

VOLUME ONE OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Robin B. Stilwell, Circuit Court Judge

RECEIVED

MAY 15 2015

S.C. Supreme Court

SAMUEL LAMONT WHITNER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-001951

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE) COURT OF GENERAL SESSIONS
) 2009-GS-23-1072
)
)
)
STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
) -vs-)
) SAMUEL LAMONT WHITNER)

March 11, 2009

Greenville, South Carolina

B E F O R E:

THE HONORABLE VICTOR PYLE, Judge.

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

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Solicitor for the State

CHRISTOPHER SCALZO, ESQUIRE
Public Defendant for the Defendant

CAROLINE HISKELL
Circuit Court Reporter

I N D E X

PG

JACKSON V. DENNO HEARING

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WITNESSES:

Robert Bradford, III

DR	CR	RED	REC
9	14	16	***

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P R O C E E D I N G S

THE COURT: Any witnesses?

MR. SCALZO: I just have one witness and I just have to get the proper spelling, but I can write it down.

I talked to my client just this morning, and he raised an issue with me that his family is trying to hire somebody. I believe my client wants me to put on the record a motion regarding a continuance for that whenever you want to hear that.

THE COURT: Does he need to be present to hear these motions? I would think he would have to be present.

MR. SCALZO: He's right there. He doesn't have any shoes yet, but otherwise if you want to bring him out and deal with that issue...

MS. SUSTAKOVITCH: Your Honor, I can go through the State's motions briefly.

THE COURT: I think his presence is required.

MR. SCALZO: He's right there. Let's bring him out.

THE COURT: Ma'am, your first motion is a Motion in

Limine?

MS. SUSTAKOVITCH: Yes, sir, Your Honor.

THE COURT: With respect to the Rape Shield Act?

MS. SUSTAKOVITCH: Yes, sir, Your Honor.

THE COURT: Mr. Scalzo, do you intend to try to introduce any evidence that would conflict with the Rape Shield Statute?

MR. SCALZO: We're going to try to challenge what she is saying actually happened, but as far as challenging whether or not she made a prior statement that was actually inconsistent to what she's saying here —

THE COURT: What I'm asking is are you going to try to introduce any evidence of any sexual involvement with anyone other than the defendant?

MR. SCALZO: No.

MS. SUSTAKOVITCH: It's just a standard motion that I filed at the beginning.

THE COURT: Okay.

MR. SCALZO: Her allegation is it's a one sole incident allegation, and we don't have any allegations —

THE COURT: Her motion is concerning the out-of-court statement about the child.

MR. SCALZO: Correct.

THE COURT: And do you contest that?

MR. SCALZO: I would contest that based on the fact that she's going to testify, but this tape of what she has previously testified to, I think, amounts to simply bolstering what she would say.

MS. SUSTAKOVITCH: Your Honor, if it pleases the Court, the State is seeking pursuant to Jessie's Law, which is 17.23.175, to have the forensic interviewer in this case testify, and pursuant to the exception that the Legislature has created for forensic interviews, which is now widely accepted and they're allowed into evidence quite often, the State is asking that the forensic interview be entered into evidence.

THE COURT: The what?

MS. SUSTAKOVITCH: The forensic interview, Your Honor.

Basically, the State needs to put up the forensic interviewer for Your Honor to hear her qualifications, to understand how she conducted the forensic interview, whether it was based —

THE COURT: She can testify to that.

MS. SUSTAKOVITCH: Yes, sir. Ultimately, all we need from Your Honor is a finding that You believe we've met 17.23.175, which the State needs to prove to you that the child was under 12 years old; that she gave a statement in response to the questions that were asked by an investigator or someone working with law enforcement; that the statement was recorded

and preserved, which it was; that the child is expected to testify and will be subject to cross-examination, which she is and she will; and that the circumstances surrounding the making of this statement provide for trustworthiness with nonleading questions.

Your Honor, these interviews, ever since 2006 when the Legislature amended Jessie's Law, specifically created an exception to hearsay so that these interviews could come in.

THE COURT: I understand that.

MS. SUSTAKOVITCH: We have the interviewer here if Your Honor would like —

THE COURT: My question is do you intend to introduce the tape?

MS. SUSTAKOVITCH: Yes, sir.

THE COURT: Well, under the Statute, is that permitted or not permitted, Mr. Scalzo? She says it's allowed under the Statute.

MR. SCALZO: One, Judge, the child is not under 12 now; currently not under 12.

THE COURT: But she was then, was she not?

MR. SCALZO: I think she was 11.

MS. SUSTAKOVITCH: She was 11 and all that needs to be required is that the child was under 11 when the recording happened.

MR. SCALZO: I would still contend that the State is attempting to bolster the witness's testimony prior to this witness even testifying. We don't even know — the witness hasn't testified yet, so there's not a question as to whether there's inconsistent statements or a prior consistent statement that's found in the tape. It's simply an effort to bolster the witness's testimony, so I would object just based on that ground.

THE COURT: Your objection is overruled.

MS. SUSTAKOVITCH: Thank you, Your Honor.

Your Honor, the final matter would be a Jackson v. Denno hearing relating to a few statements that this defendant made before he requested an attorney. The State calls Detective Bobby Bradford to the stand.

MR. SCALZO: And, Judge, I would like to know when you want to address the request for a continuance? How far along you want me to...

THE COURT: We have to do that first.

MR. SCALZO: Your Honor, in talking to Mr. Whitner, the defendant, he has indicated to me that in his contact with his family that they have been making efforts to hire a private attorney. I was hoping that they would be present. I have not been able to find them here in the courthouse. I have had contact with them before today, and he would ask for a

continuance to make sure that has actually been secured.

THE COURT: This allegedly happened back in the year 2000.

MR. SCALZO: Yes. He was not arrested in the matter until 2007.

THE COURT: How long have you represented him?

MR. SCALZO: I have represented him since September 27, 2007.

THE COURT: '07?

MR. SCALZO: Yes.

THE COURT: And are you prepared to go to trial today?

MR. SCALZO: I am prepared to go to trial. He and I have had some disagreements about how to go about doing that.

THE COURT: I'm sorry, Mr. Whitner, this motion just comes too late. The case is going to be tried today.

Is there anything else?

JACKSON V. DENNO HEARING

MS. SUSTAKOVITCH: Yes, Your Honor. The State calls Bobby Bradford.

THE CLERK: Mr. Bradford, would you please place your left hand on the Bible and raise your right hand to be sworn in.

ROBERT BRADFORD, III, after having been duly sworn, testified as follows:

THE CLERK: Thank you. You may be seated.

Please state your full name for the record.

THE WITNESS: Robert Bradford, III.

DIRECT EXAMINATION

BY MS. SUSTAKOVITCH:

Q. Good morning, Detective.

A. Good morning.

Q. Where are you employed?

A. Greenville Police Department.

Q. What is your position?

A. I'm a juvenile detective.

Q. How long have you worked in that position?

A. I've been a juvenile detective since 1994.

Q. Skipping to the Waiver of Rights in this case, did you talk to the defendant regarding allegations against him and try to get a statement from him?

A. Yes, ma'am, I did.

Q. And did you advise him of his rights?

A. Yes, ma'am, I did.

Q. Did you do so using a form with the rights listed on it?

A. Yes, ma'am, I did.

Q. Is this the form that you used? I'm showing you what's marked as State's Exhibit 5 for purposes of this hearing.

(Waiver of Rights form marked as State's Exhibit No. 5 for identification.)

THE WITNESS: Yes, ma'am, it is.

BY MS. SUSTAKOVITCH:

Q. Now, how do you recognize this is the form?

A. It's signed by myself and Mr. Whitner.

Q. And what date did this take place?

A. September 19, 2007.

Q. Can you describe the room where the interview took place?

A. It took place in our office; in the office that I'm in.

Q. Was the defendant in handcuffs?

A. He was brought from Detention in handcuffs. When I got to the office, I uncuffed his hands from behind his back. I put one cuff on the chair and released one hand so he wouldn't have to sit with his hands behind his back.

Q. And was he denied any comforts like if he wanted to use the restroom or have a drink of water or anything like that?

A. No.

Q. Was anybody else present during the interview?

A. No, ma'am.

Q. And can you list the rights that were told to this defendant that you told him of?

A. Yes, ma'am. On the form — I'll read off the form. The form states, "Before I ask you any questions, you must understand your rights. You have a right to remain silent. Anything you say may be used against you in court. You have a

right to talk to a lawyer for advice before I ask you any questions and have them with you during questioning. If you have no money to pay a lawyer's fee, the court will appoint one to represent you without cost if you wish. If you decide to answer questions now without a lawyer present, you will have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

Also, before I read his rights, I always ask the defendant's age, what his grade level of education is, and whether he can read well or not.

Q. Did the defendant make any markings on the form to indicate that he understood what you were reading to him?

A. Yes, ma'am. After reading his rights, I put a check mark by each one of the rights, and I get him to initial those. And then I get him to read the Waiver of Rights, which is below. And we always go over the word, "coercion," and I got him to initial that as well.

Q. And in your opinion, did the defendant understand his rights?

A. In my opinion, he did.

Q. Were there any threats or promises made to get him to speak with you?

A. No, ma'am.

Q. Was there intimidation?

A. No.

Q. Was his Waiver of Rights voluntary?

A. Yes.

Q. And did the defendant indicate to you that he wished to make a statement?

A. Yes, that he wished to talk to me about the incident.

* Q. What, if anything, did he tell you? First, was it a written statement or an oral statement?

A. It was an oral statement. After reading the defendant's rights, at that time I told him he could talk freely about the matter. At that time, Mr. Whitner told me — he wanted to know what was on the tape.

Q. And what tape are you referring about?

* A. The audio tape that had been submitted to me by the victim's mother.

Q. And who was on the tape?

A. On the tape was the defendant, Mr. Whitner, and the victim having a conversation.

Q. So he wanted to know what was on the tape, correct?

A. Yes, ma'am.

Q. What did you tell him?

A. I asked him, at that time, what did he mean by, "When I did what I did, I was on drugs and alcohol." Mr. Whitner stated, "I had not heard the whole tape. I only heard parts that the

mother wanted me to hear."

As we continued to talk, Mr. Whitner decided at some point that he wanted an attorney. At that point, I stopped with my interview and told Mr. Whitner our interview was through, and I proceeded to take him back to Detention.

Q. As you were taking him back to Detention, did he make any other statements to you?

A. Yes, ma'am. Mr. Whitner continued to talk. He continued to want to know what was on the tape; what the contents of the tape was, and I told Mr. Whitner because he asked for any attorney, I was not going to talk to him about the case any further. He did continue to ask and said he had some problems out of the mother and I continued to tell him I wasn't going to talk to him about it. We went back to Detention.

MS. SUSTAKOVITCH: Thank you, nothing further.

THE COURT: Mr. Scalzo.

CROSS-EXAMINATION

BY MR. SCALZO:

Q. The tape that you are referring to, the audio tape.

A. Yes, sir.

Q. At what point did you make Mr. Whitner aware that you had an audio tape?

A. I think after I read the rights and then we talked about the tape.

Q. Were you making him aware that you had the tape?

A. Was I making Mr. Whitner aware of the tape?

Q. Yes.

A. Yes.

Q. And you're asking him questions about what's on the tape. When you tell him, hey, we have the tape, are you asking him questions?

A. The only question I actually asked was what did he mean by, "When I did what I did, I was on drugs and alcohol."

Q. You were making reference to the tape.

A. To the tape.

Q. Not something that he said in this conversation?

A. Right. What I was asking Mr. Whitner is, him on the tape, I asked him what did he mean when he said that on the tape. That's what I was asking Mr. Whitner.

Q. He was already booked into the jail?

A. Yes.

Q. So you had him pulled out to brought over to you?

A. Yes.

Q. The conversation that you are referring to with Mr. Whitner, that's not recorded in any way other than your report?

A. No.

Q. And your — just so we know what statements you're referring to, which is the same one you just spoke about, is you

asked him a question about something that's on the tape, and he says he was not talking about any sexual act that happened between him and his daughter. So he's denying that.

A. He did.

* Q. And then he's telling you that there are other conversations that you don't have or have not heard?

A. That's correct.

Q. That's when he decides that he wants a lawyer and he doesn't talk to you any more?

A. That's when he decided that he'd rather have a lawyer.

Q. But statements that you're referring to that you contribute to him are, essentially, those two statements? That's what we're talking about?

A. Yes.

REDIRECT EXAMINATION

BY MS. SUSTAKOVITCH:

Q. Just to clarify, looking at your report, sir, the statement that you asked him — you're asking Whitner, "What did you mean on the phone?" Answer: "When this happened, I was on drugs and not in my right mind." The suspect stated that he was talking about other things that had happened and talking about anything sexual that he had done with his daughter. That's the question you got to ask him before he asked for a lawyer, correct?

A. Yes, ma'am.

Q. And it never came out that you had the entire 32-minute phone call between the defendant and the child, correct?

A. No, I never told him how long it was. I just asked him about the tape.

— THE COURT: Now, are you attempting to introduce that?

MS. SUSTAKOVITCH: Yes, sir. And I believe Mr. Scalzo had a motion related to that.

MR. SCALZO: You're referring to the tape itself?

THE COURT: The statement was made that you said was made by the defendant, you want to introduce?

MS. SUSTAKOVITCH: Yes, sir. That's what Mr. Scalzo was also referring to. I just went back to the supplemental report where he had it in quotes.

THE COURT: Mr. Scalzo, what's your objection?

MR. SCALZO: Well, one, I think Mr. Whitner is already in jail, and the detective is pulling him out about the conversation. He didn't say, detective, I want to talk to you. I think he just kind of pulled him out and initiated this after he was already put into placement.

THE COURT: Do you think there is any question that he was advised of his Constitutional Rights under Miranda?

MR. SCALZO: He testified that he has and that the waiver form had been filled out, but what I'm saying is prior to that taking place that Mr. Whitner did not call the detective to

bring him out. The detective brings him out, and what I'm referring to is that he can't initiate it that way, he has to initiate it —

THE COURT: Does your client wish to take the stand solely for the purpose of contesting the voluntariness of the statement?

MR. SCALZO: Let me make sure.

(Mr. Scalzo confers with Mr. Whitner.)

MR. SCALZO: No, sir.

THE COURT: I find that the defendant had been advised of his Constitutional Rights under Miranda including the right to have an attorney; that he voluntarily waived those rights and it was not the result of any undue influence by the law enforcement officer, and in fact, this Waiver will be admitted.

(Waiver of Rights form marked as State's Exhibit No. 5 for identification was admitted into evidence.)

MS. SUSTAKOVITCH: Thank you, Your Honor.

THE COURT: You can step down.

(Witness leaves witness stand.)

MS. SUSTAKOVITCH: Thank you, Your Honor. That would conclude the State's pretrial motion.

(Jackson versus Denno hearing concluded.)

MR. SCALZO: Thank you, Your Honor.

Judge, one of the things that was referred to in this

hearing was an audio cassette. What it is is a telephone conversation that takes place between the defendant and his daughter, who is the victim in this case. That phone conversation was recorded by, I believe, the stepfather. He takes a little mini cassette recorder and holds it to the end of another phone line while the conversation is going on and records that telephone conversation.

I believe the State intends to introduce that conversation.

THE COURT: Do you, Solicitor?

MS. SUSTAKOVITCH: Yes, the State does.

THE COURT: What is the basis introducing that?

MS. SUSTAKOVITCH: The statement is a 31-minute conversation between the defendant and the child and it is extremely probative on the issue of guilt. Essentially, it can be construed as a confession by this defendant to his daughter.

THE COURT: What right does that person have to unknowingly record the conversation?

MS. SUSTAKOVITCH: Your Honor, I have several cases that support this. Basically the doctrine is a doctrine that courts across the country, either federal and/or state courts, have been following.

THE COURT: Do you have a South Carolina federal cases?

MS. SUSTAKOVITCH: We do not. South Carolina and federal law.

At this time, let me pass up the cases that support the admission of this tape, and I'll briefly go through them.

Your Honor, the State has spent a lot of time researching this issue because of how significant and important the tape is. Just so Your Honor has a transcript of what the tape entails, I'm going to pass that up.

THE COURT: I just want to know the basis.

MS. SUSTAKOVITCH: The basis would be there is a Wiretapping Statute that generally applies in South Carolina that one party to the conversation needs to know that the conversation was recorded. But under the doctrine in vicarious consent, which has been upheld in federal court and state court, essentially the issue is, because the child is a minor under these different cases when the taping occurs, the parent may, when there's a good faith basis to believe that it would be in the best interest of the child, listen to and record the child's conversation with a third party without either the child or the third party's consent. That is not a violation of the Wiretapping Statute.

Our Wiretapping Statute has a consent exception, which I'll pass up to the court, 17-30-30, Your Honor, and our exception matches the exception that is in the cases that I have

passed up to the Court. Essentially, under 17-30-30, it basically says it is not unlawful to record a conversation where the party to the conversation has given prior consent. And what the doctrine of vicarious consent is saying is that because the child is a minor, they can't give consent. And from a policy standpoint, if they're acting in the child's best interest, they can record that conversation.

Your Honor, I just wanted to, briefly, go through a few cases that support this. First is Alameda versus the State, and that is out of Texas, 235 SW 3rd 218. In this case it involves a 12-year-old, and the court upheld the wiretapping in that case where one party was concerned about a sexual relationship with the defendant, and recorded the conversation between the defendant and the child, and neither party knew that was going on. That case was held admissible under the vicarious consent exception because the court found it was in the best interest of the child to have the exception recognized.

And in that case, their consent provision mirrors the one in South Carolina. They did make mention in that case and they said, "The fact there was no inter spousal consent exception to the wiretap exception does not preclude us from recognizing a parent/child vicarious exception," because they're looking at the vary different nature of what the Wiretap Statute is trying to protect, which is spouse one and spouse two trying

to get bad evidence on one another versus when a parent, in this case, is trying to protect the child.

Another case that supports the State's position that this Court should admit the tape would Pollock versus Pollock. This is the Sixth Circuit. It's a leading federal case, 154 Fed. 3rd 601. There the 14-year old child was recorded and one party to the conversation did not know that it was being recorded. The court held as long as the guardian had the good faith belief that the recording is in the child's best interest, the guardian may vicarious consent on behalf of the child to the recording, and that was when the child was 14.

The next case I passed up was Campbell versus Price out of Arkansas, and this case held that the former husband's intentional disclosure of the contents of the tape recorded conversation between the wife and the child did not violate the Statute.

Again, this court was willing to focus on the spousal exception and they went on to say that courts have recognized that there is a difference between one spouse surveying on an adult spouse as opposed to surveying on a custodial minor child.

And this case also referred to Silus versus Silus which is out of Alabama concluded that a parent may tape a minor child's conversation when they're acting pursuant to good faith and they believe that the child is being abused, threatened or

intimidated by another person. Because a lot of these cases focus on sexual abuse and because the act is so egregious, they are specifically looking at the vicarious consent exception and allowing this very probative piece of evidence.

MR. SCALZO: Judge, I think the problem with that analogy is that I think the goal of the parent here was to, in essence, trap him into some kind of confession. This wasn't a situation where she wants to make sure that no harm comes to the child. There were prior conversations to this that were chosen not to be recorded by the mother in this situation.

This is, perhaps, the final conversation of conversations that I believe, occurred over a couple of days where the first conversation, the allegation comes out, and that is not recorded. There may be other conversations prior to that or after, that are not recorded. Then you have, one, context problems where there is one piece taken out of a broader discussion.

But with regard to the wiretap issue, if you look even at the Statute, they're saying it's unlawful to do this under the cover of a ruse. I submit that's exactly what the mother was doing, in essence, knowing I'm going to try to get him to say something that I can then take to the police so that I can then use against him, and I'm using the child to further this ruse to try to get information that I can then take to the

police.

One, she's already had the child and her confront the defendant about the allegations, but this is not like the first time that they're confronting him, and you can tell by the contents of the conversation that the issue has already been discussed in the conversation, because it's not very specific. And like I said, it's a piece of a broader conversation.

I think that in itself it is a demonstration of what's going on. It is not the parent vicariously giving permission so that they can protect the child from any potential harm that might come out of the conversation. I think what you have is that the parents knowing what they ultimately want out of this conversation, taping the conversation, using the child in hopes that they will get something that they can take to the police to use as leverage.

I think that's what the Statute was intended to do. You just can't wiretap someone's conversation without the permission of somebody that's —

THE COURT: I agree with Mr. Scalzo. I'm not going to allow that.

MS. SUSTAKOVITCH: Your Honor, if I could preserve the record —

THE COURT: I have ruled. I need no further argument.

MS. SUSTAKOVITCH: Your Honor, I —

THE COURT: I have ruled, Solicitor.

MS. SUSTAKOVITCH: Can I have a brief continuance,
Your Honor to —

THE COURT: No. Anything else before I bring the jury
in?

MS. SUSTAKOVITCH: Your Honor, this is a 31-minute
phone conversation, and I think the State needs some guidance as
far as what the child can testify to. And just briefly in
response, just to preserve the record, it was not just a snippet
of a phone call. What the State was going to present and does
plan to present evidence of, Your Honor, is that the child told
the mother and the mother did not know what to do. The mother
at that point told the child to call the father and confront him
that you remember what he did to you. At this point, Your
Honor, mother hadn't thought about wiretapping anybody. Then
they called him up — there will be testimony that the defendant
denies it — on the phone and hangs up the phone.

The stepfather comes home, who is planning to testify,
at that point, Your Honor, he says we need to start recording
these conversations.

They recorded, if the Court would like to hear —
honestly, I've never —

THE COURT: Solicitor, I have ruled.

MS. SUSTAKOVITCH: Yes, sir. Can the child talk about

the 30 minutes of him basically apologizing to her and saying that —

THE COURT: She can testify to anything.

MS. SUSTAKOVITCH: And can the stepfather testify to everything that the defendant said in the call?

THE COURT: Yes.

MS. SUSTAKOVITCH: If this defendant opens the door, is the tape possibly admissible in —

THE COURT: If he opens the door.

MS. SUSTAKOVITCH: Thank you, Your Honor.

MR. SCALZO: A separate issue in this case is The mother was at least 14 at the time that she gave birth or was pregnant.

MS. SUSTAKOVITCH: The mother in the case was 14. The defendant had sex with her when he was 21. Technically, he would be guilty of criminal sexual conduct with a minor in the second degree.

The State does not intend to bring that fact out in its case in chief, unless, Your Honor, as these cases go, if the defense is that mom and mean step dad have brainwashed child into concocting the story, then possibly that fact becomes relevant.

Because, Your Honor, the mother said to me in meetings with me, when I asked her, did you realize that technically you

had the ace in the hole the whole time if your goal was to get rid of this defendant? She said, yeah, my mom always threatened to have him arrested, but I wanted him in JW's life; I wanted him to be a part of the child's life. So I think it would be very relevant and very probative to show her lack of ill will towards the defendant.

They didn't get along on many fronts, but if that goes that way, I think that the mother is being very genuine in that she wanted JW to have him around.

THE COURT: Well, I'm not in a position to rule on that at this point. I will do that at the appropriate time during the trial, if that issue comes up.

Bring the panel of jurors up.

(JURY SELECTION)

(NOT TRANSCRIBED AT THIS TIME.)

(Brief recess.)

MS. SUSTAKOVITCH: Your Honor, the State has decided to do an interlocutory appeal on Your Honor's suppression of the audio tape in this case.

I wanted to proffer for the record so it's clear on appeal.

The State intended to introduce a 31-minute tape conversation between the child victim, who was 11 years old at the time of the taping, and this defendant. Your Honor, the

charge and the allegation is that the defendant, when this child was five years old, woke her up in the middle of the night and had her perform oral sex on him twice.

The child did not disclose until several years later in 2000.

It's important to note the way disclosure came about. When the child disclosed, she disclosed to her mother Anna Grady first. Anna Grady, when the child disclosed, said you need to contact your father and you need to let him know that you know that he abused you. At this point, Anna Grady had no intention of recording anything.

Her testimony would have been that she hadn't even really considered it at this point. The child did call the defendant. She let him know that she remembered. The defendant denied the allegation. The defendant got on the phone and had a conversation with her.

The next day or shortly thereafter, the stepfather, Jeff Grady, came home and that's when the decision to wiretap the conversation came about.

There have been previous encounters with this defendant where he threatened the family, and he had been reported in the past, so the State's position was he was on notice that he could be reported, because the police had been called out to the house. He knew that Mr. Grady would report

him at will if needed.

At that point, to clarify for the record, JW Whitner did not know she was being recorded, and her stepfather, Jeff Grady, went in the other room picked up the phone and recorded the conversation.

Your Honor, for appeal purposes, I'd like to submit a transcript of that call; and the actual call.

THE COURT: Okay.

(Transcript for call marked as Court's Exhibit No. 1 for identification.)

MS. SUSTAKOVITCH: The length of the call is around 31-minutes. And the probative value of the call is, when you hear it and listen to it from this defendant's mouth, I don't believe any juror could possibly not believe that he was talking about this incident with JW in 2000.

The defendant was heard on the tape telling her that, "I'm so sorry, baby, that was a mistake." He's crying. He's begging her to forgive him. He talks about how he was sexually abused as a child. How he got on drugs and the only reason, he says, "this incident happened with you is because I was out of my mind, JW. I was doped up. I was Valium. I was on cocaine, weed, alcohol and everything. That wasn't your daddy, you hear me. I was totally out of my mind and everything because I never took you through that again, did I?"

That's just one portion from Page 4 of the transcript, but this transcript goes on and on with repeated reason for why he apologizes.

THE COURT: That's fine. But, ma'am, I want it understood you're telling me that the recording party was the stepfather?

MS. SUSTAKOVITCH: Yes, sir. The State has researched at length —

THE COURT: And that while his stepdaughter was talking on the phone to her birth father, that he goes to another telephone and picks up and records.

MS. SUSTAKOVITCH: Yes, sir.

THE COURT: I'm saying that if that's the situation, I'm saying that that does not qualify for the exception under Section C 17-30-30.

MS. SUSTAKOVITCH: Yes, sir.

The State's position would be that this phone call is admissible based on the cases I've passed up, Alameda versus State, Pollock verse Pollock, Campbell versus Price and Iowa versus Spencer, New Jersey versus Diaz.

These cases have statutes very similar to the South Carolina Wiretapping Statute that they discuss at length, and the consent exception, which is 17-30-30(c) is very similar and mirrors some of the consenting sections in this case. So the

State's position would be, while this is a novel issue of law in South Carolina, there are courts around this country that have to look at this issue, and because of the significance of the tape —

THE COURT: You can argue that to the Supreme Court.

MS. SUSTAKOVITCH: Yes, sir. The last thing I wanted to add is that you did state that the State could have the stepfather testify about what he heard on the phone. The State's position would be that my understanding of what the defense is in this case the stepfather and the mother want the biological father out of the picture, and this is all cooked up, and they brainwashed — those are my words — but the child is being put up to this because they want him out of the picture. So the State would say that the contemporaneous —

THE COURT: Solicitor, that could be argued to the Supreme Court.

MS. SUSTAKOVITCH: I just wanted to let you know that the probative value as far as that is concerned is for the jury to hear.

THE COURT: I understand.

MR. SCALZO: Your Honor, just to make sure our side is clear for the record. While obviously I agree with your ruling, given the fact scenario in this case, we would agree with Your Honor's ruling. Our basis for objecting is she cannot give

consent, one. And, two, with the factual scenario, this was not a situation where what they were doing was not really protecting her, but what they were doing is they were knowingly trying to set up a situation where they could attempt to trick him into saying something that they would then try to use.

Also, with this particular fact scenario, you do have the problem of this is a conversation that comes after other previous conversations. The conversations were not recorded with regard to this subject matter. He did not consent. The child on the phone did not consent. The stepfather is the one that is doing the recording. There may even be questions, we didn't argue it, but there may even be questions about whether or not the stepfather really falls under the same umbrella category that the State is citing under this rule. I'll argue that it does not.

I will also argue that, Judge, that the State has given you cases that are outside this jurisdiction, and they could be persuasive but they're not the law in this jurisdiction. 17-30-30, that's the law in the jurisdiction.

So I thank you for allowing me to put that on the record.

MS. SUSTAKOVITCH: I just have two very brief things to add. I want to clarify that the stepfather's testimony is going to be that when he found out about the sexual abuse

allegations, he was very concerned about JW

He has acted in a parental role to this child ever since she was two. He has been a father figure to her for years. And so it was not just a get information or cook it up to get the defendant, but it was in the best interest of this child and to look out for her to see if she was actually being put in an abusive situation by being around her father. That was point one.

And point two is going back to the fact that this is going to boil down to since all these years have passed, a credibility issue, whether the jury believes that Jeff Grady had an ax to grind with this defendant. I believe that suppressing that tape will significantly impair the ability of the State to prosecute this case.

And I appreciate Your Honor hearing this argument.

THE COURT: I ruled earlier that if he opened the door, then you can introduce the tape so you can use that tape in reply. Okay.

Thank you folks. You're excused.

MS. SUSTAKOVITCH: Thanks, Judge.

One last point that I did not put on the record that I feel is imperative and I apologize. There was absolutely, to clarify the chronology, no State action as far as the recording of this call. The police were not involved until after the

phone call was recorded and it was brought to the police station. I believe I left that out.

Thank you, Judge.

MR. SCALZO: Thank you, Judge.

(CD recording marked as Court's Exhibit No. 2 for identification.)

(Alameda versus Texas case law marked as Court's Exhibit No. 3 for identification.)

(Pollock versus Pollock case law marked as Court's Exhibit No. 4 for identification.)

(Campbell versus Price case law marked as Court's Exhibit No. 5 for identification.)

(Iowa versus Spencer case law marked as Court's Exhibit No. 6 for identification.)

(New Jersey versus Diaz case law marked as Court's Exhibit No. 7 for identification.)

(Silus versus Silus case law marked as Court's Exhibit No. 8 for identification.)

— END OF THIS PORTION OF THE
TRANSCRIPT RECORD —

I, the undersigned Caroline Hiskell, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court of Greenville County, South Carolina on the 11th day of March, 2009.

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

April 13, 2009

Caroline Hiskel

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

C. Victor Pyle, Jr., Circuit Court Judge

Case No. 2009-GS-23-1072

The State, ...Petitioner

v.

Samuel Lamont Whitner, ...Respondent

RECEIVED
JUDICIAL CIRCUIT
MAR 19 2009
CLERK OF COURT

NOTICE OF APPEAL

The State of South Carolina hereby appeals the pre-trial ruling of the Honorable C. Victor Pyle, Jr. granting Respondent's motion to suppress a taped phone call between Respondent and his daughter, the victim of sexual assault by Respondent, which contains vital evidence on the issue of guilt that significantly impairs the prosecution by the State. The date of the pre-trial ruling was Wednesday, March 11, 2009. The ruling was oral and no written order is expected.

Dated: March 19, 2009

Christy Keenöcker Sustakovitch
Christy Keenöcker Sustakovitch
Thirteenth Judicial Circuit
305 East North Street, Suite 325
Greenville, SC 29601
(864) 467-8647
Attorney for the State

Chris Scalzo, Esquire
Attorney for Respondent
305 East North Street, Suite 123
Greenville, South Carolina, 29601
(864)467-8522

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. C. Victor Pyle, Jr., Circuit Court Judge

The State,

Appellant,

v.

Samuel Lamont Whitner,

Respondent.

**MOTION TO VACATE ORDER AND ALLOW MOTION TO BE SERVED AND
FILED PURSUANT TO SECTION 17-30-110**

Appellant, The State, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

Respondent has been indicted on charges of criminal sexual conduct with a minor in the first degree. Respondent's case was called for trial on March 11, 2009. Prior to the jury being sworn, Respondent's counsel moved to suppress an audio recording made by the minor victim's step-father and mother of a phone conversation between Respondent and the minor victim.

II.

Neither the step-father nor the mother was a party to the conversation, but the recording was done for the benefit and protection of the minor victim. Law enforcement was

not involved in the case at the time the phone call was recorded. The trial court was provided both a transcript and a copy of the audio recording. The State argued the recording was appropriate under a theory of vicarious consent as expressed in Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998) or Kroh v. Kroh, 567 S.E.2d 760 (N.C. App. 2002).

III.

The Honorable C. Victor Pyle, Jr., made an oral ruling that the audio recording of the phone conversation should be suppressed because it violates the State's Wiretap Act, codified at section 17-30-10, et. seq. (Supp. 2007).

IV.

Section 17-30-110 specifies the sole means to suppress the contents of any intercepted wire, oral, or electronic communication. Specifically, the section provides:

(A) Prior to any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority, any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the:

- (1) communication was unlawfully intercepted;
- (2) order of authorization or approval under which it was intercepted is insufficient on its face; or
- (3) interception was not made in conformity with the order of authorization or approval.

The motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. The motion must be made before the reviewing authority and must be decided on an expedited basis.

S.C. Code Ann. § 17-30-110(A) (Supp. 2007) (emphasis added). Respondent's argument for suppression clearly had to fall under 17-30-110(A)(1) because no order authorizing the interception was involved in this case.

V.

Section 17-30-110(A) requires Respondent to make the motion to suppress before the "reviewing authority," which is defined by section 17-30-15(9) of the South Carolina Code (Supp. 2007) to mean: "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." The express language of the statute requires that the motion "must be made before the reviewing authority." Therefore, the statute clearly grants jurisdiction to hear the motion to suppress only to the "reviewing authority," and does not allow the trial court to hear such a motion.

VI.

As a result, the trial court in this case did not have jurisdiction to hear a motion to suppress the recording of a communication under this Act. The jurisdiction to hear the motion to suppress was reserved to the "reviewing authority" by section 17-30-110, and the trial court's order suppressing the recorded communication should be vacated. Respondent should be required to serve and file the motion to suppress pursuant to the requirements of section 17-30-110.

VII.

In order to prevent an unnecessary delay of the trial, the State requests Respondent be given thirty days from the date of this Court's order in which to serve and file a motion to suppress pursuant to section 17-30-110 if Respondent still wishes to move to suppress the recorded communication.

WHEREFORE, the State respectfully asks this Court for an order vacating the oral ruling of the trial court or, in the alternative, an order remanding the case to the trial court for the purpose of entering an order vacating the oral ruling. Additionally, the State

respectfully asks the Court to require Respondent within thirty days of this Court's order to properly serve and file the motion to suppress, if he chooses to move to suppress the recorded communication, with the "reviewing authority" as required by section 17-30-110.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ROBERT M. ARIAIL
Solicitor, Thirteenth Judicial Circuit

BY:



William M. Blitch, Jr.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

March 27, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. C. Victor Pyle, Jr., Circuit Court Judge

The State,

Appellant,

v.

Samuel Lamont Whitner,

Respondent.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have Served the Motion to Vacate Order and Allow Motion to Be Served and Filed Pursuant to Section 17-30-110 on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Joseph L. Savitz, III, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

Chris Scalzo, Esquire
Greenville County Public Defender's Office
305 East North Street, Suite 123
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.

This 27th day of March, 2009.


ELLEN R. DuBOIS
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable C. Victor Pyle, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

APPELLANT,

V.

SAMUEL L. WHITNER,

RESPONDENT

RETURN TO THE MOTION TO VACATE
ORDER AND ALLOW MOTION TO BE SERVED
AND FILED PURSUANT TO SECTION 17-30-110

Respondent Samuel Whitner files this return in opposition to the Attorney General's motion to vacate the lower court order, dismiss the solicitor's appeal, and have a suppression motion filed and heard by this Court.

1. Upon information in belief, the Attorney General made its motion to vacate the trial judge's ruling that the tape recording was not admissible without the benefit of having the suppression hearing transcript. The suppression hearing was held on March 11, 2009. A careful review of that transcript reveals that defense counsel Scalzo argued that the admission of the tape

recording itself being played for the jury, without the jury having the benefit of other conversations between respondent and his child would take the recorded conversation “out of context” since this recorded conversation was “one piece taken out of a broader discussion.” Tr. 22–23.¹ Defense counsel also argued that the tape recording was an attempt to use the child “in hopes that they will get something that they can take to the police to use as leverage.” Tr. 23. Following this argument which mostly involved “the rule of completeness”, Rule 106, SCRE the judge ruled: “I agree with Mr. Scalzo. I’m not going to allow that [recording into evidence]”² Tr. 23.

2. When the solicitor attempted to argue with the trial judge about his ruling that the tape recording was not admissible, the judge responded: “I have ruled. I need no further argument.” Tr. 23 – 24. Later, after the judge had ruled, the solicitor placed her “wiretap” exception argument on the record in more detail. The judge simply responded to the solicitor’s position, after he had already ruled, by stating: “I’m saying *that if that’s the situation*, I’m saying that does not qualify for the exception under §(C) 17-30-30.” Tr. 29. (emphasis added).

3. Thus, summary dismissal of the solicitor’s appeal, or summarily vacating the trial judge’s order, would not be appropriate under these circumstances given this record. Further, the state’s present argument on appeal is procedurally barred. The state does not get “two bites at the apple” on the issue of the admissibility of the tape recording.

4. The Attorney General’s present argument that under S.C. Code § 17-30-110 that this motion should have been made before this Court was not made by the solicitor at the trial level. The solicitor could not argue before Judge Pyle at the circuit court level that the tape recording was admissible under the wiretap statute, and now argue that the state’s wiretap argument should have

¹ The pre-trial hearing transcript contained only page numbers, not the lines to cite.

been heard before this Court. The state had the obligation to inform the trial judge that the present suppression issue should be argued before this Court, and not before him if that was the position of the state at the time. In the context of this case, this is an attempt to have “two bites at the apple,” and it constitutes impermissible “sandbagging” of the trial judge. See State v. Torrence, 305 S.C. 45, 64, 65, 406 S.E.2d 315, 325, 326 (1991); State v. Terry, 339 S.C. 352, 529 S.E.2d 274, 279 (2000) (Finney C.J., dissenting).

4. Respondent respectfully submits the proper procedure would be to allow full briefing on the solicitor’s appeal. Moreover, and importantly, the suppression of the tape recording by the trial judge is not going to substantially impair the state’s ability to prosecute respondent in this case since the child is going to obviously testify anyway. See State v. Belviso, 360 S.C. 112, 600 S.E.2d 68 (Ct. App. 2004); State v. Abdullah, 357 S.C. 344, 592 S.E.2d 344 (Ct. App. 2004); State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985); State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). Any argument to the contrary by the state should be heard after full briefing, and not by way of a motion for summary disposition.

