long time to wait if something so
20 horrible had happened. His memory of these events
21 naturally dim over time, such that he had to be reminded
22 by the state of his testimony from another date. No
23 light here.

24 You heard from his sister, Sister and his
25 brother, Brother and the judge will instruct you on the law

1 regarding these witnesses, but, briefly, their testimony
2 is not to be used to convict Mr. Smith on this crime.
3 They are not the victims of the crime for which Mr. Smith
4 is charged today. No illumination here.

5 You heard Sister say that she was close to
6 her brothers, yet she didn't tell them, nor did Child
7 tell her. All three siblings lived together with their
8 mother when the alleged abuse happened. They testified
9 they also lived with their mother's boyfriend and also in
10 that house was his son.

11 The children moved in with Aunt Cindy in
12 2001, after the incident of the abuse allegedly happened.
13 The state provided an expert witness, Mr. Tod Stanley.
14 Did his testimony help you find the light? He testified
15 that he treats symptom. By treating these symptoms, they
16 may discovery the source of the symptoms. The cause and
17 the root of sexually acting out is not always sexual
18 molestation. There may be other reasons for these
19 symptoms. No light.

20 The state's light has gone out. You are left
21 with a dark crime that has not been solved. Then you
22 must find Mr. Smith not guilty. Thank you.

23 THE COURT: All right. Mr. Solicitor?

24 MR. BANNON: Thank you, Your Honor.

25 May it please the Court and counsel, when we

1 talked yesterday, I told you that this was a case about
2 silence, and it was a case about silence, but now the
3 silence has been broken. I told you that Child a
4 very brave young man, would take the stand and that he
5 would find the strength within him to tell you what
6 Arthur Smith did to him, and that is exactly what
7 happened.

8 Child took the stand, and he was able
9 to tell you what happened. Now, what Child told us was
10 that Mr. Smith did these things to him while he was
11 between the ages of six and eight and while the family
12 was living in Bluffton. He wasn't able to remember
13 exactly where, but he knew that it was down here in
14 Beaufort County. We know from Cindy that Mr. Smith's
15 trailer was located in Bluffton, and that is where the
16 family was living, and Brother Child and Sister would go
17 over there on Wednesdays and for the weekend, and in that
18 time range, this is where the abuse occurred.

19 If you take a look at this -- I'll move it a
20 little bit closer -- this is essentially what Child told
21 us, all right? He was born on of , so he
22 would have been six years old on of . He
23 turned eight on . The time alleged in
24 the indictment is between May the 1st of 1999 and May the
25 31st of 2000.

1 He told us that the abuse was occurring
2 multiple times, that this abuse was occurring constantly
3 between these times. This is the evidence that you heard
4 in this case. This is what Child told you.

5 Now, just like Ms. Lovell said, the judge is
6 going to charge you on the law, and just like Ms. Lovell
7 said, there is some evidence in this case called Lyle
8 evidence, and that basically consists of Child older
9 brother Brother testimony and his younger sister
10 Sister testimony.

11 Now, we're not here to try Mr. Smith's abuse
12 of them, we're here to try his abuse of Child but you
13 can consider their testimony for a couple of different
14 things: You can consider it for the source of the abuse,
15 the identity of the person who was the abuser, and the
16 mean and manner in which the abuse occurred. That's what
17 you consider it for, use it as a tool to help you decide
18 the charges against Child Use it as a tool to decide
19 whether or not you believe Child testimony. That's
20 what it's there for.

21 One other thing that the judge is going to
22 talk to you a little bit about is something called
23 reasonable doubt, and what he's going to tell you is that
24 you don't reach reasonable doubt until you're firmly
25 convinced, you're firmly convinced of someone's guilt,

1 and it's the kind of firmly convinced where you wouldn't
2 hesitate to act in your ordinary life, if that makes
3 sense. So this isn't a situation where any and all
4 strange possibilities can come flooding into your mind.
5 This isn't a possibility where fantastic doubts or some
6 sort of imagined doubt can be allowed to creep in.

7 What you think about is what you heard from
8 the witness stand and whether or not that testimony left
9 you convinced in a situation where you would act in your
10 ordinary lives to think that this man is the man who
11 abused Child That's what the standard is.

12 Essentially, if I were to run into you guys
13 on the street and present to you the case that we just
14 presented here, as if I presented that case and you were,
15 like, well, that fellow is guilty, that's the same
16 standard that you bring in here, whether or not you're
17 firmly convinced of his guilt. That's what we're talking
18 about, no higher standard than that.

19 And just like the judge said, what Ms. Lovell
20 said and what I am saying to you now is not evidence.
21 The evidence that you heard came from the witness stand,
22 and the only evidence that we heard in this case is that
23 Child testified that his father molested him.

24 Now, he testified that he was molested in
25 exactly the same fashion as his older brother Brother was,

1 that he forced him to engage in anal sex and he forced
2 him to engage in oral sex. He was molested in virtually
3 the same way his younger sister was, forced to engage in
4 oral sex, forced to engage in anal sex, anal penetration.
5 Child was molested in exactly the same way as his older
6 brother was and his younger sister was. That is the
7 evidence that you heard.

8 We also learned about the way that Mr. Smith
9 likes to prey on his victims. His victims are his
10 children. He likes to molest them between the ages of
11 six and eight years old, because what we heard from the
12 witness stand is that Brother said he was molested between
13 the ages of six and seven years old, and he's a couple
14 years older than Child says he was molested
15 between the ages of six and eight years old. Sister is
16 a year older than Child and she was molested between the
17 ages of six and seven. This is exactly the area where
18 Mr. Smith likes to find his victims. That's what he
19 does. That's how he operates.

20 Now, I'll go ahead and tell you, we didn't
21 hear testimony from six- to eight year-old children, we
22 heard it from young adults, and that is because ten years
23 has gone by. The small, abused, frightened children have
24 grown up. But let me remind you, this is what Child
25 Smith looked like at the time when Arthur Smith was doing

1 this to him. We heard Cindy Solak testify that he wasn't
2 quite -- he wasn't yet five feet tall. He wasn't even
3 100 pounds.

4 What I'll tell you is most certainly
5 Mr. Smith is a coward. Do you think that Mr. Smith would
6 have the guts to try to do that with Child today?
7 Absolutely not.

8 This is a picture of Brother when he was
9 a little boy. This, Ms. Solak testified, was after they
10 had taken custody of the boys. Brother was younger than
11 this when his father chose to molest him. Do you think
12 that Mr. Smith would have the guts to molest the
13 21-year-old Marine that came in and testified before you
14 today? Absolutely not. Because he is a coward. He
15 preys on the weak and the helpless.

16 This is a picture of Sister when she was a
17 little girl. This is roughly how she appeared when
18 Mr. Smith decided to try to molest her. This is how a
19 coward chooses his victims, and Mr. Smith is most
20 certainly that.

21 We also learned from the testimony today
22 about how Mr. Smith likes to operate once he's chosen his
23 victims. He isolates them. He takes them into his
24 bedroom where they're all alone, where there is no one to
25 help, no one to hear, no one to see. All this happens

1 behind closed doors. He makes them get undressed,
2 whether he undresses them or has them undress themselves.
3 He makes them perform a variety of sex acts when he has
4 them isolated and alone. He then insures their silence.
5 That's the way that he works.

6 He told Brother that he would hurt his
7 mother if he told anything. He told Child that he
8 would kill him or break his bones if he said anything,
9 and he told little Sister not to tell. Because this is
10 the world that Mr. Smith created for these children, a
11 world of fear and a world of shame. And now what we
12 heard from Mr. Lynch-Stanley is that he told us that
13 sometimes the amount of shame and the amount of fear can
14 contribute to how long children manage to stay quiet
15 before they can finally say what's happened to them. And
16 apparently he was saying that two to three months was --
17 that was a fair amount of time for a delayed disclosure.

18 Child he had to hold on to that for
19 three years. How much fear and how much shame do you
20 think that Arthur Smith made Child feel? Now,
21 fortunately, Brother Child and Sister were brave
22 enough to come in here today and to shine a light into
23 this world of shadow and fear that Mr. Smith has created.
24 Fortunately for us that has happened.

25 Now, I told you at the beginning of this case

1 that the defendant sat clothed in a robe of
2 righteousness. Well, now, you get to decide whether or
3 not that robe is really a cloak of shadows, and I tell
4 you that it is, because in Mr. Smith's world, the world
5 that we got to be taken to by Brother by Child and by
6 Sister that is a world where fear is a weapon and
7 silence is camouflage. And, ladies and gentlemen, what
8 the evidence has shown you and the evidence has given you
9 no other choice than to find Mr. Smith guilty. Thank
10 you.

11 THE COURT: All right. Would you mind taking
12 that easel down? All right.

13 Well, we've now heard the arguments, and so I
14 will charge you on the law that applies to the facts of
15 the case as you find them. As I told you, you're the
16 finder of the facts. I'm the judge of the law. Where
17 there is a discrepancy on facts, you are the sole judges
18 of the facts. You determine the credibility of witnesses
19 and how much weight to give the testimony of a witness
20 and you consider such things as whether a witness has a
21 bias, an interest, or a prejudice in the outcome of the
22 case. You can judge such things as appearance and
23 demeanor on the witness stand and the reasonableness of
24 their statements.

25 On the other hand, as I told you, I am the

1 judge of the law, so as part of that duty, I instruct you
2 on what the law is, and so if you have some idea of what
3 you think the law is or what you think the law ought to
4 be and it does not agree with what I now tell you that
5 the law is, you are obligated under the oath that you
6 took at the beginning of the trial to abandon this
7 preconception on your part and apply the law precisely as
8 I now charge it to you.

9 I want to remind you again about the fact
10 that the defendant was arrested and indicted for the
11 case, but that fact is not to be considered by you as
12 evidence in this case and cannot be considered by you as
13 evidence of guilt, nor does it create any presumption or
14 inference of guilt. The indictment is simply the formal
15 written instrument that contains the charges made against
16 the defendant. That is the document that puts him on
17 notice of what he is to stand trial for, and it gives
18 this Court jurisdiction to try this case.

19 The defendant pled not guilty to that
20 indictment, and that plea therefore cast a burden on the
21 state to prove that the defendant is guilty beyond a
22 reasonable doubt. A person charged with committing a
23 crime in this state and every state in this union, for
24 that matter, is never required to prove himself innocent.
25 This is an important concept of law, rule of law, in this

1 country. A defendant in this country who stands trial
2 never has to prove they are innocent. They are presumed
3 to be innocent of the crime they are indicted for unless
4 and until their guilt has been proven by evidence
5 satisfying you of that guilt beyond a reasonable doubt.

6 As I told you at the beginning of the trial,
7 this is not a mere legal theory. This isn't just a legal
8 phrase. This is a substantial constitutional right to
9 which every defendant is entitled, and this presumption
10 of innocence accompanies the defendant from the time he
11 is charged, throughout the trial, until you reach a
12 verdict of guilt based upon evidence satisfying you of
13 that guilt beyond a reasonable doubt.

14 We talked about reasonable doubt at the
15 beginning of the trial, and I again want to stress to
16 you, this burden of proof is on the state and it is to
17 prove the defendant guilty beyond a reasonable doubt,
18 and, as I told you about civil trials, some of you may
19 have been in a civil trial where that burden of proof is
20 only upon a party attempting to prove something. They
21 must prove that a fact is more likely true than not true,
22 such as by the greater weight or a preponderance of the
23 evidence, but in criminal cases, the state's burden of
24 proof is much more powerful than that. It must be beyond
25 a reasonable doubt.

1 Proof beyond a reasonable doubt is proof that
2 leaves you firmly convinced of the defendant's guilt.
3 There are very few things in this world that we know with
4 absolute certainty, and in criminal cases the law does
5 not require proof that overcomes every possible doubt.
6 If, based on your consideration of the evidence, you are
7 firmly convinced that the defendant is guilty of the
8 crime charged, then you must find the defendant guilty.
9 If, on the other hand, you think there is a real
10 possibility that the defendant is not guilty, then you
11 must give the defendant the benefit of the doubt and find
12 him not guilty.

13 Now, in a case, there are generally two types
14 of evidence presented at trial. There is direct evidence
15 and there is circumstantial evidence. Direct evidence is
16 the testimony of a person who claims to have actual
17 knowledge of a fact, such as an eyewitness, and this is
18 evidence which immediately establishes the main fact to
19 be proven. Circumstantial evidence, on the other hand,
20 is proof of a chain of facts and circumstances which
21 indicate the existence of a fact. It's evidence that
22 immediately establishes collateral facts from which a
23 main fact may be inferred.

24 Circumstantial evidence is based on inference
25 and not on personal knowledge or observation. The law

1 makes absolutely no distinction between the weight and
2 value to be given to either direct or circumstantial
3 evidence, nor is a greater degree of certainty required
4 of circumstantial evidence than of direct evidence. You
5 should weigh all of the evidence in this case, and after
6 weighing all of the evidence you are not convinced of the
7 defendant's guilt beyond a reasonable doubt, you must
8 find the defendant not guilty.

9 Now, I want to instruct you and emphasize the
10 fact that the defendant did not testify is not a factor
11 to be considered by you in any way in your deliberation
12 and in your consideration of the question of guilt or
13 innocence of the defendant. It must not be considered by
14 you in any manner whatsoever. A defendant in this
15 country has a constitutional right to remain silent, and
16 the assertion of this right must not be considered by you
17 in your deliberations. I repeat, under your oath, you
18 are to draw no conclusion whatsoever from the fact that
19 the defendant in this case did not testify.

20 The fact the defendant did not testify should
21 not even be discussed in the jury room. The burden of
22 proof, as I stated, is on the state. The defendant is
23 not required to prove his innocence. The burden remains
24 on the state to prove guilt beyond a reasonable doubt.

25 Again, your job is to judge the credibility

1 of witnesses who have testified. Credibility simply
2 means believability, and it's your job as jurors to
3 analyze and evaluate evidence and determine what evidence
4 convinces you of its truth. In determining the
5 believability of witnesses who testified in this case,
6 you may believe one witness over several witnesses or
7 several witnesses over one witness. You may believe part
8 of the testimony of a witness and reject the remaining
9 part of the testimony of that same witness.

10 You may believe the testimony of a witness in
11 its entirety or you can reject the testimony of a witness
12 in its entirety, and you may consider whether any witness
13 has exhibited to you any interest, bias, prejudice, or
14 other motive in this case. You may also consider the
15 appearance and manner of a witness while on the witness
16 stand.

17 I also talked to you during the trial about
18 the fact that our rules of evidence don't normally permit
19 witnesses to testify about opinions or conclusions. We
20 do make an exception for witnesses that we call expert
21 witnesses, and, again, those are witnesses who, by
22 education and experience, have become expert in some art,
23 science, profession or a calling, and they may be allowed
24 to state an opinion as to relevant and material matter in
25 which the witness claims to be an expert and may also

1 give you their reasons for that opinion.

2 You should consider an expert opinion
3 received in this case just like any other witness or any
4 other evidence, give it the weight that you think it
5 deserves. If you decide that the opinion of an expert
6 witness is not based on sufficient education and
7 experience or if you conclude that the reasons given in
8 support of the opinion are not sound, or that the opinion
9 is outweighed by other evidence, you can disregard that
10 opinion entirely.

11 An expert witness's testimony is to be given
12 no greater weight than that of other witnesses, certainly
13 because the witness was an expert, and, further, you're
14 not required to accept an expert's opinion even though it
15 is not contradicted.

16 You also heard evidence that the defendant
17 committed a bad act that is not the subject of a
18 conviction, other than the one for which the defendant is
19 now on trial. This testimony, if you conclude is true,
20 may only be considered by you on the question of identity
21 or common scheme or plan and for no other reason and no
22 other purpose. You may give this evidence the weight and
23 value, if any, which you find it should have on the sole
24 issue of identity or common scheme or plan.

25 You must not consider the evidence of the bad

1 act not the subject of a conviction as part of the
2 defendant's guilt of the charge we are trying today.
3 Again, the charge that we are trying today is criminal
4 sexual conduct with a minor. In order for the state to
5 prove to you beyond a reasonable doubt that the defendant
6 engaged in criminal sexual conduct with a minor, the
7 state must first prove beyond a reasonable doubt that the
8 defendant engaged in a sexual battery with the victim.

9 A sexual battery is defined as sexual
10 intercourse, cunnilingus, fellatio, anal intercourse, or
11 any intrusion, however slight, of any part of a person's
12 body or any object into the genital or anal openings of
13 another person, except when the intrusion is accomplished
14 for medically recognized treatment or diagnostic
15 purposes.

16 The state must then also prove beyond a
17 reasonable doubt the victim was less than 11 years old at
18 the time of the sexual battery. I charge you that
19 consent, willingness, indifference, or ignorance on the
20 part of the minor, if any, as to what was taking place
21 does not affect the charge of criminal sexual conduct
22 with a minor, because a person under the age of 14 cannot
23 legally consent to sexual intercourse.

24 Finally, I want to charge you that in
25 determining the guilt or innocence of the defendant, you

1 cannot consider any possible penalty for a particular
2 crime. Punishment for a crime is for me to determine and
3 should not be considered by you in any way whatsoever in
4 arriving at a fair and impartial verdict as to the guilt
5 or innocence of the defendant.

6 Now, Madame foreman, I'm going to send the
7 indictment back with you, and I read you the indictment
8 at the beginning of the trial, and I've emphasized this
9 is not evidence. It's going back for the sole purpose of
10 writing what the verdict is on the charge. The verdict
11 has to be unanimous, in other words, all 12 jurors must
12 agree on what the verdict is, and there are two possible
13 verdicts in this case. There is guilty and there is not
14 guilty.

15 When the jury has unanimously agreed on what
16 the verdict is, Madame foreman, right under here where it
17 says verdict, you will write it in, guilty or not guilty,
18 sign it, date it, let the bailiffs know you've reached a
19 verdict. All right in again this is not evidence. It's
20 going back with you for the purpose of writing on the
21 back of it what the verdict is.

22 Now, I'm going to send you back to the jury
23 room. Don't begin your deliberations just yet. I have
24 to give the lawyers an opportunity to say, Judge, you
25 misspoke. You said something, you surprised us, or

1 you've left out something that you told us you were going
2 to say. It's a formality we have to go through. We'll
3 get the evidence together and send it back. This will
4 just take a couple minutes.

5 When we send the evidence back along with the
6 verdict form, then the bailiff will say, The judge says
7 it's okay to begin your deliberations. So just hold off
8 a couple minutes on beginning your deliberations until I
9 send the evidence and indictment back. All right? Thank
10 you for your patience.

11 (In open court, jury not present.)

12 THE COURT: All right. Anything from the
13 state?

14 MR. BANNON: No, sir.

15 THE COURT: From the defense?

16 MS. LOVELL: Only that I renew all my
17 objections that I previously made.

18 THE COURT: All right. They're all denied.
19 We got all the evidence together?

20 (At 10:21 a.m., the jury retires to
21 deliberate.)

22 (11:09 a.m.)

23 THE COURT: All right. We have everybody
24 back. Defendant is in the courtroom. I understand
25 they've reached a verdict. You want to bring the jury

1 back in.

2 (In open court, jury present.)

3 THE COURT: All right. Madame foreman, I
4 understand the jury has reached a verdict; is that
5 correct?

6 THE FOREPERSON: Yes.

7 THE COURT: Would you hand that to the
8 bailiff, please. All right. Clerk will publish.
9 Defendant will rise.

10 THE CLERK: 2003 GS-07-1756, the State of
11 South Carolina versus Arthur Franklin Smith, for criminal
12 sexual conduct with a minor, we, the jury, find the
13 defendant guilty.

14 Madame forelady, was this your verdict?

15 THE FOREPERSON: Yes.

16 THE CLERK: If all agree, would you please
17 raise your right hand.

18 THE COURT: Let the record reflect all the
19 jurors have raised their right hand. All right. Do you
20 wish to have the jury polled?

21 MS. LOVELL: Yes, Your Honor..

22 THE COURT: All right. Poll the jury, Madame
23 Clerk.

24 (Whereupon, the jury was polled and all
25 jurors indicated their verdict was unanimous.)

1 THE COURT: All right. Well, folks, you may
2 be seated.

3 I understand that you have reached your
4 verdict, and I appreciate your hard efforts this week.
5 This is a tough job that we have to do sometimes, and
6 sometimes you listen to some cases with some really bad
7 facts, and this is one of them, but you did your job.
8 You listened attentively through the trial, I watched
9 that, and it was clear that y'all took your time,
10 deliberated, considered the evidence and came back with a
11 verdict, and that is all we can ask people to do, is to
12 listen to the evidence, put aside any preconceptions you
13 have, and then base your evidence -- or base your
14 evidence on what is heard here in court and on the law
15 that applies. So you have done your duty as citizens
16 this week, and I want to thank you for that.

17 Now, you are no longer required to come back
18 to the court this week, because we've got one more trial
19 going on next door, and when Judge Mullen finishes, she's
20 not going to start another one. I'm going to be doing
21 pleas and motions the rest of the week, so you don't have
22 to call after 6:00. You don't have to come back the rest
23 of the week, if you don't want to.

24 We're getting ready to impose sentence here
25 in a few minutes. I hear from the victims and anything

1 the state wants to say. We also give the defendant an
2 opportunity to say anything. You're welcome to stay, and
3 you're also free to go, so I'll give anybody the
4 opportunity that wants to go now the chance to leave
5 before we go through that, but, again, you're welcome to
6 stay. Totally up to you, but if anybody wants the
7 opportunity to leave right now, go ahead. All right.
8 Looks like everybody wants to stay.

9 Mr. Solicitor, anything that you would like
10 to tell me?

11 MR. BANNON: Well, Your Honor, a couple of
12 things. I know that we were here today to try the
13 molestation of Child or Child I would also
14 like to hand up a certified copy of the defendant's prior
15 conviction where he pled guilty to ABHAN as a lesser
16 included offense for molesting Sister Also, I
17 have what has previously been disclosed to defense
18 counsel as a -- it looks like a Family Court order from
19 Erie County, in New York state, where, in a civil
20 proceeding, he was found to have abused a boy named half-
sibling
21 , who is a half sibling. It's Mr. Smith's child,
22 but a half sibling of his children in this case.

23 Your Honor, I think it's very clear that
24 Mr. Smith is a sexually violent predator. I think the
25 facts of this case call for the maximum possible sentence

1 of 30 years in prison. The victims are still present in
2 the courtroom now, and I believe that -- I know at least
3 some of them would like to address you, and perhaps all
4 of them, so I would like to give them that opportunity at
5 the appropriate time.

6 THE COURT: Certainly.

7 MR. BANNON: But I would just say that I
8 think it's clear that Mr. Smith is definitely a danger,
9 and 30 years would be the appropriate sentence.

10 THE COURT: All right. Is there any of the
11 victim's family that would like to speak, or Mr. Smith
12 himself? Anyone is welcome to at this point. Just come
13 on up to the bench here.