WHEREFORE, respondent respectfully submits that the Attorney General’s motion to summarily vacate the order of Judge Pyle, and dismiss the solicitor’s appeal, should be denied and full briefing ordered.

² While defense counsel did not cite Rule 106, SCRE, it is clear that his argument involved this rule of completeness, and the context necessary for fundamental fairness.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Respondent

This 13th day of May, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable C. Victor Pyle, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

APPELLANT,

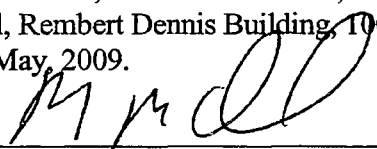
V.

SAMUEL L. WHITNER,

RESPONDENT

CERTIFICATE OF SERVICE

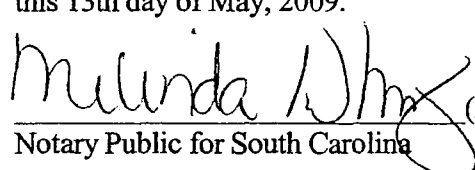
The undersigned attorney hereby certifies that a true copy of the Return to the Motion to Vacate Order and Allow Motion to be Served and Filed Pursuant to Section 17-30-110 in the above referenced case has been served upon opposing counsel, William M. Blich, Jr., Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 13th day of May, 2009.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

Attorney for Respondent

SUBSCRIBED AND SWORN TO before me
this 13th day of May, 2009.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2018

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
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Joseph L. Savitz, III, Chief Attorney
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May 13, 2009

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: The State v. Samuel L. Whitner

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Return to the Motion to Vacate Order and Allow Motion to be Served and Filed Pursuant to Section 17-30-110 in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

RMD/mwl

Enclosure

cc: William M. Blitch, Jr., Esquire
Mr. Samuel L. Whitner

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. C. Victor Pyle, Jr., Circuit Court Judge

The State,

Appellant,

v.

Samuel Lamont Whitner,

Respondent.

REPLY

Appellant, The State, through its undersigned counsel, would respectfully show unto this Court as follows:

I.

Appellant did make the initial motion prior to receipt of the transcript and upon reliance on the recollection of the solicitor. Upon receipt of the transcript, the State immediately filed a copy with the Court and served a copy on opposing counsel. The State asked in its letter to the Court dated April 15, 2009, that the Court consider the transcript as an exhibit to its original motion. The transcript and, especially the initial colloquy regarding the recording beginning on page 18 of the transcript, indicates the central issue at the hearing was whether the tape should be suppressed under the wiretap statute, sections 17-30-10 et seq. of the South Carolina Code.

II.

Respondent's initial statement to the court indicates he maintained the recording was improperly made under the wiretap statute. Specifically, he states:

What it is is a telephone conversation that takes place between the defendant and his daughter, who is the victim in this case. That phone conversation was recorded by, I believe, the stepfather. He takes a little mini cassette recorder and holds it to the end of another phone line while the conversation is going on and records that telephone conversation. (T.18).

The court then asks the basis for introducing the recording and subsequently questions: "What right does that person have to unknowingly record the conversation?" (T.18). Clearly, the court is considering this as an illegal recording under the wiretap statute which means any hearing on the issue should have been conducted pursuant to section 17-30-110.

III.

The State clearly discussed the wiretap statute and the doctrine of vicarious consent for admissibility of the recording under the wiretap statute. In response, Respondent mentions on page 22 the fact the recording is one of several conversations and would be out of context, but then immediately argues the recording was unlawful under the wiretap statute. In reference to page 23 of the transcript, Respondent argues:

I think that in itself it is a demonstration of what's going on. It is not the parent vicariously giving permission so that they can protect the child from any potential harm that might come out of the conversation. I think what you have is that the parents knowing what they ultimately want out of this conversation, taping the conversation, using the child in hopes that they will get something that they can take to the police to use as leverage. I think that's what the Statute was intended to do. You just can't wiretap someone's conversation without the permission of somebody that's — (T.23).

Respondent specifically references the intent of the statute and the only statute he could be referring to is the wiretap statute. His argument is clearly an argument being made pursuant to section 17-30-110(A)(1) of the South Carolina Code alleging the communication was unlawfully intercepted.

IV.

The court interrupted his argument on the wiretap statute and found: "I agree with Mr. Scalzo. I'm not going to allow that." His ruling, especially when juxtaposed to the question the court asked on page 18 of the transcript, demonstrates the court suppressed the recording as a violation of the wiretap statute. Later, the court clarified his ruling and made it abundantly clear he was ruling the tape was suppressed under the wiretap statute:

THE COURT: That's fine. But, ma'am, I want it understood you're telling me that the recording party was the stepfather?

MS. SUSTAKOVITCH: Yes, sir. The State has researched at length —

THE COURT: And that while his stepdaughter was talking on the phone to her birth father, that he goes to another telephone and picks up and records.

MS. SUSTAKOVITCH: Yes, sir.

THE COURT: I'm saying that if that's the situation, I'm saying that that does not qualify for the exception under Section (C) 17-30-30. (T.29)

V.

Section 17-30-110 specifies the sole means to suppress the contents of any intercepted wire, oral, or electronic communication. Specifically, the section provides:

(A) Prior to any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority, **any aggrieved person may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that the:**

- (1) **communication was unlawfully intercepted;**
- (2) **order of authorization or approval under which it was intercepted is insufficient on its face; or**

(3) interception was not made in conformity with the order of authorization or approval.

The motion must be made before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. **The motion must be made before the reviewing authority and must be decided on an expedited basis.**

S.C. Code Ann. § 17-30-110(A) (Supp. 2007) (emphasis added). Respondent's argument for suppression, and the court's ruling suppressing the recording, clearly had to fall under 17-30-110(A)(1) because no order authorizing the interception was involved in this case.

VI.

Respondent maintains the State is procedurally barred from making this motion because we failed to raise the issue before the trial court. However, the issue in the State's motion relates to the subject matter jurisdiction of the circuit court to hear the motion to suppress under the wiretap statute. Subject matter jurisdiction cannot be waived by either party, even with consent, and can be raised at any time, including by the court *sua sponte*. See State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). Further, in Brown, the Supreme Court specifically found its review of the issue of subject matter jurisdiction is **not** precluded or barred on procedural grounds. See Brown, 343 S.C. at 346-47, 540 S.E.2d at 849 (citing Carter v. State, 329 S.C. 355, 362, 495 S.E.2d 773, 777 (1998) (finding issue of subject matter jurisdiction may be raised at any time); Anderson v. Anderson, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989) (the jurisdiction of a court over the subject matter of a proceeding is fundamental)).

VII.

Section 17-30-110(A) requires Respondent to make the motion to suppress before the "reviewing authority," which is defined by section 17-30-15(9) of the South Carolina Code

(Supp. 2007) to mean: “a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals.” The express language of the statute requires that the motion “**must be made before the reviewing authority.**” Therefore, the statute clearly grants subject matter jurisdiction to hear the motion to suppress only to the “reviewing authority,” and does not allow the trial court to hear such a motion.

As a result, the trial court in this case did not have jurisdiction to hear a motion to suppress the recording of a communication under this Act. The jurisdiction to hear the motion to suppress was reserved to the “reviewing authority” by section 17-30-110, and the trial court’s order suppressing the recorded communication under the wiretap statute should be vacated. Respondent should be required to serve and file the motion to suppress pursuant to the requirements of section 17-30-110.

VIII.

The State properly filed this appeal under the holding of State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) (finding a “pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976).”). The suppression does not have to render prosecution impossible, it must “significantly impair” the prosecution and effectively determine the action.

As the solicitor expressed at the hearing, the suppression of the recording, which is the main evidence implicating Respondent aside from the testimony of the victim, would seriously and significantly impair the prosecution of this case. (T.32). Further, the State argues a finding that the appeal may or may not meet the requirements of McKnight is not necessary because the issue being raised in this motion relates to the subject matter

jurisdiction of the court to hear the suppression motion. As stated above, procedural requirements do not prevent the review of the issue of subject matter jurisdiction. See Brown, 343 S.C. at 346-47, 540 S.E.2d at 849

IX.

In order to prevent an unnecessary delay of the trial, the State further requests Respondent be given thirty days from the date of this Court's order in which to serve and file a motion to suppress pursuant to section 17-30-110 if Respondent still wishes to move to suppress the recorded communication.

WHEREFORE, the State again respectfully asks this Court for an order vacating the oral ruling of the trial court or, in the alternative, an order remanding the case to the trial court for the purpose of entering an order vacating the oral ruling. Additionally, the State respectfully asks the Court to require Respondent within thirty days of this Court's order to properly serve and file the motion to suppress, if he chooses to so move, with the "reviewing authority" as required by section 17-30-110. Finally, the State continues its request that all deadlines be held in abeyance pending a ruling on the State's motion.

Respectfully submitted,

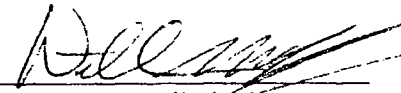
HENRY DARGAN McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

ROBERT M. ARIAIL
Solicitor, Thirteenth Judicial Circuit

BY: 
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May 14, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
Hon. C. Victor Pyle, Jr., Circuit Court Judge

The State,

Appellant,

v.

Samuel Lamont Whitner,

Respondent.

PROOF OF SERVICE

I, Ellen DuBois, certify that I have Served the State's Reply on Respondent by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 14th day of May, 2009.



ELLEN R. DuBOIS
Office of Attorney General
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The South Carolina Court of Appeals

The State,

Appellant

v.

Samuel Lamont Whitner,

Respondent.

The Honorable C. Victor Pyle, Jr.
Greenville County
Trial Court Case No. 2009-GS-23-01072

ORDER

In the above-captioned case, the State is appealing the trial court's suppression of an audio-recording. The trial court based its ruling on the requirements of the South Carolina Wiretap Act, codified at section 17-30-10, et. seq. (Supp. 2008). After filing its appeal, the State now moves our court to vacate the trial court's ruling and allow the Respondent to file and serve a proper motion to suppress pursuant to section 17-30-110, which sets forth the process by which an aggrieved party can suppress any intercepted wire, oral, or electronic communication. Specifically, that section requires the motion to suppress be made before a panel of judges on the court of appeals, not before the trial court judge.

Respondent filed a return opposing the motion.¹ In his return, Respondent argues the State never raised this issue to the trial court and therefore should not be given a "second bite at the apple."

¹ Respondent's unopposed motion for an extension to file his return is granted.

After careful consideration of the motion, return, and reply, we find the circuit court lacked subject matter jurisdiction to rule on the motion to suppress the intercepted communication. Accordingly, the State's motion to vacate is granted.

In order to avoid further delay in this case, Respondent shall file and serve his motion to suppress by 3:00 p.m., Wednesday, June 17, 2009, and the State shall file and serve its return by 3:00 p.m., Monday, June 22, 2009. Oral arguments will be heard on Tuesday, June 23, 2009, at a time set by our clerk of court.

AND IT IS SO ORDERED.

Kaye G. Hearn

Columbia, South Carolina

June 11, 2009

FILED
6/11/09

cc: Assistant Attorney General William M. Blich, Jr.
Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek

The South Carolina Court of Appeals

The State,

Appellant

v.

Samuel Lamont Whitner,

Respondent.

The Honorable C. Victor Pyle, Jr.
Greenville County
Trial Court Case No. 2009-GS-23-01072

AMENDED ORDER

In the above-captioned case, the State is appealing the trial court's suppression of an audio-recording. The trial court based its ruling on the requirements of the South Carolina Wiretap Act, codified at section 17-30-10, et. seq. (Supp. 2008). After filing its appeal, the State now moves our court to vacate the trial court's ruling and allow the Respondent to file and serve a proper motion to suppress pursuant to section 17-30-110, which sets forth the process by which an aggrieved party can suppress any intercepted wire, oral, or electronic communication. Specifically, that section requires the motion to suppress be made before a panel of judges on the court of appeals, not before the trial court judge.

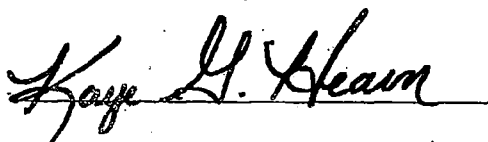
Respondent filed a return opposing the motion.¹ In his return, Respondent argues the State never raised this issue to the trial court and therefore should not be given a "second bite at the apple."

¹ Respondent's unopposed motion for an extension to file his return is granted.

After careful consideration of the motion, return, and reply, we find the circuit court lacked subject matter jurisdiction to rule on the motion to suppress the intercepted communication. Accordingly, the State's motion to vacate is granted, and the case is remitted to the trial court. See Rule 263(b), SCACR (allowing this Court to shorten the period of time to perform any act).

In order to avoid further delay in this case, Respondent shall file and serve his motion to suppress by 3:00 p.m., Wednesday, June 17, 2009, and the State shall file and serve its return by 3:00 p.m., Monday, June 22, 2009. Oral arguments will be heard on Tuesday, June 23, 2009, at a time set by our clerk of court.

AND IT IS SO ORDERED.

A handwritten signature in cursive script, reading "Kaye L. Hearn", written over a horizontal line.

Columbia, South Carolina

June 15, 2009

cc: Assistant Attorney General William M. Blitch, Jr.
Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
Court of General Sessions

Indictment No. 2009-GS-23-01072

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SC Court of Appeals

The State, ... Respondent

v.

Samuel L. Whitner, ... Petitioner.

**MOTION TO SUPPRESS WIRE, ELECTRONIC, AND/OR ORAL COMMUNICATIONS
INTERCEPTED AND/OR DISCLOSED IN VIOLATION OF THE S.C. WIRETAP
STATUTE, S.C. CODE ANN. SECTION 17-30-10, *ET. SEQ.***

Petitioner, Samuel L. Whitner, by and through his undersigned counsel, respectfully moves the Court of Appeals for an order suppressing a recorded telephone conversation intercepted and disclosed to the State in violation of S.C. Ann. Section 17-30-10, *et. seq.* Petitioner further moves this Court for an evidentiary hearing on this Motion to Suppress.

In support of this Motion, Petitioner would show unto the Court the following:

1. Minor child J.W. called her biological father, Petitioner, on August 5, 2007;
2. The telephone call was made from the biological mother's residence to the separate residence of her biological father, Petitioner;
3. The biological mother and step-father arranged to tape record the telephone conversation between J.W. and Petitioner, without obtaining consent from either party to the conversation;

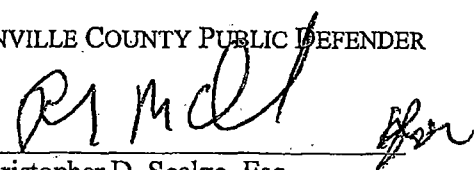
4. The recording of the conversation was taken to the Greenville City Police Department and used as the basis for an arrest warrant—and, ultimately, an indictment—charging Petitioner with Criminal Sexual Conduct with a Minor in the First Degree;
5. The trial began in the court of General Sessions in Greenville County on March 11, 2009. The State intended to introduce (1) the tape recording of the conversation, (2) a transcript of the recorded conversation, and (3) testimony of J.W. and the step-father concerning the substance of the recorded conversation;
6. At trial, Petitioner moved the trial court, prior to the swearing of the jury, for an order suppressing the recorded statement on several basis, but specifically on the basis that the recording was obtained in violation of the S.C. Wiretap Statute, S.C. Code Ann. § 17-30-10 *et seq*;
7. The trial court granted the Petitioner's motion; and
8. This Court vacated the trial court's order and ordered Petitioner to file a motion to suppress pursuant to the S.C. Wiretap Statute in the Court of Appeals.

WHEREFORE, Petitioner prays this Court order the following:

- i) An evidentiary hearing be held on July 22, 2009, prior to the hearing of arguments on this Motion;
- ii) That the recorded conversation of August 5, 2007, be suppressed pursuant to S.C. Wiretap Statute, § 17-30-65 for the reasons stated in the memorandum of law; and
- iii) That the recorded conversation be suppressed as a violation of the right to privacy under Article I, §10 of the South Carolina Constitution for the reasons stated in the memorandum of law.

Respectfully submitted,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 

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(864) 467-8522
Attorney for Petitioner

July 2, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
Court of General Sessions

Indictment No. 2009-GS-23-01072

The State, ... Respondent

v.

Samuel L. Whitner, ... Petitioner.

**PETITIONER'S MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS WIRE, ELECTRONIC, AND/OR ORAL COMMUNICATIONS
INTERCEPTED AND/OR DISCLOSED IN VIOLATION OF THE S.C. WIRETAP
STATUTE, S.C. CODE ANN. SECTION 17-30-10, *ET. SEQ.***

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JURISDICTION OF THE COURT

This Motion is made pursuant to S.C. Code Ann. § 17-30-10 *et. seq.* (the "S.C. Wiretap Statute"). Under the S.C. Wiretap Statute, an intercepted wire, oral, or electronic communication is inadmissible into evidence at any trial if its interception, acquisition, or disclosure violates the S.C. Wiretap Statute. S.C. Code Ann. § 17-30-65(A). Moreover, the S.C. Wiretap Statute requires that a motion to suppress the contents of any intercepted wire, oral, or electronic communication be made to the statutorily defined "reviewing authority." S.C. Ann. § 17-30-110(A). The "reviewing authority is defined as "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals." S.C. Code Ann. § 17-30-15(9). Thus, jurisdiction for this Motion to Suppress is exclusive to the "reviewing authority" and it is therefore properly submitted to the Court.

STATEMENT OF THE CASE

The State called Petitioner to trial on March 11, 2009. The indictment charged Petitioner with one count of Criminal Sexual Conduct in the First Degree. At trial, the State intended to offer into evidence a recording of an August 5, 2007, telephone conversation between Petitioner and the alleged victim, his minor child, J.W. (this recording is hereafter referred to as the "August 5th Intercepted Conversation"). Prior to the jury being sworn, Petitioner moved to suppress the August 5th Intercepted Conversation on the grounds that its admission (1) violated the Rule of Completeness, Rule 106, SCRE, in that several un-recorded prior conversations were needed to establish the context of the August 5th Intercepted Conversation, (2) would unduly prejudice Petitioner at trial in that the probative value of the August 5th Intercepted Conversation is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, [and/]or misleading [of] the jury," Rule 403, SCRE, and (3) violated the S.C. Wiretap statute in that the

recorded conversation was intercepted without the consent of at least one of the parties to the conversation. S.C. Code Ann. § 17-30-65.

After a pre-trial argument on March 11, 2009, the trial judge ruled that the August 5th Intercepted Conversation was inadmissible. The State sought a short recess. After less than an hour recess, the State moved to stop the trial so that an appeal could be filed. The trial was stopped.

Thirteenth Circuit Solicitor's office filed an appeal on March 19, 2009. On March 27, 2009, the State, through the Attorney General's office, filed a Motion to Vacate the trial judge's suppression order and to allow a suppression motion to be filed with the Court pursuant to the S.C. Wiretap Statute. On June 11, 2009, the Court granted the State's Motion to Vacate and ordered that Petitioner file a motion to suppress with the Court. On June 15, 2009, Petitioner moved the Court for an order allowing a petition for a rehearing *en banc*; the State consented to Petitioner's request to petition for a rehearing *en banc*. The Court denied Petitioner's motion on June 15, 2009, again ordering Petitioner to file a motion to suppress with the Court.¹ Petitioner filed his motion to suppress within the Court's ordered time requirements.

FACTS

On September 19, 2007, Petitioner was arrested and charged with Criminal Sexual Conduct in the First Degree. The State obtained a true bill for an indictment on February 19, 2009, alleging Petitioner sexually assaulted his biological daughter, J.W., on a single occasion

¹ On June 22, 2009, the Court issued a subsequent order modifying its June 11th and 15th orders only as to the dates for submission of pleadings.

occurring between December 28, 2000, and December 28, 2002—*i.e.*, when J.W. was five or six years-old.²

On August 2, 2007—forty-eight days before Petitioner's arrest—J.W. alleged to her mother, Anna Gray ("Mother"), that she was sexually assaulted by Petitioner when she was five or six years old.³ J.W. was eleven years old at the time she first made this allegation to Mother. Mother did not report her daughter's allegation to law enforcement on August 2, 2007. Mother reported the allegation to law enforcement on August 6, 2007, a day after the August 5th Intercepted Conversation.

On August 3, 2007, Mother permitted J.W. to speak with Petitioner on the telephone. Petitioner, unaware of his daughter's allegation, had called Mother's house to speak with J.W.⁴ Mother, knowing that J.W. would confront Petitioner about her allegations of sexual assault, did not record this conversation but did allow J.W. to speak with Petitioner. It was during this unrecorded telephone conversation that J.W. first informed her father of her allegation of sexual assault. Upon hearing the allegation, Petitioner denied to J.W. that he had assaulted her. During the same telephone call, Mother spoke with him about the allegation and he denied the allegation to Mother.⁵ Mother did not contact law enforcement after this telephone conversation on August 3, 2007.

² The original arrest warrant alleged the time frame for the assault occurred between July 1, 2003 and September 1, 2003; however, the State alleges J.W. claims it was when she was five or six years-old and that the original time frame was a miscalculation by law enforcement.

³ Although Petitioner is the biological father of J.W., he has not lived in the residence with Mother and J.W. for several years; stepfather resides with Mother and J.W.

⁴ Statement of Anna Gray to Detective R. Bradford of the Greenville City Police Department, date stamped September 10, 2007.

⁵ Id.

The following day, August 4, 2007, Mother took J.W. to her maternal grandmother's house to stay over night. When Mother returned home that night, there was a telephone message from Petitioner on the answering machine. Mother alleges: "I called [Petitioner] back and that's when I started the tape recording."⁶ There is an additional tape recording made during this time period of a phone call between Mother and Petitioner's girlfriend. Mother was a party to the conversation and therefore the S.C. Wiretap Statute allows her to intercept *her own conversation*.

On August 5, 2007, Mother allowed J.W. to use the home telephone to call Petitioner. J.W. called Petitioner at his home. Without obtaining prior consent from J.W. or Petitioner, Stepfather went to an extension telephone line and, using a small cassette recorder, intercepted the telephone conversation between J.W. and Petitioner. The following day, August 6, 2007, Mother took the August 5th Intercepted Conversation to the Greenville City Police department. This was the first report of J.W.'s allegations to law enforcement.

ARGUMENTS

The August 5th Intercepted Conversation was obtained without consent of either party to the conversation. The S.C. Wiretap Statute requires prior consent of at least one party to a telephone conversation. When consent of neither party is obtained, the statute mandates suppression of the interception as well as any evidence derived therefrom.

Petitioner anticipates the State will contend that an exception called "vicarious consent"⁷ provides Mother with the lawful authority to give prior consent on behalf of J.W. The "vicarious

⁶ Id.

⁷ "Vicarious consent" is a court-created exception. It was first applied in 1993 by the U.S. District Court of Utah in Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah. 1993). The district court was presented with an action involving the violation of the federal wiretap statute, codified by 18 U.S.C. § 2510 et seq., by a wife who tape recorded a telephone conversation between her estranged husband and their three- and five-year-old children. The issue was whether wife could

consent" exception, however, is not the law in South Carolina. The S.C. Wiretap Statute is clear and unambiguous as to what is meant by "consent" and it does not include either the word "vicarious" or the "vicarious consent" exception itself anywhere in the statute.

The S.C. legislature did not intend "vicarious consent" to be the law. Had the legislature intended an exception to the consent requirement, explicit language concerning the type of consent intended would have been inserted; modifiers to "consent" would have been provided; and the legislature would have followed the patterns of modifying statutory language and including terms it has followed in other statutes. It did not follow those patterns in the S.C. Wiretap Statute. Additionally, the S.C. Wiretap Statute seeks to restrict interception and protect privacy. On the other hand, the "vicarious consent" exception expands interception and undermines privacy. Because these two goals work against each other, the legislature would not have intended to include a term so contradictory to its overall intent without specifically defining it in the statute.

Assuming arguendo that the Court permits this exception to be added to the statute, the State, nonetheless, has failed to establish the elements of the "vicarious consent" exception. The State has failed to establish that Mother acted in good faith; and that there was an objectively reasonable basis to believe intercepting the private telephone conversation between Petitioner

assert the defense of "vicarious consent" to husband's claim that she had violated the prior consent requirement of § 2510. The Thompson court held, based on several state grounds, that wife could use the defense of "vicarious consent" in the "very narrow and limited" facts of the case. *Id.* at 1544. The court defined "vicarious consent" as permissible "as long as the guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of [their] minor [child] to the taping of phone conversations." *Id.* Alabama set forth a more restrictive "vicarious consent" exception in Silas v. Silas, 680 So.2d 368 (Ala.Civ.App. 1996). The Silas court held that the guardian/parent must have a "good faith basis that it is objectively reasonable to believe that the minor child is being *abused, threatened, or intimidated* by the other parent." *Id.* (emphasis added); see also Pollock v. Pollock, 154 F.3d 601 (6th Cir.Ct.App. 1998). Which version of the exception the State is asking the Court to add to the state wiretap statute is not clear.

and J.W. was necessary to protect the best interests of J.W. or to believe that J.W. was being abused, threatened, or intimidated.

I. THE S.C. WIRETAP STATUTE PRECLUDES ADMISSION OF THE INTERCEPTED CONVERSATION AT TRIAL BECAUSE NEITHER MOTHER NOR STEPFATHER OBTAINED PRIOR CONSENT TO INTERCEPT THE TELEPHONE CONVERSATION BETWEEN PETITIONER AND J.W.

In South Carolina, there are only two circumstances where it is lawful for an individual to intercept a telephone call: (1) where the individual is a party to the conversation or (2) where the individual has obtained prior consent of at least one party to the conversation. S.C. Code Ann. § 17-30-30. Stepfather violated the S.C. Wiretap Statute when he recorded the telephone conversation between Petitioner and J.W. Neither Stepfather nor Mother obtained prior consent from Petitioner to intercept the private telephone conversation between him and J.W. They did not obtain prior consent from J.W. Furthermore, Stepfather and Mother did not participate in the conversation that was intercepted. Having not been a party to the conversation, the failure to obtain prior consent before intercepting the telephone conversation between Petitioner and J.W. was, therefore, an express violation of the S.C. Wiretap Statute. Consequently, "no part of the contents of the [August 5th Intercepted Conversation] and no evidence derived therefrom may be received in evidence at any trial." S.C. Code Ann. § 17-30-65(A). The interception should be suppressed.

If Petitioner and J.W. did not give their prior consent, how then can the State meet the statute's prior consent requirement in this case? The answer is: it cannot.

Petitioner anticipates the State will contend that an exception called "vicarious consent" provides Mother with the lawful authority to give prior consent on behalf of J.W., thereby

satisfying the prior consent requirement. For several reasons, however, the "vicarious consent" exception is not the law in South Carolina.

A. "Vicarious consent" is not the law in South Carolina because the plain meaning of "consent" in the statute does not incorporate the exception.

The first reason "vicarious consent" is not the law in South Carolina is that the plain meaning of the S.C. Wiretap Statute does not include either the word "vicarious" or the exception itself in any of its twenty-eight sections. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, [then] there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." City of Camden v. Brassell, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997). The word "consent" is unambiguous. It means to agree; to give assent or approval.⁸ The legislature did not qualify consent; it placed no words in front of or after consent modifying its meaning to include consent by a third-party, a parent, or guardian. The legislature simply used the word "consent."

Had the legislature intended to modify consent to include different forms, it would have written § 17-30-30 to address the many policy concerns raised by allowing another person to consent on behalf of a minor. The subsection would have looked like other instances where the S.C. legislature intended to be specific about what it meant by consent, or qualify how it intended consent to be interpreted, and would have addressed the various policy concerns raised by expanding the meaning of the term "consent." Here are some examples.

⁸ "Consent," Merriam-Webster Online Dictionary, 2009, Merriam-Webster Online. 29 June 2009, <http://www.merriam-webster.com/dictionary/consent>.

Tattooing

In 2004 the legislature decided to change the law concerning tattooing in South Carolina. Title 44, the code of laws regulating health, was amended in 2004. Chapter 34 was added "so as to provide for the standards, requirements, and procedures of tattooing certain persons under certain conditions and at certain locations." 2004 South Carolina Laws Act 250 (S.B. 104). In subsection 44-34-60 (C), the legislature was very deliberate in its effort to distinguish between persons who could consent to a tattoo. A person who was at least twenty-one years of age could provide their own unqualified consent; however, a person who was at least eighteen years of age was required to provide the tattoo artist with a qualified consent: "parental consent." *Id.*

Body Piercing

In a similar fashion, the legislature employed detailed statutory language to protect the health of minors (and those who could not otherwise consent) seeking body piercings. In subsection 44-32-120 (A), it was made illegal for a person under the age of eighteen to receive a body piercing "unless [it] is performed in the presence of, or as directed by a notarized writing by, the person's parent or legal guardian." The statute goes on to distinguish between emancipated minors (for whom consent was not required and the entire section of law do not apply) and people impaired by drugs or alcohol. *Id.* at 120 (B) and (D).

Bungee Jumping

Another example where the legislature sought to qualify the type of consent it intended to require is found in the statute concerning bungee jumping, S.C. Code Ann. § 52-19-90 (A). The overall purpose of section 52-19-90 is clearly to ensure the safety of people who engage in bungee jumping. Consistent with that overall purpose, subsection (A) clearly states that an

owner of a bungee jumping apparatus "must secure the consent of a parent or guardian for any jumper who is under the age of sixteen." *Id.*

Abortion

The statutory scheme set forth in S.C. Code of Laws § 44-41-10 *et seq.* regulating abortions in South Carolina provides an excellent example of the language and statutory structure employed when the legislature intends to qualify consent beyond its plain meaning. To begin with, an entire section is devoted to the "persons for whom consent [to have an abortion] is required." S.C. Code Ann. § 44-41-30. An additional section, § 44-41-31, is devoted to consent as it relates to minors:

§ 44-41-31. Abortion upon minors; consent requirements; support obligations of parent or legal guardian who refuses to give consent for minor's abortion; penalty for false representation.

(A) No person may perform an abortion upon a minor unless consent is obtained in accordance with one of the following provisions:

(1) the attending physician or his agent or the referring physician or his agent has secured the informed written consent, signed and witnessed, of the pregnant minor and:

(a) one parent of the minor; or

(b) a legal guardian of the minor; or

(c) a grandparent of the minor; or

(d) any person who has been standing in loco parentis to the minor for a period not less than sixty days;

(2) the minor is emancipated and the attending physician or his agent has received the informed signed written consent of the minor; or

(3) the attending physician or his agent has obtained the informed signed written consent of the minor and has received the order of the court obtained by the minor pursuant to this chapter.

(B) If a parent or legal guardian refuses to give the informed written consent for the minor's abortion and there has been a judicial finding of refusal of consent, and the minor

has a child or children as a result of that pregnancy, the duty imposed by law of supporting the child or children extends to the minor and jointly and severally to the refusing parent or legal guardian and the natural father until the minor reaches the age of eighteen years or is emancipated.

(C) Any person standing in loco parentis and who consents to the abortion of the minor as permitted in subsection (A)(1) of this section shall sign an affidavit indicating the nature and length of his or her relationship with the minor. The affidavit must state the penalties for wilfully or knowingly making a false representation. Anyone who knowingly or wilfully makes a false representation in the affidavit shall be guilty of a misdemeanor and, upon conviction, must be fined not more than three thousand dollars or imprisoned for not more than one year.

Id. In three main subsections, each with subsections of their own, the legislature set forth a statutory scheme to ensure that consent of a minor was well defined and well qualified. It went further and added a third full section, which is devoted to addressing the circumstance of minors who seek an abortion without consent of their parent or guardian. See S.C. Code Ann. § 44-41-32. This section takes five subsections to outline the procedures to apply when a minor seeks a court's relief from the requirements of § 44-41-31.

It is clear that the legislature found it was necessary to include this wide-ranging set of sections in the law to achieve its legislative intent to regulate abortion. Part of the necessity for such an extensive definition of consent is that there are several policy considerations involved in the regulation of abortion. Because the legislature intended to address these various policy concerns regarding minors consenting to an abortion, it was necessary to provide an extensive statutory structure and to utilize more words than simply "consent."

Considering the many specific terms the S.C. legislature has used to qualify consent on behalf of a minor—such as "parental consent"⁹ and "minor," "parent," and "legal guardian"¹⁰

⁹ Concerning tattooing in § 44-34-60.

¹⁰ Concerning body piercing in § 44-32-120.

and “secure consent of parent or guardian”¹¹ and “without consent of parent or legal guardian,” “in loco parentis,” and “one parent of the minor”¹²—how could it be that the legislature intended to pack into the single word “consent” the entire exception of “vicarious consent”? The answer is that the legislature obviously did not intend to include “vicarious consent” in the S.C. Wiretap Statute.

B. If the legislature intended for there to be a “vicarious consent” exception in the S.C. Wiretap Statute, then it would have explicitly inserted language defining the exception.

The S.C. legislature did not intend “vicarious consent” to be the law. Had the legislature intended an exception to the consent requirement, explicit language concerning the type of consent would have been inserted. The legislature would have provided modifiers to “consent,” and followed the patterns of modifying terms and inclusion of policy concerns as it had in the statutory examples outlined above. None of that was done in the S.C. Wiretap Statute.

Georgia is an excellent example of how complex an endeavor it was to add the “vicarious consent” exception to the law. In 1999, the Court of Appeals of Georgia addressed the issue of whether its own wiretap statute contained the “vicarious consent” exception. In Bishop v. State of Georgia, 241 Ga.App. 517, 526 S.E.2d 917 (Ct.App. 1999), the court held that “vicarious consent” was not an exception recognized by Georgia’s wiretap statute. Id. at 524, 922. The Bishop court found that the plain meaning of the statute did not contain “vicarious consent” and it was “solely the task of the legislature to amend” the statute to permit this type of exception. Id.

¹¹ Concerning bungee jumping in § 52-19-90.

¹² Concerning abortion § 44-41-32.

The Georgia legislature followed the Court of Appeals' direction and amended its wiretap statute the following year. The amendment was neither short nor uncomplicated.

The following code section is the Georgia legislature's codification of the "vicarious consent" exception. OCGA § 16-11-66(d) reads:

The provisions of this article shall not be construed to prohibit a parent or guardian of a child under 18 years of age, with or without the consent of such minor child, from monitoring or intercepting telephonic conversations of such minor child with another person by use of an extension phone located within the family home, or electronic or other communications of such minor child from within the family home, for the purpose of ensuring the welfare of such minor child. If the parent or guardian has a reasonable or good faith belief that such conversation or communication is evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity affecting the welfare or best interest of such child, the parent or guardian may disclose the content of such telephonic conversation or electronic communication to the district attorney or a law enforcement officer. A recording or other record of any such conversation or communication made by a parent or guardian in accordance with this subsection that contains evidence of criminal conduct involving such child as a victim or an attempt, conspiracy, or solicitation to involve such child in criminal activity shall be admissible in a judicial proceeding except as otherwise provided in subsection (b) of this Code section.

It took 220 words for the Georgia legislature to codify the "vicarious consent" exception.

When the S.C. legislature defined "person" in the S.C. Wiretap Statute it very obviously set forth a well thought out definition. It defined two classes: (1) state-actors and (2) non-state-actors. See S.C. Code Ann. § 17-30-15 (5). These two classes of "person" are further separated into several categories.¹³ The classes are not supplemented with definitions of "vicarious," "consent," "parent," "guardian," or "child." Unlike the language used in the statutes discussed above (particularly the language of the Georgia exception), § 17-30-15 does not differentiate

¹³ State-actors are separated into employees or agents of (1) the State of South Carolina; (2) a political subdivision of the State; (3) the United States; or (4) any other state or political subdivision of the State. Non-state-actors are categorized as (1) individuals; (2) partnerships; (3) associations; (4) joint stock companies; (5) trusts; or (6) corporations. See S.C. Code Ann. § 17-30-15 (5).

between minors/children versus adults; nor does it set forth requirements concerning minors/children and their guardians. In fact, the words "parent," "guardian," "child," or "minor" do not appear anywhere in the entire statute. How can a term like "vicarious consent" be included in the consent requirement of the S.C. Wiretap Statute when no reference is made to parents or children? When not one word used to define the exception is even in the statute?

By asking the Court to adopt "vicarious consent" as the law, the State is asking the Court to act as a super-legislature. It is asking the Court to weigh the policy concerns raised by minors engaged in a private telephone call and choose which policy to endorse. How should a dispute between a parent who wants to intercept and one that does not be resolved? What criterion should be employed to resolve the dispute? What authority makes the decision? Should a 16 year-old's privacy rights be afforded greater protection than an 8 year-old's? The legislature provided no legal authority in the S.C. Wiretap Statute for the Court to rely upon to even attempt to resolve such issues. Resolving these, and many other, policy questions is classically the purview of a legislature not a court.

C. The purpose and effect of the "vicarious consent" exception runs counter to the S.C. Wiretap Statute's objective to protect the privacy rights of private telephone conversations.

The third reason that "vicarious consent" is not the law in South Carolina is that this doctrine runs, in its own aim and effect, so counter to the overall purpose of the S.C. Wiretap Statute that the legislature would not have remained silent when drafting the statute. The S.C. Wiretap Statute seeks to restrict interception and protect privacy; the "vicarious consent" exception expands interception and undermines privacy. The two goals work against each other.

When enacting the S.C. Wiretap Statute the legislature sought to provide privacy protection to the broadest group of people using a narrow, but clear, method: prior consent must be obtained from a party before the party's private telephone conversation can be intercepted. See Southern Bell v. Hamm, 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (recognizing that the federal wiretap law mandated passage of the S.C. Wiretap Statute, as well as the related Trap and Trace law, § 17-29-10 *et seq.*; and stating the "purpose behind the federal law was to increase privacy protection afforded to citizens"); see also Baumrind v. Ewing, 279 S.C. 350, 351, 279 S.E.2d 359, 360 (1981) ("There can be no doubt...that the congressional intent [of the Federal Wiretap Statute] and the naked language of the statute itself call for a broad prohibition against the interception of wire or oral communication"). Essentially, the purpose of the S.C. Wiretap Statute is to protect the privacy rights of each party to a private telephone conversation by tightly restricting who can and cannot intercept the call.

"Vicarious consent," on the other hand, expands who can intercept a telephone call in a way that is inconsistent with the overall intent of the S.C. Wiretap Statute. The exception permits a third-party parent to give consent to the interception of a child's private conversation with anyone, including another parent. It therefore creates an exception to the explicit restriction of § 17-30-30 (C) that only a party to the conversation can give consent. In a statute focused primarily on protecting privacy rights, it would be odd for the legislature to intend but not explicitly include an exception that thwarted its own legislative intent.

Moreover, "vicarious consent" is inconsistent with the overall statutory scheme. When the legislature intended to recognize an exception in the S.C. Wiretap Statute, it drafted language clearly setting forth the exception and procedures to be followed to meet that exception. See S.C. Code Ann. § 17-30-30 (A) and (B) (permitting interception for FCC employees and persons

acting under color of law); see also § 17-30-70 through 105 (outlining the process and requirements to be followed when an order authorizing interception is sought by SLED). However, when the legislature intended to limit interception by requiring prior consent it employed simple, clear language: "prior consent."

This type of silence-on-exceptions approach is not found in other statutes. For example, in the abortion statutes discussed above the legislature clearly intended to strike a balance between protecting the right of privacy versus the policy goal of ensuring that a minor is not left to make a life-altering decision without consent from a parent, guardian, or grandparent. See § 44-41-31. In order to effectuate the policy goal of requiring some form of parental consent, it would have been illogical for the legislature to withhold explicit language defining parental consent because it believed the word "consent" alone could somehow sufficiently address all of the policy concerns raised by a minor seeking an abortion. The legislature recognized that the policy concerns are too complex for it to have remained silent.

The basic thrust of the S.C. Wiretap Statute is that private telephone conversations are private, and third parties should not be eavesdropping without consent or a court order. The "vicarious consent" exception says the complete opposite: private telephone conversations are not really private—a third party can unilaterally eavesdrop on a private conversation. The legislature did not intend for "vicarious consent" to be the law in South Carolina.

D. The South Carolina Constitution, Article I, §10, provides an additional and explicit "right to privacy" guaranteeing citizens of this state privacy rights beyond the federal Constitution and those of other states.

Petitioner has shown above the many policy considerations the legislature would face if it chose to amend the statute to broaden the clear definition of consent to include a person who was

not a party to a two-way telephone conversation. Article I, §10 of the South Carolina Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated. . . ." The "vicarious consent" exception runs counter to this explicit right of privacy granted by our state constitution.

Our state Constitution provides a right to privacy both within and outside the search and seizure context. State v. Forrester, 343 S.C. 637, 644-645, 541 S.E.2d 837, 841 (2001). For example, in State v. Singleton, 313 S.C. 75, 437 S.E.2d 53 (1993), the Supreme Court found the state constitutional right to privacy prevented the forced medication of a death row inmate in preparation of execution. Cf. State v. Church, 538 So2d. 993 (La.1989) (disallowing a police roadblock as a violation of the state's right to privacy even though it did not violate the Fourth Amendment. In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007), the Supreme Court noted that the South Carolina Constitution favors an interpretation offering a higher level of protection than the Fourth Amendment.

In short, the plain meaning of "consent" does not authorize the expanded exception urged by the state. The "vicarious consent" exception runs counter of the S.C. Wiretap Statute's objective of protecting the privacy rights of private telephone conversations, and it also runs afoul of the grant by our state constitution of an explicit right of privacy for each of our citizens.

II. ASSUMING ARGUENDO THE COURT PERMITS "VICARIOUS CONSENT" AS AN EXCEPTION INCLUDED IN THE PLAIN MEANING OF THE S.C. WIRETAP STATUTE—THE STATE HAS FAILED TO ESTABLISH THE ELEMENTS OF "VICARIOUS CONSENT"

The law in S.C. is that "vicarious consent" is not an exception to the S.C. Wiretap Statute's prior consent requirement. However, *assuming arguendo* that the Court permits this

exception to be added to the statute, the State, nonetheless, has failed to establish the elements of the "vicarious consent" exception.

There are at least two versions of the "vicarious consent" exception. The Thompson court stated the "vicarious consent" exception as follows:

"[A]s long as the guardian has a good faith basis that it is objectively reasonable for believing that it is necessary to consent on behalf of [a] minor child to the taping of phone conversations, vicarious consent will be permissible in order for the guardian to fulfill [their] statutory mandate to act in the best interest of the [child]."

838 F.Supp. 1535, 1544. However, the Silas court stated the exception more restrictively:

[T]here may be limited instances where a parent may give vicarious consent on behalf of a minor child to the taping of telephone conversations where that parent has a good faith basis that is objectively reasonable for believing that the minor child is being abused, threatened, or intimidated by the other parent.

680 So.2d 368 at 371 (emphasis added). Petitioner is unable to determine which version the legislature intended.

Regardless of the form the exception might take, the State has failed to meet the exception's evidentiary requirements. Mother did not act in good faith; nor was there an objectively reasonable basis to believe intercepting the private telephone conversation between Petitioner and J.W. was necessary to protect the best interests of J.W. or to believe that J.W. was being abused, threatened, or intimidated. The interception should be suppressed.

A. The State has failed to show that Mother had a good faith basis for intercepting the telephone conversation.

Consider this scenario: a parent puts their minor child in a car and drives at 100 mph down a road with a posted speed limit of 35 mph. When the parent is stopped by a police officer

for speeding and reckless driving, the parent's defense to endangering the life of the child is that the child was seat belted in!

We would not consider the parent to have acted in good faith. The parent created the danger by driving 100 mph, and cannot then claim in defense to endangering the child's safety that they strapped the child in. Likewise, Mother did not act in good faith. Her intent was not to protect J.W. from some danger on the telephone; it was to entrap Petitioner into an alleged admission of sexual assault that she could bring to the police.

A common theme of the "vicarious consent" exception cases is that there is some conduct a parent suspects is taking place on the telephone that is harmful to the minor child. For example, in Thompson, wife believed that when her estranged husband was speaking with their three- and five-year-old children on the phone he was using the phone conversation to undermine and interfere with wife's relationship with the children. 838 F.Supp. 1535, 1542, 44. In Silas, father believed mother was saying something on the phone to cause daughter to become upset—but he did not know what it was. 680 So.2d 368, 370. In Pollock, mother suspected father and stepmother were pressuring daughter to do what she could to convince mother to allow custody to be changed to father. 154 F.3d 601, 604. The circumstances in this case are unlike these examples.

Mother's focus was not protecting J.W. from something that would transpire on the telephone; it was getting Petitioner on tape. The allegation was first made to Mother on August 2, 2007, which she did not immediately report to police. The following day, Mother permitted J.W. to confront Petitioner on the telephone, Petitioner denied the accusation, and Mother did not report anything to the police. Mother began recording the telephone calls with Petitioner but did not obtain anything she believed could be used to prosecute. On August 5, 2007, Mother then

permitted J.W. to use the home telephone to call Petitioner so that a tape recording could be made. The goal was to further an investigation by Mother and Stepfather, it was not to protect J.W. from a danger that J.W. might potentially be exposed to during the conversation. That is not the kind of good faith found in the cases discussed above. In those cases, the parents were specifically concerned with what might be taking place on the telephone but had no real proof of danger. The parents either had made efforts to prevent the calls but were unsuccessful; or, because they lacked proof of actual harm, could not stop the calls.

Mother faced neither of those situations in this case. She knew that Petitioner denied the allegation. Therefore there was no potential danger to be discovered in the conversation. Several of the cases discussed above were divorce cases where any potential action on the part of one parent could easily mean going back to court and a potential change in custody. Mother was not faced with such a dilemma: there was no real risk that if she cut off contact a court was going to remove J.W. and give her to the father she was now alleging had sexually assaulted her.

Most importantly, though, is the lack of any real effort to shield J.W. from the perceived harm. If Mother believed there was a danger to J.W. in speaking with Petitioner on the telephone, then she should not have permitted the call to be placed in her presence from her own home. Any claim of a good faith basis is undermined by Mother's direct placement of J.W. into the very circumstance she would now assert J.W. needed protection from. Just as the parent who drives at an excessively dangerous speed cannot ("with clean hands" in the parlance of the law of equity) claim they acted in good faith to protect the child's safety by buckling them in—Mother cannot in good faith claim there was a potential danger to J.W. when Mother was the one who placed J.W. in the very situation she would now claim J.W. needed protection from.

Even despite lacking a general good faith to intercept the telephone call, Mother lacked the specific good faith required by the exception because given she had no objectively reasonable basis for believing it was necessary to intercept the telephone call in order to act in J.W.'s best interests.

B. The State has failed to show that Mother had an objectively reasonable basis for believing it was necessary to intercept the telephone conversation in order to act in the best interest of J.W.

Mother did not have an objectively reasonable basis to believe intercepting the telephone conversation between J.W. and Petitioner was necessary to protect J.W.'s best interest. Mother does not contend prior conversations produced any immediate harm that required interception. There was no effort on the part of Mother to prevent the call between J.W. and Petitioner; nor was Mother in a situation where she could not prevent the conversation from taking place.

In the cases where "vicarious consent" was held to have been established, the vicariously-consenting parents had observed their children to be crying, upset, or appearing to be psychologically hurt by the telephone conversations. In Silas, the basis for the interception was that father had observed "several instances when the minor child became extremely upset and began to cry during the telephone conversations, [and so] he decided to find out what was happening during the telephone conversations." 680 So.2d 368, 370. In Pollock, mother observed "emotional and psychological pressure" on her child. 154 F.3d 601, 604. In Campbell v. Price, the father had observed daughter crying and becoming upset after talking with mother. 2 F.Supp.2d 1186 (E.D.Ark. 1998).

Also, in these cases the parents were not able to prevent the telephone conversations from ever taking place. A prime example is State of Iowa v. Spencer, where father's suspicions that his minor daughter was having an inappropriate relationship with her teacher were confirmed by,

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
Court of General Sessions

Indictment No. 2009-GS-23-01072

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SC Court of Appeals

The State, ... Respondent

v.

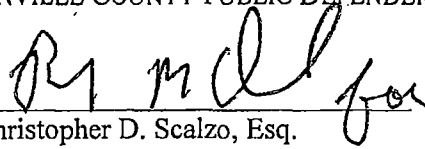
Samuel L. Whitner, ... Petitioner.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petitioner's Motion to Suppress and Memorandum In Support of the Motion to Suppress in the above referenced case has been served upon Christy Kednocker Sustakovitch at the Office of the Solicitor for the Thirteenth Judicial Circuit, at the Greenville County Courthouse, Suite 325, Greenville, South Carolina 29601 on the date reflected below.

Respectfully submitted,

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July 2, 2009
Greenville, South Carolina

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JUL 15 2009

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of AppealsGREENVILLE COUNTY
Court of General Sessions

Indictment No: 2009-GS-23-01072

State of South Carolina.....Respondent,

v.

Samuel Lamont Whitner,.....Petitioner.

**STATE'S RESPONSE TO PETITIONER'S MOTION TO SUPPRESS AN AUDIO
RECORDING BETWEEN PETITIONER AND HIS MINOR CHILD AS A
VIOLATION OF THE SOUTH CAROLINA WIRETAP ACT,
CODIFIED AT SECTION 17-30-10, et. seq. (Supp. 2008)**

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**STATEMENT OF ISSUE
PRESENTED FOR REVIEW**

WHETHER SOUTH CAROLINA SHOULD ADOPT THE DOCTRINE OF "VICARIOUS CONSENT" ALLOWING A PARENT TO RECORD A CONVERSATION BETWEEN A MINOR CHILD AND ANOTHER PARTY WITHOUT VIOLATING THE STATE'S WIRETAP STATUTE IF THE RECORDING IS MADE IN THE CHILD'S BEST INTEREST?

STATEMENT OF THE CASE

In September 2007, Petitioner was charged with one count of Criminal Sexual Conduct with a Minor in the First Degree. The minor victim is his 11-year-old daughter. On March 11, 2009, Petitioner's case was called for trial. Prior to the jury being sworn, Petitioner's counsel moved to suppress an audio recording of a phone call made by the minor victim's step-father and mother between Petitioner and the child as a violation of South Carolina Wiretap Act, codified at Section 17-30-10, et. seq. (Supp. 2008) (hereafter referred to as "the State's Wiretap Act"). Neither Petitioner nor the victim knew the phone call was recorded. The State argued the call was admissible pursuant to Section 17-30-30(c), the consent exception to the State's Wiretap Act, under the doctrine of "vicarious consent" recognized nationally in both federal and state courts.

The Honorable C. Victor Pyle, Jr., asked whether South Carolina had any law adopting the "vicarious consent" doctrine. The State advised the trial court this issue is a novel one in South Carolina. The trial court suppressed the audio recording, ruling it violated the State's Wiretap Act. The State requested a brief recess, and then sought an interlocutory appeal to the trial court's ruling. On March 27, 2009, the State, through the Attorney General's Office, filed a motion to vacate the trial court's oral ruling, arguing the court did not have jurisdiction to hear defense counsel's motion to suppress. The State argued any motion to suppress the phone call as a wiretap violation should have been made to the South Carolina Court of Appeals as the "reviewing authority" under section 17-30-110.

This Court agreed and vacated the trial court ruling and ordered the defense to properly file its motion asserting a violation of the State Wiretap Act with the Court of

Appeals pursuant to 17-30-110. Subsequently, Petitioner filed his motion to suppress pursuant to Section 17-30-110(A) before the "reviewing authority," which is defined by section 17-30-15(9) of the South Carolina Code (Supp. 2008) to include: "a panel of three judges of the South Carolina Court of Appeals designated by the Chief Judge of the South Carolina Court of Appeals."

STATEMENT OF FACTS

Petitioner is the biological father of the minor victim in this case. Petitioner and the minor victim's mother met when the mother was 13 years of age. She became pregnant and gave birth to the minor victim at 14 years of age and when Petitioner was 21 years old. The mother and Petitioner never married. Petitioner had contact with the minor victim throughout the years, and often saw her at his home or at his sister's home. According to the minor victim, Petitioner sexually assaulted her on one occasion between the years of 2000 and 2002 when she was between 5 and 6 years of age.

The minor victim states Petitioner came into her room while she was sleeping at her aunt's house and asked if she wanted to "see his little buddy."¹ He then pulled out his penis and made her perform oral sex on him. Later that same night, Petitioner made her perform oral sex again. He then got behind the minor victim and humped the child's body before stopping the assault. In her forensic interview, the minor victim said that when her father stopped the sexual assault, he began to cry and told her he was sorry.² The child did not disclose the abuse for several years.

In July 2007, the child's mother brought home a library book, which talked about "good" and "bad" secrets. The minor victim read the book which explained if a child had a "bad" secret, she should tell an adult and she would feel better. On Thursday, August 2, 2007, the minor victim disclosed to her mother that her father had sexually assaulted her years ago and it was a "bad secret" she had carried for years. The mother told the minor victim to let her father know she remembered what he had done to her. On Friday, August 3,

¹ Forensic Interview conducted on minor victim at Greenville Child Advocacy Center.

² Id.

2007, Petitioner called the mother's residence and talked to the child. The minor victim told him she remembered what he had done to her. Petitioner denied the assault. He then got on the phone with the mother and also denied the assault.³

On Saturday, August 4, 2007, the minor victim stayed at her grandmother's house, as her mother and step-father⁴ tried to figure out what to do. That same day, Petitioner called the mother's house again, left a message and told the mother to call him back. Later that Saturday night, the mother and step-father began recording phone conversations with the Petitioner. There are a total of three recorded phone calls in this case. The first brief call from Saturday night, August 5, 2007, is between the mother and Petitioner's girlfriend when the mother returned Petitioner's call. This call has no wiretap implications.⁵ The second call is from Sunday morning, August 5, 2007, between the mother and Petitioner. He again denies the assault and asks that the minor victim call him.⁶ The content of second recorded call is clearly about her disclosure, but Petitioner never admits to the assault.

Then later Sunday, August 5, 2007, the minor victim calls Petitioner back as he had requested. The child's mother and step-father recorded this phone call in an effort to act in the best interest of the minor victim and to protect her against possible future

³ Statement of the mother to Detective Bobby Bradford dated 9/10/2007.

⁴ Step-father has been acting in a parental role to the minor victim for years. Step-father and mother married in 1999.

⁵ The call is very short. Petitioner's girlfriend asked why the mother is calling so late. She responds that Petitioner told her to call and the call is ended.

⁶ The mother tells Petitioner that the minor victim "is crying a lot" and will "need help getting over this." Petitioner states he wants to talk "about the situation with" the minor victim and, "I don't want [minor victim] to go through no more pain."

harm.⁷ Petitioner begins the call by saying, "Is anybody else listening to the conversation?"⁸ Throughout the call, Petitioner repeatedly tries to explain why the "incident" with the minor victim happened. He tells her he was sexually abused as a child by his father and then turned to drugs to cover his pain.⁹ He further confesses: "It drove me to the point to where I was on drugs. It was bad, *when the incident, what happened with you*, I was high and out of my mind. I was tore up on valium, on cocaine, on weed, on alcohol and everything, that wasn't your daddy, you hear me?"¹⁰

Later he tells the minor victim, "I made a horrible, a horrible mistake, you hear me?"... "[D]arling it beats me down like crazy, because I know that wasn't me and I know that it's a bunch of influences, a bunch of stuff that I was on and going through, and you know what I'm saying, you know because I can't see myself now as sober as the person that I am today as ever doing that, you hear me, okay?"¹¹ The tape is replete with Petitioner asking the child for forgiveness. Petitioner's words echo in the minor victim's disclosure of the assault to a forensic interviewer. The minor child said her father cried when he stopped the assault and told her he was sorry.

Petitioner:	"That's why I cried so hard, you remember?"
Minor victim:	"Yeah"
Petitioner:	"I mean, honestly, do you remember?"

⁷ A copy of the recorded call at issue is enclosed for the Court's review as well as a transcript prepared by the State. Some portions of the call are difficult to hear.

⁸ Transcript of August 5, 2007, call at page 2.

⁹ Id., at pages 3 and 4. The Petitioner has told several parties that he was the victim of sexual abuse; including a DSS case worker and the mother.

¹⁰ Id., at page 4.

¹¹ Id. Page 10.

Minor victim: "Yeah"
Petitioner: "You said to me, 'That's okay Daddy,' and I said, 'No it's not Baby. It's not okay. I just done the worst thing that I can never come back from all this life and I did not mean it....'"¹²

Later in the call, Petitioner goes on to say that he is responsible for what happened with the minor victim.¹³ On Monday, August 6, 2007, the mother took the audio recording and the minor victim to the Greenville Law Enforcement Center to report the assault. Police had no involvement in this case prior to that point.

¹² Id., at page 5.

¹³ Id., at page 9.

ARGUMENT

I. SOUTH CAROLINA SHOULD ADOPT THE DOCTRINE OF "VICARIOUS CONSENT" ALLOWING A PARENT TO RECORD A CONVERSATION BETWEEN HIS OR HER CHILD AND THIRD PARTY IF THE RECORDING IS MADE IN THE CHILD'S BEST INTEREST.

Petitioner contends because neither the minor child nor Petitioner consented to the recording of their phone call, the recorded call is inadmissible at trial. Petitioner argues the word "consent" in section 17-30-30(c) of the South Carolina Code does not explicitly state "vicarious" or "parental" consent, therefore the Legislature must not have intended the doctrine of "vicarious consent" to apply. The recorded call between Petitioner and the minor victim, however, is admissible under the theory of "vicarious consent." The doctrine is accepted in both federal and state courts across the nation, and should be applied in South Carolina. The State's Wiretap Act generally regulates who can intercept a call and how they may do so. The Act contains a one party consent exception codified at Section 17-30-30(c) which states a call is legally intercepted as long as one party to a conversation makes the recording or consents of its recording. State v. Aragon, 579 S.E.2d 626 (2003).

This Honorable Court should interpret "consent" in section 17-30-30(c) to include "vicarious consent" because the doctrine is in accordance with the overall intent of the Legislature and this Court for protecting children. The State is not asking this Court to craft a judicially created exception to the Wiretap Act, but rather merely interpret the provision already written into the statute. This Court can find guidance from the weight of authority on this issue from both federal and state courts to be discussed *infra*.

In Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998), a seminal case interpreting the federal wiretap statute's one party consent exception, the Sixth Circuit held that "as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary to consent on behalf of his or her minor child to the taping of telephone conversations, the guardian may vicariously consent on behalf of the child to the recording." 154 F.3d at 610. Under this widely accepted doctrine, the mother and step-father's recording of the minor child's telephone conversation with Petitioner fits within this exception because the two guardians were motivated by concern for the welfare and safety of the minor child, and as such, they could "vicariously consent" to recording the call at issue. *See also* Kroh v. Kroh, 567 S.E.2d 760 (N.C. App. 2002).

A. The State Wiretap Act permits lawfully intercepted communications, and under the doctrine of 'vicarious consent,' the recorded call is a legally intercepted communication.

The South Carolina Wiretap Act sets forth when it is permissible to disclose and use intercepted communications. The Act allows the interception of wire, electronic, or oral communications as long as they are done "*in the manner permitted by this chapter.*" See section 17-30-10. The Act criminalizes only unlawful communications under section 17-30-20. The State concedes the recorded phone call between the minor victim and Petitioner is an "intercepted communication" within the meaning of the State Wiretap Act's definitions. But the recorded call is a lawfully intercepted communication. S.C. Code Ann. § 17-30-30(c) provides that a person not acting under the color of law may intercept a call of as long as one party consents to the recording of the conversation.

This type of intercepted communication does not violate the wiretap statute. State v. Andrews, 324 S.C. 516, 479 S.E.2d 808, 811 (Ct.App.1996); S.C. Code Ann. § 17-30-

30(C). Therefore the recording is considered to be one to which one of the parties (the child with the parent standing in the child's shoes) consented to the conversation, thereby satisfying the one party consent exception and protecting parents from civil and criminal liability. The statute does not need any additional provisions to authorize the actions by the mother and step-father as they tried to protect their child from any possible future harm. The Legislature already put in place the appropriate law for this court to interpret.

B. The majority of federal and state courts which have addressed "vicarious consent" for children adopt the doctrine

1. Federal precedent

Congress first enacted the federal wiretap statute in 1968 as Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510- 2521 ("Title III")(hereafter referred to as "the Federal Wiretap Statute."). The Federal Wiretap Statute governs the interception of wire and other communications. The United States Supreme Court has stated the purpose of Title III is "to prohibit, on the pain of criminal and civil penalties, all interceptions or oral and wire communications, except those specifically provided for in the Act." United State v. Giordano, 416 U.S. 505, 515 (1974). The legislative history for Title III also states the purpose is to "prohibit [] all wiretapping and electronic surveillance by person other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes after obtaining a court order, with exceptions" provided for in the code.¹⁴ Subsequent to its passage, South

¹⁴ See Daniel R. Dinger, *Should Parents be Allowed to Record a Child's Telephone Conversations when they Believe the Child is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 Seattle U.L.Rev. 955, 992 (2005) (arguing in favor of "vicarious consent") citing S. REP. NO. 1097 (1968), reprinted in 1968 U.S.C.C.A.N.2112, 2113.

Carolina enacted the State Wiretap Act. The South Carolina one party consent exception mirrors the federal wiretap statute.

South Carolina's consent exception in section 17-30-30 (c) reads as follows:

(C) It is lawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception.

The Federal Wiretap Act in Title 18 U.S.C. Section 2511(2)(d) reads:

(d) It shall not be unlawful under this chapter for a *person not acting under color of law* to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the Constitution or laws of the United States or of any State.

A look to the federal wiretap statute and federal case law interpreting the "consent exception" provides much instruction on the "vicarious consent" doctrine.¹⁵ Petitioner argues if the Legislature intended the consent exception to allow a parent to "vicariously consent" for his or her child, the Legislature would have certainly put that exact language, explicitly defining "consent," into the statute. Yet, the State's position is supported in federal jurisprudence. Although the federal wiretap statute contains no express provision authorizing the "vicarious consent" doctrine and nowhere in the body of Title III is the word "vicarious" ever written, federal courts (discussed *infra*) have overwhelmingly recognized the doctrine by judicial decision through their interpretation

¹⁵ Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993), Campbell v. Price, 2 F.Supp.2d 1186 (E.D.Ark.1998), Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998), and Wagner v. Wagner, 64 F.Supp.2d 895 (D. Minn. 1999).

of the one party consent exception found in 18 U.S.C.A. § 2511(2)(a)(iii)(c)-(d). Federal courts also find the existing one party consent exception is to be interpreted broadly.¹⁶

The first court to address "vicarious consent" was the United States District Court for the District of Utah in Thompson v. Dulaney, 838F. Supp.1535 (D.Utah 1993). In Dulaney, a husband sued his former wife for violating the Federal Wiretap Statute by recording his conversations with their children. The Utah Federal District Court held that where a "guardian has a good faith basis that is objectively reasonable for believing that it is necessary to consent on behalf of her minor children to the taping of the phone conversations, vicarious consent will be permissible in order for the guardian to fulfill her statutory mandate to act in the best interests of the children." Thompson v. Dulaney, 838 F.Supp.at 1544. The court based the vicarious consent theory on the one party consent exception found in 18 U.S.C.A. § 2511(2)(a)(iii)(c)-(d), and remanded the case to the trial court for a factual determination as to whether or not the wife acted in the best interest of the children. Id.

In the previously discussed case of Pollock v. Pollock, a husband and his current wife sued his former wife for violation of the federal wiretap statute because his former wife recorded conversations between the husband, his current wife, and their 14-year-old daughter without either's knowledge or consent. 154 F.3d 601 (6th Cir. 1998). The Sixth Circuit Court of Appeals held a parent may provide vicarious consent on behalf of a child to record a conversation as long as the "good faith" Pollock requirements are met as discussed previously. Id. at 610. The court then remanded the case to the District court to determine whether the former wife acted in the best interest of the daughter. Id. at 613.

¹⁶ Thompson v. Delaney, 838 F. Supp. 1535, 1543 (D. Utah 1993).

Similarly, in Campbell v. Price, 2 F.Supp.2d 1186 (E.D.Ark.1998), the mother filed suit against the father seeking damages for violation of the Federal wiretap statute. In Price, the Arkansas Federal District Court found that under both the one party consent exception and the extension phone exception, 18 U.S.C.A. § 2510(5)(a)(i), the vicarious consent doctrine applied where “a custodial parent is clearly acting in the good faith belief that his action furthers the best interests of his minor child.” Id. at 1191. Then in Wagner v. Wagner, 64 F.Supp.2d 895 (D. Minn. 1999), a former wife and daughter brought an action against the former husband under the federal wiretap statute alleging he violated the statute by recording conversations between them and the couple’s two minor children. The Minnesota Federal District Court, following Pollock and Campbell, adopted the doctrine of “vicarious consent.” Id., at 901.

2. State court precedent

Texas

In Alameda v. State, 235 S.W.3d 218 (Tex. Crim. App. 2007), the Texas Court of Criminal Appeals held a mother could “vicariously consent” on behalf of her child to record conversations between her 12 year old child and the defendant, with whom the mother suspected her daughter was having sexual relations, because the mother had an objectively reasonable, good-faith basis for believing the recordings were in her child’s best interest. Accepting the vicarious consent doctrine from Pollock, the court held the tapings did not violate either the federal or state wiretapping statutes. Id. at 223.

Iowa

In State v. Spencer, 737 N.W.2d 124, 135 (Iowa 2007), the Iowa Supreme Court also adopted the doctrine of “vicarious consent.” In that case, a father recorded

conversations between his 13-year-old daughter and her school teacher, after he suspected the two had a sexual relationship. Id. at 124. The court found that, because the “vicarious consent” doctrine applied, if the father had a good-faith, reasonable basis for believing that it was necessary and in the best interests of his daughter to consent to the taping on her behalf, then he did not violate the state or federal wiretapping statutes, and, therefore, admission of the tapes was not barred. Id. at 134.

Arizona

In State v. Morrison, 56 P.3d 63, 64 (Ariz.Ct.App.2002), the mother of a 14-year-old girl tape recorded her daughter’s sexually explicit calls with a 45 year old defendant. The tape was introduced into evidence in the defendant’s trial for sexually abusing the girl. Id. The Arizona Court of Appeals held a mother who has a “good faith, objectively reasonable basis for believing it was necessary and in the best interests of her minor daughter to vicariously consent to the taping of the telephone conversation” did not violate 18 U.S.C. 2511(2)(d). Id. at 65.

Alabama

In 1996, the Court of Civil Appeals of Alabama handed down another decision supporting the vicarious consent doctrine in Silas v. Silas, 680 So.2d 368 (Ct. App. Ala. 1996). A father made recordings of phone calls between his child, and the child’s mother. The tapes showed verbal abuse to the child, and the Silas Court held “the father had a good faith basis that was objectively reasonable for believing that the minor child was being abused, threatened, or intimidated by the mother.” Therefore, it was permissible for the father to vicariously consent on behalf of the minor child to the taping of the telephone conversations. Id. at 371.

Other States

In addition to Texas, Iowa, and Arizona, many other states have adopted the “vicarious consent” doctrine including: North Carolina in Kroh v. Kroh, 152 N.C.App. 347, 567 S.E.2d 760 (2002); New Jersey in State v. Diaz, 308 N.J.Super. 504, 706 A.2d 264 (1998), Cacciarelli v. Boniface, 325 N.J.Super. 133, 737 A.2d 1170 (1999), and D’Onofrio II v. D’Onofrio, 344 N.J.Super. 147, 780 A.2d 593 (2001); and Louisiana in Smith v. Smith, 923 So.2d 732, 2004-2168 (La.App.1 Cir. 2005).

C. The Court should interpret 17-30-30(c) to include the doctrine of “vicarious consent” because the Legislature intended it to be the law, consistent with the Legislature’s long-standing intent to protect South Carolina’s children.

While there is a large amount of federal and state case precedent supporting the Court adopting this important doctrine, the State recognizes this Honorable Court is not bound by the cases cited above in determining the matter. The sole issue for this Court is one of statutory interpretation: Did the legislature intend for “vicarious consent” to be included in the existing one party consent exception, codified as 17-30-30 (c), such that “the present consent exception is satisfied when the consent of a minor party to a conversation is given by that minor’s parent or guardian.” State v. Spencer, 737 N.W.2d 124, 129 (Iowa 2007). To determine statutory intent, this Court must look to the general rules of statutory interpretation.

The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature. State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008). The Legislature’s intent should be ascertained primarily from the plain language of the statute without resorting to subtle or forced construction. Id. In construing a statute, the court looks to the language as a whole and gives that language a practical, reasonable,

and fair interpretation consistent with the purpose, design, and policy of the lawmakers. Id. at 497. In the end, Courts are to reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

Utilizing these well-established rules of statutory interpretation, the Honorable Court can only conclude that the one party consent exception already contained within the State Wiretap Act encompasses the doctrine of "vicarious consent." Thus, our Legislature intended to allow a parent or guardian, like the mother and step-father in this case, charged with the care and wellbeing of their minor victim, to be able to consent for her and record the phone call (as long as it is in the child's best interest) without violating the State Wiretap law.

1. **If the Court finds the statute ambiguous, it should follow the reasoning of Iowa v. Spencer and interpret the statute to recognize "Vicarious Consent"**

Case law supports this Court recognizing the "vicarious consent" doctrine regardless of whether the Court finds the State Wiretap Statute is ambiguous or unambiguous with regards to the meaning of "consent." This Court may find the statute is ambiguous in its definition of consent as it relates to minors because sometimes they can consent (minors are bound by contracts unless disaffirmed) while many other times they cannot consent without parental consent *first* (as seen in the examples given by Petitioner related to abortion, tattooing and bungee jumping).

If this Court finds the State Wiretap Statute to be ambiguous as to whether the Legislature intended a parent to be able to vicariously consent for his or her child, the Court should attempt to ascertain the intent of the Legislature. The rules of statutory construction mandate: "If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself. Any ambiguity in a statute should be resolved in *favor of a just, beneficial, and equitable operation of the law.*" Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 659 S.E.2d 171 (S.C.App. Feb 01, 2008)), rehearing denied (Apr 18, 2008), certiorari granted (Jun 24, 2009) (emphasis added). A "just" and "beneficial" operation of law does not protect the rights of a criminal defendant while ignoring the rights of the child victim.

At the core of this entire dispute is the recorded call containing evidence of a sexual assault on a child. Petitioner designates the call at issue in a very benign, sterile way: "the August 5th Intercepted Conversation." But in reality, no matter how much Petitioner fights this call being heard in open court or attempts to minimize its true nature, the tape is a confession that should be heard by the jury and used by the jury in determining the truth about what happened to the minor victim. The truth is explained and documented exhaustively by Petitioner on this tape in his own words.¹⁷

¹⁷ Petitioner will most certainly say he is apologizing for some other "incident" with J.W. on the tape and the tape is not a confession to the sexual assault. The State believes a jury should get the chance to determine the context of the call. When arrested by Greenville City Detective Bobby Bradford, Petitioner immediately tried to figure out how much of what he said to J.W. was recorded on tape. He said the mother only let police hear what she wanted. He did not realize law enforcement had the entire phone call between Petitioner and J.W. The State is confident the 31 minute taped call, viewed in light of all the events that occurred between August 2 – August 5, 2007, will lead a reasonably jury to reach the "just" result.

He states: "...I am responsible. You hear me?.....I'm the one who's gotta deal with everything. I'm the one that's gotta take what's coming. You hear me?"¹⁸ So based on the extremely probative nature of this call, the State asks this Court to recognize "vicarious consent" because it is legally viable to do so and socially imperative to do so.

In the event this Court finds the statute ambiguous, the analysis and result found in State v. Spencer is illuminating. As discussed above, In State v. Spencer, the Iowa Supreme Court adopted the doctrine of "vicarious consent." Id at 135. In that case, the defendant took the exact same position Petitioner takes in this case, saying the Statute is clear and unambiguous and if the Legislature intended for there to be a "vicarious consent" exception, then it would have explicitly inserted language into the statute. The Supreme Court of Iowa found the definition of consent in the statute was ambiguous and went through a very thoughtful and thorough analysis of the "vicarious consent" doctrine. The Court analyzed the consent exception in Iowa's statute, codified as Iowa Code section 808B.2(2)(2)(c), which mirrors federal consent exception as well as South Carolina's consent exception.¹⁹

In the end, the Supreme Court of Iowa overruled the trial court, and adopted the doctrine of "vicarious consent" to allow admission of phone conversations between a 13

¹⁸ Transcript, page 9.

¹⁹ Other state courts with one party consent provisions similar to the federal provision look to the federal courts for guidance: "Therefore, we can look at the federal act and the interpretations placed on the consent provision by federal courts and assume the Iowa legislature had the same objectives in mind and employed the statutory terms in the same sense as its federal counterparts." State v. Spencer, 737 N.W.2d 124, 135 (Iowa 2007) citing City of Davenport v. Pub Employment Relations Bd, 264 N.W.2d 307, 313 (Iowa 1978).

year old girl and her school teacher, recorded by her father after he suspected the two had a sexual relationship. The court held:

“After considering (1) the weight of authority behind the adoption of the vicarious consent doctrine; (2) the similarity between the Iowa statute, federal statute and the statutes of those states adopting vicarious consent; (3) the protections against parental abuse provided by this doctrine; (4) our conclusion a minor’s privacy is not violated when a parent or guardian vicariously consents for that minor consistent with the protections provided by the doctrine; and (5) the refusal of the Iowa legislature to allow a minor to consent to certain acts, especially with respect to those matters traditionally left to a parent or guardian to determine the best interests of the child, we interpret section 808b.2(2)(c) to include the vicarious consent doctrine as outlined in Pollock.” Id at 133-134.

In the event this Court finds the statute ambiguous, the Court should follow Spencer. As this Court is divining the real purpose and intent of the Legislature, the State respectfully asks this Court to consider these two questions: First, would the Legislature have intended to keep this extremely probative piece of evidence from a jury’s consideration in determining whether a small child has been sexually assaulted? Second, would the Legislature consider it a “just” and “beneficial” operation of law to subject parents and guardians to criminal and civil penalties, when out of concern for that their child has been the victim of a sexual assault and in the best interest of their minor child, they record that child’s conversation? The answer to both questions is certainly no.

2. Even if the Court finds the statute unambiguous, it should follow the reasoning in Alameda v. State and interpret the statute to recognize “Vicarious Consent”

If a statute’s meaning is clear and unambiguous on its face, the court interprets and applies the statute according to its literal meaning. State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (S.C. Ct. App. July, 18, 2008). But the court must also look to the language as a whole in light of its manifest purpose, giving it a practical, reasonable, and

fair interpretation consonant with the purpose, design, and policy of the lawmakers. *Id.* at 495-498. The Court can find the statute is clear and unambiguous and still find the Legislature intended to allow "vicarious consent" because it is nothing more than a *means of or type of* consent by a party when that party is a minor. The Court should determine the consent exception includes: the usual consent by a party when that party is an adult and also "vicarious consent" by the party's parent when the party is a minor.

As previously discussed, the Alameda court ruled in favor of adopting the "vicarious consent" doctrine in Texas. The defense in that case argued, that since the Texas Family Code enumerated circumstances under which a parent has the right to consent on behalf of a child but the code did not mention the right of parents to consent to the recording of a child's conversations, then the legislature must have intended that no such right exist. 235 S.W.3d 218, 222 (Tex. Crim. App. 2007). Petitioner makes the same argument, saying the Legislature did not intend "vicarious consent" to be the law in South Carolina because the wiretap statute does not specifically include the word "vicarious" or have the exception itself written specifically in the statute.

The Alameda Court rejected this narrow argument:

"Appellant states that this case may illustrate why a vicarious-consent exception should be added to the statute, but he argues that it should be added by the legislature and not the courts. However, by holding that a parent can give vicarious-consent for a child, we are not adding a new exception to the wiretap statute. *Rather*, we are saying that vicarious-consent, which is a *type of consent* recognized in many contexts in the law regarding the parent-child relationship, also applies to the existing consent exception to the wiretap statute. *Alameda v. State* 235 S.W.3d 218, 223 (Tex.Crim.App.,2007)

As in Alameda, Petitioner points to other statutory provisions where parental consent is explicitly defined and required such as abortion, bungee jumping and tattooing,

and he argues since the Legislature explicitly defined those statutes, its silence must mean the Legislature did not intend for "vicarious consent" to exist. The examples of legislation cited by Petitioner were passed requiring parental consent for the best interest of the child. The case before this Court is distinguishable because the legislative intent is not *to require* parental consent to record the communication for the best interest of the child but *to allow* vicarious consent to record the communication for the best interest of the child. All the statutes cited by Petitioner do is further display the Legislature's clear desire to protect the safety and best interest of children in South Carolina, and therefore, the "vicarious consent" doctrine would be consistent with the Legislature's clearly demonstrated intent.