14 THE WITNESS: Your Honor, I'm Brother
15 I'm Art's second oldest son. I have a two-year-old child
16 at home and I wouldn't want somebody like this walking
17 around our streets. He did a lot to damage our lives,
18 but we have all moved on and become better people, so I
19 would ask that you give him the maximum sentence that you
20 can.

21 THE COURT: Thank you. Anyone else?

22 THE WITNESS: Your Honor, my name is Child
23 . I just want him to be put away for a very long
24 time. He did everything to jeopardize us, but eventually
25 we made the best of our lives.

1 THE COURT: All right. Thank you. Anyone
2 else?

3 THE WITNESS: Your Honor, my name is Sister
4 , and I just want to say that I want him to be put
5 away as long as you can. It's not safe for me, or for my
6 brothers or for any other younger child or anybody, for
7 him to be out, and I just want everybody to be safe.

8 THE COURT: Thank you.

9 THE WITNESS: Your Honor, my name is Mark
10 Solak. My wife, Cindy, and I were appointed guardians
11 about ten years ago, and in the last few years, we've
12 become parents to Brother Child and Sister When the kids
13 arrived, Sister was a little girl who couldn't look at
14 anybody. She let her hair hang in her face. She was so
15 ashamed her of life and everything that happened to her
16 that she didn't want to look or didn't even want anybody
17 looking at her.

18 Child he was scared of everything. He
19 couldn't sleep at night without the doors, windows,
20 shades drawn, all the outside blocked off so that he felt
21 like he was in a secure room, and when he could sleep, he
22 would wake up with terrors, screaming, couldn't sleep at
23 night. You would find him awake, laying in bed.

24 Brother he was an angry child. He would fight
25 with his own shadow to prove that he had control of his

1 life because he could do it.

2 The kids had a tough ten years. They're
3 still learning how to deal with their father's abuse.
4 It's been a long road. It's very evident to us and I
5 think everybody here that Art has no remorse. He brought
6 us back again to relive all this horrendous activity that
7 went on. He's had at least eight years to think about it
8 and try to get some kind of counsel to deal with his
9 obsession with young children.

10 To put it quite simply, he's nothing more
11 than a predator. I'm standing here today to show the
12 kids that a father protects their kids. They'll stand up
13 for them and say what needs to be said, not do what he
14 does. They need an example of what a father is supposed
15 to be, and that is why I am standing here.

16 My wife and I are proud of our three kids,
17 more than you could know. We respectfully request that
18 he is put away for every possible second that he can be
19 in jail by the law.

20 Thank you.

21 THE COURT: Thank you. Anyone else?
22 Anything further from the state?

23 MR. BANNON: Nothing from the state.

24 THE COURT: Ms. Lovell?

25 MS. LOVELL: May I speak with my client one

1 moment?

2 THE COURT: Sure.

3 MS. LOVELL: Your Honor, we ask that you --
4 that under the statute that he be credited for time
5 served that he has been in prison since -- for the time
6 he's been in there. We ask that you don't take a civil
7 conviction and that should not be used to aggravate the
8 criminal conviction and that we ask you to give him the
9 same sentence that he received at 20 years, and he does
10 wish to address the Court.

11 I have spoken to him about the parameters of
12 that. I would ask whether or not you wish to -- if
13 that's appropriate at this time and ask for your
14 guidance.

15 THE COURT: He does wish to speak or he does
16 not?

17 MS. LOVELL: He does.

18 THE COURT: All right. This is your chance,
19 Mr. Smith.

20 THE DEFENDANT: I have been sitting here,
21 silent, which took a lot to do. Cindy, since day one
22 that I have known her -- we moved down the road, about
23 five houses down from her, and ended up marrying her
24 sister. Since day one -- her sister getting pregnant and
25 so on and anyway, we had got married and it interfered

1 with her marriage.

2 It took a lot of money from her marriage but
3 her brother allowed her to get married because her wife,
4 and her sister, to get married, and from there I had a
5 relationship prior to that and a son was born named ^{half-}
_{sibling}

6 , and I was going through -- me and the mother
7 was unmarried, and we were going through a custody -- not
8 custody, kid visitation battle. I had never gotten a
9 child out of supervised visitation because the child was
10 so young, and no other time, okay, prior to the
11 conviction, okay, that they are talking about in Family
12 Court -- it's noncriminal court. In Family Court in
13 Buffalo, you need no evidence whatsoever to get a
14 conviction.

15 But, anyway, when I asked for custody of
16 ^{half-}_{sibling} that's when she come up with sexual abuse, and
17 there was no medical evidence. I never had a child
18 unsupervised.

19 I went through Salvation Army supervised
20 visitation by my own request because of her allegations,
21 and still I never had him unsupervised before the
22 conviction, so there is no possible way I could have done
23 anything. There was a camera in the ceiling, okay, so --
24 but an allegation will get you a conviction, especially
25 when you have a child who can sit there and get them to

1 point.

2 This is a retrial, okay? Ms. Solak said I
3 had nine years, I believe it was -- I had nine years to
4 think about it. I've been in Lieber Correctional
5 Facility, I spent 14 months prior to the last trial, five
6 years up in Lieber Correctional Facility and two years
7 now.

8 During the first trial, Child was on the
9 stand and Cynthia Solak was coaching him from the
10 audience, okay, shaking her head yes and no, in a yes and
11 no fashion at questions being asked about molesting. You
12 don't need help to answer the questions.

13 I was granted a new trial after that. I came
14 back here and had my new trial. None of this was brought
15 before you because if I mentioned the fact that he was
16 coached, they would bring in the conviction of Sister
17 which was not a trial, it was not -- it was a plea deal
18 because I know to get a young child up there to point,
19 you're going to get convicted no matter what.

20 Mark also says I have no remorse. The
21 prosecutor said -- how did he refer to it? Not just a
22 predator -- labelled me --

23 MR. BANNON: He culled you a sexually violent
24 predator.

25 THE DEFENDANT: No, you called me a coward.

1 It takes more than somebody who is a coward to sit here
2 and go through a trial. It's not my wish to have my
3 children go through what they alleged happened to them.
4 The one I'm charged with is -- or now convicted of,
5 again, is Child which was coached the first time.
6 They've had so much time to recoach them before they come
7 here.

8 Part of which you haven't heard is that they
9 never mentioned, they were supposed to be tied up and
10 everything else. None of them said that. There is a lot
11 that they said they don't remember, but they only
12 remember the exact things the prosecutor needed for his
13 conviction. That's all. And I remind you he was coached
14 before, so -- I'm not trying to retry this, Your Honor.
15 I'm just trying to let the jury know that there was a lot
16 of factors that didn't come in to their decision and tell
17 them that it is wrong.

18 (I did not do anything to my child, but I will
19 hear -- I have to, I have no choice to hear your
20 decision, but your decision is wrong, and you're forgiven
21 for me. That's all.

22 THE COURT: Anything further from the
23 defense?

24 MS. LOVELL: No, Your Honor.

25 THE COURT: All right. Well, I want to first

1 speak to the children, and, you know, there is nothing
2 really I can say that would restore your childhood to
3 you. You know, it sounds like you guys had a rough go of
4 it from a very early age, weren't raised in a good
5 environment at an early age, but your young lives were,
6 in essence, destroyed, as far as having a normal
7 childhood goes.

8 You were lucky enough to have, it sounds
9 like, two angels brought into your life in your aunt and
10 uncle and that they took you in and tried to give you a
11 normal life, and it sounds like y'all have made
12 tremendous progress in that regard. I don't think you
13 can probably get through something like this without a
14 tremendous amount of help and perhaps some professional
15 therapy. I would encourage you to do that.

16 It is an awful, awful set of facts that we
17 heard this week. That you have an incredible set of
18 people that sounds like you all have adopted as your mom
19 and dad. I suppose the law is difficult enough them for
20 to officially adopt you, but it sounds like y'all have
21 adopted each other, and you should consider yourself
22 fortunate that you are in their lives, and I'm sure --
23 they sound like they are very lucky to have you in their
24 lives. So, you know, to the extent this story ever has a
25 good ending, it sounds like that is the starting point

1 for it.

2 As to you, Mr. Smith, I don't know, you're
3 either the unluckiest guy in the world or you're a
4 monster, one of the two, because it sounds like every
5 child you have come in contact with have somehow found
6 yourself, at least in the position of being accused of
7 committing crimes against nature, and it is absolutely
8 abhorrent the acts that we heard of in the last couple
9 days. And there is, you know, a bad feeling that you
10 have when you hear testimony like that.

11 I know people say, well, kids are coerced
12 into making false confessions and things like that, but
13 we have a long period of time between the time that these
14 acts took place and their testimony on the witness stand
15 yesterday, and, frankly, it's been my experience that
16 people that are coerced into making false accusations
17 against somebody change their story. They don't become
18 more hardened in their remembrance of what happened.

19 So the fact that they are willing to come
20 into court after this period of time and still maintain
21 that their father did this to them -- under the best of
22 circumstances, that must be a tremendously painful thing
23 to have to go through, but they stood up and they did it,
24 and the jury obviously was persuaded of the truth of
25 their testimony, as was I, and for that reason, there is

1 absolutely nothing in the record that indicates that you
2 are deserving of any mercy.

3 The maximum sentence for this is 30 years.
4 I'm imposing the sentence of 30 years on you. The law
5 requires that I give you credit for the time you have
6 been sitting in jail waiting for trial, so I'm required
7 to do that, but I'm putting down here at the end of your
8 sentence, I'm recommending that they would evaluate you
9 for the sexually violent predator program.

10 Frankly, the way the system is run at this
11 point, this conviction would automatically classify as
12 the sort of crime that would be reviewed by the sexually
13 violent committee folks, but I don't know what the law is
14 going to be like in, you know, 20 something years when
15 you become eligible for release.

16 So I'm putting down on here that it is my
17 recommendation as the trial judge that you be evaluated
18 for that program, and if -- that is basically a civil
19 procedure where we go through a process and they
20 determine, based on his past convictions and the
21 circumstances surrounding that, if there is a
22 recommendation that he be declared to be a sexually
23 violent predator and a jury hears evidence and makes that
24 determination, then he is committed to the Department of
25 Mental Health for an indefinite period. It could be the

1 rest of his life, but they make an evaluation on that.

2 He has the right to have that reviewed on a
3 yearly basis, and if a jury, you know, a couple decades
4 from now determines that he's no longer a threat, then he
5 would be allowed to be free, but, frankly, somebody with
6 his kind of background, without a tremendous amount of
7 treatment, it's unlikely that he'll ever walk the streets
8 again, either through this conviction or the sexually
9 violent predator program, I think would, based on what
10 I've heard, and this record that he has, very likely keep
11 him off the streets, but that's down in the future.

12 You never know. This is a no parole offense,
13 and so he's not eligible for parole. He has to do 85
14 percent of this sentence, so he's got close to 20 more
15 years to do since it sounds like he's got credit for
16 close to nine that he's been while he's awaiting trial.

17 So that is the sentence of the Court, 30
18 years in the department of correction with credit for
19 time served. Good luck.

20 Folks, I again want to thank you for your
21 service. You are free to go, and we thank you on behalf
22 of the State of South Carolina for your service this
23 week.

24 (Jury dismissed.)

25 THE COURT: All right. Well, we're done.

1 MS. LOVELL: I would like to make a post
2 conviction motion. The defense makes a motion that the
3 Court would entertain a JNOV, motion for JNOV.

4 THE COURT: On what grounds?

5 MS. LOVELL: That the state didn't prove the
6 evidence beyond a reasonable doubt.

7 THE COURT: All right. That motion is
8 denied. Anything else?

9 MS. LOVELL: And also that we would receive a
10 new trial based on the admittance of some of the rulings
11 of evidence. Inadmissible testimony under Lyle would be
12 one of those.

13 THE COURT: That's denied as well.

14 MR. BANNON: Nothing further from the state.

15 THE COURT: All right. Thank y'all.

16 - - -

17 (Whereupon, the proceedings were concluded.)

18 - - -

19

20

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22

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25

WITNESSES

FLORENCIO/BCSD

ARREST WARRANT NUMBER

F788500

08/28/2003

ACTION OF GRAND JURY

True Bill

John S. Miller

Forfeiture of Grand Jury

Date: SEP 25 2003

VERDICT

Guilty

John E. Murray

Forfeiture of Petit Jury

Date: 9-21-11

DOCKET NO.

2003-GS-07-01756

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III., Solicitor

COURT OF GENERAL SESSIONS

09/25/2003

TERM

THE STATE

VS.

SMITH, ARTHUR FRANKLIN

Indictment for

Sex/Crim sex conduct w/min <11yrs-1st d e

SC Code : 16-03-0655

CDR Code: 0385

Class:

STATE OF SOUTH CAROLINA

INDICTMENT

2003-GS-07-01756

COUNTY OF BEAUFORT

At a Court of General Sessions, convened on 09/25/2003 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

Sex/Crim sex conduct w/min <11yrs-1st de

16-03-0655

THAT ARTHUR SMITH DID IN BEAUFORT COUNTY BETWEEN 5-1-99 AND 5-31-00 DID
WILFULLY AND UNLAWFULLY PERFORM ORAL AND ANAL SEX ON HIS SON,
A MINOR/AGE 7-9. HE ALSO FORCED HIS SON TO PERFORM ORAL AND ANAL SEX ON
HIM. THE DEFENDANT THREATENED TO "BREAK HIS BONES" AND OTHER PHYSICAL
ABUSE IN ORDER TO FORCE HIM TO COMPLY.

Against the peace and dignity of the State, and contrary to the statute in
such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

10-30 yrs

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Beaufort
STATE VS.

Arthur Franklin Smith

INDICTMENT/CASE# 2003GS0701756

A/W# F788500

Date of Offense: 8/28/2003

S.C. Code § 16-03-0655(1)

CDR Code# 0385

AKA:

Race: U Sex: M Age: 48

DOB: SS#:

Address:

City, State, Zip: BEAUFORT, SC 29906

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Sex / Criminal sexual conduct with minor - victim under 11 yrs of age - First de

in violation of § 16-03-0655(1)

of the S.C. Code of Laws, bearing CDR Code# 0385

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st of Lewd Act) ☐ §17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☒ Recommendation by the State.

ATTEST

Defendant: [Signature] SC Bar# 77912 Attorney for Defendant: [Signature] SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$ provided that upon the service of days/months/years and/or payment of \$ plus costs and assessments as applicable*, the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C. Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Receipts:

*Fines:

§ 14-1-206 (Assessments 107.5%)	\$	\$
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def Prob)	\$500	\$
§ 14-1-212 (Law Enforcement Funding)	\$24	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114 (BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(1) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCOA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)	\$	\$ 3.90
TOTAL		\$ 1,393.90

Clerk of Court/Deputy Clerk

Court Reporter:

SCCA/217 (03/2011)

PTUP: days/hours Public Service Employment

Obtain GED ☐Attend Voc. Rehab. or Job Corp. ☐May serve W/E beginning ☐Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning

\$ paid to Public Defender Fund

Other: Monitored probation for Sexually Violent Predator at appropriate times☐ Appointed PD or appointed other counsel, § 47-12 requires \$500 be paid to Clerk during probation.

Presiding Judge

Judge Code: 2134

Sentence Date: 9/10/11

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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."

April 26, 2013

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

FINAL BRIEF OF APPELLANT

BREEN RICHARD STEVENS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court reversibly erred by permitting testimony of the forensic interviewer regarding the identity of Appellant as the individual who molested the complaining witness during Appellant's trial for criminal sexual conduct with a minor where the trial court previously ruled such identification was impermissible?
- II. Whether the trial court reversibly erred by permitting testimony of the State's expert in the field of sexual deviancy regarding the relationship of the length of delay in an individual's disclosure of sexual abuse and the credibility of such disclosure?
- III. Whether the trial court reversibly erred by permitting the Complaining Witness to refresh his recollection by reading his testimony from the previous trial to refresh his recollection after he could not remember specific details of the alleged incident, where the Complaining Witness' prior testimony was tainted by in-court coaching and formed the basis for the first trial court's grant of a new trial?

STATEMENT OF THE CASE

Appellant Arthur Smith was indicted by the Beaufort County grand jury on September 25, 2003, for first degree criminal sexual conduct with a minor (CSCM 1st). R. 71; R. 235 (Indictment). His case proceeded to trial before the Honorable Jackson V. Gregory and a jury. The jury found Appellant guilty, and the trial court sentenced him to twenty years.

The next day, the court heard testimony regarding Appellant's motion for a new trial based on the in-trial coaching of the minor child witness by his guardian, Cynthia Solak. The trial court granted Appellant's motion for a new trial, finding: (1) that the guardian used body language and other non-verbal signals in the courtroom during the child's testimony and such communications were directed at the child during his testimony; (2) that such behavior on the part of the guardian may have overridden the child's free will; and (3) that the guardian's behavior and the potential for corruption of the child's testimony clearly denied Appellant of a fair trial.

The State appealed the trial court's order. On February 5, 2007, the South Carolina Court of Appeals affirmed the grant of a new trial. The State's petition for certiorari to the Court of Appeals was granted on December 6, 2007. On June 22, 2009, the South Carolina Supreme Court held that, "[i]n view of the clearly improper 'coaching' by Solak of the minor victim, we find the judge did not abuse his discretion or commit an error of law in granting . . . a new trial."¹ Consequently, the Court of Appeals opinion was vacated because "the State did not have a right to appeal the trial judge's order."

¹ State v. Smith, 383 S.C. 159, 164, 679 S.E.2d 176, 179 (2009).

Appellant's case was called again for trial on the charge of CSCM 1st, this time before the Honorable Roger M. Young, Sr., and a jury from September 19 through 21, 2011. R. 68. Gail Lovell (Counsel) represented Appellant, while James Bannon represented the State. R. 68. Appellant was found guilty, and the trial court sentenced him to thirty years incarceration. R. 220, lines 10-19; R. 232, line 3—R. 233, line 19; R. 237 (Sentence sheet).

STATEMENT OF THE FACTS

Appellant Arthur Smith's case resulted in the grant of a new trial due to in-trial coaching of the Complaining Witness² by his aunt Cynthia Solak (Solak).³ That ruling was appealed by the State, and ultimately decided by the South Carolina Supreme Court. Specifically, the Court found as follows:⁴

Because [Complaining Witness] was the key witness in the prosecution's case, we cannot disregard the trial judge's conclusion concerning the prejudicial impact on [Smith's] right to a fair trial.

.

In view of the clearly improper 'coaching' by Solak of the minor victim, we find the judge did not abuse his discretion or commit an error of law in granting . . . a new trial.

As a result, the Supreme Court vacated the opinion of the Court of Appeals because "the State did not have a right to appeal the trial judge's order."

On September 19, 2011, a pretrial motions hearing was held in Appellant's retrial, at which the State called several witnesses including the Complaining Witness. R. 1; R. 24, line 3—R. 35 line 14. During the Complaining Witness' testimony, he could not recall certain conduct allegedly committed by Appellant. Specifically, the Complaining Witness did not recall instances of oral sex. R. 26, lines 19-21. The State then sought to refresh the Complaining Witness' memory regarding these allegations by having him read his prior impermissible testimony from Appellant's first trial—the same trial that resulted in the grant

² The Complaining Witness was twelve years of age when he testified at Appellant's first trial, and nineteen years of age at the time of the present trial.

³ R. 88, lines 2-24; State v. Smith, 383 S.C. 159, 679 S.E.2d 176 (2009).

⁴ Smith, 383 S.C. at 168, 679 S.E.2d at 181 (emphasis added).

of a motion for new trial due to the Complaining Witness' testimony being tainted by in-trial coaching from Solak:

Q. Now, . . . do you remember testifying in a hearing prior to this one?

A. Yes.

Q. Okay. And would seeing a transcript of that hearing refresh your recollection as to what might have occurred?

A. Yeah.

R. 26, line 22—R. 27, line 2. Counsel objected as follows:

Objection, your honor. I object to the form which you are showing him the transcript. . . . I don't think he can read it over and then testify. So that would just remind him of the things that he's not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from.

R. 27, lines 5-11 (emphasis added).

During the course of discussion on the matter, Counsel repeatedly objected to the use of the Complaining Witness' prior testimony. R. 29, lines 3-9; R. 33, line 24—R. 34, line 4. However, the trial court ultimately ruled that the State was allowed to refresh the Complaining Witness' recollection with his prior testimony, observing that the only issue was whether the Complaining Witness' memory should be refreshed there at the pretrial hearing, later that day, or the following day before the jury:

Well, ultimately one way or another, he's going to get a chance to refresh his memory, whether it's at this hearing today or it's after the hearing today or in front of the jury tomorrow. As long as the defense gets the opportunity to talk about how his memory of this incident was not so clear before he had it refreshed, and I suppose that's the way to cure that.

R. 31, line 24—R. 34, line 13; R. 33, lines 5-22 (emphasis added). The State sought and was permitted to use the prior improper testimony at the pretrial hearing, after which the Complaining Witness testified that oral sex occurred, as well as threats by Appellant after the alleged offense. R. 31, lines 21-23; R. 34, line 3—R. 35, line 5.

The following day during trial, the Complaining Witness' testimony before the jury included the information from the prior trial that the State used during the pretrial hearing to refresh his recollection. R. 108, lines 15-17; R. 109, lines 11-13; R. 109, lines 21-25; R. 110, lines 17-24. Counsel later renewed her objection as follows:

And I also need to put something on the record that I wanted to bring out and reinforce that I had made objections in limine, motions in limine, objecting to the testimony of [Sibling 1], [Sibling 2], [Solak], and [Complaining Witness], and I wanted to be sure that that was an ongoing objection. While I may not have mentioned at the time they were coming in, I wanted to make sure the record was preserved that I did object. I do want a continuing objection to their testimony.

R. 141, line 21—R. 142, line 4. The trial court acknowledged her objection by saying, "All right." R. 142, line 5. Counsel then asked if that could be part of the record, and the court further confirmed Counsel's objection by stating, "So noted. Okay." R. 142, lines 6-8.

The State also presented forensic interviewer Kendra McIlvee Twitty (Twitty) as a witness in its case-in-chief. R. 142, lines 14-18. At one point, Twitty testified that the Complaining Witness "disclosed that he had to suck his dad's penis," and the trial court sustained Counsel's objection. R. 148, line 8-14. The court further admonished that "the question was the time and place. I instruct the jury to disregard that last answer." R. 148, lines 12-14. However, Twitty again provided testimony regarding Appellant's identity as the alleged perpetrator:

Q. If I would show you a copy of your report, would it refresh your recollection as to the time frame of the abuse?

A. Absolutely.

.....

Okay, I had written [Complaining Witness] reported that he was about six or seven years old when his dad started doing these things to him.