3. The Court should interpret Section 17-30-30 (c) to allow "vicarious consent" to avoid an absurd result

The Supreme Court is very clear that statutory interpretation should not lead to absurd results that subvert justice. "We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Sonoco Products Co. v. South Carolina Dept. of Revenue, 378 S.C. 385, 662 S.E.2d 599 (2008) When it drafted the State Wiretap Act, the Legislature certainly did not intend to protect the criminal acts of defendants in child sexual assault cases, while casting aside the rights of children who have been sexually abused by those defendants or their parents who have the responsibility and duty to protect them from future harm.

Under the Petitioner's theory of the wiretap statute, a completely absurd result, one affecting evidence admissibility, as well as the possibility of criminal charges and civil causes of action, would happen in this case: 1) the call of a defendant apologizing to his

daughter for a heinous crime would be suppressed; 2) technically, her mother and step-father would have committed a criminal act for recording the call in the first place under state law but not federal law; and 3) Petitioner could, in theory, seek civil redress against the mother and step-father. This result, when carried out to its illogical conclusion, would mean that these two well-meaning guardians *could* be charged with a felony and prosecuted for doing what any responsible parent would do in this situation: acting in the child's best interest and protecting her. The statute would protect the child abuser and criminalize the parent who acts in that child's defense. Would the Legislature have intended this result? Surely, it would not.

D. Courts rejecting "vicarious consent" are distinguishable from this case

The State finds only a handful of jurisdictions have rejected the "vicarious consent doctrine."²⁰ Yet each case is distinguishable from Petitioner's case. In Williams v. Williams, Brenda Williams filed suit under the Federal and Michigan wiretap statutes against her former husband when she discovered he has secretly recorded conversations between Brenda and her son, without either's knowledge or consent. 581 N.W.2d 777 (Mich. Ct. App. 1998). In Williams, the Michigan Court of Appeals failed to apply the "vicarious consent" doctrine and reversed the trial court. *Id.* at 778-79.

Ultimately, the case was appealed to the Michigan Supreme Court which remanded the case back to the Court of Appeals for reconsideration in light of Pollock which was decided after the first appellate decision. 593 N.W. 2d 559 (Mich. 1999). On remand, the Williams Court of Appeals acknowledged it was bound to follow Pollock and ruled the

²⁰ See Williams v. Williams, 229 Mich.App. 318, 581 N.W.2d 777 (Mich. Ct.App.1998). Bishop v. State, 241 Ga.App. 517, 526 S.E.2d 917 (2000). State v. Christensen, 153 Wash.2d 186, 102 P.3d 789 (2004).

doctrine of “vicarious consent” did apply with regard to the federal wiretap statute. 603 N.W.2d 114, 115 (Mich. Ct. App. 1999). But the Williams II court refused to adopt “vicarious consent” on the state claim. Id. This case is distinguishable because the Michigan wiretap statute requires *consent of all parties* to fit into exception. Therefore, by adopting “vicarious consent,” the court would have been creating an exception rather than merely interpreting one. Petitioner’s case is dissimilar to the stringent Williams requirement since the state and federal statutes contain only one party consent exceptions.²¹

Finally, Petitioner cites Bishop v. State for the premise that if the South Carolina Legislature intended “vicarious consent” to exist, it could have codified a consent provision as was done by the Georgia legislature. 241 Ga.App. 517, 522; 526 S.E.2d 917, 921 (2000). But Petitioner gives a generalized holding that does not accurately explain what happened in Bishop. The State is asking this Court to interpret one provision, 17-30-30(c). In Bishop, the court had to, not only interpret the existing one party consent provision, but also interpret an entirely different, specific Georgia statute, which is not part of S.C. law. In Bishop, the parents of a 13 year old child recorded conversations between their child and the defendant. Id.

The Georgia statutory scheme at the time led to the Georgia Court of Appeal’s unfortunate result in Bishop of suppressing the calls. Georgia’s additional statute

²¹ See also, State v. Christensen, 153 Wash.2d 186, 102 P.3d 789 (2004) where the Washington Supreme Court recognized the vicarious consent doctrine with regard to the Federal statute and its one party consent exception, but found that “[t]he Washington act, with its all-party consent requirement, contains no such parental exception and no Washington court has even implied such an exception.” Id. at 194, 792.

presented a hurdle to the adoption of "vicarious consent" through judicial interpretation and required legislative reform. The statute read:

1. First, OCGA section 16-11-62 "prohibits the interception or recording of a telephone call by any person who is not a party to the conversation." Id. at 519.

2. Second, OCGA section 16-11-66(a) contained a "one party consent" statute mirroring our exception which read as follows: "Nothing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Id.

3. The problem was OCGA section 16-11-66(b) which stated "that the telephone conversations of a child under 18 years of age may be recorded and divulged *if*, upon written application by a private citizen, law enforcement agency, or prosecutor's office, *a judge* of a superior court and the child consent to such taping. (Emphasis added) Id.

At the time of Bishop, the Georgia statutory scheme pursuant to OCGA 16-11-66(b) led to bad results and was flawed in many ways. First, as a matter of law, "the child victim alone could never have given consent to the recording of her phone call because a judge of a superior court had to consent to the recording. Id. at 523. Likewise, even if a judge had consented to the recording, if the child did not consent, the recording was inadmissible."²² Id. In reaction to the bad result in Bishop, the Georgia State Legislature amended § 16-11-66 to fix this unintended result and created a parental "vicarious consent" exception to the state wiretap statute. OCGA § 16-11-66.

²² The Bishop Court recognized the flaws in the Georgia Code: "This Court recognizes that OCGA § 16-11-66, as drafted, creates numerous evidentiary problems in cases such as this, when a child is under significant criminal influence by another and such criminal influence poses a genuine risk which is not recognized by a child of tender years. Clearly, even if the State or the parents in this case had petitioned a superior court judge, under OCGA § 16-11-66(b), for permission to tape the conversations between Bishop and the victim, the victim would have refused to consent and participate at that time, thereby precluding the issuance of such order..." 241 Ga. App. 517, 523.

West Virginia has not rejected the “vicarious consent” doctrine but has declined to apply to it to a very specific set of facts in ex rel. Wright v. David L., 192 W.Va. 663, 453 S.E.2d 646 (1994).²³ In Wright, a father got his mother (the children’s grandmother) to plant a voice recorder in the children’s bedrooms in the mother’s home. *Id.* The court acknowledged and agreed with reasoning in Thompson, but held that because the recording was done in mother’s home, the father had no right to record or vicariously consent for the children. *Id.* at 671, 654. There is every reason to believe that West Virginia would rule in favor of “vicarious consent” under the facts set forth in this case, since the mother and step-father did the recording in their home in an effort to protect the minor child from future harm.

E. The elements of “vicarious consent” are met under the Pollock test

Once this Court finds that South Carolina recognizes the “vicarious consent” doctrine, the recorded call would clearly be admissible under the Pollock test. Here, these two parents were faced with any parent’s worst nightmare: the reality that their child had been sexually assaulted and could possibly face future harm, especially if allowed to visit the offending parent. The Pollock case centered on calls that occurred “during the context of a bitter and protracted custody dispute.” 154 F.3d 601(6th Cir. 1998). The doctrine would most certainly apply in a case of suspected child sexual abuse, finding the mother and

²³ See also State v. Hensley, 145 Idaho 852, 187 P.3d 1227 (2008) where the Idaho court did not reject “vicarious consent” but simply did not address the issue because the court found the father was not acting in the best interests of the child so there was no need for further inquiry. *Id.* at 857, 1232. The Hensley court implied “vicarious consent” could only apply when a parent is acting in a child’s best interest as in this case.

step-father were acting in the minor child's best interest when they recorded the call at issue with Petitioner.²⁴

Consider the position they were in as parents. First, the mother hears the terribly disturbing disclosure from her daughter, that 5 or 6 years ago, her own biological father forced her to give him oral sex and humped her body one night. A myriad of confusion sets in. Petitioner thinks it is significant the mother did not run down to the police station the very second she heard the news. The reality is that there is no "cookie cutter," appropriate response any parent should have to such upsetting news. The parents acted entirely appropriately and only allowed a few short days to pass before going seeking help. But during the interim, they were trying to get to the bottom of what happened to prevent possible future harm to the minor child.

After Petitioner denied the assault to both the minor child and the mother, the child was seen by the mother crying after telling her "bad" secret.²⁵ Any parent would want to search for the truth to help his or her child with counseling and recovery. Step-father would testify, while he knows minor child is a truthful, honest child, he hoped by some miracle, she was confused or it was a dream. As with many parents in this type of situation, step-father did not want to believe Petitioner could have done such a terrible thing to his own child. By finding out if something illegal happened in the past, the mother and step-father were trying to prevent *future* harm as well. If they did nothing to

²⁴ See State v. Morrison, 56 P.3d 63, 64 (Ariz.Ct.App.2002)(another case involving sexual assault on a child).

²⁵ In the recorded phone call on Sunday morning, August 5, 2007, the mother tells Petitioner that the minor victim is "crying a lot" and "will need help getting over this..." Petitioner does not admit or deny the assault.

ferret out the truth of what happened to the minor victim those many years ago, their actions would equate to negligence and dereliction of their duties as a parent.

Imagine what could have happened if they did nothing, sat quietly by and hoped it was all the confused memory of a little girl. Then at some later date, Petitioner, gets "high and out of my mind" again,²⁶ has a relapse, and assaults the minor victim again. Not only would the parents have failed their child, but some might believe they would have committed a crime themselves by doing nothing to stop possible future harm. Under the circumstances, both the mother and step-father had a good faith, objectively reasonable basis for believing that it was necessary to consent on behalf of the minor child to the taping of the call with Petitioner.

²⁶ Transcript page 4.

II. THE "VICARIOUS CONSENT" DOCTRINE DOES NOT INFRINGE ON PRIVACY RIGHTS: IT PROMOTES SOUND PUBLIC POLICY

Petitioner contends the doctrine of "vicarious consent" infringes upon the privacy rights of the parties, and especially the child. The doctrine does not compromise privacy protections for South Carolina citizens as stated by Petitioner. Nor does it run counter to the overall purpose of the South Carolina Wiretap Act. Petitioner argues the "vicarious consent" doctrine permits a "third-party" to "unilaterally eavesdrop" on a private conversation. The State is not seeking that kind of broad, sweeping exception to the State Wiretap Act. The State is asking this Court to adopt the restrictive "vicarious consent" doctrine as set forth in Pollock. The doctrine does not allow just any "third party" to intercept a call. The requirements are the person must be: 1) a parent or guardian, 2) who has a good faith, objectively reasonable basis for believing that it is in the best interest of his or her minor child to record of telephone conversations. 154 F.3d at 610. Even with the adoption of this doctrine, there will be cases where intercepted calls will not be admissible because the court finds the parent did not have proper motives.

The doctrine does not violate the privacy rights of S.C. citizens guaranteed in the South Carolina Constitution, Article I, § 10. It is important to remember South Carolina only requires one party to know that a call is recorded. The legislature could have adopted the more stringent "all party" consent exceptions seen in Michigan and Washington. The State Wiretap Act was intended to protect the privacy of individuals, to an extent, but not protect the criminal acts of defendants by allowing them to assert the rights of their victims. The bottom line here is that had J.W. been told by her mother and step-father that they were going to record the call, Petitioner would have no standing to complain his confession was caught on tape and recorded without his permission. As

such, Petitioner is trying to assert the rights of the victim. The end result would be terribly unfair for this child victim. She would be forced to go through a trial where the most critical piece of evidence against her sexual abuser was thrown out. It would basically be "her word versus his word," making it much more difficult for a jury to reach the proper verdict.

The doctrine also does not unduly infringe on the privacy rights of children. In Bellotti v. Baird, the United States Supreme Court recognized although children are due many of the same rights as adults, "the constitutional rights of children cannot be equated with those of adults." Bellotti v. Baird, 443 U.S. 622, 634 (1979). The Court provided three justifying reasons for this conclusion: 1) the peculiar vulnerability of children, 2) children's inability to make critical decisions in an informed, mature manner, and 3) the importance of the parental role in child rearing. Id. The Court explained that "the parental role implies a substantial measure of authority over one's children", and that "legal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and rewarding." Id. at 638-639.

Finally, South Carolina should recognize "vicarious consent" because the doctrine provides a significant benefit to society and to the administration of justice. In the criminal context, the doctrine is extremely useful in helping parents protect their children from harmful, sexual offenders. The doctrine is particularly important in situations, such as in this case, where one parent (Petitioner) is the abuser but still has the love and affection of the child. It is very unlikely the child would be able to act in her best interest because she would be afraid to harm the parent she loves. Society and the State have an

interest in not requiring a child to be put into this sort of terrible dilemma. In this situation, the parents, Anna and Jeff Grady, are charged with the responsibility and duty to provide for the care and best interest of J.W. and should be allowed to step in and offer "vicarious consent" for her.

CONCLUSION

For the foregoing reasons, this Honorable Court should interpret section 17-30-30(c), the consent exception of South Carolina's wiretap statute, to recognize "vicarious consent" for children in South Carolina.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
Court of General Sessions

Indictment No. 2009-GS-23-01072

The State, ... Respondent

v.

Samuel L. Whitner, ... Petitioner.

PETITIONER'S REPLY TO THE STATE'S RESPONSE

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I. PETITIONER RESPECTFULLY SUGGESTS THAT THE COURT DETERMINE FIRST WHETHER, AS A MATTER OF LAW, PRIOR CONSENT WAS OBTAINED FROM AT LEAST ONE PARTY.

The State is the party seeking admission of the August 5th Intercepted Conversation into evidence. Thus, the State has the burden of providing the Court with the proper foundation for admissibility. It is undisputed that neither party to the August 5th Intercepted Conversation gave prior consent to their private telephone conversation being intercepted. In light of this undisputed fact and the "prior consent" provision of the South Carolina Wiretap Statute, the State has argued that the Court should *adopt* a definition of the term "consent" to include the "vicarious consent" exception. That is not the law in South Carolina by the clear and unambiguous language of the statute.

As a consequence of both the State's proposed adoption of a new definition of "consent" and the express provisions of the South Carolina Wiretap Statute, this Court is being asked to rewrite the South Carolina Wiretap Statute under the guise of statutory interpretation.

The interpretation of a statute is a matter of law to be determined by a court. Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 154, 659 S.E.2d 171 (Ct. App. 2007). The undisputed fact here is that neither party to the conversation consented to it being intercepted. Petitioner respectfully recommends that the Court first determine the matter of law through legal argument by the parties on the statute. However, should this Court adopt the new provision the State is requesting this Court read into the statute, then an evidentiary hearing would be necessary for the State to provide the proper foundation for admissibility of its evidence.

II. THE LEGAL ISSUE BEFORE THE COURT IS WHETHER CONSENT WAS OBTAINED BY AT LEAST ONE PARTY PRIOR TO THE PRIVATE TELEPHONE CONVERSATION BEING INTERCEPTED—NOT WHETHER SOUTH CAROLINA SHOULD “ADOPT” VICARIOUS CONSENT.

The State asserts the issue for the Court's review is “whether South Carolina should *adopt* the doctrine of ‘vicarious consent’.” State's Response at p. 1. That is not the issue before this Court. Pursuant to the South Carolina Wiretap Statute, this Court has subject matter jurisdiction as a “reviewing authority” to hear all pre-trial motions to suppress intercepted wire communications. S.C. Code Ann. §§ 17-30-15 (9) and -110 (A). In this matter, the Court sits not as an appellate court but as a trial court. Petitioner has moved this court as if it were the Circuit Judge in General Sessions: filing a pre-trial motion for an order suppressing an illegally intercepted wire communication. Petitioner has not moved the Court relative to a pending appeal. Rather he has moved this court relative to a pending trial. The contention that the issue is whether to adopt a doctrine is incorrect. The posture of this matter is a trial court review. A trial court cannot “adopt” law; it can only follow law. Hence, the correct issue for review is whether prior consent was obtained from at least one party to the intercepted telephone conversation.

This is not a distinction without a difference. The framing of the issue by the State underscores what is wrong with what the State is ultimately asking this court to do: *i.e.*, legislate policies. The Court is not conducting an appellate review of Judge C. Victor Pyle, Jr.'s pre-trial ruling. What was incorrect about Judge Pyle's ruling was the lack of subject matter jurisdiction; it was correct on the underlying law that neither party consented. There is no South Carolina legal authority, statutory or otherwise, that permits a private telephone conversation to be intercepted without the prior consent of at least one party. By framing the issue as one of appellate review instead of a trial level review, the State is incorrectly positioning the matter to

permit the declaration of a new rule of law. A trial court does not create new law; it follows established law.

III. THE STATE IS ASKING THE COURT TO "ADOPT" A LAW THAT DOES NOT EXIST IN SOUTH CAROLINA AND THUS IS ASKING THE COURT TO ACT AS A SUPER-LEGISLATURE.

The State's first argument in its response asserts that "South Carolina should *adopt* the doctrine of 'vicarious consent'." State's Response at p. 8 (emphasis added). The State's framing of its own argument demonstrates that what it is asking the Court to do is legislate. A trial court does not "adopt" a policy. A trial court adheres to the law set forth in statutes and case precedent. The argument that this state "should adopt the 'vicarious consent' doctrine" is a policy argument to be made to the legislature, not this court.

Throughout the State's response it asks this court to make legislative policy considerations. Here are some examples.

Policy Consideration: The "Vicarious Consent" Exception is a Social Imperative.

The State argues that it is "socially imperative" to recognize the "vicarious consent" exception. State's Response at p. 18. While a court may necessarily need to understand the legislature's social policy considerations, it cannot create its own social policy or, on its own, "adopt" a policy on behalf of the legislature as the State is suggesting in its response. The social consequences or necessities of enacting a particular law are policy considerations for a legislature to make—not a court.

Policy Consideration: Child Sex Abuse Prosecutions Require Loosening of Privacy Protections and Constitutional Rights.

After asking the Court to “divine” the “real” purpose of the legislature—thus suggesting that the true purpose cannot be ascertained by the plain meaning of the term “prior consent”—the State proposes this court consider two additional policy concerns. First, whether the strict privacy protections of the South Carolina Wiretap Statute should be loosened in criminal prosecutions of child sexual assaults; and, second, whether the civil and criminal penalties resulting from violation of the express terms of the South Carolina Wiretap Statute should be excepted for parents or guardians of child victims in such criminal prosecutions. See State’s Response at p. 19. The State couches these policy concerns as being part of interpreting legislative intent. However, the State provides nothing to support its claim that the legislature specifically meant to address these issues over the many other circumstances (criminal, civil, and/or domestic) that would be raised by the addition of “vicarious consent” as an exception to the prior consent of at least one party requirement.

The State suggests the legislature “certainly did not intend to protect the criminal acts of defendants in child sexual assault cases, while casting aside the rights of [child victims of sexual assault].” State’s Response at p. 21. Wiretaps, in large part, involve the interception of communications involving illegal or wrongful conduct. There are legal wiretaps and illegal wiretaps. Merely positing the “protection of children” as an all encompassing rule of statutory construction—if the statute was, in fact, ambiguous—really does not advance the ball in the argument. To be blunt: you could drive a truck through the breadth of legal exceptions created by such an expansive legislative intent. Citing the concern for an alleged child victim, the State could argue that the legislature also intended exceptions to statutory protections (*e.g.*, physical and mental health records or financial records) and, most dangerously, to constitutional

protections (e.g., Fourth and Fifth Amendment rights). More importantly, though, the State is suggesting that, out of the universe of competing legislative interests, the legislature chose “vicarious consent” as the one it meant to imply but not expressly state. Can it be that the legislature considered the competing rights of potential criminal defendants and potential child sexual assault victims and then balanced those rights by using the single term “prior consent” to reflect all of its efforts and intent?

The State fails, also, to square this assertion with the legislature’s clear choice in many other circumstances to protect privacy rights over the collection and use of evidence in criminal prosecutions. The Fourth Amendment to the U.S. Constitution is a good example. Regardless of the substance of the evidence or its importance to proving guilt, suppression is required if evidence is obtained without adherence to the Fourth Amendment’s requirements. The South Carolina Constitution went a step further than the federal constitution and has provided for a right to privacy for all of its citizens, including Petitioner. See State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

The Fifth Amendment to the United States Constitution’s right to remain silent provides a similar example of the choice of protection of personal rights regardless of the significance of evidence to proving guilt of a crime.

The South Carolina Wiretap Statute itself provides an example of the legislature’s choice to protect the rights of the accused over the collection and use of evidence in criminal prosecutions. There are no exceptions in the South Carolina Wiretap Statute for criminal prosecutions. If a person is using a wire communication to further a criminal conspiracy, then failure to obtain prior consent or a court order to intercept will result in the suppression of that interception.

The State's argument creates a false dichotomy. It assumes that the legislature (and by implication this Court) has only one option: criminal defendants or child victims. The legislature and the courts both, within their respective spheres of authority, have protected the rights of potential criminal defendants while also protecting the rights of victims of all crimes.

IV. SOUTH CAROLINA PROVIDES A GREATER DEGREE OF PRIVACY PROTECTION THAN DOES THE FEDERAL GOVERNMENT.

The South Carolina Legislature has made a clear choice to provide a greater degree of privacy protection to its citizens than the federal government. The choice begins with the explicit language of S.C. Const. Art. 1 § 10, where the legislature took the language of the Fourth Amendment to the United States Constitution and added an express right to privacy.¹ As noted by our Supreme Court in State v. Forrester, South Carolina and the five other states who have added an express right to privacy into their search and seizure provisions have held that "such a provision creates a distinct privacy right that applies both within and outside the search and seizure context." 343 S.C. at 645. Also noted in Forrester is the legislature's concern in drafting the additional privacy protection was "the emergence of new electronic technologies." Id. at 647.

Out of the ten states that also provide greater protection of privacy rights than the federal government,² only two have judicially adopted the "vicarious consent" exception. Arizona and Louisiana have both adopted "vicarious consent" as an exception to the prior consent requirements of their respective wiretap statutes. See State of Arizona v. Morrison, 203 Ariz.

¹ "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, ..." S.C. Const. Art. 1 § 10 (emphasis added).

² As noted by the Forrester court, Alaska, Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington all provide a greater protection of privacy rights than does the federal government or the other states. 343 S.C. 637 Fn. 3.

489, 56 P.3d 63 (2002) and Smith v. Smith, 923 So.2d 732 (La.Ct.App. 2005). Neither court addressed the inconsistency of their respective holdings with the greater protection of privacy rights their states provide over that of the federal government. Yet both courts cite to the interpretation by other courts (who do not provide greater privacy protection) of the federal wiretap statute as support for interpreting their state statutes. Morrison, at 490-91; Smith at 740. While it is not clear the exact arguments put before those two courts, the Court should not “adopt,” as the State urges, a doctrine of third-party consent that the legislature could have added—or may add in the future—after proper and full debate on the issue of permitting a third party consent to the interception of private telephone conversations.

The federal wiretap statute was intended as a baseline for the states. States are not permitted to provide less protection but are permitted to provide greater protection. See e.g. Forrester. The federal constitution does not provide the same increased protection of privacy rights as the South Carolina constitution. Consequently, relying on cases that interpret the federal wiretap statute is a risky analysis. Gauging legislative intent from the federal statute does not take into account that the South Carolina legislature’s intent would have an additional concern for “unreasonable invasions of privacy.” S.C. Const. Art. 1 § 10.

V. CONSENT IS NOT AN AMBIGUOUS TERM BEAUSE THE SOUTH CAROLINA WIRETAP STATUTE IS AIMED AT PROVIDING PROTECTION OF PRIVACY RIGHTS TO ALL CITIZENS.

The aim of the South Carolina Wiretap Statute is to protect the rights of South Carolina citizens. Much like the Fourth and Fifth Amendments to the federal constitution and their state counterparts, the South Carolina Wiretap Statute seeks to provide privacy protection to all citizens. When it comes to protecting personal rights, the legislature is expansive in those it

protects. Citizens can waive important rights but the legislature rarely allows one person to waive important rights for another (*e.g.*, minors and adults can waive constitutional rights but cannot have them waived by a third party). Consent is not an ambiguous term in the South Carolina Wiretap Statute because the aim of the statute is to provide broad privacy protections for all citizens.

Some courts have held that consent as it relates to minors is an ambiguous term. For instance, in State of Iowa v. Spencer, 737 N.W.2d 124 (2007), the Supreme Court of Iowa held that the term consent in its wiretap statute was ambiguous. Id. at 129. The Spencer court relied on the different ways in which the Iowa legislature dealt with consent by and for minors to hold the term was ambiguous. At first glance, this is an attractive analysis. A close inspection, however, reveals an analysis not built by one premise logically leading to another but on an ends-oriented analysis.

The Spencer court was called upon to analyze “consent” in Iowa’s state wiretap statute. Id. at 128. Much like the law in South Carolina, the law in Iowa would not permit a court to go beyond the plain meaning of a statute absent the finding of an ambiguity. Id. at 129 (“Before engaging in statutory construction, we must first determine whether the statute is ambiguous.”); see Thompson ex rel. Harvey, 377 S.C. at 158 (“If the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself”). The Spencer court could not have looked to other case law without finding an ambiguity; it would have had no link to the doctrine it wanted to adopt.

An analysis built by one premise leading logically to the next would have included an inquiry into the legislative intent of the Iowa wiretap statute itself. Even with the finding of an ambiguity, the Spencer court was still required by its own law to look to the intent of its

legislature when it adopted the state's wiretap statute. See Spencer at 129-30 ("We determine legislative intent from the words chosen by the legislature, not what it should or might have said. ... Under the guise of construction, an interpreting body may not extend, enlarge or otherwise change the meaning of a statute.") (internal cites omitted). The Spencer court, however, made no effort to determine the Iowa legislature's intent in adopting the statute; nor did it analyze whether the "vicarious consent" exception was consistent or inconsistent with the overall purpose of Iowa's wiretap statute.

The Spencer court did state that there was no legislative history on the specific issue of "vicarious consent" in its wiretap statute. Id. at 130. However, no legislature has any history on this specific exception. Detailed discussion of "vicarious consent" is not even found in the legislative history of the federal wiretap statute, which the Spencer court and other courts have relied upon to interpret state statutes. Lack of such specific legislative history on "vicarious consent" should not have prevented the Spencer court from looking at its own legislature's overall intent; or offering an explanation for why that intent was not necessary. Neither should it have prevented the court from looking at the way in which the Iowa legislature designed statutes when it intended to provide parental consent and when it did not. In fact, even when its flawed logic leads to the issue of analyzing the privacy rights of children, and how the "vicarious consent" exception affects those rights, the Spencer court ignores its own state law. The Spencer court cites to authority for the general propositions that parents must protect their children, to look out for them, and account for their vulnerabilities (mainly by citing United States Supreme Court cases). However, rather than analyzing how the Iowa legislature enacted these general propositions, the Spencer court simply concludes that the "vicarious consent" exception does not conflict with the privacy rights of children. Id. at 132.

What the Spencer court wanted to get to was that the language of the federal wiretap statute is similar to the Iowa wiretap statute. If it got there, the court could then rely on the analysis of other jurisdictions—which could then get it to the “vicarious consent” doctrine. This is the pattern of several other courts: do not truly analyze the state statute, but get to the federal statute so that law from other jurisdictions interpreting their own state statutes using federal law can be used to interpret yet another state statute based on federal law. It is a circular analysis. The analysis never truly analyzes the legislative intent of the particular legislature that enacted the statute.

The result in several states rely on the analysis of one court: Thompson v. Dulaney, 838 F.Supp. 1535 (D.Utah 1993). The problem, of course, is that Thompson v. Dulaney is a federal lawsuit based on the federal wiretap statute. An analysis based solely on the federal wiretap statute and its legislative history, while relevant and perhaps instructive, cannot substitute for the analysis of a state statute that may have been adopted in a state, such as South Carolina, with a more expansive right to privacy than the federal government provides.

Regardless of these analyses, Iowa and the federal government do not have a right to privacy in their constitutions. This state does.

CONCLUSION

For the foregoing additional reasons, the Court should suppress the August 5th Intercepted Conversation and any evidence derived there from at trial. It is, respectfully, the province of the legislature, and not this Court, to “adopt” vicarious consent if, after full debate of the privacy considerations inherent in this policy decision, it so chooses.

Respectfully submitted,

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July 20, 2009

THE STATE OF SOUTH CAROLINA
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The State, ... Respondent

v.

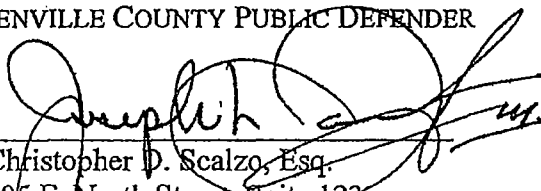
Samuel L. Whitner, ... Petitioner.

PROOF OF SERVICE

I certify that I have served Petitioner's Reply to the State's Response on the State by personally delivering a copy of the same to Christine Kednocker Sustakovitch at the Office of the Solicitor for the Thirteenth Judicial Circuit, at the Greenville County Courthouse, Suite 325, Greenville, South Carolina 29601 on the date reflected below.

Respectfully submitted,

GREENVILLE COUNTY PUBLIC DEFENDER

By: 

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July 20, 2009
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

COPY

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

The Honorable C. Victor Pyle, Jr., Circuit Court Judge

Trial Court Case No. 2009-GS-23-01072

The State,

Respondent,

v.

Samuel Lamont Whitner,

Petitioner.

TRANSCRIPT OF RECORD

A Wiretap Act Suppression Hearing was held before the South Carolina Court of Appeals in Columbia, South Carolina, on the 22nd day of July, 2009.

Said Court of Appeals Panel consisted of the Honorable Kaye G. Hearn, Chief Judge; the Honorable Paula H. Thomas, Associate Judge; and the Honorable Aphrodite K. Konduros, Associate Judge.

The Respondent appeared, represented by Ms. Christy Kednocker Sustakovitch, Esquire, Assistant Solicitor, Thirteenth Judicial Circuit.

The Petitioner appeared, represented by Mr. Christopher D. Scalzo, Esquire, Assistant Public Defender, Thirteenth Judicial Circuit.

KATHY A. SNELLING, CVR

The Supreme Court, State of South Carolina
Office of the Commission Counsel
1015 Sumter Street, Suite 305, Columbia, South Carolina 29201

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None

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1 (Whereupon, the Matter Commenced on the 22nd of July,
2 2009, at 10:05 a.m.)

3 CLERK OF COURT: Be upstanding for the Court. All
4 persons having anything to do before the Honorable the
5 Judges of the Court of Appeals, draw near and give your
6 attendance for the Court is now in session. God save the
7 people of South Carolina and this Court.

8 JUDGE HEARN: Thank you very much. Please be seated.
9 Madam Clerk, would you call the case?

10 CLERK OF COURT: Case Number 17421, State v. Whitner.

11 JUDGE HEARN: All right. Mr. Scalzo, are you ready
12 to proceed?

13 MR. SCALZO: I am, Your Honor.

14 JUDGE HEARN: All right.

15 MR. SCALZO: Your Honor, may it please the Court.
16 This is an unusual format I realize for the Court, and
17 as well for the parties. Because one of the things I'm
18 going to ask of the Court is the format that you would
19 like us to employ.

20 JUDGE HEARN: Well, you know, we're open to
21 suggestions. But we thought perhaps it would make sense
22 to call the witnesses, if you're calling witnesses, first
23 and then make arguments.

24 MR. SCALZO: I do not have any witnesses of the
25 Defense. As I argued in my reply, my position is that

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1 from a matter of law standpoint I think the Court would
2 have to determine whether or not as a matter of law the
3 exception actually is adopted into the law. That then
4 triggers the relevance of whether or not testimony needs
5 to be taken to lay the proper foundation. Obviously, I'm
6 going to do what the Court instructs me to do. But that
7 I guess is our position.

8 JUDGE HEARN: Ms. Sustakovitch?

9 MS. SUSTAKOVITCH: Yes, ma'am.

10 JUDGE HEARN: You do have witnesses, do you not?

11 MS. SUSTAKOVITCH: Yes, ma'am, may it please the
12 Court. The State is prepared if Your Honor would like to
13 hear witnesses first, we have two witnesses.

14 The State's position would be that it is a legal
15 issue as far as whether this Court is going to interpret
16 the Statute to provide for vicarious consent. And then
17 once that is determined then this Court has to decide in
18 this case did the parents, did the mother and the step-
19 father have good faith when they recorded the call.

20 So honestly I don't see any problem doing the
21 witnesses first, if that would give you more context to
22 the case. We'll just follow your direction on that.

23 JUDGE HEARN: I think that's what the Panel would
24 prefer.

25 MS. SUSTAKOVITCH: Okay. Yes, ma'am.

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1 JUDGE HEARN: So call your witnesses.

2 MS. SUSTAKOVITCH: May it please the Court, the State
3 calls Anna Grady. I take it, up here?

4 JUDGE KONDUROS: The Clerk is going to come to your
5 witness for the oath.

6 CLERK OF COURT: Place your left hand on the Bible
7 and raise your right hand.

8 MS. ANNA MICHELLE GRADY, after having been duly
9 sworn, testified as follows:

10 MS. GRADY - DIRECT EXAMINATION BY MS. SUSTAKOVITCH:

11 Q: Good morning, Ms. Grady, would you please state
12 your full name for the record?

13 A: Anna Michelle Grady.

14 Q: Would you get a little closer to the microphone
15 for the Court Reporter? Thank you. Ms. Grady, do you
16 know the Defendant, Samuel Whitner?

17 A: Yes, I do.

18 Q: And how do you know him?

19 A: He's my oldest daughter's biological father.

20 MS. SUSTAKOVITCH: And Your Honor, just to provide
21 context, the State is only going to go into basically
22 some surrounding facts about the case, what the sexual
23 allegation was. And then why I guess some details about
24 the recording of the call. But we are not going to go
25 into the rest of the issues that the State would go into

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1 at trial.

2 JUDGE KONDUROS: Ms. Sustakovitch, the Court Reporter
3 has set up microphones for the purposes of recording the
4 conversation, they are not amplifying.

5 MS. SUSTAKOVITCH: Okay.

6 JUDGE KONDUROS: So it's taking your voice down fine.
7 But you need to speak as loud as I am for me to hear you.
8 That's not making your voice bigger, okay?

9 MS. GRADY: Okay.

10 JUDGE KNODUROS: Thank you.

11 MS. SUSTAKOVITCH: Okay.

12 Q: So going back to how do you know the Defendant,
13 Samuel Whitner?

14 A: He's the biological father of my oldest
15 daughter.

16 Q: And when did you meet Mr. Whitner?

17 A: The summer of 1994 I believe.

18 Q: How old were you when you met the Defendant?

19 A: I was --

20 MR. SCALZO: I'm going to object, Your Honor, as to
21 that not being relevant to the matter at hand, her age.

22 MS. SUSTAKOVITCH: Your Honor, it just goes to
23 provide a context on how these parties knew each other,
24 what the relationship was. It's already been put in our
25 brief.

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1 JUDGE HEARN: Overruled.
2 Q: Go ahead?
3 A: I was 13.
4 Q: And when did you get pregnant with the victim in
5 this case?
6 A: When I was 14.
7 Q: Were you married to this Defendant when you gave
8 birth to the victim?
9 A: No, I was not.
10 Q: How old was the Defendant?
11 A: He was 21.
12 Q: Through the early years of the victim's life
13 what was your relationship with Mr. Whitner, how much
14 contact I guess did the child victim have in this case?
15 A: She would in the beginning, she would see him
16 quite often in the beginning when she was first born.
17 And they've seen each other throughout the years.
18 Q: Okay. And you being 14, did you live on your
19 own or did you live with your mother?
20 A: I lived with my mother.
21 Q: All right. Who is Jeff Grady?
22 A: He is my husband.
23 Q: And how old were you when you met Jeff Grady?
24 A: I was 17.
25 Q: Did you ever, in fact, marry Jeff Grady?

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1 A: I did.

2 Q: And when did you marry him?

3 A: When I was 18.

4 Q: How long has Jeff Grady been in the victim's
5 life?

6 A: Since she was two years old.

7 Q: And again, what is your daughter's name?

8 A: JW

9 Q: So from the time that JW was two Jeff Grady
10 has acted as her father figure as well, is that correct?

11 A: That's correct.

12 Q: So I want to go forward in the years of JW
13 growing up, your testimony is that you had off and on
14 contact with the Defendant, correct?

15 A: That's correct.

16 Q: Did you ever, were you ever made aware that
17 JW was the victim of sexual abuse?

18 A: I was.

19 Q: And when did you find out that your daughter had
20 been sexually abused?

21 A: In 1998.

22 Q: I'm sorry?

23 A: Oh, I'm sorry. No, I'm thinking 2008. Was it
24 2008?

25 Q: Just to refresh your memory --

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1 A: It's 2009.

2 Q: I know you're probably nervous.

3 A: Very.

4 Q: Okay. I want to take you back to the summer of
5 2007?

6 A: Yes, it was 2007.

7 Q: Okay. Let me show you what is --

8 MS. SUSTAKOVITCH: Do we need to mark this, Your
9 Honor?

10 JUDGE HEARN: Yes.

11 MS. SUSTAKOVITCH: Okay.

12 **(State's Exhibit One was Marked for Identification)**

13 Q: All right. And I recognize you're nervous, just
14 take a second. I'm showing you what's marked as State's
15 Exhibit One for purposes of this hearing. Do you
16 recognize your statement?

17 A: I do.

18 Q: And take a second to reflect back on it and the
19 date that the statement was taken?

20 A: August, 2007.

21 Q: Okay. So I want to go back to August of 2007.
22 Did you, in fact, find out that your daughter had been
23 the victim of sexual abuse?

24 A: I did.

25 Q: And how did you find out that your daughter had

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1 been the victim of sexual abuse?