R. 149, lines 6-15 (emphasis added). Yet, the trial court overruled Counsel's timely objection, and permitted the testimony to stand. R. 149, lines 16-17.

Tod Lynch-Stanley (Lynch-Stanley) also testified on behalf of the State, and was qualified as an expert in the field of sexual deviancy. R. 178, lines 19-20; R. 181, lines 12 – 14. The State not only elicited testimony regarding delayed disclosure by a victim of sexual abuse, but also elicited testimony regarding the impact of delayed disclosure on credibility:

Q. Does the length of the delay in the disclosure have any—in your opinion, does it erode the credibility of the disclosure?

R. 189, line 5—R. 192, line 24; R. 196, lines 21-23 (emphasis added).

Over Counsel's immediate objection, the trial court permitted Lynch-Stanley to testify:

No, it really doesn't.

.....

I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure.

R. 197, lines 1-22 (emphasis added).

The jury found Appellant guilty as charged. R. 220, lines 10-19. The trial court imposed a sentence of thirty years incarceration. R. 232, line 3—R. 233, line 19; R. 237 (Sentence sheet). This appeal follows.

ARGUMENT

- I. The trial court reversibly erred by overruling Counsel's objection to testimony of the forensic interviewer regarding the identity of Appellant as the individual who molested the complaining witness during Appellant's trial for criminal sexual conduct with a minor where the trial court previously ruled such identification was impermissible.**

The trial court reversibly erred by permitting Twitty to testify regarding the identity of Appellant as the alleged perpetrator of the offense. Such testimony is expressly forbidden by both the South Carolina Rules of Evidence and case law. Further, Appellant was prejudiced by Twitty's improper testimony, particularly due to its cumulative effect with the Complaining Witness' testimony. As a result, Appellant respectfully requests reversal of his conviction, and remand of his case for a new trial.

"The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted unless an exception to the rule applies." Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) (reversing the PCR court where counsel was ineffective for failing to object to hearsay evidence that corroborated the victim's testimony). One exception permits corroborative testimony in criminal sexual conduct (CSC) cases, the scope of which is limited to the time and place of the alleged assault. Smith v. State, 386 S.C. 562, 566, 689 S.E.2d 629, 632 (2010) (interpreting and applying Rule 801(d)(1), SCRE). "The corroborative testimony cannot include 'details or particulars' regarding the assault." Id. Moreover, the limited exception in CSC cases permitting such corroborative hearsay testimony applies when the victim testifies. Dawkins, 346 S.C. at 156, 551 S.E.2d at 262 ("When the victim testifies, evidence from other witnesses is that the victim complained of the sexual assault is admissible in corroboration.").

In the present case, the trial court repeatedly acknowledged the rule restricting corroborative hearsay testimony to time and place in cases of alleged sexual abuse. In fact, at one point, the court specifically cautioned the State regarding such testimony. Yet, even after once sustaining Counsel's objections to testimony from Twitty identifying Appellant as the alleged perpetrator of sexual abuse to the Complaining Witness, the trial court failed to sustain Counsel's objection to the same when Twitty again gave such impermissibly corroborating hearsay testimony:

Okay, I had written [Complaining Witness] reported that he was about six or seven years old when his dad started doing these things to him.

R. 149, lines 6-15 (emphasis added).

This testimony went well beyond merely the time and place of the alleged offense, and specifically included the identification of Appellant as the perpetrator of sexual abuse. As a result, the trial court erred in failing to sustain Counsel's objection, and instead permitting improper testimony.

Appellant was also prejudiced by the forensic interviewer's improper corroborating hearsay. First, although Twitty's testimony was cumulative the Complaining Witness' testimony, "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Accordingly, admission of the evidence mandates reversal of the conviction." State v. Barrett, 299 S.C. 485, 487, 386 S.E.2d 242, 243 (1989); see also Smith, 386 S.C. at 567, 689 S.E.2d at 632 (quoting with approval Dawkins, 346 S.C. 156-57, 551 S.E.2d at 263). Second, there was no physical evidence in the case to corroborate the allegations. Therefore, the testimonial evidence against Appellant regarding the specific

offense alleged was bolstered by the improper hearsay testimony of Twitty in the eyes of the jury. As a result, Appellant was prejudiced by the trial court's erroneous ruling.

II. The trial court reversibly erred by overruling Counsel's objection to testimony of the State's expert in the field of sexual deviancy regarding the relationship of the length of delay in an individual's disclosure of sexual abuse and the credibility of such disclosure.

The trial court reversibly erred by permitting testimony regarding the credibility of a witness' disclosure where disclosure was delayed. Such testimony improperly bolstered the credibility of the Complaining Witness in the case where Lynch-Stanley treated the Complaining Witness, and where his disclosure regarding the alleged offense was delayed.

"The law is clear that it is improper for a witness to give testimony as to his or her opinion about the credibility of a child victim in a sex abuse matter." State v. Hill, 394 S.C. 280, 294, 715 S.E.2d 368, 376 (Ct. App. 2011)). This is because "[t]he assessment of witness credibility is within the exclusive province of the jury." State v. McKerley, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (2012) (citing State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977)).

In the case at bar, Lynch-Stanley's testimony constituted improper bolstering of the Complaining Witness' credibility. The State specifically asked:

Does the length of the delay in the disclosure have any—in
your opinion, does it erode the credibility of the disclosure?

R. 196, lines 21-23 (emphasis added). Lynch-Stanley replied, "No, it really doesn't. . . . I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure." R. 197, lines 1-22 (emphasis added). Therefore, in his capacity as an expert, Stanley-Lynch was essentially permitted to tell the jury that the delay in the Complaining Witness' disclosure of the alleged abuse does not affect the credibility of that disclosure. Such testimony on the witness' credibility is forbidden. Accordingly, the trial court erred in allowing Lynch-Stanley's testimony regarding credibility.

Further, Appellant was prejudiced by the trial court's error. The heart of the State's case relied upon the jury's determination of witness credibility. The evidence introduced by the State to prove the charged offense was not physical evidence, such as DNA, or even results of a physical examination. Rather, the evidence against Appellant was largely testimonial from the Complaining Witness regarding specific conduct comprising the alleged offense, and from the Complaining Witness' two siblings who testified regarding alleged instances of prior bad acts by Appellant pursuant to Rule 404(b) of the South Carolina Rules of Evidence. Importantly, the testimony from the Complaining Witness and each of his siblings included instances of delayed disclosure. As a result, the expert witness' impermissible testimony improperly bolstered not only the credibility of the Complaining Witness' testimony, but also the credibility the two 404(b) witnesses. Accordingly, because credibility was crucial to the State's case, Appellant was prejudiced by the trial court's error. See, e.g., State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94-95 (2011) (reversing where "[t]he only evidence presented by the State was the children's accounts of what occurred and other hearsay evidence of the children's accounts."); State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) ("An officer's improper opinion which goes to the heart of the case is not harmless."). As such, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

III. The trial court reversibly erred by permitting the Complaining Witness to read his testimony from the previous trial after he could not remember specific details of the alleged incident, where the Complaining Witness' prior testimony was improper and formed the basis for the first trial court's grant of a new trial.

The trial court erred by allowing the State to use the Complaining Witness' prior trial testimony to refresh his recollection at Appellant's present trial where the Complaining Witness' testimony from the first trial was tainted by in-trial coaching to the point that it caused the first trial court to grant a new trial. Although Rule 612 of the South Carolina Rules of Evidence generally permits refreshing a witness' recollection with prior writings, it was used here by the State to reintroduce tainted testimony that was so prejudicial to due process and fundamental fairness that it caused a new trial in the first case. The trial court erroneously permitted the Complaining Witness to refresh his recollection regarding substantive matters pertaining directly to the allegations against Appellant by using the testimony from the first trial that was tainted by in-trial coaching. Therefore, Appellant respectfully requests reversal of his conviction, and remand for a new trial.

Rule 612 of the South Carolina Rules of Evidence generally permits a witness to use a writing to refresh his memory for the purpose of testifying either (1) while testifying, or (2) before testifying, so long as the adverse party is permitted to inspect the writing and cross-examine the witness on it "if the court in its discretion determines it is necessary in the interests of justice." Rule 612, SCRE; See also State v. Dean, 72 S.C. 74, 51 S.E. 524, 526 (1905) ("[T]he rule is stated that a witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own testimony at a previous trial, or from a copy of the same.").

However, the use of prior testimony to refresh a witness' recollection is not unfettered. As indicated by the United States Supreme Court in United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S.Ct. 811 (1940), the use of prior sworn testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge. Id. 310 U.S. at 233, 60 S.Ct. at 849 (addressing the use of witness' prior grand jury testimony to refresh recollection at trial). Thus, the trial court's decision is still subject to review under the abuse of discretion standard. For example, "there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence." Id. 310 U.S. at 234, 60 S.Ct. at 849. Further, use of such material could be prejudicial in cases "where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in a delicate balance if that testimony was deleted." Id. 310 U.S. at 235, 60 S.Ct. at 850.

Additionally, the competence of the proposed writing must also be established prior to its use. As the United States Supreme Court also indicated in Putnam v. United States, 162 U.S. 687, 16 S.Ct. 923 (1896), it is "clear that, where a memorandum or writing is presented to a witness for the purpose of refreshing his memory, it must either have been made by the witness or under his direction, or he must be connected with it in such a way as to make it competent for the purpose for which it is proposed to use." Putnam, 162 U.S. at 694, 16 S.Ct. at 926.

In the present case, the State was allowed to "refresh" the Complaining Witness' recollection through the use of incompetent evidence that was not originally the product of his own memory: namely, the trial transcript of the Complaining Witness' prior

testimony that was the product of in-trial coaching. As the South Carolina Supreme Court previously found regarding the Complaining Witness' testimony from the first trial, "[a]ll parties admitted that Solak acted improperly in mouthing words and making nonverbal signs to [Complaining Witness] during his testimony." Smith, 383 S.C. at 181, 679 S.E.2d 167. Thus, the Court agreed that the acts amounted to "clearly improper 'coaching' by Solak of the minor victim," and determined that "the trial judge properly exercised his authority to grant a new trial upon the facts given 'an injustice had been done' during the trial." Smith, 383 S.C. at 181-82 n.3, 679 S.E.2d 168-69 n.3. Therefore, the Complaining Witness' trial testimony from Appellant's first trial was irreparably tainted and unquestionably incompetent: it was the product of in-trial coaching. See, e.g., Huggins v. Winn-Dixie Greenville, Inc., 252 S.C. 353, 357, 166 S.E.2d 297, 299 (1969) ("It is well settled in this jurisdiction that a decision of this court on a former appeal is the law of the case."); see also Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.") (emphasis added) (citing 5 C.J.S. Appeal and Error § 975(a) (1993)). Moreover, the prior "coached" testimony was so tainted and prejudicial that the only way to ensure Appellant's fundamental constitutional right to a fair trial was to grant a new trial. Id.

Yet, in the pretrial hearing of Appellant's second trial, the trial court permitted the State to refresh the Complaining Witness' recollection regarding substantive allegations through the use of his prior tainted testimony. This was error. The Complaining Witness' testimony from the first trial was not a product of his own memory, and the law

of the case is that this tainted testimony was so prejudicial that it warranted a new trial. Indeed, the fact that the Complaining Witness could not recall the allegations of oral sex or threats from Appellant without relying on the transcript testimony tainted by in-trial coaching indicates that such information was never a product of the Complaining Witness' memory in either the first or second trial. In essence, the trial court permitted the State to import into the second trial the same taint that caused a new trial to be granted in the first trial. Cf. State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) (reversing in second trial where the same impermissible testimony regarding foot impressions was entered into evidence that was previously ruled impermissible on appeal from the first trial). As a result, the trial court erred by permitting the State to refresh the Complaining Witness' recollection using the tainted testimony from the first trial.