2 A: She told me about it.

3 Q: Was there anything in particular that triggered
4 her telling you about this sexual assault?

5 A: I had got a book from the library.

6 Q: Could you speak up, please?

7 A: I got a book from the library, and I had got it
8 for my niece just to read it to her and my youngest
9 daughter. And it talked about secrets, bad secrets and
10 good secrets. And she had wanted me to read the book to
11 her but I never got around to it. And she took it upon
12 herself and she read the book.

13 And she came and woke me up out of the bed and she
14 said, "Mama, I have to tell you something." I said,
15 "What is it?" She said, "Are you woke?" I said, "Yes."
16 She said, "Mama, it's really important." I said,
17 "Okay." And she said, "When I was about five or six ..."
18 she had went to go stay at the Defendant's sister's house
19 with him. And she was sleeping. And he woke her up in
20 the middle of the night and asked her if she wanted to
21 meet his little buddy. And she said yes. And he pulled
22 out his penis and asked her could she suck it. And I
23 said, "Well, baby, what did you do?" She said, "I did
24 it." I said, "How many times did he ask you to do it?"
25 She said, "He asked me again and I did it again."

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1 And she said later on in the night she was laying
2 down and he was behind her and he was telling her she had
3 to go up and down with him. And I said, "Did he have his
4 clothes off?" And she said, "No, I don't think so." But
5 she was turned around away from him. And I said, "Did
6 you have your clothes off?" And she said no, she didn't
7 have her clothes off.

8 MS. SUSTAKOVITCH: Okay. And Your Honor, I did want
9 to make a note to the record. Defense Counsel and I have
10 spoken about this line of testimony. We recognize that
11 at a trial this would certainly be limited to time and
12 place as far as the mother's testimony. We did not make
13 the victim come to this hearing because it's a pretrial
14 matter. And so I did want you to know that Defense
15 Counsel did know that that was going to come and has no
16 objection to it. And the reason was we didn't want to
17 make the child victim testify.

18 JUDGE HEARN: Thank you.

19 MS. SUSTAKOVITCH: Yes, ma'am.

20 Q: All right, Ms. Grady. So that's the basis of
21 what the sexual assault was?

22 A: Yes.

23 Q: Essentially one night between the time of her
24 being five or six?

25 A: That's correct.

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1 Q: She had to perform oral sex on him twice when he
2 pulled out his penis?

3 A: Yes.

4 Q: And then he got behind her and humped on her
5 body?

6 A: That's the understanding I got from her. She
7 said he was, yes.

8 Q: And from a time period perspective, when would
9 JW have been five years old?

10 A: Around 2000.

11 Q: Okay. So between 2000 and 2002 would be the
12 time period we're talking about?

13 A: Yes.

14 Q: When the assaults having taken place.

15 A: Yes.

16 Q: When you heard this information what was
17 JW demeanor?

18 A: She was really sad and she was crying.

19 Q: And where were you when this happened?

20 A: I was at home and I was laying in the bed and
21 she came into my room.

22 Q: And where was your husband, Jeff Grady?

23 A: He was at work.

24 Q: All right. When JW told you this
25 information what was your initial reaction to it?

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1 A: I just couldn't believe it, I didn't know what
2 to do, I didn't know what to say, I just couldn't believe
3 it.

4 Q: Did you, in fact, instruct JW in any way as
5 to what to do in regards to her father, whether she
6 should confront him or not?

7 A: Yes, I said you need to let him know that you
8 remember what he did.

9 Q: All right. I'm going to show you again what's
10 marked as State's Exhibit one, do you recognize that item
11 again?

12 A: I do.

13 Q: And what is that?

14 A: It's my statement that I gave to the Police
15 Department.

16 Q: And who, what was the name of the Detective you
17 gave it to?

18 A: Bobby Bradford.

19 Q: All right. If you'll, just so the Court can
20 have some time references, what was the date that JW
21 disclosed this information to you?

22 A: August 2nd, 2007.

23 Q: And tell me again what you instructed her to do?

24 A: I told her she needs to let him know that she
25 remember what he did.

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1 Q: Why did you tell her that?

2 A: Because I felt like it was important for her to.
3 I felt like it was important for her to let him know so
4 she could try to get over it, so she could get some help,
5 so something could be done.

6 Q: Okay. And remember to speak up, please.

7 A: Okay.

8 Q: So did JW in fact, call the Defendant?

9 A: She did.

10 Q: Okay. In that phone call did the Defendant ever
11 admit --

12 A: Actually, I'm sorry, I believe he called that
13 day.

14 Q: He called that day?

15 A: I believe he called the next, yes.

16 Q: Okay. During that phone conversation with the
17 Defendant did JW let him know that she remembered
18 what had happened when she was five years old?

19 A: Yes, she did.

20 Q: And did he admit or deny the assault?

21 A: He denied it.

22 Q: Did he ever talk to you about it?

23 A: No, he never talked to me about it.

24 Q: Well, did you ask him?

25 A: I asked him about it, and he denied it.

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1 Q: Okay. In the same phone conversation?

2 A: In the same phone conversation.

3 Q: All right. I want to move forward to get to the
4 call that's at issue in this case. So after this initial
5 phone call on I believe Friday, August 3rd, I want you to
6 go forward to August 4th, Saturday. Was JW at the
7 house that day?

8 A: Saturday, I believe -- she was, I don't believe
9 she was.

10 Q: You can use your statement to refresh your
11 recollection.

12 A: I don't believe she was Saturday.

13 Q: Did you, in fact, send her to your mother's?

14 A: Yes, she was at my mom's that Saturday.

15 Q: Okay. And did you end up telling Jeff Grady,
16 your husband, what had happened?

17 A: I did, I ended up telling him after, a day or so
18 later I told him about it.

19 Q: What was his reaction?

20 A: He was really, really sad, and he was upset.

21 Q: All right. Did you and Jeff end up making the
22 decision to record conversations between the Defendant
23 and your house, conversations that were going on between
24 you and the Defendant and the victim and the Defendant?

25 A: Yes, we did.

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1 Q: And was that a joint decision between you and
2 Jeff?

3 A: It was.

4 Q: Why did y'all decide to record the
5 conversations?

6 A: Well, I had previously --

7 Q: First of all, whose idea was it initially?

8 A: It was Jeff's idea to record it.

9 Q: And so you're saying that you went along with
10 it, what was the idea behind it?

11 A: I just, I didn't know what he was saying to

12 JW I didn't know if it would still be okay or if
13 she would still be safe to be around him. And I just --

14 Q: In one of your, there are three phone calls that
15 are recorded in this case, correct?

16 A: That's correct.

17 Q: The first one is between who?

18 A: Me and his girlfriend, Danni.

19 Q: And what was the content of that call?

20 A: I was calling him when I got in. And she was
21 saying it was late. And I believe he say he was going to
22 have to call me back the next day.

23 Q: Were you returning the call at his request?

24 A: I was.

25 Q: All right. And I believe your statement says

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1 that Saturday night?

2 A: Uh-huh (non-verbal response).

3 Q: I want you to go forward to August 5th, Sunday,
4 did you have another conversation with the Defendant
5 yourself that was recorded?

6 A: Sunday I --

7 Q: The first one was with the girlfriend?

8 A: Oh, yes, and then the second one is I called
9 him.

10 Q: And in that conversation with you did he ever
11 admit to the assault?

12 A: No, he did not.

13 Q: All right. Did you state to him any information
14 related to how JW was doing?

15 A: I told him she was sad a lot, she was crying a
16 lot, and she would need some help more than I could give
17 her to get through this.

18 Q: And that was after, she was crying a lot and sad
19 a lot since she had disclosed, is that your testimony?

20 A: Yes.

21 Q: All right. I want to go forward to the
22 conversation at issue in this case.

23 A: Okay.

24 Q: Later sometime Sunday, August 5th, 2007. Can you
25 tell me how that conversation took place, meaning where

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1 were the parties?

2 A: JW was in the den with me, I was down there
3 playing a game. My husband, Jeff, he was in our bedroom
4 with the door closed. He had a cordless phone, it was on
5 speakerphone, and he recorded it with a handheld video, I
6 mean tape recorder.

7 Q: Okay. Did JW have any idea that you guys
8 had decided to record her conversation?

9 A: No, she did not.

10 Q: Why did you all leave her out of that equation?

11 A: Because previously the Defendant knows that from
12 time to time that he can be recorded when he calls our
13 house because sometimes, I mean, he can be recorded. So
14 if he would have asked JW she would have been
15 truthful with him and said yes, my mom is on the other
16 line or my dad is on the other line. She would have been
17 truthful about it. So we didn't let her know about it.

18 Q: And going back to your initial answer, you
19 stated you were worried about her getting over it?

20 A: Yes.

21 Q: Her recovery, getting recovery, and you wanted
22 to know what to do next, is that correct?

23 A: Yes. I didn't know if she should still go over
24 there and see him or not, or even be around him.

25 Q: Right. During the recorded phone conversation

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1 could you hear what was going on, on the phone between
2 JW and the Defendant?

3 A: I could not, I was just --

4 Q: Okay. After the phone conversation ended did
5 you and Jeff, in fact, listen to the tape and did you
6 then hear the tape, what was on it?

7 A: Jeff listened to it, I didn't listen to it.

8 Q: Okay. After that Sunday call did you ever take
9 the tape to law enforcement?

10 A: After Sunday, yes, I did.

11 Q: Okay. And who else was with you when you went
12 to take the tape to law enforcement?

13 A: It was just me and my daughter JW because
14 it was on a Monday, it was just me and JW because my
15 husband --

16 Q: And looking at your statement for date's sake,
17 that would be Monday, August 6th, correct?

18 A: Correct.

19 MS. SUSTAKOVITCH: All right. Your Honor, I believe
20 that's all I have for this witness related to the taping
21 of the call.

22 JUDGE HEARN: Mr. Scalzo?

23 MR. SCALZO: May it please the Court.

24 **MS. GRADY - CROSS EXAMINATION BY MR. SCALZO:**

25 Q: Ms. Grady, you testified that it was August 2nd

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1 when JW first talked to you about the allegation of
2 sexual abuse, is that correct?

3 A: That's correct.

4 Q: And I believe you believed her, is that correct,
5 when she told you?

6 A: I did, I believed her. I was hoping it wasn't
7 true, but yes, I did believe her.

8 Q: Okay. And you didn't talk to your husband Jeff
9 about it for a day or so I believe?

10 A: Yes, it was about a day, I didn't tell him that
11 same day.

12 Q: And after you and Jeff spoke about it, you told
13 him about it, that's when you determined that you were
14 going to make tape recordings of any contact with Sam,
15 isn't that right?

16 A: After me? Yes, after me and my husband talked
17 about it we decided to.

18 Q: And in fact, the phone call where you called his
19 house and ended up speaking to his girlfriend Danni, that
20 was the first time that you started recording?

21 A: Yes.

22 Q: And the second time that was recorded was a
23 phone call that you actually got Sam on the phone, is
24 that correct?

25 A: That's correct.

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1 Q: Now I'm going to jump back again, sorry to jump
2 backwards, but on August 3rd I believe it was, was the
3 actual first phone call between Sam and your daughter,
4 isn't that right?

5 A: Yes, I believe so.

6 Q: And Sam doesn't know about the allegation, he's
7 just simply calling?

8 A: No, he did not know about it when he first
9 called. That's when she spoke to him about it and said
10 something to him about it.

11 Q: Okay. Now over the years he has as you
12 testified had phone conversations and seen JW isn't
13 that correct?

14 A: That's correct.

15 Q: And the fact that he was calling that day
16 unaware of the allegation, it wouldn't have been unusual
17 for him to call, would it?

18 A: No, it wouldn't have been unusual.

19 Q: Okay. Now when he calls you already know about
20 the allegation?

21 A: I do.

22 Q: And you answer the phone?

23 A: Maybe, I'm not sure, I can't remember.

24 Q: All right. And whether you answer the phone or
25 somebody else answered the phone, JW you allow

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1 JW to have the conversation with Mr. Whitner?

2 A: Yes, I do.

3 Q: Okay. And based on that conversation, you
4 understand that during that conversation she not only
5 tells him of her allegation but that he denied the
6 allegation?

7 A: That's correct.

8 Q: And you, in fact, got on the phone and confirmed
9 for yourself that he denied the allegation?

10 A: That's correct.

11 Q: All right. And that is all on August 3rd?

12 A: Yes, I believe so.

13 Q: August 5th is when we have the two other
14 conversations that are recorded, correct?

15 A: On the 5th of August?

16 Q: Yes.

17 A: Yes, the 4th and the 5th I believe.

18 Q: I'm sorry, the 4th is the first conversation with
19 Danni?

20 A: Yes.

21 Q: Is that right?

22 A: Yes.

23 Q: All right. Now --

24 A: Actually --

25 MS. SUSTAKOVITCH: Your Honor, I'd like to clarify.

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1 I think Defense counsel just misspoke. The first
2 conversation, and I don't think he disputes this, is not
3 recorded.

4 JUDGE HEARN: She answered.

5 MS. SUSTAKOVITCH: She did. I'm sorry.

6 Q: All right. Let's talk about the actual
7 conversation that's recorded between JW and Sam,
8 that takes place August 5th, correct?

9 A: Correct.

10 Q: And you described you being in the den with
11 JW

12 A: Yes.

13 Q: And that Jeff was in your bedroom?

14 A: Yes.

15 Q: And he had the tape recorder already?

16 A: Yes.

17 Q: And you had already talked about him tape
18 recording. And did you know he was going to put it on
19 speakerphone and tape, was that the plan?

20 A: Yes.

21 Q: And you chose, you said you were not going to
22 tell JW that you were actually going to tape record
23 you said because you felt that if you told her and Sam
24 asked her she would be truthful and say it was being
25 recorded?

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1 A: Yes.

2 Q: All right. The phone call takes place and it's
3 about 30 minutes, 31 minutes I believe was the length of
4 time, do you agree with that?

5 A: I believe so.

6 Q: And it's after this phone conversation on the 5th
7 -- well, I guess you wait until the next day and on the
8 6th is when you go and bring this tape recording to the
9 police, is that correct?

10 A: Yes, that's correct. I went to the Police
11 Department on the 6th.

12 Q: And after JW first discloses this to you a
13 couple of days before that, had you gone to any doctors,
14 any psychiatrists, people like that?

15 A: No.

16 Q: And other than Jeff, your husband, had you
17 discussed what had happened with anybody else?

18 A: I told my mom.

19 Q: Your mother?

20 A: Yes.

21 Q: And JW is she 11 years old at the time
22 that this is happening in 2007, how old is she?

23 A: She, in 2007 she would have been (inaudible).

24 Q: Say that again?

25 A: In 2007 she would have been, yes, 11 going on

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1 12.

2 Q: Okay. You said that in the first conversation
3 when Sam calls that you felt that it was necessary for
4 JW to confront him and tell him what she remembered,
5 isn't that correct?

6 A: That's correct.

7 Q: And he denies it, he denies it to JW and he
8 denies it to you, correct?

9 A: Correct.

10 Q: And when he called, when JW calls him on
11 the 5th when you're going to record the conversation, I
12 mean, you understood that he was going to denied having
13 done it, didn't you?

14 A: Honestly, I didn't know.

15 Q: He had denied it to JW already?

16 A: Yes, he had already denied it to JW

17 Q: And he denied it to you as well?

18 A: And he denied it to me as well.

19 Q: And it had been two days that had gone by since
20 you first had that conversation where he denied it?

21 A: That's correct.

22 Q: Okay. That's all I have, Judge.

23 JUDGE HEARN: Thank you so much.

24 MS. SUSTAKOVITCH: Nothing further from the State
25 from this witness, Your Honor.

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1 JUDGE HEARN: All right. Thank you, ma'am, you may
2 step down.

3 JUDGE KONDUROS: Leave that.

4 JUDGE HEARN: Any other witnesses?

5 MS. SUSTAKOVITCH: Yes, ma'am. Briefly, the State
6 calls Jeff Grady.

7 CLERK OF COURT: Place your left hand on the Bible
8 and raise your right.

9 MR. JEFFERSON KOCHISE GRAY, after having been duly
10 sworn, testified as follows:

11 **MR. GRADY - DIRECT EXAMINATION BY MS. SUSTAKOVITCH:**

12 Q: Good morning, Mr. Grady. Could you please slide
13 forward and state your full name for the record?

14 A: Jefferson Kochise Grady.

15 Q: Okay. Mr. Grady, how do you know Anna Grady?

16 A: She's my wife.

17 Q: And how long have you been married to Anna
18 Grady?

19 A: Ten and a half years.

20 Q: You said ten and a half years?

21 A: Yes.

22 Q: Do you know the Defendant, Samuel Whitner?

23 A: Yes.

24 Q: How do you know him?

25 A: He is my daughter's biological father.

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1 Q: And your daughter's name is?

2 A: JW

3 Q: Just briefly can you describe -- well, again,
4 when did you get married to Anna Grady?

5 A: March the 18th, 1999.

6 Q: And when you got married to Anna what was your
7 relationship like with JW

8 A: She's my daughter so I love her.

9 Q: So you treated her as a daughter?

10 A: Oh, yes.

11 Q: To talk about the Defendant for a minute, was
12 the Defendant also in her life in a father figure
13 capacity?

14 A: I mean, he was in and out. I mean, he was there
15 for her whenever he could be, I guess. I don't know his
16 circumstances. But whenever, I guess, he could, he would
17 make himself available, he was.

18 Q: When he could make himself available, he was?

19 A: Yes, yes.

20 Q: So you raised JW as your daughter, correct?

21 A: Yes.

22 Q: I want to fast forward in time. Did you ever
23 become aware that your daughter, or your step-daughter,
24 JW was the victim of a sexual assault?

25 A: Yes.

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1 Q: And when did you become aware of that?

2 A: On Saturday, it was a Saturday in 2007, I don't
3 remember the exact date, but it was in 2007.

4 Q: Do you remember what month in 2007?

5 A: August.

6 Q: August of 2007?

7 A: Yes.

8 Q: Okay. How did you become aware that JW had
9 been the victim of a sexual assault?

10 A: My wife told me.

11 Q: And what did she tell you?

12 A: She sat me down on the bed and she said Jeff,
13 don't get mad. And I could tell she was serious, so I
14 told her I wouldn't. And she told me what had happened.

15 Q: What was your reaction when she disclosed this
16 information to you?

17 A: I was real mad, upset, and sad. But I was
18 trying to get to the bottom of it. And I was kind of
19 hurt being the fact that it was, yes, it was some days
20 later.

21 Q: I'm sorry, could you speak up just a little bit?

22 A: I said, I'm sorry, I was kind of hurt about it
23 because she waited to tell me. But it was good that she
24 did and I had time to think about it. So she told me
25 what had happened. And I just wanted to, I just -- I

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1 maybe thought she was dreaming because I know she don't
2 lie. But I just, I really don't know. I had so many
3 different emotions about it. Man to man it hurt about
4 what I had heard.

5 Q: You said you were mad, hurt, sad?

6 A: Yes.

7 Q: And then you also just stated that you thought
8 maybe she was dreaming?

9 A: Yes. I hoped she was.

10 Q: Tell me about that, what do you mean by that?

11 A: You -- (witness is crying).

12 Q: Mr. Grady, you said you wanted to believe it was
13 a dream but you knew JW didn't lie. I'm just trying
14 to have you explain a little bit to the Court about what
15 was going through your head to explain why you recorded?

16 A: I believed my daughter. But I just wanted to
17 know what could we do to get her some help from him. She
18 wanted him to help her through this situation. I
19 couldn't do nothing. She was saying he wouldn't admit
20 it. I don't know about this. I don't know what to do
21 but to try to go forward, counseling, whatever. That's
22 why we recorded the conversation, to see, to help her, to
23 see what could we do with what we had, all the
24 information we had versus what I say. I wanted to get
25 everything from my wife, to him, to her, to see where do

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1 we go from here.

2 Q: And you said you wanted to help her?

3 A: Yes.

4 Q: And you wanted to see if she needed counseling?

5 A: Yes.

6 Q: And you wanted to believe it was a dream?

7 A: Yes. But if it wasn't where do you go from
8 here.

9 Q: Okay.

10 A: Where do you go.

11 Q: So with all that going on in your mind were you
12 the one who made the decision to actually record the
13 call?

14 A: Yes.

15 Q: And did you talk to your wife about it?

16 A: Yes.

17 Q: And did she agree to go along with recording the
18 call?

19 A: She did because of my concerns. I did not want
20 her to be around him if that was the case.

21 Q: Will you tell the Court how the phone call was
22 actually recorded?

23 A: As my wife earlier stated, they were in our
24 dining room on a land line, ~~my~~ was on, I had a
25 corded phone in there. And I was in our bedroom with the

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1 door closed. And I had a speakerphone, I put the phone
2 on speaker. And I had my handheld recorder, which I had
3 already had. I always have had it. And I recorded the
4 conversation.

5 Q: And while the phone call was going on you said
6 the phone had a speakerphone, is that correct?

7 A: Yes.

8 Q: So you're able to hear JW and her father
9 talking about this whole situation?

10 A: Yes.

11 Q: After the phone call was recorded what did you
12 do at that point, how did you decide that law enforcement
13 needed to be notified?

14 A: My parents. I was very angry. Being that I
15 didn't expect him to say nothing like that. I just
16 wanted to see for her benefit where do we go from that
17 point. Then after this conversation was over and I heard
18 everything that he said, I wanted to take the law into my
19 own hands. That's my daughter. So I called my parents
20 and they talked me into doing the right thing. This is
21 the right thing for her, for my family, my wife, her,
22 even him. This was the right thing to do. And I did
23 what they requested.

24 Q: What, the right thing was to go to law
25 enforcement?

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1 A: To go to law enforcement.

2 Q: Just the last question, to clarify, when you
3 were doing the actual call you testified that your reason
4 for doing it was because you wanted to help JW is
5 that correct?

6 A: Yes. Help. Because like I say, I don't know,
7 I've never, this has never been nothing I've ever dealt
8 with. I may not have reacted the best to it or even been
9 the best for the situation. But that's the best thing
10 that I could do at the time.

11 Q: Okay. Did you go to law enforcement or did your
12 wife go by herself with your daughter?

13 A: My wife and JW went.

14 Q: And did she take the tape?

15 A: Yes.

16 Q: Just briefly, you said the recording was on a
17 micro cassette recorder, is that correct?

18 A: Yes, hand held.

19 Q: And in preparation for this hearing did you
20 listen? Well, you listened to the complete micro
21 cassette recording, correct?

22 A: Yes.

23 Q: And then did you listen in preparation for this
24 hearing to a CD of the actual call?

25 A: I did.

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1 Q: And did you make sure that what was on the micro
2 cassette recorder was the actual phone call that you
3 listened to through the speakerphone and that was also on
4 the CD that you listened to?

5 A: Yes, wasn't nothing different.

6 MS. SUSTAKOVITCH: Your Honor, for the record, the
7 State is referring to the phone call that has been sent
8 to the Court in this case. That would be all from this
9 witness.

10 JUDGE KONDUROS: The transcribed report that we have,
11 the transcribed conversation?

12 MS. SUSTAKOVITCH: Yes, ma'am.

13 JUDGE THOMAS: And that was transcribed from the CD
14 that he listened to and verified?

15 MR. GRADY: Yes, yes.

16 MS. SUSTAKOVITCH: And just so the Court knows, that
17 was the State's best effort at transcribing. Some parts
18 were hard to hear. So if there is anything Your Honors
19 hear that is different than what's there, it was a true
20 and accurate best effort that we could. And Defense
21 Counsel certainly was able to make their own transcript
22 if they wanted, and both could have been submitted.

23 JUDGE HEARN: Do we have the entire transcript from
24 the time the phone was answered?

25 MS. SUSTAKOVITCH: Yes, ma'am.

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1 MR. GRADY: Yes.

2 JUDGE HEARN: So the child answered the phone, is
3 that correct?

4 MS. SUSTAKOVITCH: But that is what the phone call,
5 yes, that is my understanding. What was provided to law
6 enforcement was when she starts talking. And then you go
7 through I guess it's about 30 minutes of the call, which
8 is transcribed. And then the phone call is ended. I'm
9 looking at the transcript we provided the Court. She
10 starts with hello. Whitner says hey sugar. Minor child,
11 hey, what ya doing. And then the transcript ends with
12 you're my angle baby. I swear to God. You hear me?
13 Yes. I love you sugar. I love you, too. All right.
14 Bye, bye. And then JW says bye.

15 JUDGE HEARN: Thank you.

16 Cross examination, Mr. Scalzo?

17 MR. SCALZO: Thank you, may it please the Court.

18 MR. GRADY - CROSS EXAMINATION BY MR. SCALZO:

19 Q: Mr. Grady?

20 A: Yes.

21 Q: You described naturally being very upset when
22 you heard about what JW had told your wife?

23 A: Yes.

24 Q: And the words you said, you were angry I believe
25 you said, mad was the word you used, is that accurate?

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1 A: Yes.

2 Q: And you found out on Saturday, which was about a
3 day or so after JW had told your wife?

4 A: Yes, yes.

5 Q: All right. And it sounds to me, and tell me if
6 I'm wrong, but it sounds to me that what you were saying
7 was you had a little bit of disbelief, like how could
8 this be happening?

9 A: Yes. Disbelief in the fact that it happened to
10 my daughter.

11 Q: Yes.

12 A: Yes. Not disbelief in my child.

13 Q: I understand.

14 A: Not that she's a liar or anything. Disbelief in
15 the situation, not my daughter.

16 Q: One of those situations where you kind of
17 believe it's happened, but you're also saying to yourself
18 how could this be happening, that kind of thing?

19 A: Yes.

20 Q: And as you said, you were hurt by it. And
21 another thing that you said was you were, I guess what
22 you were trying to tell the Court was you were trying to
23 understand what had happened?

24 A: Yes.

25 Q: And I think at one point you said you wanted to

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1 know what he did?

2 A: Yes.

3 Q: In that I guess you said she, but I believe you
4 were referring to JW

5 A: Yes.

6 Q: That she wanted him to help her?

7 A: Yes.

8 Q: Is that what you were saying?

9 A: My wife, me, just all of us wanted to get help,
10 me, my daughter wanted help from him, I wanted help from
11 him, my wife wanted help from him. Because she was
12 asking us stuff for him. We can't answer for him, we
13 cannot answer for him. So, and since, yes, her. But us
14 also. Because she, that's something we can't give her.

15 Q: Okay. And you knew of course after you had your
16 conversation with your wife that he had denied when
17 JW talked to him, as well as when your wife talked
18 to him, you knew that, right?

19 A: Yes, I mean, yes, that he denied it.

20 Q: Okay. And you had said that he wouldn't admit,
21 that was the phrase that you used when the Prosecutor was
22 questioning you?

23 A: Uh-huh (non-verbal response).

24 Q: And you also described sort of not knowing what
25 to do?

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1 A: Yes.

2 Q: And you described you wanted to get information
3 to see where to go from here I think is what you said?

4 A: Yes, because my daughter is, during this process
5 my daughter is asking questions. All this stuff is
6 coming out. And it hit me that Saturday. My wife has
7 had time to deal with this, I don't, I didn't.

8 Q: All right. And you also said that you had
9 decided to record the call, your wife had agreed in that
10 you did not want her, and I believe you were referring to
11 JW to be around him, and you were referring to Sam?

12 A: I mean, if. I didn't want her to be around him
13 if this is the case that this happened.

14 Q: Okay.

15 A: That he did this, that this abuse has happened.
16 Not being us against him, it's just this is our daughter,
17 this is my child. Me asking you a question, would you
18 put your, if the shoes were switched would you put your
19 daughter around another instance close to that? If the
20 shoe was switched, would you allow your child to go to a
21 dangerous, possibly harmful environment?

22 Q: Right, and I understand that.

23 A: That's why.

24 Q: That was your motivation?

25 A: Yes.

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1 Q: Was to understand what had happened?

2 A: Yes.

3 Q: And for you, what you were trying to get at was
4 you wanted sort of some confirmation from Sam that that
5 had happened?

6 A: No, no, I wanted confirmation, not from him.
7 For the whole situation in itself where do you go from
8 here? Where, being, getting her some help, because she's
9 going to need help, counseling, whatever. To get her
10 help. It has nothing to do with me. Her, her. Me, as I
11 stated earlier, wanted to do something different. But
12 it's about her, not about me.

13 Q: Well, let me ask you this. Let's back up and
14 figure out when it is that you began to feel that way?
15 Because you testified that you were very angry and that
16 you ended up speaking with your parents?

17 A: No, no.

18 Q: About the situation?

19 A: Okay, I spoke to my parents because of the fact,
20 even after the conversation I was still angry. But the
21 whole time, I won't lie, even from the beginning to the
22 end, even until now, it's still about her.

23 Q: Okay.

24 A: Because things would have happened, if it was
25 left to me things would have been handled totally

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1 different. Period. It's not about me, it's about my
2 daughter getting what she, over this process of her life,
3 what has happened to her. It's not about me, my wife,
4 it's not even about him. Let's get her handled, let's
5 get her the counseling, the process, get this. I want
6 her to know as her father I did the best that I could to
7 help her. Take myself out of the equation.

8 Q: Okay. Now let's talk about that. You've said
9 several times today that you've talked about counseling
10 and trying to get her help, is that correct?

11 A: Yes.

12 Q: Between August 3rd when she told your wife about
13 it and you found out on August 4th pretty much the next
14 day?

15 A: No, my wife found out on Thursday from my baby.

16 Q: All right, on Thursday, and then it was Saturday
17 when you found out?

18 A: I found out Saturday.

19 Q: Okay. You and your wife did not take JW to
20 a therapist or a psychologist, is that correct?

21 A: Does it not cost money to go to those places?

22 Q: That wasn't my question.

23 A: No.

24 Q: My question to you was did you take her to a
25 counselor, a psychologist, or anybody like that?

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1 A: I never knew who to take her to.

2 Q: Okay.

3 A: Who can I trust my daughter in the hands of now?

4 JUDGE HEARN: No, sir.

5 A: I mean, I don't understand.

6 JUDGE HEARN: Sir, you need to answer his questions.

7 This is not the time for you to ask him questions. Go
8 ahead.

9 Q: The question is, and I think you've answered it,
10 so I want to make sure we all understand what you did or
11 didn't do. You did not take her to any counseling?

12 A: No.

13 Q: Okay. And you said that you didn't know where
14 to take her, or you needed some guidance on that I guess
15 is what you were trying to tell us, is that correct?

16 A: Yes.

17 Q: Okay. You didn't go to the police at that time
18 and either report it or ask for guidance from them, did
19 you?

20 A: I asked for guidance from my parents.

21 Q: Okay. But that was after the recording of the
22 conversation, isn't that right?

23 A: Oh, that was, yes.

24 Q: Okay. You were, as you said, you were concerned
25 with how to get JW through the circumstances that

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1 you now found all of you in, isn't that right?

2 A: Uh-huh (non-verbal response).

3 Q: And your wife testified she believed JW
4 when she first told her, and it sounds to me that you
5 believed it, you may not have wanted it to have happened,
6 but you believed her?

7 A: Uh-huh (non-verbal response).

8 Q: Okay. And when on the 5th this phone
9 conversation was going to take place between Sam and
10 JW it had already been planned out that you were
11 going to go into the room?

12 A: Actually, the phone conversation took place on
13 Sunday, which was, yes.

14 Q: Okay.

15 A: Which was, it was, that conversation, the phone
16 conversation recording took place on that Sunday.

17 Q: Okay.

18 A: Because the very next day they took the tape to
19 the highway, to the police.

20 Q: That Monday?

21 A: Yes. So it wasn't like I recorded on Saturday
22 and waited.

23 Q: I understand that.

24 A: Yes.

25 Q: Here's my question, my question is that when you

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1 knew the conversation was going to take place was it
2 already planned out what you would do? In other words,
3 that you would go in one room and that your wife would be
4 in another room, and that you would not tell JW Is
5 that something you and your wife had thought about and
6 planned out beforehand?

7 A: No, no.

8 Q: Okay. Did it just happen and develop as the
9 phone conversation was taking place?

10 A: Yes. No, because he told, as you can hear in my
11 call he told my wife to tell when she gets back from her
12 grandma's house to call.

13 Q: Okay.

14 A: Okay. That was, that was, I don't remember the
15 date, it was when she came back that's when the call
16 started. She didn't know. Me and my wife hadn't planned
17 it, because we didn't know she was coming back. The day
18 she came back she wanted, I already told her to go ahead
19 and call him. I went and proceeded to go in the other
20 room. I told my wife, I said I'm going in the room and
21 record the conversation. And that's how I, I mean, that
22 was just it.

23 Q: All right.

24 A: It wasn't something where we sat down and said
25 oh yeah, we're going to do this. No, that wasn't the

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1 issue.

2 Q: All right. So what you understood was that
3 based on the last conversation that your wife had with
4 Sam, that Sam was saying tell her to call me, meaning
5 JW to call him?

6 A: Yes.

7 Q: And that when JW returned your wife
8 basically tells JW that it's okay for her to call
9 her father, or her biological father, Sam?

10 A: Yes, because we're thinking at that time that
11 this is about, we all know what this is about.

12 Q: Okay. And it's at that point that both you and
13 your wife allow her to make the phone call?

14 A: Uh-huh (affirmative response).

15 Q: You did not ask her permission prior to her
16 calling, she doesn't even know you're going to record,
17 correct?

18 A: Uh-huh (non-verbal response).

19 Q: You go in the other room and she stays with your
20 wife?

21 A: (Moves head up and down).

22 Q: Okay. And at any point during the conversation,
23 because you were listening to the conversation?

24 A: Yes.

25 Q: You did not interrupt the conversation?

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1 A: No.

2 MR. SCALZO: That's all I have, Judge, thank you.

3 MS. SUSTAKOVITCH: Your Honor, just to clarify one
4 point. The State as submitted the call at issue as a
5 potential wiretap violation already. The State does have
6 all three calls if there is any desire of the Court to
7 hear them. As stated in the State's brief, the first one
8 is very brief, between Anna Grady and the Defendant's
9 girlfriend. The second one is between Anna Grady and
10 Defendant. And the third one is the call at issue
11 between Mr. Whitner and the victim. If Your Honor would
12 like this I will submit it as part of the record. I
13 didn't initially do that because I didn't want to confuse
14 what's going on. But I did not want you to not have
15 something that you might want.

16 JUDGE HEARN: Is it only the one call that you are
17 seeking to introduce?

18 MS. SUSTAKOVITCH: The one call that we are seeking
19 to introduce has been submitted when the State sent in
20 their response. And I believe our briefs really spell
21 out the other two calls, they're not at issue. There was
22 just the brief one between the girlfriend and the mom.
23 And then the one between the mom and Mr. Whitner. I just
24 didn't want Your Honors to be confused at all. Okay.
25 Then I won't submit that.

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1 JUDGE HEARN: I think we're fine. Thank you so much.

2 MS. SUSTAKOVITCH: Yes, ma'am. Nothing further.

3 **MR. GRADY - EXAMINATION BY JUDGE KONDUROS:**

4 Q: Sir, the phone line in question is a land phone
5 line?

6 A: Yes, ma'am.

7 Q: And who owns that phone line?

8 A: We owned it at that time.

9 Q: We who?

10 A: Me and my wife.

11 Q: And whose name was the bill in?

12 A: At that time it was in, I think it was in my
13 name. Yes, ma'am.

14 Q: And do you still have that phone line?

15 A: No, ma'am. We moved out of that house actually.

16 Q: You didn't transfer the number?

17 A: Oh, no, ma'am.

18 Q: And you have not formally adopted JW

19 A: No, ma'am.

20 JUDGE KONDUROS: Thank you, sir.

21 MS. SUSTAKOVITCH: Your Honor, the last witness would
22 only testify, it's the Officer, Detective Bobby Bradford.
23 His testimony would only be that he was not involved in
24 the case until the tape was brought to him. If that's an
25 uncontested fact, I will not put that witness up.

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1 JUDGE HEARN: Mr. Scalzo?

2 MR. SCALZO: It certainly is not contested that
3 that's when he became involved.

4 JUDGE HEARN: I don't think we need to hear from him
5 then.

6 MS. SUSTAKOVITCH: Thank you, ma'am.

7 JUDGE HEARN: All right. We'll hear arguments now on
8 the motion. Mr. Scalzo?

9 MR. SCALZO: May it please the Court, Your Honor.
10 Again for format questions, what kind of time period are
11 we working under for argument?

12 JUDGE HEARN: We have decided to give you 10 minutes,
13 and 10 minutes for Ms. Sustakovitch.

14 MR. SCALZO: We've got Scalzo and Sustakovitch, not
15 an easy thing to say.

16 JUDGE HEARN: I know, I know. And then we'll hear
17 from you briefly in reply after that.

18 MR. SCALZO: Okay. Thank you, Your Honor. Obviously
19 the testimony really does put the issue in a sort of
20 context. Kind of bringing it back to the legal matter.
21 It is a matter of law because South Carolina has got a
22 one party consent rule.

23 JUDGE HEARN: Doesn't our Statute mirror the Federal
24 Act though? And haven't the majority of Federal Courts
25 adopted this theory of vicarious consent when a minor

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1 child is involved?

2 MR. SCALZO: To answer your first question, there is
3 a mirror. But I don't think it's a mirror in the sense
4 that oh, we like that Statute, we will then now adopt it.
5 Really what the Federal Government said is we're drawing
6 a baseline. We're in essence instructing the States,
7 usually they do it by saying we're not going to give you
8 money, but we're really saying adopt your Statute, you
9 can't go below what our standards are, obviously you can
10 be more restrictive. And so in that sense it's not quite
11 a mirror in the sense that I don't know, I don't think
12 that we can really say that the South Carolina
13 Legislature intended to mirror all of the intentions of
14 the Federal Statute.

15 And I disagree with the analysis of the other Courts
16 that the conclusion can be drawn that the Federal Statute
17 and the Legislative history support some sort of argument
18 that Congress really entertained vicarious consent.
19 Every case cites the same one line for that support.
20 One, I believe he is a professor who gives this one line
21 of testimony about I don't think we really intend to make
22 an illegal, I think he says fathers to tape record their
23 daughters.