Appellant was also prejudiced by the trial court's error. As indicated above, the Complaining Witness was unable to recall or make any allegations regarding forced oral sex or threats by Appellant without resorting to prior tainted testimony. Thus, the State would not have been able to support these particular aspects of alleged conduct to either the trial court during the pretrial hearing, or to the jury during the trial itself without first resorting to the tainted testimony.

Further, the State's proffered 404(b) testimony of the Complaining Witness' siblings regarding prior bad acts under a theory of common scheme or plan would not likely have been admissible without the common testimonial thread of forced oral sex followed by threats to satisfy the substantial similarity requirement. Major components of similarity between the acts allegedly done to the Complaining Witness and the acts allegedly done to the siblings relied upon by both the State in its proffer, and the trial

court in its ruling admitting the 404(b) testimony, were the alleged acts of oral sex and threats by Appellant.⁵ R. 38, line 25—R. 39, line 20; R. 40, line 18—R. 41, line 12.

Therefore, without the specific allegations by the Complaining Witness of oral sex and accompanying threats—which the State supplied to the Complaining Witness through the use of tainted testimony from the first trial—the State would not likely have been able to meet the similarities requirement for admission of the 404(b) testimony from the Complaining Witness’ siblings. State v. Wallace, 384 S.C. 428, 433-34, 683 S.E.2d 275, 277-78 (2009) (“When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity.” Also listing factors the trial court should consider “when determining whether there is a close degree of similarity between the bad act and the crime charged.”).

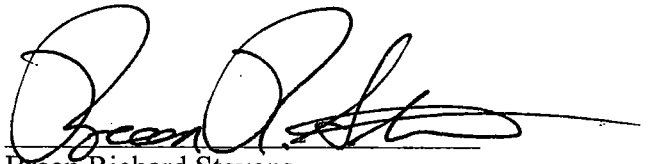
Accordingly, Appellant was prejudiced by the trial court’s error. He respectfully requests reversal of his conviction, and remand for a new trial.

⁵ The remaining two factors relied upon by the court were approximate age ranges of the Complaining Witness and his siblings when each was allegedly abused, and location in the house of the alleged conduct. R. 40, line 18—R. 41, line 12.

CONCLUSION

For the foregoing reasons, Appellant Arthur Smith respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", written over a horizontal line.

Breen Richard Stevens
Appellate Defender

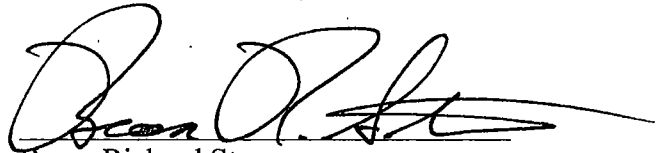
ATTORNEY FOR APPELLANT

This 16th day of May, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability 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."

May 16, 2013

A handwritten signature in black ink, appearing to read "Breen Richard Stevens", with a long horizontal flourish extending to the right.

Breen Richard Stevens
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARTHUR SMITH,

APPELLANT

APPELLATE CASE NO. 2011-200306

CERTIFICATE OF SERVICE

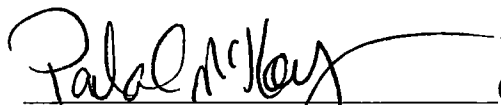
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2013.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2011-200306

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ARTHUR SMITH,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. **The testimony of the forensic interviewer going beyond “time and place” was merely cumulative to other testimony in the record and admission of the testimony was harmless.**

- II. **Assuming the issue was preserved for review, the trial court properly permitted testimony from the expert witness, who was not the forensic interviewer of the victim, regarding the length of delay in making a disclosure and its effect on the credibility of a disclosure where Appellant opened the door to this testimony in his cross-examination of the expert. Further, Appellant was not prejudiced where the expert never vouched for the credibility of the particular victim in this case.**

- III. **Assuming the issue was preserved for review, the trial judge properly allowed the victim to refresh his recollection using a transcript from the previous trial and Appellant was not prejudiced.**

STATEMENT OF THE CASE

Appellant was indicted in Beaufort County in September 2003 for criminal sexual conduct with a minor in the first degree. He proceeded to trial on November 15-16, 2004, before the Honorable Jackson V. Gregory and the jury found him guilty. Judge Gregory sentenced Appellant to twenty years. Appellant subsequently moved for a new trial. A hearing on Appellant's motion for new trial was held on November 17, 2004. In a written order dated April 19, 2005, Judge Gregory granted Appellant's motion, and the State appealed. On June 22, 2009, the South Carolina Supreme Court affirmed the trial judge's grant of a new trial.

Appellant was tried again before the Honorable Roger C. Young, Sr., and a jury on September 19-21, 2011. The jury found Appellant guilty and Judge Young sentenced Appellant to thirty years. A timely notice of appeal was served and filed.

ARGUMENT

Background

After the victim and his parents moved from Buffalo, New York to Beaufort County, South Carolina, the victim's parents separated and the victim lived primarily with his biological mother. (R. p. 106-107). The victim visited his biological father, Appellant, at his house from time to time. (R. p. 107). During these visits, beginning around when the victim was six years old, Appellant would perform oral and anal sex on the victim. (R. p. 108). He would also make the victim perform oral sex on him and make him try to perform anal sex. (R. p. 109-110). The sexual abuse always occurred in Appellant's house, specifically in Appellant's bedroom, when the two of them were alone. (R. p. 108, lines 18-22). Appellant threatened to kill the victim or break his bones if he told anyone what was happening. (R. p. 110, lines 20-24). The victim stated that the abuse continued for about two years. (R. p. 110, lines 2-5). He testified that the sexual abuse made him feel "terrible" and "angry" and that it hurt. (R. p. 109, lines 11-20). Because he was scared, the victim did not tell anyone about the abuse until after he stopped having contact with Appellant. (R. p. 110-11).

The victim's aunt obtained custody of the victim and his two siblings in November 2001. (R. p. 91). At the time, the victim was "acting out" and exhibiting behavior that was "concerning." (R. p. 92). Specifically, the victim fondled other children, was physically aggressive, and destroyed property. (R. p. 92-93). The victim was sent to two different counseling centers because of these behaviors. (R. p. 93-94). One of the victim's counselors testified that it appeared that the victim had been sexually abused and that he was suffering from symptoms of post-traumatic stress disorder. (R. p. 186-88). The victim's aunt learned, in January 2002, that the victim had been sexually

abused. (R. p. 95). After allowing the victim to spend more time in counseling trying to deal with his health issues, she took the victim, in May 2003, to file a police report regarding the sexual abuse. (R. p. 94-95). The victim had a forensic interview shortly thereafter and disclosed that he had been sexually abused in his biological father's bedroom and that it began around age six or seven. (R. p. 148-49). The forensic interviewer recommended that the victim have no contact with his biological father. (R. p. 150, lines 1-4).

The victim's brother testified at Appellant's trial that Appellant also sexually abused him beginning around age six. (R. p. 118-19). The abuse involved oral and anal sex either in Appellant's bedroom or his bedroom, and Appellant threatened to hurt his mother if he told anyone about the abuse. (R. p. 119; p. 122-23). Additionally, the victim's sister testified that Appellant sexually abused her when she was six and seven years old. (R. p. 126-27). She testified that Appellant made her touch his penis with her hand and her mouth, and he would touch her vagina and her "butt." (R. p. 127). The abuse mainly occurred in Appellant's bedroom. Appellant told her that she should not tell anyone about the abuse. (R. p. 128).

Following trial, Appellant was convicted of criminal sexual conduct with a minor in the first degree and was sentenced to thirty years. (R. p. 220; p. 233).

I. The testimony of the forensic interviewer going beyond "time and place" was merely cumulative to other testimony in the record and admission of the testimony was harmless.

Relevant Facts

Before the testimony of the forensic interviewer, the trial judge ruled that the forensic interviewer's testimony would be limited to "time and place" in accordance with Rule 801(d)(1)(D), SCRE. (R. p. 131, lines 17-19; p. 133, lines 13-17). Subsequently,

before the jury, the forensic interviewer was asked whether the victim disclosed abuse to her, and she stated that the victim disclosed that “he had to suck his dad’s penis.” (R. p. 148, lines 8-10). Defense counsel objected, and the judge sustained the objection and instructed the jury to disregard the witness’s last answer. (R. p. 148, lines 11-14). The forensic interviewer then testified that the victim told her the abuse happened when he was around six or seven years old and continued for a number of years, and that the abuse occurred in “his dad’s bedroom.” (R. p. 148, line 19 – p. 149, line 2). Defense counsel again objected, but the court overruled the objection. (R. p. 149, lines 3-4). When the solicitor asked the forensic interviewer to clarify the time frame of the abuse, the forensic interviewer responded that the victim “reported that he was about six or seven years old when his dad started to do these things to him.” (R. p. 149, lines 6-15). Defense counsel objected, and the court overruled the objection. (R. p. 149, lines 16-17). Thereafter, on cross-examination, defense counsel elicited testimony that, following the interview, the forensic interviewer “made a recommendation that [the victim] not have contact with his biological father and that he be supervised at all times when he’s around other children.” (R. p. 149, lines 21 – p. 150, line 5).

Discussion

Assuming the court erred in overruling defense counsel’s objection to the forensic interviewer’s testimony that the victim “reported that he was about six or seven years old when his dad started to do these things to him,” the error was truly harmless under the facts of this case. First, the challenged testimony was merely cumulative, not to the victim’s testimony,¹ but to other un-objected-to testimony; specifically, the testimony of

¹ See *State v. Jennings*, 394 S.C. 473, 478-79, 716 S.E.2d 91, 93 (2011) (distinguishing between improper corroboration testimony that is merely cumulative to *the victim’s testimony* and improper corroboration testimony that is merely cumulative to *other evidence*).

a police officer and other testimony of the forensic interviewer. The first witness in the case, Deputy Florencio, testified that the victim reported that he was “sexually assaulted by his father” in 1999 and 2000. (R. p. 82, lines 15-21). There was no objection to this testimony. Later, the forensic interviewer properly testified that the victim reported that the abuse happened in “his dad’s bedroom.” (R. p. 149, lines 2-4). See Rule 801(d)(1)(D), SCRE (permitting testimony limited to the time and location where the abuse occurred). Further, on cross-examination, defense counsel elicited testimony from the forensic interviewer that, after the interview, she recommended the victim “not have contact with his biological father.” (R. p. 150, lines 1-4). See, e.g., State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30 (1972) & State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) (a defendant cannot complain of an error which results from his own conduct, or to which his conduct has contributed).

The testimony being challenged on appeal was merely cumulative to the other testimony properly in the record. See State v. Kirton, 381 S.C. 7, 44, 671 S.E.2d 107, 126 (Ct. App. 2008) (sex abuse case where the court held that improper testimony which corroborated the victim was harmless where it was cumulative to other un-objected-to testimony in the record); see also State v. White, 361 S.C. 407, 415, 605 S.E.2d 540, 544 (2004); State v. Price, 368 S.C. 494, 499-500, 629 S.E.2d 363, 366 (2006); State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Additionally, in the context of this case, where there was no genuine dispute about the identity of the perpetrator (see R. p. 77, line 18 – p. 79, line 6; p. 79-130; p. 142-50; p. 178-98; p. 202-203), the challenged testimony was insignificant and could not have affected the verdict. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of

the trial). The jury was well aware Appellant was the one accused of this crime and there was no suggestion anywhere in the record that anyone else committed the crime. Finally, although largely testimonial in nature, the evidence of Appellant's guilt was overwhelming. (See R. p. 79-130; p. 142-150; p. 178-98). See State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant's guilt). For all of these reasons, the challenged testimony was harmless beyond a reasonable doubt and its admission does not warrant reversal of Appellant's conviction.

- II. Assuming the issue was preserved for review, the trial court properly permitted testimony from the expert witness, who was not the forensic interviewer of the victim, regarding the length of delay in making a disclosure and its effect on the credibility of a disclosure where Appellant opened the door to this testimony in his cross-examination of the expert. Further, Appellant was not prejudiced where the expert never vouched for the credibility of the particular victim in this case.**

Relevant Facts

Tod Lynch-Stanley was qualified as an expert in "sexual deviancy" over the objection of the defense. (See R. p. 178-81). The judge immediately instructed the jurors that they were not required to accord extra weight to an expert's opinion and that they could give an expert's testimony as much weight as they felt it deserved.² (R. p. 181-82). Thereafter, the expert testified that he began treating the victim several years ago for "sexual acting out behavior" and other "aggressive behavior." (R. p. 182-83). He testified that in the course of treating the victim, he learned that the victim made a disclosure of sexual abuse. (R. p. 183, lines 18-21). He also testified that it appeared to him that the victim had been sexually abused. (R. p. 186, lines 1-5). However, he stated

² The judge elaborated on this instruction in the final jury charge. (See R. p. 215, line 17 – p. 216, line 15).

that his focus was on treating the symptoms the victim was experiencing rather than “trying to uncover sexual abuse.” (R. p. 186, lines 7-9). The expert further testified that the victim appeared to have symptoms of post-traumatic stress disorder. (R. p. 186, lines 11-17). He then discussed the phenomenon of “delayed disclosure” and testified that delayed disclosure is typically caused by shame, intimidation, and fear of the consequences of telling someone about the abuse. (See R. p. 189-91). He also testified that generally, the longer the delay, the more extensive the abuse. (R. p. 191, lines 15-19). He indicated that the length of delay is correlated with the degree of shame, which could be heightened by the fact that the abuser was a family member. (R. p. 192, lines 5-15).

On cross-examination, defense counsel inquired about delayed disclosure and asked what a “long period of delayed disclosure” would be. (R. p. 195, lines 13-16). The expert testified that a long delayed disclosure would be anything longer than two or three months. (R. p. 195, lines 24-25). He elaborated that some disclosures occur within minutes, while others occur after two or three months or after twenty years. (R. p. 196, lines 1-3). He agreed with defense counsel that a disclosure that occurred within a few minutes would not be a delayed disclosure. (R. p. 196, lines 4-8). When defense counsel asked him to classify a three-year delay, the expert testified “that would be a fairly long delayed disclosure.”³ (R. p. 196, lines 13-14).

In response, on re-direct, the solicitor asked whether, in his opinion, the length of the delay in a disclosure would erode the credibility of the disclosure. (R. p. 197, lines 21-23). Defense counsel objected but did not state any particular grounds. (R. p. 196,

³ The victim in this case disclosed the abuse by Appellant approximately three years after it ended. (See R. p. 89-95; p. 104-111).

lines 24). The judge overruled the objection. (R. p. 196, line 25). The expert then testified as follows:

No, I really doesn't. People disclose at different times. Different things, again, triggers and things like that, can come up that cause people more symptoms, so – and the other part of PTSD, the symptoms come up and PTSD occurs at different times when the trauma gets reenacted in some way and starts to overtake the person.

PTSD is really the body's efforts to try and cope with the trauma that's occurred, and then the body isn't coping anymore. And so what happens is that's when you see these more outlandish types of behaviors. So you might have someone who doesn't show symptoms of sexual abuse for a year, six months, eighteen months, and then, all of a sudden, something triggers them and reminds them of the abuse and helps to reenact it in some way, and then they start to act out and do those things.

So that's why you have disclosures that occur at different times as well, so I never see it as a credibility or non-credibility thing. I think when you're looking at credibility, you're looking for other types of things, but not necessarily the length of disclosure. (R. p. 197, lines 1-22).

Issue Preservation

Appellant now argues the trial judge erred by permitting the above-quoted testimony of the expert. Initially, the State submits that this issue is not preserved for review. In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). An appellant is limited to the arguments he makes at trial. See, e.g., State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Here, Appellant stated no specific grounds for his objection to the expert's testimony, and the judge did not rule on any specific grounds. Therefore, the issue is not preserved for appellate review. See, e.g., State v. Patterson, 324 S.C. at 17-18, 482 S.E.2d at 765-66 (a general objection which fails to specify the particular ground on which the objection is based is insufficient to preserve a question for review; a trial judge does not err by overruling a general objection); State v. Hess, 279 S.C. 14, 19, 301 S.E.2d 547, 550 (1983) (general objection to evidence did not bring the specific error to the trial court's attention; therefore, the issue raised on appeal was not preserved for review); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (an objection must be made with sufficient specificity to inform the judge of the point being urged); see also State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (failure to request a more explicit ruling constitutes a waiver of any objection to a trial court's general ruling regarding admissibility); compare State v. Foster, 354 S.C. 614, 621, 582 S.E.2d 426, 429 (2003) (issue was sufficiently preserved for review where counsel objected *and added that* he was objecting because the statement would "add to" the witness's credibility).

Discussion

Assuming the issue was preserved, the trial judge did not err in allowing the solicitor to elicit the testimony in question because Appellant opened the door to this testimony via his cross-examination of the expert. Defense counsel spent much of her cross-examination asking about the length of delay in disclosures, the clear implication being that the longer a victim waited to disclose sexual abuse, the less credible the victim. (See R. p. 195-96). The solicitor had a right to respond since defense counsel's suggestion was misleading to the jury. As the expert explained, delays in the disclosure

of sexual abuse are extremely common for a variety of reasons.⁴ (See R. p. 170-71). See also John E. B. Meyers, Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion, 14 U.C. Davis J. Juv. L. & Pol'y 1, 45-46 (2010) ("Psychological research demonstrates that delayed reporting is common among sexually abused children.) (citations omitted). Laypersons such as jurors may not understand this, and, without correction of defense counsel's suggestion, there was a danger that the jurors would be improperly misled into concluding that a lengthy delay in the disclosure of sexual abuse renders the disclosure not credible. See State v. Myers, 359 N.W.2d 604, 609-610 (Minn. 1984) (The nature, however, of the sexual abuse of children places lay jurors at a disadvantage. . . If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. . . [U]ncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt, and fear, disclosure of the abuse is often long delayed.").

Because Appellant himself opened the door to the challenged testimony, he cannot now complain about it on appeal. See State v. White, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (defendant opened the door to testimony about the victim's credibility where counsel cross-examined the expert witness regarding whether she had cases in which she did not believe the alleged victim); State v. O'Neal, 210 S.C. 305, 312,

⁴ Although not challenged at trial or on appeal, the State submits that the expert's general testimony regarding delayed disclosure, and regarding other behavioral science evidence pertaining to sexual abuse victims, was proper. See State v. Schumpert, 312 S.C. 502, 505, 435 S.E.2d 859, 861-62 (1993); State v. White, 361 S.C. 407, 414-15, 605 S.E.2d 540, 544 (2004); State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999); see also State v. Kennedy, 320 N.C. 20, 31-32, 357 S.E.2d 359, 366-67 (1987); Westbrooks v. State, 309 Ga.App. 398, 401-402, 710 S.E.2d 594, 597-98 (Ga.App. 2011); State v. Cardany, 35 Conn.App. 728, 732, 646 A.2d 291, 294 (Conn. App. 1994).

42 S.E.2d 523, 526 (1947) (holding a defendant may not complain of admission of evidence when he introduced the same kind of evidence on cross-examination); State v. Beam, 336 S.C. 45, 53, 518 S.E.2d 297, 301 (Ct.App.1999) (“Beam cannot complain about the admission of evidence where he opened the door to the evidence.”); see also State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); State v. Harvey, 253 S.C. 328, 339, 170 S.E.2d 657, 662-63 (1969); State v. Smith, 220 S.C. 224, 67 S.E.2d 82, 90-91 (1951).

In any event, Appellant was not prejudiced by the testimony in question because the expert did not ever testify, or even suggest, that he believed the particular victim in this case and thus he did not improperly vouch for the victim’s credibility.⁵ See State v. Douglas, 380 S.C. 499, 503-504, 671 S.E.2d 606, 609 (2009); State v. Hill, 394 S.C. 280, 295, 715 S.E.2d 368, 376-77 (Ct. App. 2011). Accordingly, there was no reversible error.

III. Assuming the issue was preserved for review, the trial judge properly allowed the victim to refresh his recollection using a transcript from the previous trial and Appellant was not prejudiced.

Relevant Facts

During a pre-trial Lyle hearing, the solicitor asked the victim whether there was ever any “oral contact” between himself and Appellant. (R. p. 26, lines 19-20). The victim stated that he could not remember.⁶ (R. p. 26, line 21). The solicitor inquired whether the victim remembered testifying at a previous hearing, and the victim said he did. (R. p. 26, lines 22-24). The victim then testified that seeing a transcript of the previous hearing would refresh his recollection as to what occurred. (R. p. 26, line 25 –

⁵ As mentioned previously, the jurors were thoroughly instructed that they should not accord extra weight to an expert’s testimony simply because of his or her qualification as an expert. (See R. p. 181-82; p. 215, line 17 – p. 216, line 15).

⁶ Notably, more than thirteen years had passed since the abuse began. (See R. p. 104-108).

p. 27, line 2). At that point the solicitor requested permission to approach the witness to hand him a copy of the transcript, and Appellant's counsel objected, stating as follows:

Objection, Your Honor. I object to the form which you are showing him the transcript. I believe that he is – I don't think he can read it over and then testify. So that would then just remind him of the things that he's not testifying to now, which would then go back to our underlying issue of which we are trying to separate out this trial from. (R. p. 27, lines 5-11).

The solicitor responded:

Well, Your Honor, if I may, I think she's objecting to the very procedure by which you refresh your witness's recollection. I asked him if he recalled whether any oral conduct occurred and he said he didn't remember, so I asked him if he testified previously and if looking at a transcript of that would refresh his recollection, and essentially he said yes. (R. p. 27, lines 12-18).

The trial judge noted that, usually, a witness refreshes his or her recollection under Rule 612, SCRE, by using a writing they previously made or a statement they previously gave and adopted. (See R. p. 27, line 19 – p. 28, line 1). He stated that he had never seen a prior trial transcript used to refresh a witness's recollection but noted that "I don't suppose there is anything to stop [the witness] from looking at a prior transcript to refresh his memory at that point anyway." (R. p. 28, lines 4-23). Defense counsel stated "[b]ut then if he didn't remember, I don't understand why we're trying to refresh his recollection when we had a problem with the tenor of the prior case. (R. p. 29, lines 6-9). The solicitor asked the judge whether it would help to have the victim refresh his recollection using "one of the many other different statements" he gave indicating that oral sex occurred. (R. p. 30, lines 9-11).