24 Well, I think that's faulty analysis. One, it's one
25 line out of what would have probably been many hours of

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1 testimony from a witness. It's not a line from one of
2 the Senators, Congressmen who got on the floor and said
3 hey, we're adopting this because here's my reasons. And
4 oh, by the way, just so it's clear, our intent is not to
5 criminalize parents recording. So I think the logic is a
6 little bit faulty in a lot of these opinions. And as I
7 argued in my brief, they sort of build on each other, but
8 they don't really analyze below one level. They cite to
9 one case and then just kind of pull it in.

10 They have adopted it in Federal Courts. Big
11 difference though, I think, is that the Federal Statute
12 is done in consistency with obviously the Federal
13 Constitution. South Carolina has got a right of privacy
14 protection that is greater than what is in the Federal
15 protections. As I've argued in the brief it is kind of
16 hard to believe that given that South Carolina has in the
17 past, and I've cited the examples, recognize that we as a
18 State have this added level, this greater expectation of
19 privacy that we provide and afford citizens, the Federal
20 Government does not.

21 So I think while you can kind of look to it as an
22 idea about the issue, I don't think that this State
23 should be relying on it in the way that the other States
24 have. Because they do not address, these other States do
25 not address the privacy issue or a heightened privacy

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1 issues that would be raised here.

2 JUDGE THOMAS: What happens in the case of a minor
3 though, do you think the minor needed to give consent?

4 MR. SCALZO: I think as the statute is written
5 currently the minor would have needed to give consent.

6 JUDGE THOMAS: Wouldn't you be here before the Court
7 arguing now that the minor didn't have the ability to
8 give consent, wouldn't we be hearing that argument had
9 the minor actually consented?

10 MR. SCALZO: I don't know. That's not the argument
11 that I've developed. Certainly as an advocate I might go
12 down that road.

13 JUDGE THOMAS: Do you believe the minor could
14 consent, and what's your authority for that?

15 MR. SCALZO: Well, I think the minor could consent.
16 I think that some of the analysis of the other Courts
17 where in essence to formulate the argument is to say
18 well, look, the Legislature has described consent in
19 various ways. And now they put consent here and it seems
20 ambiguous is kind of the logic.

21 I don't agree with that logic. I think that logic in
22 itself is faulty. If there were several other Statutes
23 where the Legislature says okay, we're going to take a
24 special circumstance, children are a special circumstance
25 when it comes to this idea of consent. Well, I don't

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1 think it shows that it's ambiguous, I think it shows that
2 it's clear. Because the Legislature understands that
3 when there is a special circumstance and we are concerned
4 with a child giving consent and the ability to give
5 consent, what does the Legislature do. The Legislature
6 takes that special circumstance, applies specific
7 language to deal with it.

8 And the abortion is a very good example, primarily
9 because it's a privacy right issue. In essence, the
10 Federal case law gives a baseline, you can't go below a
11 certain level. And clearly, the State Legislature is
12 concerned with not only protecting the privacy interests
13 of the mother, who may be a minor, but the unborn child.
14 So in trying to balance those two things, what did they
15 do. They actually went to great pains to come up with a
16 very complicated, complex statutory structure. If all
17 they were simply doing was saying we have the generalized
18 idea that children lack a certain level of capacity and
19 ability to consent, then why would they have gone through
20 that effort.

21 And I also think to answer your question further, is
22 there's a difference between abortion and the seriousness
23 of that consequence, marriage, a medical procedure, that
24 you don't have in a telephone conversation. The level
25 of, the ability for a child to understand private,

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1 children aren't able to understand privacy. Now they may
2 not understand it as well as adults, but they understand
3 when they want something to be just theirs. And the
4 ability of them to be consulted is a little bit
5 difference in that context.

6 Which is why what I've argued is, this is really a
7 Legislature's ball to run with. The better process would
8 be, or the Democratic process of saying Legislature, if
9 this is what you want, they're going to look at all sides
10 of the issue and going to hear to what degree of privacy
11 do we want to protect the children. Because even the
12 Federal, I mean, the child has privacy rights.

13 JUDGE KONDUROS: I want to change over your argument
14 to something that you were bringing out in your cross-
15 examination which was the difference between whether this
16 was done in her best interest or whether it was
17 retribution?

18 MR. SCALZO: Okay. Clearly that was a very important
19 thing for me to bring out. And I want to be clear, it's
20 not, I don't allege sort of that that is some ill motive.
21 That in other words, two parents who really believe the
22 child, that somehow this was a devious plan. But
23 nonetheless, if you adopt it, and I think it's very
24 important that adoption is the word that is being used.
25 That's not the appropriate, it's a Trial Court, that's

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1 not the appropriate thing to be doing.

2 But I think the testimony here brought out today, and
3 I think it was honest, I don't think it was contrived,
4 really shows the Court what they were trying to do. They
5 weren't trying to, it's a weird way to say it, they
6 weren't trying to protect the child from the context of
7 the conversation that was taking place. They may have
8 been trying to protect the child in the broader context
9 of if this happened we have to have some way of maybe
10 proving this or getting this or getting her help as the
11 witnesses said. Well, I don't think that that's what
12 vicarious consent was intended by these other
13 jurisdictions.

14 If you look at cases, what they did, the parents
15 found themselves in situations where they didn't really
16 know what was going on in the conversation. Most of the
17 time it's between, it's a domestic situation where you
18 have one parent, the child lives with one parent, having
19 a conversation with the parent that they don't live with
20 currently. And you have this difficulty of how does the
21 parent justify cutting off conversations when they don't
22 really know what's going on. That makes a little bit
23 more sense if you're applying that rule.

24 That's not what you have here. If the 11-year-old
25 daughter is saying hey, this happened to me, then you're

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1 allowing that 11-year-old daughter to confront who she
2 says is her accuser on the telephone, he denies it. At
3 what point two days later do you really believe that he
4 is now all of a sudden not deny it. And if the motive
5 was to get her help, which was put forth, other than
6 prosecuting what kind of help is being provided? They
7 didn't consult a psychologist or a counselor who said,
8 you know, doing this would be helpful for her.

9 Again, it's not that they have ill motives, but that
10 they're real motive was not, they weren't left with no
11 other choice. And I think that's really what vicarious
12 consent is saying. It's saying if you've got a good
13 faith and reasonably objective basis for believing, the
14 only thing you could do is record this so that you could
15 try to protect the child. Then that's really where it's
16 coming out of. It's not coming out of the idea that you
17 know it's about to happen, let's help further the
18 investigation. Because as I argued in my first brief,
19 that thwarts the whole point of the Wiretap Statute.
20 It's a privacy Statute. It's broadly applied because
21 there are a lot of people, citizens that both the Federal
22 Government and the States intended to protect. And when
23 you have this expansive protection it makes sense given
24 the context.

25 Now I still believe that it's not in the Statute

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1 currently. And I realize my time is almost up.

2 But I will point out that you have an example in the
3 State with the armed robbery Statute. In 1996 the
4 Legislature passes as an amendment to the armed robbery
5 Statute that said if a person uses an object that is not
6 a weapon, but they use it in a manner that somebody might
7 believe was a weapon, then that's still armed. Well,
8 State v. I think it's Gordine, that amendment had passed
9 but it didn't apply to the current case. And the Supreme
10 Court said we're not going to read it into the Statute
11 even now. Even though the Legislature had clarified it,
12 they still didn't read it in. They said the Statute
13 didn't say that. And it's the same concept here. It may
14 be a good idea. If I were in the Legislature I might
15 vote for it or I might propose it. But unfortunately
16 that's not what was put into the Statute. And I really
17 do think that what is being asked of the Court is to
18 adopt a policy as opposed to interpret a policy.

19 JUDGE HEARN: All right, we'll hear from you again in
20 reply.

21 MR. SCALZO: Thank you.

22 JUDGE HEARN: Ms. Sustakovitch?

23 MS. SUSTAKOVITCH: Thank you, may it please the
24 Court. The State is not seeking to have this Honorable
25 Court be a Super Legislature. The State is seeking and

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1 is asking this Court to interpret a Statute, to give it a
2 commonsense interpretation so that vicarious consent can
3 mean, consent can mean vicarious consent.

4 JUDGE HEARN: So you're not asking us to find the
5 Statute ambiguous?

6 MS. SUSTAKOVITCH: Well, Your Honor, and I'm not
7 trying to be non-response to your question. I think this
8 Court could find the Statute ambiguous, and it could
9 follow the reasoning in Spencer. I think this Court
10 could say no, it's not ambiguous, we're just under
11 Alameda, we're going to follow that line of reasoning.
12 And I think this Court would be well within its right to
13 say we don't find it ambiguous, we just say that
14 vicarious consent is a type of consent.

15 And I go back to, you know, you boil this down,
16 essentially in South Carolina two people are on the
17 phone, as long as one person knows the call is recorded
18 there is no wiretap violation.

19 Now the Petitioner keeps talking about all the
20 privacy considerations involved in that. Frankly, it's a
21 one party consent Statute. It is not the most stringent
22 Statute that our State could have. We're not
23 Massachusetts, we're not Washington, DC, we are not
24 Michigan thankfully.

25 What the State is asking this Court to do is yes,

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1 Your Honor, our one party consent exception mirrors the
2 Federal one party consent exception. And Defense Counsel
3 cannot offer to the Court precedent on which to make a
4 decision in this case.

5 The State is not asking you to adopt any new law,
6 it's asking this Honorable Court to consider the weight
7 of authority, the Federal cases starting with Pollock and
8 Thompson v. Dulaney, Pollock, Campbell v. Price, all of
9 those cases that look at the Federal Statute and say that
10 in the situation where a parent has an objectively
11 reasonable basis to believe that it is in the child's
12 best interest to record --

13 JUDGE KONDUROS: Well, let's follow back through
14 that. If we go with Pollock which does speak to
15 vicarious liability, I mean vicarious consent of the
16 parties go to best interest then. And we get back to
17 retribution versus truly trying to find out. I mean, I
18 think at the point that JW had told them that this
19 had happened, told the mother, told the father, so what
20 did they need to actually learn from this conversation?

21 MS. SUSTAKOVITCH: Honestly, Your Honor, I heard Jeff
22 Grady's testimony, and what I heard was a step-father who
23 considers himself to act as a father to this child who
24 was hurt, he was angry, he was a mixture of emotions. I
25 don't think it was retribution. His answer was if he had

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1 wanted to handle it the way he wanted, man to man, this
2 might have been a completely different criminal
3 proceeding against Jeff Grady and the Petitioner.

4 So with that, what I heard the testimony to be was
5 they wanted to find out and get to the bottom of what
6 happened. Keeping in mind that Jeff Grady who was the
7 person who thought the whole idea up of recording the
8 call, he was caught in the nuclear fallout of hearing
9 this on Saturday, trying to process it. Thinking to
10 himself oh, my God, I really hope this didn't happen. I
11 believe my child, but please say this didn't happen.

12 And he honestly, I couldn't put the words any better
13 than he did I feel, at least with my line of questioning,
14 to me he seemed like a concerned parent who was not
15 focused on retribution. He testified that even after,
16 number one, he didn't expect to hear that on the phone
17 call. He was caught off guard. I don't think most
18 people would expect that to come out of his mouth for 30
19 minutes.

20 That being said, then he's in the swirling of emotion
21 trying to figure out what do I do. That's when his
22 parents advise him you need to let law enforcement help
23 you. You don't go do this by your own hand, you don't
24 take the law into your own hands. You let the law
25 enforcement that's out there, that's charged with the

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1 responsibility to help you, let them help you.

2 So honestly, I didn't feel like it was retribution.
3 I felt like he was in the maelstrom of trying to figure
4 out what to do. The call happened, bam, it wasn't what
5 he expected. And then he's sitting on it going wow,
6 should I allow my child to be around this man again. He
7 sees her, do I allow that. All this goes back through
8 his mind.

9 But Your Honor, to go back to the State's argument
10 that this Court should adopt vicarious consent, there is
11 a weight of authority out there. The Courts that are
12 adopting it are following a very thoughtful, reasoned
13 analysis behind it. And recognizing that it is helpful
14 to the child, it is important to the child.

15 One thing that I think has been lost in this whole
16 debate so far is the big picture of what we're talking
17 about, it's the South Carolina Wiretap Statute. This
18 Court interpreting consent in 17-30-30(C) to mean
19 vicarious consent in certain situations, it is not in
20 disagreement with the intent of the Legislature. And
21 what do I have to back that up? Well, if you go back in
22 time and you look, in 2002 the State Wiretap Statute was
23 actually passed as part of the Homeland Security Act.

24 And I think one thing that hasn't been discussed at
25 all, which I did want to supplement the record was, it's

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1 important to go back and look at the Legislative history
2 of that Act, if that's what we're really talking about.
3 Was it the intent of the Legislature in that Act that --

4 JUDGE HEARN: And of course, the Pollock precedent
5 was out there at the time this Act was passed.

6 MS. SUSTAKOVITCH: Yes, ma'am. Yes, ma'am. And I
7 guess the background that I would offer to the Court is
8 that in South Carolina we did not have a Wiretap Statute
9 prior to 2002. If you go back and look at case law, in
10 Mays v. Mays, that's a 1976 case, it's under 267 S.C.
11 490, South Carolina is looking at the Federal Statute in
12 Mays v. Mays some almost 30 years ago. It is following
13 Federal precedent.

14 In Mays v. Mays it says Title 3, Section 25-11-2(d)
15 allows that when somebody, it makes it clear that one
16 party to a telephone conversation may lawfully tape
17 record the conversation without the other's knowledge or
18 permission, and subsequently disclose it.

19 Then you go forward in time, and I'm getting to where
20 we're at 2002, Mays v. Mays is saying let's follow the
21 Federal law because we don't have a Statute. And under
22 Federal preemption it says we have to follow Federal law.

23 This Court in 1996 under State v. Andrews which I
24 think is a very important case to combat Petitioner's
25 argument of privacy, State v. Andrews, which is in the

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1 State's brief, it talks about the fact that no one has a
2 constitutionally protected expectation that the person to
3 whom he reveals incriminating information will keep it
4 secret. And it does not offend the Fourth Amendment.

5 In that case, Your Honor, and I beg the Court's
6 indulgence one second, in that case South Carolina again,
7 the Court of Appeals was looking to Federal precedent,
8 was looking at the Federal consent exception, and it was
9 following it. And it was saying that you don't have a
10 right to privacy in that regard. It is not a violation
11 of the Constitution as argued by Petitioner in the
12 scenario where one party to the conversation knows that
13 the call is recorded, all of these privacy considerations
14 are not brought to bear.

15 Then you fast-forward to 2002, Your Honor, and I did
16 want to offer to the Court, the State has gone through
17 the whole Legislative history of the actual Homeland
18 Security Act. Because we wanted to see, you know, what
19 happened in the Homeland Security Act is they took the
20 Federal consent exception and they dropped it into that
21 Statute.

22 And if I may, I'd like to offer, this is the House
23 Week in Review from February 26, 2002; and then the
24 Overview of the 2002 Legislative year; and then South
25 Carolina Session Laws from July, 2002. And I'll give one

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1 to --

2 JUDGE HEARN: Go ahead and mark it.

3 **(State's Exhibit Two was Marked for Identification)**

4 MS. SUSTAKOVITCH: Okay. My point to bringing those
5 documents to the Court's attention is when the
6 Legislature passed the Homeland Security Act in 2002
7 which added the Wiretap Bill, it says, and this is, I'm
8 quoting from February 26, the House Week in Review, "The
9 full Judiciary Committee met on Tuesday, February 19, and
10 gave a favorable report on House Bill 4416, the South
11 Carolina Omnibus Counter-Terrorism and Homeland Defense
12 Act of 2002. This legislation affords state law
13 enforcement authorities with new means of investigating
14 potential terrorist threats."

15 And it goes on to describe all the very intricate
16 other parts of the Wiretap Statute that are completely
17 focused on SLED, applications for wiretaps, orders for
18 wiretaps, that was the focus of the Legislature.

19 When they dropped in the Federal consent exception
20 into that piece of legislation the State's position is if
21 they had any problem with the fact that South Carolina in
22 Mays v. Mays, and also in State v. Andrews for the last
23 almost 30 years had been following Federal precedent,
24 2002 was the time to do something. 2002 was the time not
25 to take the Federal Statute and drop it into our Wiretap

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1 Statute with no direction whatsoever.

2 What that tells me is that the actual intent of that
3 Bill was we were dealing with post 9/11 concerns and
4 we're going to give law enforcement additional tools.
5 And it is completely consistent with believing they
6 didn't make any additions or changes in 2002 to the
7 consent exception. They followed almost verbatim the
8 Federal consent exception. Which is completely
9 consistent to believe that they would want this Court to
10 follow Federal precedent and the other cases that have
11 acknowledged vicarious consent.

12 JUDGE HEARN: Thank you very much.

13 MS. SUSTAKOVITCH: Yes, ma'am.

14 JUDGE HEARN: Your time is up. Thank you.

15 MS. SUSTAKOVITCH: Thank you.

16 JUDGE HEARN: Reply?

17 MR. SCALZO: May it please the Court again. In
18 reply, I don't think the Statute is ambiguous. And if
19 it were ambiguous that is the point at which a Court can
20 go into it.

21 JUDGE HEARN: I don't think opposing counsel thinks
22 it's ambiguous either.

23 MR. SCALZO: Well, it was a little bit unclear
24 because she did argue for both sides. But I believe that
25 it is not ambiguous. I believe it is straightforward..

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1 The words prior consent, simple, straightforward.

2 Spencer --

3 JUDGE KONDUROS: You're just saying it would have to
4 say prior consent including vicarious consent.

5 MR. SCALZO: Or have a section, I think Georgia is a
6 prime example, Georgia looks at the Statute as it was at
7 the time and said you know what, it's not in our Statue.
8 The very next year Georgia Legislature says well,
9 actually, we like that. And that happens all the time.
10 A Court rules --

11 JUDGE KONDUROS: We're still in the same position
12 Georgia would have been the year before they made that
13 step if they'd had ten wiretapping cases we'd be
14 mirroring their experience.

15 MR. SCALZO: Perhaps. I think it's important given
16 the argument that was just talked about in 2002 and the
17 adoption of the Homeland Security Act. And I don't know
18 Mays, I wasn't cited in the other brief so I can't speak
19 to it. But it is, 2002 is late in the game as far as
20 vicarious consent is concerned, it's been around for
21 quite a long time by that point, almost ten years.

22 The State really, and these other Courts, too, the
23 State is picking up on the other Courts, it's an argument
24 by silence. Its saying because the Legislature is silent
25 somehow it's affirmatively saying this is what I want or

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1 what we want. I just don't think that that's the way the
2 Legislature operates.

3 If the Legislature knowing all of the law that was
4 there, and looking at Georgia, which our State often
5 does, we're neighbors, it's hard to believe that the
6 Legislature would say hey, we know this has gone on, we
7 know this has been an issue at least in Georgia, that
8 they're not going to put it in there, just to be clear.

9 I mean, if the Legislature is going to do it in
10 abortion, and to be clear, and just how well developed
11 that Statute is to deal with all the policy concerns,
12 grandparents, guardians, what do they mean. As I put in
13 my brief, what about a 16-year-old versus an 8-year-old,
14 what are the privacy differences there. Now in abortion
15 it may not be a great difference between those two
16 things. But a telephone call is an entirely different
17 animal with regard to privacy rights.

18 It really is an argument for preemption. Perhaps
19 that would work until you get to the point where what
20 happens, South Carolina does enact its own Statute. If
21 we were back perhaps in the time of Andrews before the
22 Statue then maybe there's a stronger argument to say that
23 since South Carolina law is not here and we've got to
24 look at the Federal Courts then maybe we go there. But
25 now we have our own Statute.

KATHY A. SNELLING, CVR

The Supreme Court, State of South Carolina
Office of the Commission Counsel

1015 Sumter Street, Suite 305, Columbia, South Carolina 29201

1 And again, it goes back to what would this
2 Legislature have done when it, would have approached it
3 when it was enacting it, heightened protection of privacy
4 here. You don't find that in any of the other States
5 except for Louisiana and Arizona, who skirt the issue in
6 their opinions. They never even raise the issue that
7 they have a heightened level of privacy protection.

8 But in South Carolina consistently the Legislature
9 has recognized that and tried to put words that would
10 address it when it became an obvious issue to them. And
11 they did not do that. And the argument that it is
12 somehow being silent is giving an affirmative assent, if
13 that's the case then there are a lot of circumstances
14 where either side, Plaintiff, Defendant, Prosecutor,
15 criminal defense would be able to come in and say well,
16 the Legislature didn't say anything about it, so
17 therefore we want it to be this. And I just don't think
18 that it works that way. That the appropriate thing to do
19 would be go ask the Legislature to enact this law and go
20 through the process.

21 I think that I guess the last big picture idea is I
22 disagree with the big picture as the way the State
23 described it. The big picture is we want broad privacy
24 protections. That is what the Federal Government wanted,
25 that is what the States want. I think it's Baumrind

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1 which is the State case that describes the Omnibus Bill
2 that the Federal Government passed, and it's describing
3 it as broad, expansive.

4 For there to be a special circumstance that narrows
5 that, it's very hard to imagine that a Legislature that
6 intended that would remain silent, particularly given ten
7 years of the issue being out there for everyone to look
8 at and consider and Georgia.

9 JUDGE THOMAS: When was the Georgia, would you remind
10 me?

11 MR. SCALZO: I believe 1999 is the Bishop decision.
12 And I forget if 2000, I believe its 2000 when they adopt
13 the language. And look at the language which I cited in
14 the brief, Georgia takes 220 words to put into its
15 Statute what it believes vicarious consent means from a
16 statutory standpoint. It's very different from sort of a
17 Rule of Law, tends to be a little bit broader and you
18 might have to deal with, you know, various fact patterns.

19 But the Legislature tends to be very specific about
20 what it intends to allow, what it intends by its meaning.
21 And the very fact that it chose not to put specific
22 language doesn't make it ambiguous, it makes it
23 unambiguous. It makes it clear. If we're just going to
24 say consent, that is what we mean. And they've had
25 plenty of opportunities to go back and say well,

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Office of the Commission Counsel

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1 actually, we didn't really mean consent.

2 In demonstrating it by the other Statutes it
3 understands how to do that. It understands the
4 difference between, you know, if you're going to get your
5 ear pierced it actually doesn't take 220 words to
6 describe that you need a parent to consent, but abortion
7 is a different story. I guess vicarious consent would
8 lie perhaps somewhere in the middle as far as the
9 seriousness of the privacy rights that are at stake. But
10 it's nonetheless something that is not easily just stated
11 in one word which is consent. And that's all that is in
12 the Statute.

13 Any other questions I can answer for the Court?

14 JUDGE HEARN: Thank you very much.

15 MR. SCALZO: Thank you.

16 JUDGE HEARN: We'll take this matter under
17 advisement. We'll issue a decision shortly.

18 CLERK OF COURT: Be upstanding for the Court.

19 (Whereupon, the Hearing Concluded on the 22nd of July,
20 2009, at 11:21 a.m.)

KATHY A. SNELLING, CVR

The Supreme Court, State of South Carolina
Office of the Commission Counsel
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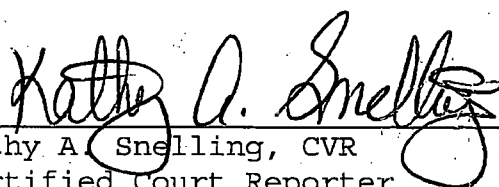
CERTIFICATE OF REPORTER

I, the undersigned Kathy A. Snelling, Official Court Reporter for the Office of the Commission Counsel and Notary Public for the State of South Carolina, do hereby certify:

That the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned matter, on the 22nd day of July, 2009.

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

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal this 24th day of July, 2009.


Kathy A. Snelling, CVR
Certified Court Reporter

Notary Public for South Carolina
My Commission Expires: June 6, 2018

KATHY A. SNELLING, CVR
The Supreme Court, State of South Carolina
Office of the Commission Counsel
1015 Sumter Street, Suite 305, Columbia, South Carolina 29201

The South Carolina Court of Appeals

The State,

Respondent,

v.

Samuel Lamont Whitner,

Petitioner.

The Honorable C. Victor Pyle, Jr.

Greenville County

Trial Court Case No. 2009-GS-23-01072

ORDER DENYING MOTION TO SUPPRESS

Pursuant to section 17-30-110 of the South Carolina Code (Supp. 2008), Samuel Lamont Whitner filed a motion to suppress an audio-recording of an August 5, 2007 telephone conversation he had with his daughter, the alleged victim in the above-captioned case. Whitner argues the interception of his conversation violated South Carolina's Wiretap Statute because neither he nor his daughter consented to the interception. See S.C. Code Ann. § 17-30-30(C).

The South Carolina Wiretap Statute was passed as part of the Homeland Security Act in 2002. See S.C. Code Ann. §§ 17-30-10 et seq; South Carolina Homeland Security Act, 2002 Act No. 339. In writing the statute, the South Carolina General Assembly included a "consent exception" to the general rule prohibiting third parties from intercepting conversations between other individuals. This consent exception parallels the Federal Wiretap Statute's consent exception in that they both proscribe third parties who are not acting under the color of law from intercepting a conversation unless one of the parties to the communication has given prior consent. Compare S.C. Code Ann. § 17-30-30(C) with 18 U.S.C. § 2511(2)(d). Prior to South Carolina's adoption of this language, the federal courts had interpreted the consent exception to allow a minor's guardian to vicariously consent to the interception of a communication to which the minor is a party "as long as the guardian has a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child to consent." Pollock v. Pollock, 154 F.3d 601, 610 (6th Cir. 1998); accord Wagner v. Wagner, 64 F.Supp.2d 895,

896 (D. Minn. 1999); Campbell v. Price, 2 F.Supp.2d 1186, 1191 (E.D. Ark. 1998); Thompson v. Dulaney, 838 F.Supp. 1535, 1544 (D. Utah 1993). By adopting a consent exception which parallels the federal exception, we conclude the South Carolina Legislature intended to embrace the vicarious consent doctrine that federal courts interpreted was included in section 2511(2)(d) of Title 18 of the United States Code.

Based on the testimony presented during the motion to suppress, we make the following findings of fact and conclusions of law:

Findings of Fact

1. When the phone conversation took place, daughter was eleven years old and lived with her mother and step-father.
2. Together, mother and step-father decided to record telephone conversations between daughter and Whitner after daughter disclosed to mother that Whitner had sexually abused her approximately five years earlier.
3. Mother and step-father's motive for recording the conversation was to assist them in counseling daughter and to protect daughter from harm.
4. The actual recording was made by step-father, with the knowledge and permission of mother, and was accomplished using a phone extension in mother and step-father's home.
5. Mother and step-father had a good faith and objectively reasonable belief that intercepting daughter's conversation with Whitner was necessary and in daughter's best interest.

Conclusions of Law

1. Mother and step-father vicariously consented to intercept the conversation on behalf of daughter.
2. The interception did not violate South Carolina's Wiretap Statute because section 17-30-30(C) of the South Carolina Code mirrors section 2511(2)(d) of Title 18 of the United States Code and embraces the vicarious consent doctrine.

Based on the foregoing, Whitner's motion to suppress is denied.

AND IT IS SO ORDERED.

Kaye L. Hearn
Paul M. Thomas
U. Ke

Columbia, South Carolina

July 27, 2009

cc: Christopher Scalzo, Esquire
Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
Assistant Attorney General William M. Blitch, Jr.
Christine Kednocker Sustakovitch, Esquire

STATE OF SOUTH CAROLINA	) COURT OF GENERAL SESSIONS
	)
COUNTY OF GREENVILLE	) Case No(s) .: 09-GS-23-1072
	)
State of South Carolina	)
	)
Plaintiff,	)
	)
-VS-	) TRANSCRIPT OF RECORD
	)
Samuel Lamont Whitner	)
	)
Defendant.	)
	)

November 2-4, 2009
Greenville, South Carolina

B E F O R E:

HONORABLE JOHN C. FEW, Judge.

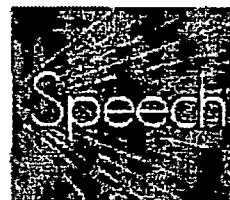
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DEFENSE EXHIBITS

(No exhibits offered.)

COURT'S EXHIBITS

(No exhibits offered.)

P R O C E E D I N G S

(WHEREUPON, State's Exhibits 1 through 14 are marked for identification purposes.)

MRS. SUSTAKOVITCH: May it please the Court, Your Honor. The State has several pretrial matters to be handled with the Court. First, I would like to hand up a motion that I have given defense counsel. I don't believe there are any issues related to it. But I did want to make that a part of the record. My understanding is he doesn't intend to introduce anything that would violate Rape Shield.

MR. SCALZO: My only response to the actual motion is in the State's motion, it says, regarding prior sexual knowledge and/or sexual activity, the Rape Shield refers to comments. What the State is asking is for you to limit the defense to talking about any knowledge about sex. Sure, we don't have any other prior conduct that we intend to elicit testimony with regard to the victim. But knowledge is certainly a relevant issue. I don't know if it's going to come up but I don't think it's appropriate for us to --

THE COURT: Well, if y'all don't have anything to fight about, then I don't have to

1 rule. So let's go on to the next argument, the
2 next point.

3 MRS. SUSTAKOVITCH: Your Honor, next, uh, the
4 first time that this matter was heard, March
5 11th, the State did do a Jackson v. Deno hearing
6 related to several statements that were made by
7 the Defendant in this case. But upon further
8 thought, those statements honestly, they appear
9 to the State to be self-serving hearsay.

10 THE COURT: You're not going to offer them?

11 MRS. SUSTAKOVITCH: No, sir.

12 THE COURT: Well, then we don't need to deal
13 with them.

14 MRS. SUSTAKOVITCH: I wanted to make sure
15 that while Bobby Bradford is on the stand
16 testifying, defense counsel does not try to
17 elicit --

18 THE COURT: Let's focus on the issues that
19 are actually before us right now, not those that
20 come up at some point in the future.

21 MRS. SUSTAKOVITCH: Your Honor, I wanted a
22 ruling about whether or not defense counsel can
23 go into that.

24 THE COURT: I won't be able to rule on that
25 until we get to that point. Just like Mr. Scalzo

Motions

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1 pointed out about knowledge under the Rape Shield
2 statute, we don't know exactly what the scope of
3 relevance is going to be until we get to that
4 point. When we get there, I will rule on it.

5 **MRS. SUSTAKOVITCH:** Okay. Next, Your Honor,
6 defense counsel served me Friday with a motion to
7 provide a more specific timeline. I just
8 prepared a very brief response that states the
9 appropriate case law. In this case, the child
10 has alleged that her father made her perform oral
11 sex on him between the ages of five and six.
12 Based on her birth date, that would be December
13 28th, 2000 through December 28th, 2002. That has
14 always been what the victim has stated. We feel
15 based on the case law that that is sufficiently
16 specific.

17 **THE COURT:** Okay. Anything else?

18 **MRS. SUSTAKOVITCH:** No, sir.

19 **THE COURT:** Mr. Scalzo.

20 **MR. SCALZO:** May it please the Court. With
21 regard to the motion that Mrs. Sustakovitch
22 referred to, my motion is -- essentially the
23 facts are that -- the allegation is one incident.
24 Whether it was one night or one short period of
25 time within the same day when the child said she

1 was five or six years old. This is not multiple
2 alleged incidences over an alleged period of
3 time. We have evidence. I think it is
4 undisputed that the Defendant was incarcerated
5 either in Greenville County Detention Center or
6 the Department of Corrections for probably more
7 than 200 days between the two dates that are
8 alleged in the indictment.

9 There are a couple of reasons or bases for my
10 making that motion. One, Rule 5 says the State
11 needs to be specific about a date and time as
12 well as the place with regard to any notices of
13 alibi. The State knows where he was. I provided
14 a list regardless of the fact that they would
15 have known they would have had him in custody.
16 They don't provide anything more specific than --

17 **THE COURT:** Didn't she just tell us that she
18 is not in a position to be any more specific than
19 she has already been.

20 **MR. SCALZO:** That may be true with regard to
21 the child. I'm not saying that somehow --

22 **THE COURT:** I'm sure she would concede that
23 he did not do it while he was incarcerated at the
24 detention center or the Department of
25 Corrections.

1 **MRS. SUSTAKOVITCH:** That's correct. The
2 defense, in their case, wishes to put those
3 documents in to limit the timeline. That would be
4 great.

5 **MR. SCALZO:** Here is my point, Judge, though.
6 In doing that, I think it procludes -- in
7 essence, that is the State's burden to do that.
8 The State needs to come in and say, look, this
9 happen on such and such day or within a
10 reasonable period of time. This case is a unique
11 set of facts in that there isn't going to be a
12 controversy over whether or not the Defendant
13 actually had alibi or was it possible for him to
14 do it during certain periods of time. Unlike a
15 case where you might have a witness who says he
16 was with me and the jury has to evaluate the
17 credibility of the witness. In this case, you
18 are going to have periods of time where there is
19 not a question as to where he was.

20 I think there is a burden shifting that is
21 involved in that set up, I guess if I use it that
22 way. What the State is essentially doing is
23 saying we know it was impossible for him to have
24 committed the crime during these periods of time.
25 We don't have any other evidence other than the

1 victim saying that it happened so we are going
2 to, in essence, say it must not have happened on
3 those dates. What it is doing is shifting the
4 burden over to the Defendant to somehow try to
5 prove that an allegation he says never took place
6 happened in a period of time where he was --

7 THE COURT: What is the motion?

8 MR. SCALZO: My motion was to have the State
9 be more specific.

10 THE COURT: Have you been as specific as you
11 can?

12 MRS. SUSTAKOVITCH: I believe based on the
13 child's testimony, we have.

14 THE COURT: Let's go with yes or no.

15 MRS. SUSTAKOVITCH: Yes, sir.

16 THE COURT: I don't know what else to do.
17 What else can I do in response to your motion
18 other than make her be as specific as she can?

19 MR. SCALZO: I think if the State is not able
20 to be more specific than they have been, then
21 they should not be allowed to go forward until
22 they are more specific. It's an investigation.
23 They haven't investigated to be more specific.

24 THE COURT: On what -- so you -- are you
25 saying that I should not allow the case to be

1 called for trial until they be more specific or
2 that I should dismiss the indictment because they
3 can't be more specific? What exactly are you
4 asking?

5 **MR. SCALZO:** I am specifically saying they
6 could not or should not be allowed to call the
7 case to trial until they are able to be more
8 specific. On the face of the indictment, I guess
9 I would make that motion as well.

10 **THE COURT:** What provision of law allows me to
11 tell the State they can't call a case for trial
12 unless they get their evidence right?

13 **MR. SCALZO:** I think it is a due process
14 violation.

15 **THE COURT:** Okay. Due process.

16 **MR. SCALZO:** In burden shifting, you have a
17 due process because the Defendant does not have a
18 fair ability to rebut the testimony or the
19 evidence because they are not specific in the
20 evidence.

21 **THE COURT:** You already covered due process.
22 What else?

23 **MR. SCALZO:** We will obviously get to the
24 issue of a directed verdict or the burden of
25 proving in the case beyond a reasonable doubt.

1 If -- at this stage, they can not prove beyond a
2 reasonable doubt when it occurred and we have
3 indisputable evidence about where he would have
4 been and not capable of committing the crime. You
5 have that issue that was raised this early in the
6 game. I think those are issues that get raised
7 right off the bat.

8 **THE COURT:** I think that all you have given
9 me as a basis for your motion would be due
10 process. I don't think that -- I believe that if
11 you have a -- on the facts that you presented, if
12 there is a due process issue, it comes up at the
13 close of the State's case and not now.

14 **MR. SCALZO:** Well, what about Rule 5? Rule 5
15 is putting a burden on the State to be specific.

16 **THE COURT:** Yes, and they have responded, she
17 has responded as an Officer of the Court that she
18 has been as specific as possible. I don't know
19 of any basis under Rule 5 for me to do anything
20 other than accept that. You are calling it
21 burden shifting. I don't really understand that.
22 I don't see it.

23 I don't know that there is anything I can do
24 to grant your motion or to give you any form of
25 relief right now. You just told me that the

Motions

14

1 indictment alleges that the event occurred
2 between two dates. You both agree that there are
3 242 out of those 365 days on which it could not
4 have happened.

5 MR. SCALZO: That's not the exact number but
6 something more than 200 days.

7 THE COURT: Something like that. That is
8 where we are.

9 MR. SCALZO: If the Court does not understand
10 the burden shifting, I should be more clear about
11 it. I believe the burden shifting comes into
12 play because, in essence, it's a bootstrapping
13 argument by the State. The State is saying this
14 happened. Part of what it's asking the jury to
15 believe, the basis to believe that it happened is
16 that it could have happened. And what they are
17 shifting the burden on the Defendant to do is to
18 in essence somehow prove that the claim of the
19 victim or the State that it happened on a such
20 and such date was a time when he could not have
21 committed the crime.

22 THE COURT: That is a very clever argument
23 but it just does not fly. I'm sorry. I can not
24 grant you any relief on that basis.

25 MRS. SUSTAKOVITCH: Your Honor, if I could as

1 an Officer of the Court just clarify one thing.
2 The State is alleging what the victim already
3 stated ages five and six. When I stated that we
4 are as specific as possible, we are as specific
5 as possible as that child can be.

6 **THE COURT:** I understand that.

7 **MRS. SUSTAKOVITCH:** Also, I wanted to let you
8 know the State passed to the defense a lease
9 agreement that we came across where this
10 Defendant's sister, which is where this incident
11 is alleged to have occurred, moved into that
12 location about 10 months after our incident date
13 occurs. We provided that to the defense.

14 If they want to use that, because there is
15 some issue that possibly, I am not sure, we have
16 to prove that a sexual assault occurred in
17 Greenville County. I don't know if at the end of
18 the day they are going to say it did not happen
19 at [REDACTED] it happened two doors down at [REDACTED]
20 [REDACTED]. I did want to clarify that with the
21 Court. Our burden is prove that between that
22 two-year span, this child had to suck her
23 father's penis and perform oral sex. Time is not
24 an essential element. I appreciate, Your Honor.
25 I just wanted to clarify that.

1 **THE COURT:** Okay. Anything further before we
2 get the jury up here?

3 **MRS. SUSTAKOVITCH:** Yes, sir. The State does
4 have a -- beg the Court's indulgence. The State
5 does have a forensic interview in this case and
6 is making a motion pursuant to 17-23-175. I will
7 pass a copy to the Court. Shortly after, the
8 mother and the child came to the police
9 department. A forensic interview was done.
10 Christine Carlberg is present in the Court today.
11 The State did want to have Your Honor make a
12 finding pursuant to 17-23-175 that the statement
13 is admissible. We have her ready to testify if
14 Your Honor needs that type of testimony.