The judge pointed out that, since the victim was currently testifying in a pre-trial hearing outside the presence of the jury, if he refreshed his recollection at this point and then testified before the jury the next day without having to refresh his recollection, it would appear to the jury that his memory was better than, in fact, it was. (See R. p. 29,

lines 10-23). The judge stated it would hamper the defense to not be allowed to cross-examine the witness regarding the circumstances of refreshing his memory, and stated that "there ought to be some mechanism out of fairness, if nothing else, that [Appellant] gets to come in and say, yesterday afternoon we had a hearing and you testified today that you remember having oral sex, but yesterday your memory wasn't quite so clear, was it?" (Sec R. p. 29, line 19 – p. 31, line 5). The judge ruled that "as long as the defense gets the opportunity to talk about how his memory of this incident was not so clear before he had it refreshed," the victim could refresh his memory. (See R. p. 31, line 24 – p. 32, line 6). The judge then stated that he would allow the witness to go ahead and look at the transcript, which he would deem a "writing." (R. p. 32, lines 7-8; see also p. 32-33).

Appellant's counsel again objected to providing the victim with the transcript to refresh his recollection, stating that she disagreed and that she believed "it's more for me to impeach him with at the trial than it is for this type of hearing." (R. p. 33, line 24 – p. 34, line 2). The judge stated that counsel's objections were noted on the record. (R. p. 34, lines 3-4). Thereafter, the victim refreshed his memory with the trial transcript and subsequently testified that he recalled that Appellant had required him to "suck [Appellant's] penis" and that Appellant had sucked the victim's penis. (R. p. 34, lines 9-20). Later in the pre-trial hearing, following a motion by Appellant to exclude the victim's testimony because he had no vivid recollection of what happened to him and because he has been "unable to remove himself from the influences" of others, the trial judge reiterated that counsel would have "free reign" on cross-examination of the victim and would "get about as much leeway as you want." (R. p. 62, line 15 – p. 63, line 24).

During trial, the victim gave testimony similar to that given in the pre-trial hearing, and Appellant's counsel cross-examined him about having to refresh his memory

at the pre-trial hearing. (See R. p. 108-110; p. 113, lines 9-21). On re-direct, the victim testified that the transcript with which he had refreshed his memory contained his own words and that no one told him to say it was Appellant who abused him. (R. p. 114, lines 1-9). Following the testimony of several other witnesses, Appellant's counsel stated as follows:

And I also need to put something on the record that I wanted to bring out and reinforce that I had made objections in limine, motions in limine, objecting to the testimony of [the victim's two siblings, the victim's aunt, and the victim], and I wanted to be sure that that was an ongoing objection. While I may not have mentioned at the time they were coming in, I wanted to make sure the record was preserved that I did object. I do want a continuing objection to their testimony. . . And if that would be part of the record, I would appreciate it.⁷ (R. p. 141, line 21 – p. 142, line 7).

The judge indicated he was noting her objections for the record. (See R. p. 142, lines 5-8).

Issue Preservation

Appellant now argues that the trial court erred in permitting the victim to refresh his recollection using a transcript from Appellant's previous trial because the victim's prior testimony was "improper and formed the basis for the first trial court's grant of a new trial." However, this argument is not preserved for appellate review because Appellant never made this specific argument below to the trial judge. Appellant's counsel's objection was, apparently, that she did not believe the State should be allowed to refresh the witness's recollection if he could not remember the events, and that she felt refreshing recollection was a tool for her to use to impeach the witness rather than for the State to use. (See R. p. 27, lines 5-11; p. 29, lines 6-9; p. 33, line 24 – p. 34, line 2).

⁷ Presumably, defense counsel was renewing her objections to the Lyle testimony that was ruled admissible in the pre-trial hearing (see R. p. 14-18; p. 39-40); to the victim's testimony (see R. p. 62-63); and to the victim's aunt's testimony (see R. p. 64-66).

Appellant never argued below that the victim should not be permitted to refresh his memory with the prior trial transcript because the prior testimony was “tainted by in-trial coaching.” (Brief of Appellant, p. 16). Because Appellant never argued this ground below, the parties never discussed it below and the trial judge never addressed it.

For all of these reasons, the issue Appellant raises on appeal is not preserved for appellate review. See, e.g., State v. Tucker, 319 S.C. 425, 427-28, 462 S.E.2d 263, 264-65 (1995) (a party may not argue one ground below and then argue different ground on appeal); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (for an objection to be preserved for appellate review, the objection must be made with sufficient specificity to inform the circuit court judge of the point being urged); State v. Bennett, 328 S.C. 251, 260, 493 S.E.2d 845, 849 (1997) (an objection that is too vague will not preserve an issue for appellate review); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. at 422, 526 S.E.2d at 725 (preservation requirements are meant to enable the lower court to rule properly after it considered *all relevant facts, law, and arguments*) (emphasis added); Atl. Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (the appellate court should follow longstanding precedent and resolve an issue on preservation grounds when it is clearly unpreserved).

The Trial Judge Did Not Abuse His Discretion

Even assuming the issue was preserved for appellate review, the trial judge did not err in allowing the victim to refresh his recollection using the transcript from Appellant’s previous trial. Rule 612, SCRE indicates, in pertinent part, that a witness may use “a writing” to refresh his memory for the purpose of testifying, either while testifying or before testifying. See Rule 612, SCRE. “[A] witness may refresh his memory from notes taken by counsel or other persons at a former trial, or from his own

testimony at a previous trial, or from a copy of the same.” State v. Dean, 72 S.C. 74, 51 S.E. 54 (1905). It is not required that the refreshing material be made by the witness himself because it is *the recollection of the witness*, not the memorandum, that is in evidence. State v. Broome, 268 S.C. 99, 103, 232 S.E.2d 324, 325 n1 (1977).

In this case, the solicitor asked the victim whether there was ever any oral contact between himself and Appellant, and the victim stated that he could not remember.⁸ (R. p. 26, lines 19-21). The solicitor inquired whether the victim remembered testifying at a previous hearing, and the victim said he did. (R. p. 26, lines 22-24). The victim testified that seeing a transcript of the previous hearing would refresh his recollection as to what occurred. (R. p. 26, line 25 – p. 27, line 2). The victim then refreshed his memory with the trial transcript and subsequently testified that he now remembered that Appellant had required him to “suck [Appellant’s] penis” and that Appellant had sucked the victim’s penis. (R. p. 34, lines 9-20).

Since the victim testified from his **own** - albeit refreshed - recollection, there is no merit to Appellant’s claims that a “taint” from the alleged coaching at the previous trial was “imported” into this trial.⁹ Moreover, if Appellant believed that the victim’s testimony in the current trial was not the product of his own memory or was the result of coaching, the appropriate remedy was cross-examination. See, e.g., Geders v. United States, 425 U.S. 80, 89-91 (1976); U.S. v. Rhynes, 218 F.3d 310, 320 (4th Cir. 2000);

⁸ As mentioned previously, more than thirteen years had passed since the abuse began. (See R. p. 104-108).

⁹ Moreover, accuracy of the writing used to refresh is not required. See Rule 612, SCRE, see also U.S. v. Carey, 589 F.3d 187, 191 (5th Cir. 2009) (the admissibility of testimony accompanied by a Rule 612 refreshment does not depend upon the source of the writing, the identity of the writing’s author, or the truth of the writing’s contents, since it is hornbook law that any writing may be used to refresh the recollection of a witness) (citations omitted). Indeed, any kind of stimulus can produce a flash of recognition in the witness. See 1 McCormick On Evid. § 9 (7th ed.) (noting that most courts today adhere to the “classical” view that any memorandum or object may be used as a stimulus to present memory without restriction as to authorship, guarantee of correctness, or time of making) (citations omitted).

State v. McCormick, 298 N.C. 788, 259 S.E.2d 880 (1979); State v. Osborn, 241 Neb. 424, 490 N.W.2d 160 (1992); State v. Rodriguez, 244 Neb. 707, 710-11, 509 N.W.2d 1, 3-4 (Neb. 1993); State v. Edwards, 420 So. 2d 663 (La. 1982); State v. Schoolcraft, 183 W.Va. 579, 396 S.E.2d 760 (1990) (all supporting the proposition that whether a witness has been coached is a matter bearing upon the witness's credibility and that the question of coaching is for the jury). Indeed, the judge stated he would permit defense counsel "free reign" on cross-examination and stated she would "get about as much leeway as you want." (R. p. 62, line 15 – p. 63, line 24). Counsel did cross-examine the victim regarding his need to refresh his recollection, and could have cross-examined him further, i.e., explored the issue of the alleged coaching by his aunt at the previous trial, had she desired to do so.¹⁰ (See R. p. 113, lines 9-21; sec p. 63, lines 10-21). In sum, since the victim testified from his own recollection and memory, and since the trial judge allowed Appellant to cross-examine the witness regarding the relevant issues, there was no error or abuse of discretion on the part of the trial judge. Compare the reasoning of State v. Sadowski, 329 Wis.2d 269, 789 N.W.2d 753 (Wis.App. 2010) (unpublished decision), a factually similar case addressing almost the same legal issue.

Appellant was not Prejudiced

In any event, Appellant was not prejudiced as a result of the trial judge allowing the solicitor to impeach the victim using his prior trial testimony. As the solicitor pointed out, the victim had given "many other different statements," at least one of which was given June 5, 2003 - well before Appellant's first trial in November 2004 - reporting the same version of events and, specifically, indicating that oral sex occurred between

¹⁰ Notably, in the previous trial, the victim stated that the testimony he was giving was his own despite any actions on the part of his aunt and despite any pre-trial discussions he had with his aunt. See State v. Smith, 383 S.C. 159, 162, 679 S.E.2d 176, 178 (2009). Additionally, in the current trial, the victim again affirmed that no one told him to say it was Appellant who abused him. (R. p. 114, lines 7-9).

himself and Appellant. (See R. p. 30, lines 9-11; p. 43-48; see also p. 81-83; p. 160-61). The solicitor could have just as easily provided the witness with any one of those statements to refresh his memory - as she offered to do during the pre-trial hearing (R. p. 30, lines 9-11) - and the result would have been the same. Accordingly, Appellant was not prejudiced even assuming the trial judge committed error. See, e.g., State v. White, 371 S.C. 439, 447, 639 S.E.2d 160, 164 (Ct. App. 2006) (a trial court should only be reversed when an error is prejudicial). Additionally, considering the evidence against Appellant, any error could not reasonably have affected the outcome of trial. (See R. p. 79-130; p. 142-150; p. 178-98). See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the result of the trial); State v. Elders, 386 S.C. 474, 486-87, 688 S.E.2d 857, 864 (Ct. App. 2010) (even though admitting certain evidence was error, the error was harmless in light of the overwhelming evidence of the defendant's guilt). Accordingly, there was no reversible error on this ground.

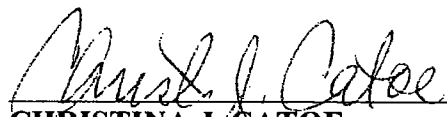
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 9, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Roger M. Young, Sr., Circuit Court Judge
Appellate Case No. 2011-200306

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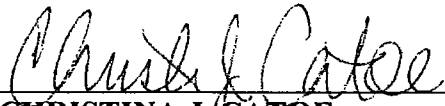
v.

ARTHUR SMITH,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.


CHRISTINA J. CATOE

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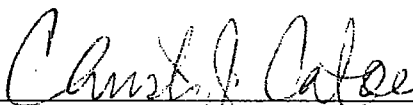
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AFFIDAVIT OF SERVICE

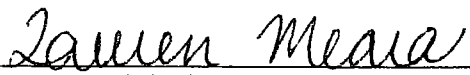
The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Breen R. Stevens**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **9th** day of **May, 2013**.



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SWORN to before me this 9th day of May, 2013.



Notary Public for South Carolina.
My Commission Expires: 9/25/19