15 **MR. SCALZO:** Judge, I think in terms of the
16 statute, you have got to take the testimony in
17 camera at least is what the statute says with
18 regard to the actual forensic interviewer and
19 making a finding that is consistent with the
20 statute.

21 **THE COURT:** All right. How about -- what if we
22 try to pick the jury and then do that?

23 **MRS. SUSTAKOVITCH:** Whatever Your Honor would
24 like. The audio on this thing, Judge, I did want
25 to pass you a copy so you can view it in

1 chambers. It is difficult to hear on a computer
2 like you have. We have got a setup in here that
3 it is easier to hear. So Your Honor might want to
4 hear it in the courtroom.

5 THE COURT: Okay. I probably will. All right.
6 So let's go ahead and get the jury panel up here.
7 Strikes are five and 10, right?

8 MRS. SUSTAKOVITCH: Yes, sir.

9 THE COURT: Let me -- before, uh, -- let me
10 speak to the witnesses and other folks involved
11 in the case. We are going to need most of the
12 seats out there. If you are involved in the
13 case, I want you to stay in the courtroom. We
14 will find you a place. We just may have to wait
15 until we get all the jurors in. If you are with
16 the Defendant's family -- and perhaps Mr. Scalzo
17 can get them to set up here. If you are just a
18 witness, go set on that back row on this side.

19 If you are with the State, then speak to
20 Mrs., uh, Sustakovitch, excuse me, about where
21 you should sit. But we will find you a seat. If
22 you are a witness, I do want you in here when the
23 jury is picked.

24 (WHEREUPON, a recess is taken at approximately
25 2:31 PM.)

1 (WHEREUPON, the jury panel enter at approximately
2 2:40 PM.)

3 (WHEREUPON, the Court resumes at approximately
4 2:45 PM.)

5 MR. SCALZO: Your Honor, can we approach for
6 a second?

7 THE COURT: Yes, sir.

8 (WHEREUPON, a bench conference is held off the
9 record at approximately 2:45 PM.)

10 (WHEREUPON, the bench conference concludes at
11 approximately 2:46 PM.)

12 THE COURT: Ladies and Gentlemen, good
13 afternoon. I am John Few. I am one of your
14 circuit judges in Greenville. I could not be
15 here this morning. I had to be in Columbia until
16 about lunchtime and so I was not able to be
17 downstairs when you all were qualified. I am
18 going to be your judge though in this case.

19 We are ready for jury selection in the State
20 of South Carolina versus Samuel Lamont Whitner.
21 Mr. Whitner has been indicted in Indictment 2009-
22 GS-23-1072 for Criminal Sexual Conduct with a
23 Minor in the First Degree. In that indictment,
24 it is alleged that Samuel Lamont Whitner did in
25 Greenville County between the 28th of December

1 2000 and the 28th day of December 2002, commit a
2 sexual battery on J.W. who is less than 11 years
3 of age. This is in violation of section 16-3-
4 655(a)(1) of the South Carolina Code of Laws.

5 For those of you who are selected to serve on
6 the jury in this case, I will spend a few minutes
7 before we actually begin with opening statements
8 explaining to you some of the legal principles
9 that will guide your service as jurors. I want
10 to take a moment now to talk to you about the
11 indictment that I just read to you.

12 The indictment that I just read to you is not
13 in any sense evidence of the allegations that are
14 contained within that indictment. The indictment
15 is simply the formal document that contains the
16 allegations that have been made against the
17 Defendant. The indictment serves to process the
18 case and bring it into this court for trial.

19 The Defendant has pled not guilty to this
20 indictment and that plea of not guilty casts the
21 burden on the State to prove the Defendant guilty
22 beyond a reasonable doubt. For those of you who
23 are selected to serve on the jury, that will be
24 your job to determine whether or not the State
25 has met that burden of proof.

Jury Qualification

20

1 We are about to go through a series of
2 questions and answers that are similar in format
3 but of course different questions than the ones
4 you were asked downstairs this morning. Please
5 listen carefully to each of these questions. If
6 you have any information that is responsive to a
7 question that I ask, then I would like for you to
8 stand and tell me your name and tell me your
9 information.

10 If you don't want to speak out loud in front
11 of other members of the juror -- I'm sorry. If
12 you don't want to speak out loud in front of the
13 other members of the jury, then you can just tell
14 me that you would like to speak to me privately.
15 I will get you down front and you can speak with
16 me and the attorneys.

17 If you know something about this case or if
18 you know some of the people who are going to be
19 involved in this case and you think that giving
20 your information out loud in front of other
21 members of the jury might expose other jurors to
22 information that they should not be exposed to,
23 then in that event, you must come down front and
24 answer the question privately with me and with
25 the attorneys.

1 I will start off by reminding you or telling
2 you that you are still under oath. You were given
3 an oath downstairs this morning, correct? All
4 right. You are still under oath from this
5 morning.

6 I would like for Mrs. Sustakovitch to
7 introduce yourself and your assistant to the
8 jury.

9 **MRS. SUSTAKOVITCH:** Good afternoon. My name is
10 Christy Sustakovitch. I'm a prosecutor with
11 Greenville County. This is my investigator Marie
12 Bustamonte. Thank you.

13 **THE COURT:** Any member of the jury related by
14 blood or marriage to Mrs. Sustakovitch or to Mrs.
15 Bustamonte or do you know either of these women
16 in either way? If so, please stand. (No
17 Response)

18 Both Mrs. Sustakovitch and Mrs. Bustamonte
19 work for Bob Ariail who is the elected solicitor
20 of this circuit. Solicitor Ariail has the
21 responsibility of prosecuting criminal cases here
22 in Greenville County and also over in Pickens
23 County. He has a staff of lawyers and nonlawyers
24 who assist him in doing that. Is there any
25 member of the jury panel who is related by blood

1 or marriage to Solicitor Ariail or to anyone who
2 works for him or do you know Solicitor Ariail or
3 anyone who works for him? If so, please stand.

4 **THE JUROR:** I know most of the Solicitors
5 there, Your Honor.

6 **THE COURT:** Tell me your name please.

7 **THE JUROR:** I'm Richard Garrett. I'm with the
8 Greenville County School District.

9 **THE COURT:** Mr. Garrett, you say you know most
10 of the Solicitors?

11 **THE JUROR:** Yes, sir.

12 **THE COURT:** Is that just through your work?

13 **THE JUROR:** Yes, sir. I go to Family Court
14 with the Solicitors and prosecute criminal cases.

15 **THE COURT:** Other than going to court with
16 them, do you have any personal relationships with
17 them outside of court?

18 **THE JUROR:** I do have a fraternity brother
19 that works there. We don't socialize every day
20 but I do know him.

21 **THE COURT:** Okay. Tell me who that is.

22 **THE JUROR:** Jeff Weston.

23 **THE COURT:** Jeff Weston. Okay. And do the
24 names of any of the folks who go to Family Court
25 with you stick out right now? Anybody in

1 particular you can tell me about?

2 THE JUROR: Ashley Case. Wanda Adams.

3 THE COURT: Okay. All right. How about Mrs.
4 Sustakovitch? Have you ever dealt with her on any
5 cases?

6 THE JUROR: No, sir.

7 THE COURT: Mrs. Bustamonte, you ever dealt
8 with her?

9 THE JUROR: No, sir.

10 THE COURT: Okay. Mr. Garrett, would the fact
11 that you worked closely with the Solicitor's
12 Office in cases that arise out of your work and
13 go to court with them and you are fraternity
14 brothers with Mr. Weston, and you know these
15 other folks as you described, would that
16 interfere in any way with either your willingness
17 or your ability to give both the State and the
18 Defendant a fair and impartial trial?

19 THE JUROR: No, sir.

20 THE COURT: Thank you, Mr. Garrett.

21 MR. SCALZO: Mr. Scalzo, would you please
22 introduce yourself and your client to the jury.

23 MR. SCALZO: Thank you, Your Honor.

24 My name is Chris Scalzo. I'm an Assistant
25 Public Defender here in Greenville County. And

1 this is Samuel Whitner.

2 **THE COURT:** Is there any member of the jury
3 panel who is related by blood or marriage to Mr.
4 Scalzo or to Mr. Whitner or do you know either of
5 these gentlemen in any way? If so, please stand.
6 (No Response).

7 Now, I'm going --

8 Do we have a witness list?

9 **MRS. SUSTAKOVITCH:** Yes, sir, Your Honor.

10 **THE CLERK:** They are up there.

11 **THE COURT:** All right. I got it. I'm going
12 to read to you a list of potential witnesses.
13 After I have done that, I'm going to ask you
14 whether you know or are related to any of these
15 witnesses.

16 If the witness is in the courtroom, when I
17 call your name, please stand. JW
18 Anna Grady.

19 Thank you, Mrs. Grady.

20 Jeff Grady. Thank you, sir.

21 Johnny Mae Simpson. Thank you, ma'am.

22 Christine Carlberg from Greenville Mental
23 Health. Dr. Nancy Henderson. Detective Bobby
24 Bradford, Greenville Police Department.

25 Thank you, sir.

1 Lieutenant Mike Peterson, Greenville County
2 Sheriff's Office. Valerie Bishop, Greenville
3 County Library System. Ulysses Sweeney,
4 Greenville County Housing Authority. Linda
5 Hutton, Bay Laurel Center, Paul Silvaggio, Erla
6 Lacey, Haley Brown, Greenville County DSS, Myra
7 Grady, Willie James Grady, Laura Minor,
8 Greenville, I'm sorry, Greer Middle School and
9 Karen Clinkscales from Greer Middle School.
10 Langdon "Danni" Marion-Crummy. Danni is the
11 nickname, correct? Sharon Lafay Whitner,
12 Quenessas Howard, and Captain Jinny Moran,
13 Greenville County Detention Center. Janice
14 Kenealy, South Carolina Department of
15 Corrections. James Brennon, South Carolina
16 Department of Corrections. Wanda Thompson.
17 Any additional witnesses?
18 **MRS. SUSTAKOVITCH:** None from the State, Your
19 Honor.
20 **MR. SCALZO:** No, sir.
21 **THE COURT:** Any member of the jury panel who
22 is related by blood or marriage to any of these
23 potential witnesses or do you know any of them in
24 anyway? If so, please stand.
25 **THE JUROR:** I know Mrs. Haley Brown from DSS.

1 **THE COURT:** That's okay. Tell me your name
2 please.

3 **THE JUROR:** Deborah Kutner.

4 **THE COURT:** You know Hazel Brown?

5 **THE JUROR:** Haley Brown. We are not personal
6 friends but on occasion, I have worked with
7 clients of hers. I work with children that are
8 involved in the Department of Social Services.

9 **THE COURT:** When was the last time that you
10 worked with Mrs. Brown?

11 **THE JUROR:** Probably 2007. I remember the
12 name and initials of the child.

13 **THE COURT:** Have you seen her since then?

14 **MR. SCALZO:** Only in passing.

15 **THE COURT:** Tell me what you do.

16 **THE JUROR:** I am a Child and Adolescent
17 Psychologist.

18 **THE COURT:** Okay. Would the fact that you
19 worked with Mrs. Brown interfere in any way with
20 either your willingness or your ability to give
21 both the State and the Defendant a fair and
22 impartial trial, Mrs. Kutner?

23 **THE JUROR:** No, sir.

24 **THE COURT:** Thank you.

25 Mr. Garrett.

THE JUROR: Karen Clinkscates and Ulysses

Sweeney. Karen Clinkscates is a School District

employee that I've worked with before. Ulysses

Sweeney is also a fraternity brother. He and I

served on a couple of boards together at one

time. I hired him one time.

THE COURT: You hired him?

THE JUROR: Yes, sir. I was a chairman on

the Board of Directors for Greenville Mental

Health. I hired him to work for a program for

Greenville Mental Health.

THE COURT: All right. Well, would the fact

that you know these two additional witnesses,

would that interfere with either your willingness

or your ability to give both the state and the

Defendant a fair and impartial trial?

THE JUROR: No, sir.

THE COURT: All right. Thank you, Mr.

Garrett. Is there any member of the jury panel

or any member of your immediate family or anyone

who is a particularly close friend to you or who

is particularly close to you in some other way,

have you or any other of these closely related or

closely affiliated people ever been involved in

any type of violent crime or any type of alleged

1 sexual crime?

2 There are several different ways that you or
3 a friend or a family member could have been
4 involved in such a crime. You might have been
5 the victim of such a crime. You might have been
6 or might have had a family member who was accused
7 of committing such a crime. It is possible that
8 you were a witness to such a crime or you were
9 involved in the investigation of such a crime.
10 There are other ways that you might have been
11 involved.

12 If there is any member of the jury panel or
13 any member of your immediate family or anyone who
14 is particularly close to you in your view who has
15 ever been involved in any situation as I
16 described or in any way as I described or others,
17 please stand. If you would like to go ahead and
18 tell me about it, you can. If you want to just
19 give me your name, then I can get you down front
20 in just a few minutes and you can talk to me in
21 private.

22 Sir?

23 **THE JUROR:** Daniel Vance. Talk to you.

24 **THE COURT:** All right. Mr. Vance. You want to
25 talk to me in private, right, sir?

1 THE JUROR: Yes.

2 THE COURT: All right. Ma'am?

3 THE JUROR: Jessica Blackstock. My sister and

4 I have both have been sexually abused as

5 children. I been through DSS. My mother has also

6 been sexually abused.

7 THE COURT: All right. I'm going to get you

8 down front in just a few minutes, Mrs.

9 Blackstock, and we'll get a little bit more

10 information from you.

11 Yes, ma'am.

12 THE JUROR: Sharee James. Sharee James.

13 THE COURT: All right.

14 THE JUROR: My name is Colleen Case. My

15 son was attacked at the high school. That was

16 Assault and Battery with Intent to Kill. It has

17 been six years or so.

18 THE COURT: All right. Was anybody

19 prosecuted for this?

20 THE JUROR: The young man that attacked him

21 pleaded guilty before the trial.

22 THE COURT: Were you a witness to the attack?

23 THE JUROR: No, I was at work. They called

24 me at work.

25 THE COURT: You were involved in at least

1 dealing with your son and dealing with the --

2 THE JUROR: We had to come to court. He pled
3 guilty.

4 THE COURT: Okay. Would the fact that you and
5 your son were involved in that situation, do you
6 think that would interfere with your ability to
7 be a fair and impartial juror in this case?

8 THE JUROR: I don't think so. I forgave the
9 boy for doing it.

10 THE COURT: Thank you, Mrs. Case.

11 Yes, ma'am.

12 THE JUROR: Sara Davis.

13 THE COURT: You want to talk to me in
14 private, Mrs. Davis?

15 THE JUROR: Yes.

16 THE COURT: Okay.

17 THE JUROR: Daniel Maurer, talk to you in
18 private please.

19 THE COURT: All right. All right. Let me
20 see Mr. Vance, Mrs. Blackstock, Mrs. James, Mrs.
21 Davis and Mr. Maurer. If you all will wait at
22 the rail there, I will bring you up one at a
23 time.

24 All right. Mr. Vance.

25 (WHEREUPON, the following bench conference is

1 held with Daniel Vance, Juror Number 263, at
2 approximately 3:01 P.M.)

3 **THE COURT:** How are you, sir?

4 **THE JUROR:** My stepson is in the
5 Greenville Detention Center. He has been charged
6 for methamphetamine manufacturing and
7 trafficking. He has not been tried yet.

8 **THE COURT:** He is waiting in the detention
9 center right now?

10 **THE JUROR:** Yes, sir.

11 **THE COURT:** How long has he been in there?

12 **THE JUROR:** Well, he had to do a stint in
13 Anderson. He has been Greenville probably for
14 about a month and a half now. He was first
15 arrested back in January.

16 **THE COURT:** Does he have an attorney?

17 **THE JUROR:** Yes, sir, Richard Warder.

18 **THE COURT:** Do you know who is prosecuting
19 it, the individual attorney?

20 **THE JUROR:** Oh, man. If I saw the list of
21 names, I probably would tell you. It starts with
22 A. Last name is A.

23 **THE COURT:** It would be someone who works
24 with Mrs. Sustakovitch, somebody who is a lawyer
25 in her office and has the same boss who is Bob

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1 Ariail. Would the fact that your stepson is being
2 prosecuted by the same people who are prosecuting
3 this case, would that interfere with your ability
4 to be a fair and impartial juror?

5 **THE JUROR:** No, sir.

6 **THE COURT:** Is there anything about that
7 case, the arrest, the way it was handled, the
8 fact that your stepson is still in jail, anything
9 you think --

10 **THE JUROR:** No. He's in jail for his best
11 good.

12 **THE COURT:** Well, is there anything about that
13 case and your involvement in it that would
14 interfere with your ability to be a fair and
15 impartial juror?

16 **THE JUROR:** No, sir.

17 **THE COURT:** Do you know what police agency is
18 investigating that case?

19 **THE JUROR:** Greenville County is the one who
20 arrested him. I'm not sure of what other
21 department.

22 **THE COURT:** Okay. All right. Thank you.

23 (WHEREUPON, the juror exits the bench conference
24 at approximately 3:03 PM.)

25 **THE COURT:** If you all have any follow-up

1 questions you want to ask, ask at that time. You
2 have a motion?

3 **MRS. SUSTAKOVITCH:** I don't know what the
4 man's son's name is. It does not make any
5 difference to me. The Solicitor, he says it
6 starts with an A.

7 **THE COURT:** If you have any follow-up
8 question you want me to ask him, ask right now.
9 If you have a motion to strike for cause, ask it
10 right now.

11 **MRS. SUSTAKOVITCH:** All right.

12 **THE COURT:** Mrs. Blackstock.

13 (WHEREUPON, the following bench conference is
14 held with Jessica Blackstock, Juror Number 22, at
15 approximately 3:03 P.M.)

16 **THE JUROR:** My sister and I both were
17 sexually abused as children. I was seven. She
18 was five. And then, again when I was eight and
19 she was six. My mother was molested as a child
20 also.

21 **THE COURT:** Who did?

22 **THE JUROR:** A babysitter and my mother's
23 boyfriend.

24 **THE COURT:** Was either of them prosecuted for
25 what they did?

1 **THE JUROR:** Yes.

2 **THE COURT:** How did that come out?

3 **THE JUROR:** The babysitter was put in jail. I
4 don't know for how long. And my mother's
5 boyfriend was put on house arrest in North
6 Carolina.

7 **THE COURT:** All right. So the one with the
8 boyfriend happened in North Carolina?

9 **THE JUROR:** No, it happened here. He lived
10 in North Carolina. So he was put on house arrest
11 with his mother in North Carolina.

12 **THE COURT:** It happened here in Greenville?

13 **THE JUROR:** Yes, sir.

14 **THE COURT:** What about the other with the
15 babysitter? Where did it happen?

16 **THE JUROR:** Greenville.

17 **THE COURT:** How old are you now?

18 **THE JUROR:** I'm 22.

19 **THE COURT:** 22? These were 16 and 17 years
20 ago.

21 **THE JUROR:** Yeah.

22 **THE COURT:** Well, uh, do you recall the names
23 of any of the people who were involved in the
24 prosecuting or defending these folks?

25 **THE JUROR:** No, I was not in court for either

1 of the cases.

2 **THE COURT:** Is there anything about --
3 well, let me see. The allegations here are going
4 to be similar in nature. I don't know a whole
5 lot about them so I can't tell you what the
6 specific facts of the cases are. The general
7 allegation is going to be sort of similar. Is
8 there any, do you think that the fact that you
9 were involved in that case, in the situation that
10 her sister and the one that happened with your
11 mother also, do you think any of that would
12 interfere with your ability to be a fair and
13 impartial juror?

14 **THE JUROR:** No. It is in the past. I feel
15 like it made me a better person.

16 **THE COURT:** Thank you. All right. Thank you.
17 You can return to your seat.

18 (WHEREUPON, the juror exits the bench conference
19 at approximately 3:05 PM.)

20 **MR. SCALZO:** I object to her.

21 **THE COURT:** All right. Tell me what follow-up
22 -- do you have any follow-up questions want me to
23 ask her?

24 **MR. SCALZO:** For her?

25 **THE COURT:** Yes.

1 **MR. SCALZO:** Other than, my natural instinct
2 would be ask her why she thinks that she could be
3 fair given that she was a victim of criminal
4 sexual abuse. That is really what I'm trying to
5 figure out. I'm not necessarily saying -- I
6 think just being a victim in the same age group
7 as this victim, if she doesn't want --

8 **THE COURT:** It definitely raises concerns. It
9 is not an automatic disqualification. Her
10 answers to the question was unequivocal. And it
11 left me with little doubt that unless there is
12 some other question that I should ask her, if
13 that is all the information I had to go on, I am
14 satisfied that she is able to follow my
15 instructions under the law and will be able to
16 fulfill her responsibilities.

17 **MR. SCALZO:** My only objection to that would
18 be that she may very well be of the best
19 intentions to be fair and impartial but whether
20 she has the capacity to be given her life
21 experience. I don't think so given what she has
22 experienced. Whether she's motivated to do the
23 right thing, I would agree she's probably
24 motivated to do the right thing. I just wonder
25 if she can separate her experience from the --

1 **THE COURT:** I have to make a ruling like that
2 based on evidence. Unless you have some more
3 follow up questions that you suggest I answer, I
4 am prepared to move forward.

5 **MR. SCALZO:** I'm asking you to ask why she
6 believes having been a victim herself would not
7 cause her to identify with the victim.

8 **THE COURT:** I'm not going to ask her why.
9 First of all, I don't know how that helps me.
10 And secondly, she already answered that question.
11 She said she has moved on and she feels like it
12 made her a better person. Now, if you want me to
13 ask her things like details of the crime so that,
14 of the events that she was involved in so that I
15 could perhaps differentiate what is alleged to
16 have happened here or associate the difference
17 between what happened here, if you want me to ask
18 how she coped with it, I will be happy to
19 consider those types of questions.

20 **MR. SCALZO:** I think those questions would be
21 good as well as asking her whether or not she
22 went through a forensic interview.

23 **MRS. SUSTAKOVITCH:** They didn't have that
24 back 15 years ago.

25 **MR. SCALZO:** We don't know if she did or not.

1 That would be relevant because we're going to
2 have witnesses talking about forensic interview.
3 She might have experienced a forensic interview.
4 That is not something everybody experience. I
5 want to ask her about that. She obviously
6 probably would have been interviewed by the
7 police or somebody to find out what happened.
8 That is a very unique scenario. I would ask that
9 you ask that.

10 **THE COURT:** All right. Ms. Blackstock, would
11 you mind coming back up for just a few minutes
12 please.

13 (WHEREUPON, a juror resumes the bench conference
14 at approximately 3:08 PM.)

15 **THE COURT:** I want to ask you a few more
16 questions about your two situations.

17 **THE JUROR:** Okay.

18 **THE COURT:** First of all, I think -- let's
19 just take them one at a time. The first one was
20 the babysitter, right?

21 **THE JUROR:** Yes, sir.

22 **THE COURT:** How soon after that happened did
23 you report it?

24 **THE JUROR:** I believe it was the day after.

25 **THE COURT:** When it happened to your sister,

1 did it happen the same timeframe?
 2 THE JUROR: Yes. We were both there with
 3 him.
 4 THE COURT: Same night?
 5 THE JUROR: Yes.
 6 THE COURT: Who reported it first?
 7 THE JUROR: I did.
 8 THE COURT: She is younger than you?
 9 THE JUROR: Yes.
 10 THE COURT: Tell me a little bit about what
 11 you recall, if anything. You were five, right?
 12 THE JUROR: I was seven.
 13 THE COURT: You were seven.
 14 THE JUROR: My sister was five.
 15 THE COURT: Okay. Tell me what you recall
 16 about the way in which the police responded, the
 17 way they interviewed you.
 18 THE JUROR: I remember I went with a DSS
 19 worker to a room. I talked to her by myself.
 20 She just kind of wanted to know what happened.
 21 He was not a regular babysitter of ours. My mom
 22 left us with him to go to the grocery store. He
 23 was a neighbor. Another guy was there. He was
 24 supposed to stay. He left. He touched us
 25 inappropriately. That night, I told her. The

1 DSS workers came in. We were interviewed
2 basically. My sister could not recall anything
3 but I told what I could remember it. I don't
4 remember very much now.

5 THE COURT: Okay. All right. Do you remember
6 or whether or not when the interviewer
7 interviewed you, did they record it?

8 THE JUROR: I don't remember.

9 THE COURT: What about the second one? How
10 long after that happened did you report it?

11 THE JUROR: It was that night. We were in
12 bed. My sister and I shared a queen-size bed.
13 My mom actually found him over her. My mother --
14 we were, uh, -- he fled. The police must have
15 caught him or whatnot. She let him back in.
16 Then, I would crawl in her bedroom at night and
17 wake her up to make him leave.

18 THE COURT: Crawl in who's bed?

19 THE JUROR: I would crawl around my mother's
20 bed and wake her up to make him leave.

21 THE COURT: Wake your --

22 THE JUROR: Wake my mother up to make him
23 leave cause she let him back in. We were taken
24 from her to live with my grandmother by DSS. We
25 had a DSS worker, three or four different DSS

1 workers. I can't remember the names of really
2 any of them. We were with my grandmother for 16
3 months.

4 **THE COURT:** All right. Thank you. You can
5 return to your seat.

6 (WHEREUPON, the juror exits the bench conference
7 at approximately 3:11 PM.)

8 **THE COURT:** I have changed my mind about her.
9 I'm going to take her out.

10 Uh, Mrs. James.

11 (WHEREUPON, a bench conference is held with
12 Sharee James, Juror Number 129, at approximately
13 3:12 PM.)

14 **THE JUROR:** Hi. My daughter was molested by
15 a 10-year-old when she was three. This is just --

16 **THE COURT:** How old is your daughter now?

17 **THE JUROR:** 15.

18 **THE COURT:** 15. This was 12 years ago that
19 this happened. You're saying is this kind of
20 bringing it all back up for you.

21 **THE JUROR:** Yes.

22 **THE COURT:** Is that right?

23 **THE JUROR:** Yes.

24 **THE COURT:** Does she remember it?

25 **THE JUROR:** So far, no. She was only three

1 when it happened. I would talk with her about
2 her private parts and nobody was to touch it but
3 her. So she was able to tell us what he did to
4 her.

5 **THE COURT:** Okay. Now, do you think that
6 that situation, really those two situations in
7 combination would interfere with your ability to
8 be a fair and impartial juror?

9 **THE JUROR:** The second situation I think it
10 was pretty much an innocent thing. He was just
11 playing. He did touch her and she did not
12 understand that. So I'm willing to give, go
13 through the process to talk to him and listen to
14 him and see. You know, cause there's two sides.
15 It could have been a simple thing and not
16 nothing. He did not really do anything but
17 touch. He just grabbed her like boys and girls
18 grab each other at school. I think she was
19 getting the wrong misunderstanding.

20 **THE COURT:** With the first incident that
21 occurred 12 years ago, was the 10-year-old
22 charged?

23 **THE JUROR:** No.

24 **THE COURT:** Was it reported to the police?

25 **THE JUROR:** Yes. He did a thing where he had

1 to go through counseling. He came home. We
2 assumed that someone must have done it to him for
3 him to do it to her.

4 THE COURT: This new incident, was it
5 reported to school authorities?

6 THE JUROR: Yes.

7 THE COURT: Was it reported to the police?

8 THE JUROR: Yes.

9 THE COURT: Was he charged?

10 THE JUROR: Not yet.

11 THE COURT: This just happened in the last
12 few days?

13 THE JUROR: Last Thursday.

14 THE COURT: So less than a week?

15 THE JUROR: Yes. Assault charge, yes.

16 THE COURT: There is a lot going on with this
17 and it is very current. We are obviously trying
18 this case right now. What do you think about how
19 this might affect your ability to be a fair and
20 impartial juror?

21 THE JUROR: I don't think it would affect. I
22 believe -- I would like to hear the case first,
23 the evidence. Sometimes, things could be taken a
24 misunderstanding just like with my daughter. The
25 boy is 15 years old. She is 15. He could have

1 been just -- cause they have been talking to each
2 other on the telephone, but she's a virgin.

3 He touched her private part but not on the
4 inside, the outside. Just like I told her,
5 sometimes boys are going to grab you in high
6 school. They just playing around. But if you felt
7 violated, I am going to support you in this case.

8 **THE COURT:** Let me ask you to step to the
9 rail for a moment before you sit down. I may
10 have some more questions for you.

11 **THE JUROR:** Thank you.

12 **THE COURT:** Thank you.

13 (WHEREUPON, the juror exits the bench conference
14 at approximately 3:15 PM.)

15 **THE COURT:** Any additional questions?

16 **MRS. SUSTAKOVITCH:** No.

17 **MR. SCALZO:** Did I hear her correctly that
18 police interviewed her? I don't think you asked
19 that specifically.

20 **MRS. SUSTAKOVITCH:** I think I was confused
21 too what the ages of the two victims were.

22 **THE COURT:** The victim -- this was this same
23 victim, different ages. She was three when the
24 first one happened and she is 15 now.

25 **MRS. SUSTAKOVITCH:** 15 and the incident

1 happened in high school?

2 **THE COURT:** Uh-huh.

3 **MR. SCALZO:** I would ask you to inquire
4 particularly as to whether the child went through
5 a forensic questioning with DSS.

6 **THE COURT:** Any others?

7 **MR. SCALZO:** (Shakes Head).

8 **THE COURT:** Are you going to make a motion to
9 strike the cause?

10 **MR. SCALZO:** Yes. I mean part of what you
11 talked to her about was the freshness of this
12 case. In essence --

13 **THE COURT:** You want me to ask her if there
14 was a forensic interview when the child was
15 three.

16 **MR. SCALZO:** If Your Honor doesn't think
17 there's enough right now. I think it does fall
18 into the category of she wants to do something
19 and while in emotional situation she finds
20 herself in, why do you think you can be
21 objective?

22 **THE COURT:** I'm going to go ahead and strike
23 her for cause.

24 (WHEREUPON, the bench conference concludes at
25 approximately 3:16 PM.)

1 **THE COURT:** Mrs. James, you can be seated.
2 Thank you.

3 Mr. Maurer.

4 **(WHEREUPON, the following bench conference is**
5 held with Daniel Maurer, Juror Number 162, at
6 approximately 3:16 PM.)

7 **THE JUROR:** How are you?

8 **THE COURT:** Fine. Thanks.

9 **THE JUROR:** My stepdaughter was the victim of
10 a sexual attack when she was 15.

11 **THE COURT:** How long ago was that?

12 **THE JUROR:** 14 years ago.

13 **THE COURT:** All right, were you involved in
14 the family at that point?

15 **THE JUROR:** Yes. I raised her. She's 28.

16 **THE COURT:** She's 28 now?

17 **THE JUROR:** Yes.

18 **THE COURT:** Tell me how that person is
19 affiliated with you.

20 **THE JUROR:** He had worked with my wife and I
21 at Dominos Pizza. He was best friends with my
22 wife for a long time. He was at my wedding. He
23 used to babysit the kids for us all the time. As
24 the kids got older, he used to take them to the
25 park and took them places. We trusted him.

1 One night, he took her back to his apartment,
2 got her drunk, raped her, brought her back,
3 dropped her off. My daughter was very
4 emotionally distraught. She kept hitting
5 herself. We called him. He said nothing
6 happened, nothing happened. Took her to the
7 hospital. She didn't get pregnant.

8 We went to trial. He pled guilty before the
9 trial. My wife didn't think prison would be a
10 good thing for him, that he wouldn't recover. So
11 the Court mandated therapy, sexual offender list
12 and no contact with the family.

13 **THE COURT:** Where did that happened?

14 **THE JUROR:** An apartment complex off of
15 Pelham Road.

16 **THE COURT:** Here in Greenville?

17 **THE JUROR:** Yes, sir.

18 **THE COURT:** Do you all still have contact
19 with him?

20 **THE JUROR:** No, it was court ordered he can't
21 have contact with the family.

22 **THE COURT:** Does he still live in Greenville
23 as far as you know?

24 **THE JUROR:** Yes, sir.

25 **THE COURT:** How is your stepdaughter doing

1 now?

2 **THE JUROR:** She is finally married. She had a
3 child out of wedlock. She was never able to make
4 good decisions since that occurred. She's been
5 arrested for public drunkenness, breaking and
6 entering.

7 **THE COURT:** Going back to the time it
8 happened, you said for some period of time
9 afterward she was doing things like hitting
10 herself, how did it all come about that she
11 finally talked with you about what happened? Was
12 there police involvement? Was there psychiatric
13 involvement or counseling that lead her
14 eventually telling you what happened?

15 **THE JUROR:** My wife took her to the hospital
16 and my daughter confessed to the persons at the
17 hospital that it happened.

18 **THE COURT:** Do you know who -- what kind of,
19 uh -- when you say person at the hospital, was it
20 nurse or a psychologist or a doctor?

21 **THE JUROR:** It was a nurse, I believe.

22 **THE COURT:** You know whether it was a nurse
23 who specialized in that type of work? Was it
24 sexual assault nurse examiner or was it any other
25 type of specialized nurse or was it just who she

1 happened to be seen by?

2 **THE JUROR:** My wife took her for the express
3 purpose of getting examined.

4 **THE COURT:** Did the daughter, stepdaughter
5 continue with counseling for a long time after
6 that?

7 **THE JUROR:** About a year.

8 **THE COURT:** How about after that?

9 **THE JUROR:** No.

10 **THE COURT:** Do you think that that situation
11 and how you all have had to deal with it, the
12 prosecution of it, everything, do you think that
13 that would interfere with your ability to be a
14 fair and impartial juror in this case?

15 **THE JUROR:** I don't believe it would. I
16 would deal just for the facts. I would want to
17 get full exposure as to what happened.

18 **THE COURT:** Uh-huh. All right. You hesitated
19 just a moment. I don't mean to, uh -- I just
20 simply want to ask you is that an emotional
21 reaction that you had when you made those
22 expressions to me?

23 **THE JUROR:** Yes. It still bothers me.

24 **THE COURT:** I appreciate you telling us about
25 it. Step back to the rail for a second.

(WHEREUPON, the juror exits the bench conference

at approximately 3:21 PM.)

THE COURT: All right. You got a motion to

strike?

MR. SCALZO: Yes, for cause.

THE COURT: You have an objection?

MRS. SUSTAKOVITCH: I'm just saying that he

said he can be impartial based on the background.

Defense counsel does have ten strikes.

THE COURT: That has absolutely nothing to do

with it. Nothing.

MRS. SUSTAKOVITCH: I'm sorry.

THE COURT: I'm going to grant the motion to

strike for cause.

(WHEREUPON, the bench conference concludes at

approximately 3:22 PM.)

THE COURT: Mr. Maurer, you can be seated.

Thank you very much, sir.

Mrs. Davis.

(WHEREUPON, the following bench conference is

held with Sara Davis, Juror Number 69, at

approximately 3:22 P.M.)

THE COURT: How are you, ma'am?

THE JUROR: I forgot what the question was.

THE COURT: Question was have you ever

1 been --

2 **THE JUROR:** Been involved in an
3 investigation. In two ways. I am a former child
4 protective service supervisor in North Carolina.
5 So I've been involved in a lot of investigations.
6 They have turned out different ways for various
7 types of violence involving children and adults.

8 I recently was involved in the reporting of
9 an alleged sexual abuse on a child. It was just
10 a report. I don't know how it turned out. But
11 the decision to report suspected abuse on a
12 child, I was involved in.

13 **THE COURT:** How long ago was this recent
14 incident?

15 **THE JUROR:** The recent decision occurred last
16 summer.

17 **THE COURT:** Tell me how you got involved in
18 that situation.

19 **THE JUROR:** My daughter was concerned about
20 having a person associate with my granddaughter.
21 She talked too -- we talked to the therapist.
22 She said we probably should report it. She made
23 the report. I didn't. It was fairly distant
24 involvement.

25 **THE COURT:** Take the first, your work.

1 **THE JUROR:** I am retired.

2 **THE COURT:** Would any of your work related
3 issues or any specific incidents you dealt with
4 in your work, would any of that interfere with
5 your ability to be a fair and impartial juror to
6 both the State and the Defense.

7 **THE JUROR:** I don't see how. I don't think it
8 would.

9 **THE COURT:** How about the recent incident?
10 Would any of that interfere with your ability to
11 be a fair and impartial juror?

12 **THE JUROR:** I don't think so.

13 **THE COURT:** Okay. Thank you. You can be
14 seated. Thanks.

15 (WHEREUPON, the juror exits the bench conference
16 at approximately 3:24 PM.)

17 **THE COURT:** Anything further?

18 **MR. SCALZO:** I would move for cause on her
19 mainly on the idea that part of her profession
20 was to evaluate children for abuse. We will have
21 testimony from people also to do that.

22 **THE COURT:** Any follow-up questions you would
23 like me to ask her?

24 **MR. SCALZO:** I don't think she needs a
25 follow-up question. I think she should be struck

1 for cause.

2 **THE COURT:** Okay. I deny the motion to
3 strike her for cause. She was very calm and very
4 resolute in answering my questions. I believe
5 that she would have no trouble following my
6 instructions.

7 **MR. SCALZO:** My grounds for her capacity as
8 well to be able to do it even if she intends to
9 do the right thing. It's too close for comfort.
10 She got experience doing it.

11 **THE COURT:** As my understanding, the basis
12 that I must decide on whether to strike for cause
13 is whether or not she can follow the instructions
14 on the law. I am satisfied that if you listen to
15 her answers that her previous experience are not
16 such as they would interfere with her ability to
17 be fair and impartial and that she can and will
18 follow my instructions and obey my instructions
19 as a juror. So I deny the motion.

20 **MR. SCALZO:** Thank you.

21 **MRS. SUSTAKOVITCH:** Thank you.

22 (WHEREUPON, the bench conference concludes at
23 approximately 3:26 PM.)

24 **THE COURT:** Is there any member of the jury
25 panel who has any particular interest in the

Jury Selection

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1 outcome of this case? If so, please stand. (No
2 Response).

3 Is there any member of the jury panel who has
4 formed or expressed any opinion as to the guilt
5 or innocence of the Defendant? If so, please
6 stand. (No Response).

7 Is there any member the jury panel who has
8 any bias or prejudice towards or against the
9 State or the Defendant in connection with this
10 case? If so, please stand. (No Response).

11 Is there any member of the jury panel who has
12 such a strong feelings about the subject matter
13 of child sexual abuse or alleged child sexual
14 abuse that you feel that listening to the facts
15 presented in this case or being involved in this
16 case would interfere with your ability to be a
17 fair and impartial juror? If so, please stand.
18 (No Response).

19 Any member of the jury panel know of any
20 reason why they can not give both the State and
21 the Defendant a fair and impartial trial? If so,
22 please stand. (No Response)

23 Any additional voir dire from the State?

24 **MRS. SUSTAKOVITCH:** None from the State.

25 **THE COURT:** From the defense?

1 **MR. SCALZO:** No, sir.

2 **THE COURT:** Ladies and Gentlemen, we are
3 going to strike a jury. Your names have been
4 sorted randomly by a computer and will be called
5 one at a time. When your name is called, please
6 gather your things and come on up here to the
7 front of the courtroom and stand right here in
8 front of this podium. Turn around and face the
9 attorneys.

10 We will first hear from Mrs. Sustakovitch who
11 will ask either that you be excused or that you
12 be presented to the defense. If you are
13 presented to the defense, then we will hear from
14 Mr. Scalzo who will ask either that you be
15 excused or that you be seated on the jury. We
16 will continue with that process until we have a
17 jury.

18 **THE CLERK:** Juror number 141, Deborah Kutner.
19 What says the State?

20 **MRS. SUSTAKOVITCH:** Please present the juror.

21 **THE CLERK:** Thank you. What says the
22 defense?

23 **MR. SCALZO:** Judge, I have a motion for cause
24 on Mrs. Kutner.

25 **THE COURT:** Okay. Mrs. Kutner, would you

1 stand back at the rail for one minute please and
2 let me see the attorneys down front.

3 (WHEREUPON, the following bench conference is
4 held at approximately 3:29 PM.)

5 MR. SCALZO: Judge, in your initial voir dire
6 with her, she indicated that she knows Haley
7 Brown. She is a potential witness in the case.
8 She would know her experiences with obviously
9 child abuse. She is a child adolescent
10 psychiatrist.

11 The State is going to call an expert witness
12 in the realm of obviously child sexual abuse.
13 She has a lot of issues, uh, professional
14 experience. It is so closely related to the
15 evaluation of what is going on and she does know
16 a witness in the case through professional work
17 in the very subject matter that we are talking
18 about.

19 THE COURT: I deny the motion for cause.
20 There is absolutely no evidence on which I could
21 grant the motion. The only question that I asked
22 her, she said she knew Haley Brown. I asked her
23 whether that would interfere. She gave a very
24 convincing answer that that would not interfere
25 with her ability to be fair and impartial. You

1 pointed out that she does work that could be
2 similar in nature. There is nothing about the
3 simple fact that she does this work that would
4 indicate to me that she could not be fair.

5 I asked all the voir dire that was answered.
6 All the evidence that is supposed to be before me
7 is. I mean, I could get each individual juror up
8 here and try to plant seeds with them as to why
9 they might find reasons not to be fair and
10 impartial but I don't think that is an
11 appropriate way to handle it. Based on the
12 evidence that is before me, then I deny the
13 motion to strike for cause.

14 (WHEREUPON, the bench conference concludes at
15 approximately 3:31 PM.)

16 THE COURT: Come back up, Mrs. Kutner. Right
17 where you were.

18 MR. SCALZO: Your Honor, please excuse the
19 juror.

20 THE CLERK: You may be seated. You're
21 excused from this trial.

22 Juror 198, Joseph Perkins.

23 What says the State?

24 MRS. SUSTAKOVITCH: Please present the juror.

25 THE CLERK: What says the Defendant?

1 **MR. SCALZO:** Please excuse the juror.

2 **THE CLERK:** You may be seated. You're

3 excused from the trial. You may be seated.

4 Juror number 28. Justin Boyd.

5 What says the State?

6 **MRS. SUSTAKOVITCH:** Please present the juror.

7 **THE CLERK:** What says the Defendant?

8 **MR. SCALZO:** Please excuse the juror.

9 **THE CLERK:** You may be seated. You're

10 excused from the trial.

11 Juror number 180, Laurie Morgan Warren.

12 What says the State?

13 **MRS. SUSTAKOVITCH:** Please present the juror.

14 **THE CLERK:** Thank you. What says the

15 Defendant?

16 **MR. SCALZO:** Please excuse the juror.

17 **THE CLERK:** Thank you. You may be seated.

18 You're excused from this trial.

19 Try number 160 -- I'm sorry. Juror number

20 20, Kathleen Bitsura.

21 what says the State?

22 **MRS. SUSTAKOVITCH:** Please present the juror.

23 **THE CLERK:** Thank you. What says the

24 defense?

25 **MR. SCALZO:** Please seat the juror.

1 THE CLERK: Thank you. You may be seated in

2 the jury box.

3 Juror number 155, Douglas Lupu.

4 What says the State?

5 MRS. SUSTAKOVITCH: Please present the juror.

6 THE CLERK: Thank you.

7 MR. SCALZO: Please seat the juror.

8 THE CLERK: Thank you. You may be seated in

9 the jury box.

10 Juror number 51, Arthur Cheek.

11 What says the State?

12 MRS. SUSTAKOVITCH: Please present the juror.

13 MR. SCALZO: Please seat the juror.

14 THE JUROR: Thank you. May I get my jacket?

15 THE CLERK: Yes.

16 Juror number 102, Nicole Gary.

17 What says the State?

18 MRS. SUSTAKOVITCH: Please present the juror.

19 THE CLERK: Okay.

20 MR. SCALZO: Please seat the juror.

21 THE CLERK: Thank you. You may be seated in

22 the jury box.

23 Juror number 62, Jason Davenport.

24 What says the State?

25 MRS. SUSTAKOVITCH: Please present the juror.

1 THE CLERK: Thank you.
2 MR. SCALZO: You said 62?
3 THE CLERK: 65.
4 MR. SCALZO: 65. Okay.
5 THE CLERK: What says the Defendant?
6 MR. SCALZO: Please seat the juror.
7 THE CLERK: Thank you. Please be seated in
8 the jury box.
9 Drawn number 123, Charles Humphreys.
10 What says the State?
11 MRS. SUSTAKOVITCH: Please excuse this juror.
12 THE CLERK: Thank you. You're excused from
13 this trial. Juror number 45, Randy Carrier.
14 What says the State?
15 MRS. SUSTAKOVITCH: Please present the juror.
16 THE CLERK: Uh-huh.
17 MR. SCALZO: Please seat the juror.
18 THE CLERK: Thank you. You may be seated in
19 the jury box.
20 Juror number 186, Kelli Mullis.
21 what says the State?
22 MRS. SUSTAKOVITCH: Please present the juror.
23 THE CLERK: Thank you.
24 MR. SCALZO: Please excuse the juror.
25 THE CLERK: Thank you. You may be seated.

1	You're excused from this trial.
2	Juror number 15, Jessie Herbert.
3	what says the State?
4	MRS. SUSTAKOVITCH: Please present the juror.
5	THE CLERK: Thank you.
6	MR. SCALZO: Please excuse the juror.
7	THE CLERK: Thank you. You may be seated.
8	You're excused from this trial.
9	Juror number 262, Thomas Turner.
10	what says the State?
11	MRS. SUSTAKOVITCH: Please present the juror.
12	THE CLERK: Thank you.
13	MR. SCALZO: Please seat the juror.
14	THE CLERK: Thank you. You may be seated in
15	the jury box.
16	Juror number 105, Katharine Godsey.
17	what says the State?
18	MRS. SUSTAKOVITCH: Please present the juror.
19	THE CLERK: Okay. What says the Defendant?
20	MR. SCALZO: Please excuse the juror.
21	THE CLERK: You may be seated. You're
22	excused from this trial.
23	Juror number 66, Kortney Davidson.
24	What says the State?
25	MRS. SUSTAKOVITCH: Please present the juror.

1 THE CLERK: Thank you.

2 MR. SCALZO: Please seat the juror.

3 THE CLERK: Thank you. You may be seated.

4 Juror number 69, Sara Davis.

5 What says the State?

6 MRS. SUSTAKOVITCH: Please present the juror.

7 THE CLERK: Thank you.

8 MR. SCALZO: I would redo my motion for

9 cause.

10 THE COURT: I deny the motion.

11 MR. SCALZO: Please excuse the juror.

12 THE CLERK: Please be seated. You're excused
13 from this case.

14 Juror number 277, Joan Wright.

15 What says the State?

16 MRS. SUSTAKOVITCH: Please present the juror.

17 MR. SCALZO: Please excuse the juror.

18 THE CLERK: You may be seated. You're
19 excused from this trial.

20 Juror number 24, Angela Blakely.

21 What says the State?

22 MRS. SUSTAKOVITCH: Please present the juror.

23 THE CLERK: Thank you.

24 MR. SCALZO: Please excuse the juror.

25 THE CLERK: Thank you. You may be seated.

1 You're excused from this trial.

2 Juror number 282. Susan Yeargin.

3 What says the State?

4 **MRS. SUSTAKOVITCH:** Please present the juror.

5 **MR. SCALZO:** Please present the juror.

6 **THE CLERK:** Thank you. You may be seated.

7 Juror number 228, Pamela Schliffka.

8 What says the State?

9 **MRS. SUSTAKOVITCH:** Please present the juror.

10 **THE CLERK:** Thank you.

11 **MR. SCALZO:** Please excuse this juror.

12 **THE COURT:** Let me see the lawyers at the
13 bench.

14 Would you stay right there, please, ma'am.

15 Let me see the lawyers.

16 (WHEREUPON, the following bench conference is
17 held at approximately 3:47 PM.)

18 **THE COURT:** How many strikes you have left?

19 **MR. SCALZO:** Two more probably.

20 **THE COURT:** What do you think about sticking
21 with your allotted ten?

22 **MR. SCALZO:** I have got one, two, three,
23 four, four, five, six, seven, eight, nine.

24 **MRS. SUSTAKOVITCH:** I have one, two, three,
25 four, five, six, seven, eight, nine and 10. If

1 you strike her, that's 11.

2 **THE COURT:** You can be quiet until I ask you
3 to say anything.

4 **MR. SCALZO:** I may have missed one.

5 **THE COURT:** Joelle, let me see your list
6 please. (Pause).

7 **MR. SCALZO:** I'm sorry. I missed 18. I did
8 not count the one for cause.

9 **THE COURT:** You have got --

10 **MR. SCALZO:** This one, 24 would have been
11 ten. Sorry.

12 **THE COURT:** Let me see your list. You've
13 used all of your peremptory challenges.

14 **MR. SCALZO:** Yes.

15 **THE COURT:** Come on back up to right here
16 please, ma'am.

17 (WHEREUPON, the bench conference concludes at
18 approximately 3:50 PM.)

19 **MR. SCALZO:** Please seat the juror.

20 **THE COURT:** Thank you. You may be seated in
21 the jury box.

22 Juror number 150, Bernard Leung.

23 What says the State?

24 **MRS. SUSTAKOVITCH:** Please present the juror.

25 **THE CLERK:** Thank you.

1 **MR. SCALZO:** Please seat the juror.

2 **THE CLERK:** Thank you. You may be seated in
3 the jury box.

4 Juror number 63, Andrew Crowe.

5 What says the State?

6 **MRS. SUSTAKOVITCH:** Please excuse the juror.

7 **THE CLERK:** Thank you. You may be seated.

8 You're excused from the trial.

9 Juror number 171, David Miller.

10 What says the State?

11 **MRS. SUSTAKOVITCH:** Please present the juror.

12 **THE CLERK:** Thank you.

13 **MR. SCALZO:** Please seat the juror.

14 **THE CLERK:** Thank you. You may be seated in
15 the jury box.

16 **THE COURT:** All right. We will get an
17 alternate. Strikes are one and two.

18 **THE CLERK:** Juror number 33, Dana Brown.

19 What says the State?

20 **MRS. SUSTAKOVITCH:** Please present the juror.

21 **THE CLERK:** Thank you.

22 What says the Defendant?

23 **MR. SCALZO:** Please excuse this juror.

24 **THE CLERK:** Thank you. You may be seated.

25 You are excused from this trial.

1 Juror number 17, Tom Berry.
 2 What says the State?
 3 MRS. SUSTAKOVITCH: Please present the juror.
 4 THE CLERK: Thank you.
 5 What says the Defendant?
 6 MR. SCALZO: Please excuse the juror.
 7 THE CLERK: Thank you. You may be seated.
 8 You're excused from this trial.
 9 Juror number 61, Susan Kramer.
 10 What says the State?
 11 MRS. SUSTAKOVITCH: Please present the juror.
 12 THE CLERK: Thank you.
 13 MR. SCALZO: Please excuse the juror.
 14 MRS. SUSTAKOVITCH: Your Honor, may we
 15 approach?
 16 THE COURT: Ma'am, how about just stay right
 17 there.
 18 Mr. Scalzo, count your strikes again.
 19 MR. SCALZO: Did you not say two and five?
 20 THE COURT: I said one and two.
 21 MR. SCALZO: Seat the juror.
 22 THE CLERK: You may be seated.
 23 THE COURT: Any exception to the composition
 24 or manner of selection of the jury?
 25 MRS. SUSTAKOVITCH: None from the State, Your

1 Honor.

2 MR. SCALZO: Nothing other than my previous
3 motions, Judge.

4 THE COURT: All right. Ladies and Gentlemen,
5 we have some nonjury issues in this case that I
6 am going to have to take some time to deal with.
7 I'm not sure exactly how long they're going to
8 take but I am virtually certain it would take us
9 at least until about 5:00. So rather than hold
10 you all with the chance that we might be able to
11 begin with opening statements tonight, I'm going
12 to go ahead and let you all go for the day in a
13 few minutes and ask you to return tomorrow
14 morning. We will begin with you all in the
15 morning.

16 When you get here in the morning, one of the
17 first things that I'm going to do as I alluded to
18 you earlier is I'm going to talk to you all about
19 some of the considerations that will govern your
20 service as jurors. One of the things, that I
21 will talk to you about is the fact that you may
22 not discuss this case in any manner until I have
23 given you permission to begin with your
24 deliberations which will be sometime right at the
25 end of trial.

1 Until then, you can not discuss the case
2 among yourselves, you can not discuss the
3 allegations, the names of the witnesses, the
4 lawyers or anything about jury selection. When
5 you go home tonight, I'm sure that somebody in
6 your family is going to pressure you to give them
7 some information about the case that you are
8 working on up here in the courthouse. When you
9 tell them no, this judge was clear that if I did
10 that, I would be, that would be a no-no and I
11 would be in trouble. They say he will never
12 know, just tell me anyway. Please do be very
13 careful not to talk to anyone about this case.

14 One other thing that I tell jurors as a
15 matter of course now is in this information age,
16 there is information out there perhaps about all
17 sorts of different things on the Internet or
18 elsewhere. Please do not do any type of inquiry
19 whether it be Internet search or a visit to a
20 scene or anything of that nature. Anything that
21 you learn about this case must come to you as you
22 sit in that jury box in this courtroom under my
23 supervision.

24 With those two instructions, I'm going to
25 excuse you for the night and ask you to return to

1 the jury room that the bailiff will show you in.
 2 just a moment by 9:30 tomorrow morning. We will
 3 resume at that time. I will see you then. Y'all
 4 have a nice night.

5 (WHEREUPON, the jury exit at approximately

6 3:57 PM.)

7 THE COURT: Those of you who were not

8 selected to serve on this jury, please call back
 9 tonight after six o'clock tonight for

10 instructions about what you to do tomorrow. You
 11 all are free to go.

12 THE JUROR: Do you mind if I step back and

13 grab my tie? Would it be alright if it step back

14 and grab my tie?

15 THE COURT: Yes, sir.

16 THE JUROR: Thank you. Appreciate it.

17 (WHEREUPON, the jury panel exit at approximately

18 3:57 PM.)

19 THE COURT: Okay. We're going to deal with,

20 uh, these pretrial issues regarding the forensic

21 interview.

22 MRS. SUSTAKOVITCH: Yes, sir, Your Honor.

23 Would you like proffered testimony from the

24 witness as well as to view the audio?

25 THE COURT: Let's have a quick discussion

1 about exactly what the issues are in this hearing
2 and then we will decide how to go about resolving
3 them.

4 **MRS. SUSTAKOVITCH:** Your Honor, the child in
5 this case did perform a forensic interview. It
6 is around 43 minutes long. The State is offering
7 this in its case-in-chief. It falls under
8 section 17-23-175 and that the child was under 12
9 at the time that it occurred. The child gave the
10 statements in response to a trained investigator
11 who was, by the name of Christine Carlberg, who
12 works with the Child Advocacy Center.

13 The child's statement was recorded. It was
14 preserved by electronic means. All of these which
15 are requirements of 17-23-175. The child in this
16 case is going to testify. She will be subject to
17 cross-examination in reference to the tape. The
18 circumstances, uh, what the State would like to
19 offer to the Court is that the circumstances
20 surrounding the making of the statement do
21 provide a particular guarantee of
22 trustworthiness. This will be very probative
23 evidence in the State's case, Your Honor.

24 **THE COURT:** What is the citation?

25 **MRS. SUSTAKOVITCH:** 17-23-175. It is part of

1 Jessie's law. It was passed --

2 **THE COURT:** I just wanted to know the
3 citation.

4 **MRS. SUSTAKOVITCH:** I'm sorry.

5 **THE COURT:** It's okay. All right, Mr.
6 Scalzo, anything you want to say?

7 **MR. SCALZO:** The only thing I would say,
8 Judge, is the statute does require you to have
9 the in camera hearing with regard to particular
10 guarantees of trustworthiness.

11 **THE COURT:** All right. Let's do it.

12 **MRS. SUSTAKOVITCH:** Thank you, Judge. The
13 State calls Christine Carlberg.

14 **CHRISTINE CARLBERG,**
15 is first duly sworn and then testifies as follow:

16 **THE CLERK:** Would you please state your
17 full name for the record.

18 **THE WITNESS:** Christine Carlberg.

19 **THE CLERK:** Thank you.

20 **DIRECT EXAMINATION**

21 **BY MRS. SUSTAKOVITCH:**

22 **Q** Good afternoon, where are you employed, Mrs.
23 Carlberg?

24 **A** I'm employed with the Greenville Department
25 of Mental Health.

1 Q What exactly is your position with the
2 Greenville Department of Mental Health?

3 A I mainly conduct forensic interviews at the
4 Children's Advocacy Center.

5 Q Where is the Children's Advocacy Center
6 located?

7 A It's located on White Horse Road. It's part
8 of the Greenville Rape Crisis and Child Abuse Center.

9 Q And in your job as a forensic interviewer,
10 what does that entail?

11 A I meet with children and conduct forensic
12 interviews.

13 Q Can you explain to the Court what a forensic
14 interview is?

15 A It is a non-leading developmentally
16 appropriate method of gathering information from a
17 child.

18 Q Can you give the Court a little bit about
19 your work experience and your training in the field of
20 forensic interview?

21 A I been conducting forensic interviews since
22 May 2000. First, in Mississippi. Then I became
23 employed at the Greenville Department of Mental Health
24 in February of 2007.

25 Q Can you give the Court some of your, uh,

1 where you graduated from and that type of thing, what
2 are your degrees in?

3 A I graduated with a Bachelor of Science in
4 Rehabilitation Services Education with a minor in
5 Psychology from Pennsylvania State University. I
6 graduated with a Masters of Arts in Marriage and
7 Family Therapy.

8 Q You say you been a forensic interviewer since
9 2000, what special training have you had in the area
10 of the forensic interviewing?

11 A I been to several national training
12 facilities. One called Corner House in Minneapolis. I
13 been to Finding Words in Mississippi and also Finding
14 Words in South Carolina. Those are 40 hour per week
15 trainings specifically geared for forensic
16 interviewing.

17 Q In forensic interviewing, is there a standard
18 protocol that's used when you conduct a forensic
19 interview?

20 A I use a protocol RATAC.

21 Q What is RATAC?

22 A It is a similar structure protocol consisting
23 of rapport, anatomy identification, touch inquiry,
24 abuse scenario and closure.

25 Q Is the RATAC method a method that is widely

1 and generally accepted in the field of forensic
2 interviewing?

3 A Yes.

4 Q Have you read articles on the RATAC method
5 that are subject to peer review?

6 A Yes, ma'am.

7 Q You just described some of your specialized
8 training in RATAC, how many children have you
9 conducted forensic interviews on either in Mississippi
10 or in South Carolina?

11 A I did a total of 1383 interviews.

12 Q Have you testified in the courts of
13 Mississippi and in South Carolina?

14 A Yes, ma'am.

15 Q In South Carolina, how many times have you
16 testified?

17 A I think about eight times.

18 Q Have you ever been qualified as an expert in
19 the area of forensic interviewing?

20 A Yes, ma'am.

21 MRS. SUSTAKOVITCH: Your Honor, that would be
22 the foundation in the area of forensic
23 interviewing. Next, moving to the specific
24 interview in this case.

25 BY MRS. SUSTAKOVITCH:

1 Q Did you have occasion to conduct an interview
2 on the victim in this case, JW

3 A Yes, ma'am.

4 Q How was the child referred to you?

5 A She was referred to us by Detective Bobby
6 Bradford with the Greenville Police Department.

7 Q Why was she referred to you?

8 A She was referred because there was sexual
9 abuse allegations regarding her father, Samuel
10 Whitner.

11 Q Where did this interview take place?

12 A It took place at the Children's Advocacy
13 Center.

14 Q Who was present in the room when the
15 interview happened?

16 A Just me and the child.

17 Q Did you make an audio recording of the
18 interview that you conducted?

19 A Video and audio.

20 Q Video and audio. I apologize.

21 A Yes, ma'am.

22 BY MRS. SUSTAKOVITCH:

23 Q I'm showing you what is marked as State's
24 Exhibit 11. Do you recognize that?

25 A Yes, ma'am.

1 Q What is that?

2 A This is the video recording of the interview
3 I conducted with JW

4 Q Have you watched that video recently?

5 A Yes, ma'am.

6 Q Is it a true and accurate depiction of the
7 interview you conducted?

8 A Yes, ma'am.

9 Q Has this video been tampered with or altered
10 or deleted in any way?

11 A No, ma'am.

12 Q During this interview, did you utilize non-
13 leading questions with JW

14 A Yes, ma'am.

15 Q Did the victim give a detailed account of the
16 abuse?

17 A Yes, ma'am.

18 Q In your expert opinion as a forensic
19 interviewer, did the child give --

20 MR. SCALZO: Objection, Your Honor. She is
21 not qualified as an expert.

22 BY MRS. SUSTAKOVITCH:

23 Q Okay. For purposes of this hearing, I'll
24 rephrase my question. Uh, was the victim's disclosure
25 internally coherent and what did that mean if you find

1 it internally coherent?

2 **A** I found it to be internally coherent meaning
3 she was internally consistent in her interview. She
4 was able to provide core contextual details
5 surrounding the incident.

6 **Q** Okay. Did it appear in your opinion to be
7 logical and follow a path?

8 **MR. SCALZO:** Objection.

9 **THE COURT:** Sustained.

10 **MRS. SUSTAKOVITCH:** Okay. Your Honor, that
11 concludes the State's testimony.

12 **THE COURT:** Cross-examination.

13 **MR. SCALZO:** Judge, is she going to put in
14 the video for you to --

15 **THE COURT:** She just did.

16 **MR. SCALZO:** Well, I mean for you to observe
17 it. That may be relevant to my cross-examination
18 of the witness. I think, by the statute, you
19 have to have got to make a determination or
20 ruling.

21 **THE COURT:** Are you telling me you would
22 rather me watch the video before you conduct your
23 cross-examination?

24 **MR. SCALZO:** Yes, sir.

25 **THE COURT:** It is 43 minutes?

1 MRS. SUSTAKOVITCH: Yes, sir.

2 THE COURT: Do you have other witnesses?

3 MRS. SUSTAKOVITCH: In reference to this, no, sir.

4

5 THE COURT: You are going to show the video

6 in here?

7 MRS. SUSTAKOVITCH: Yes, sir.

8 THE COURT: You said the audio is a little

9 difficult on the video?

10 MRS. SUSTAKOVITCH: It's -- if you take it

11 back in chambers --

12 THE COURT: Yes or no.

13 MRS. SUSTAKOVITCH: Yes, sir.

14 THE COURT: You are talking about this

15 particular exhibit?

16 MRS. SUSTAKOVITCH: This particular Exhibit

17 is difficult in a personal computer. We have

18 boosted the audio in here.

19 THE COURT: All right. Play it. (Pause).

20 Are you ordering me to move too?

21 MRS. SUSTAKOVITCH: I'm sorry?

22 THE COURT: Are you ordering me to move so

23 that I can see the video?

24 MRS. SUSTAKOVITCH: No, sir. We would never

25 do that.

1 **THE COURT:** I will sit in the jury box. I
2 got to do that one time, believe it or not, in
3 this courthouse almost 20 years ago. I was not a
4 judge then. I was a juror. In the old courtroom
5 on the old side. The seats are hard.

6 (WHEREUPON, State's Exhibit 11 is played at
7 approximately 4:10 PM.)

8 (WHEREUPON, State's Exhibit 11 is stopped at
9 approximately 4:15 PM.)

10 **THE COURT:** I still am having trouble with a
11 lot of the audio mainly because she is kind of
12 mumbling. Have you all tried to make a
13 transcript of this?

14 **MRS. SUSTAKOVITCH:** We have not done that,
15 Your Honor. We, uh, we have not.

16 **THE COURT:** All right, well --

17 **MR. SCALZO:** The speaker is right there. I
18 can hear. She is mumbling but I can kind of make
19 out what she is saying from that one.

20 **MRS. SUSTAKOVITCH:** Ms. Carlberg does repeat
21 a lot of what the child says because she tend to
22 have a very low voice.

23 **THE COURT:** Okay. Can you back it up just a
24 few minutes?

25 (WHEREUPON, State's Exhibit 11 resumes playing at

1 approximately 4:16 PM.)

2 THE COURT: Let's take a break. Let's stop
3 it right there for a few minutes.

4 (WHEREUPON, State's Exhibit 11 is stopped at
5 approximately 4:25 PM.)

6 THE COURT: Let's take a short break.

7 (WHEREUPON, a recess is taken at approximately
8 4:25 PM.)

9 (WHEREUPON, the Court resumes at approximately
10 4:34 PM.)

11 (WHEREUPON, State's Exhibit 11 resumes playing at
12 approximately 4:34 PM.)

13 (WHEREUPON, State's Exhibit 11 concludes at
14 approximately 4:57 PM.)

15 THE COURT: All right. We will take a short
16 break and come back. Mr. Scalzo, you can cross-
17 examine her.

18 MR. SCALZO: Thank you, Your Honor.

19 (WHEREUPON, a recess is taken at approximately
20 4:57 PM.)

21 (WHEREUPON, the Court resumes at approximately
22 5:09 PM.)

23 THE COURT: Mr. Scalzo.

24 MR. SCALZO: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. SCALZO:

2 Q Mrs. Carlberg, is that right?

3 A Yes, sir.

4 Q In your training, do you, I guess, do you
5 become familiarized with the statute we're talking
6 about 17-23-175? Is that part of your training?

7 A Is that Jessie's Law?

8 Q Yeah. I guess it is part of Jessie's Law.
9 The law on the admissibility of this kind of video or
10 statement?

11 A A little bit.

12 Q A little bit. Okay. What I really want to
13 ask you about is in your training, do you go through
14 training regarding developing information that gives a
15 particularized guarantee of trustworthiness? Is that
16 something that you are specifically trained on, that
17 kind of term? That is what is in the statute. Do you
18 understand my question?

19 A Not really.

20 Q In the statute, it says that part of what the
21 court has to evaluate with the video we just watched
22 is whether the statement provides particularized
23 guarantees of trustworthiness. What I'm asking you is
24 do you get specific training in that area in helping a
25 Court evaluate that?

1 A No.

2 Q Mrs. Sustakovitch did ask you about internal
3 coherence.

4 A Yes, sir.

5 Q Is that a phrase that is part of, people who
6 do your kind of work, is that a -- what does that
7 mean?

8 A We look for like internal consistency. Does
9 the child's statement have core contextual details. We
10 look for those kinds of things.

11 Q When you say core contextual details, what do
12 you mean by that?

13 A Core details.

14 Q Okay.

15 A Can the child say who did it, what happened,
16 where it happened. Somewhat how -- contextual details.
17 How were clothes, were any statements made, how did
18 things taste, smell, where other people are located.
19 Those kinds of details.

20 Q That sounds like something that you are
21 specifically trained on trying to develop.

22 A Yes, sir.

23 Q The term "internal coherence", other than
24 what it just means in plain English, is there a
25 special meaning or refined meaning that is used in

1 forensic interviewing?

2 **A** I don't think so.

3 **Q** Okay. As far as your overall task in that
4 kind of video, is it simply to elicit information?

5 **A** Yes, sir.

6 **Q** I think you testified non-leading questions
7 was one of the purposes or techniques that you
8 utilize?

9 **A** Yes, sir.

10 **Q** Okay.

11 **MR. SCALZO:** I don't have any further
12 questions at this time, Judge.

13 **MRS. SUSTAKOVITCH:** Your Honor, the State
14 would move that we met the requirements of 17 --

15 **THE COURT:** I just want to know if you have
16 any follow-up questions.

17 **MRS. SUSTAKOVITCH:** No, sir. I do not.

18 **THE COURT:** Okay. Ma'am, you can step down.
19 Thank you.

20 Any additional evidence from the State?

21 **MRS. SUSTAKOVITCH:** No, sir.

22 **THE COURT:** Mr. Scalzo.

23 **MR. SCALZO:** No additional evidence.

24 **THE COURT:** All right. I going to take the
25 exhibit with me this evening. I will come back.

1 We will reconvene at nine o'clock in the morning.
2 I will hear any arguments that you all want to
3 present and I will rule before 9:30.

4 MR. SCALZO: Okay.

5 THE COURT: All right. Are there any other
6 pretrial issues?

7 MRS. SUSTAKOVITCH: Yes, sir.

8 MR. SCALZO: Yes, sir.

9 THE COURT: Tell me what they are.

10 MRS. SUSTAKOVITCH: One, before we leave the
11 forensic interview, I did want to offer to the
12 Court that as you listen to it, Your Honor, I do
13 want to let you know that the State is going to
14 be producing the book that the child is talking
15 about. I say this to the Court to let you know
16 that her account in the forensic interview is
17 corroborated by several pieces of evidence. The
18 book that is going to be entered and also the
19 audiotape of the Defendant's phone call to the
20 child. It is very important to the State. I
21 just wanted to tell you this before you take it
22 home.

23 In the forensic interview, the child
24 repeatedly said how this Defendant cried and how
25 he said he was sorry. On the tape that Your

1 Honor will hear at some point, this Defendant is
2 replete with saying --

3 THE COURT: Is there a transcript of it?

4 MRS. SUSTAKOVITCH: Yes, sir.

5 THE COURT: Let me go ahead and take that
6 with me as well.

7 MR. SCALZO: You are referring to the
8 transcript of the telephone conversation?

9 THE COURT: Yes, sir.

10 MRS. SUSTAKOVITCH: Yes. If you would like a
11 copy of the call, you can take it home.

12 THE COURT: I just need to read it.

13 MRS. SUSTAKOVITCH: My point to that is that
14 his phone call is replete with going on and on
15 about didn't I say I was sorry, JW didn't I
16 cry, didn't I cry. I have it written down the
17 number of times in that 20-minute call that he
18 does that.

19 THE COURT: Okay.

20 MRS. SUSTAKOVITCH: Here you go, Judge. Your
21 Honor, the final motion or matter the State
22 wanted to address is this Defendant, the
23 background is this Defendant got the victim's
24 mother pregnant at 14. He was 21. The Defendant
25 was in and out of this child's life. He was kind

1 of not around. He would see her when he was not
2 incarcerated or when it would fit his schedule.

3 Depending on how the evidence lays out, the
4 State did want to elicit testimony from the
5 mother that she took this Defendant off child
6 support in 2006. Basically, she took him off
7 because he kept going to jail over it. Her
8 testimony would be that she did not want her
9 child to have not have access to her father and
10 that she did not want him to keep going to jail
11 because of that.

12 The State anticipates the defense to be that
13 the mother and stepfather have brainwashed the
14 child and made her make this up. I do believe
15 the child support information would be relevant
16 to show the lack of motive on the part of the
17 mother to do something like that and the fact
18 that she was actually trying to do something in
19 this Defendant's best interest. Even though he
20 was almost \$15,000 in arrears on child support,
21 she took him off and left any responsibility out
22 of the equation in 2006.

23 **THE COURT:** Well, that may become relevant at
24 some point but I don't see how that has anything
25 to do with this interview, does it?

1 **MRS. SUSTAKOVITCH:** No, sir. It is a
2 separate pretrial matter. I thought you wanted
3 the last matter the State was going to bring up
4 pretrial. That would be the last matter before
5 the Court.

6 **THE COURT:** I am not going to -- it seems to
7 me that unless Mr. Scalzo just does what you just
8 advised him that he shouldn't do, then that
9 information would not be relevant.

10 **MRS. SUSTAKOVITCH:** Okay.

11 **THE COURT:** We will see.

12 **MR. SCALZO:** Do you want to know the other
13 pretrial motions charges or just regarding this
14 video?

15 **THE COURT:** I would like to know what they
16 all are, any other pretrial motions.

17 **MR. SCALZO:** I have a motion regarding some
18 of the information that the allegation, not the
19 allegation but the fact that the mother of the
20 victim was 14 at the time, I would make a motion
21 that that be excluded as evidence in this case.
22 Essentially it turns into propensity evidence
23 that because he was 21 and the mother of the
24 victim was 14, it was a statutory rape situation.
25 They are using that as propensity evidence. It

1 is unduly prejudicial on top of that.

2 THE COURT: You intend to offer that into
3 evidence?

4 MRS. SUSTAKOVITCH: The State does not unless
5 the defense goes the route that I just
6 articulated which is stepmom and mean stepdad
7 have colluded and brainwashed the child.

8 THE COURT: We got it. Let's focus on short
9 answers when they will do.

10 MR. SCALZO: A related issue is what you
11 also heard on the video which is references to
12 the fact that my client was sexually abused by
13 his father. I believe it is along the same lines
14 as the propensity evidence and unduly
15 prejudicial.

16 THE COURT: You want that excluded from --

17 MR. SCALZO: I want that excluded from the
18 trial. That obviously also would include the
19 video we just viewed as well, that evidence.

20 MRS. SUSTAKOVITCH: Your Honor, the State
21 would --

22 THE COURT: You want it excluded on what
23 basis?

24 MR. SCALZO: Ultimately, it is propensity
25 evidence meaning that because he was abused he

1 might be more than likely or have the propensity
2 to do this to this child. On top of that, it is
3 unduly prejudicial that it is obviously connected
4 to each other that it is not probative of whether
5 or not he committed this crime. The prejudice of
6 it is pretty great in the sense that you have lay
7 people who believe that you were a victim and
8 therefore will go out and do this or you done
9 this before and therefore would do it again.
10 Those two issues do kind of work together, those
11 two motions.

12 **MRS. SUSTAKOVITCH:** Your Honor, may I briefly
13 respond?

14 **THE COURT:** Yes, ma'am.

15 **MRS. SUSTAKOVITCH:** The defense is leaving
16 out the fact that what you have a 26-minute what
17 I would consider a confession by this Defendant
18 where the context of the call -- and Your Honor
19 will read it -- is he is saying to the child --

20 **THE COURT:** I only have 19 pages.

21 **MRS. SUSTAKOVITCH:** 26 minutes. I'm sorry.

22 **THE COURT:** Oh, okay.

23 **MRS. SUSTAKOVITCH:** It is a 26-minute call.

24 The context of the call is, JW I was
25 sexually assaulted. I was on drugs, I was out of

1 my mind. When this, quote, unquote, I believe
2 it's page four where he says when the incident
3 happened with you, I was on cocaine, marijuana,
4 Valium and weed. He goes on and on to explain to
5 her that it was the drug monster that overtook
6 his life because he never could deal with what
7 his father did to him.

8 In the context of this call, which I believe
9 is a confession, that is critically important to
10 understanding the context of what he's talking
11 about and what he is apologizing, I believe,
12 eight times --

13 **THE COURT:** I will think about that as I
14 watch this video again. It seems to me that, uh,
15 it seems to me that not only is it a confession
16 and it is in the context of a confession, kind of
17 like State versus Andrey Tuss which strangely was
18 a case I tried down in Aiken years ago. It also
19 is a, is a, it seems to me like it is an effort
20 to keep her from telling. He is using it as
21 justification in order to convince the child that
22 she should not tell.

23 In that sense, it, for two reasons, is not
24 really -- I see what you say when you said it is
25 propensity, that a normal person makes the

1 connection between it was done to this child and
2 when the child grows up, he does it to his own
3 children. That is something for me to think
4 carefully about. I will do that as I watch it
5 again. It is possible if I don't exclude it that
6 I can even fashion some type of limiting
7 instruction. That is something for you to think
8 about tonight is the possible limiting
9 instruction.

10 **MR. SCALZO:** Judge, I don't know if you
11 realize this or not. The telephone conversation
12 that is recorded that you have the transcript of,
13 that comes after she disclosed it. In other
14 words, she said, Mom, this happened. There's a
15 telephone conversation between my client and his
16 daughter where she confronts him that is not
17 recorded. He said he did not do it. That is
18 confirmed by the daughter as well as the mother.
19 This comes later on in the conversations that
20 precede that first disclosure. In terms of what
21 you said which is trying to stop --

22 **THE COURT:** Is it before or after the police
23 are notified?

24 **MR. SCALZO:** It is before the police are
25 notified. It is not -- I don't think it -- when

1 you read the transcript, I don't think it reads
2 as hey don't tell anybody about this. He already
3 knows that it has been divulged. He already
4 knows that -- he does not even know if they went
5 to the police or not. I don't take the same
6 spin. I just want you to have that fact.

7 **THE COURT:** In saying that, it is not for me
8 to decide how the factfinder would interpret it.
9 It is for me to decide why it is offered. As I
10 am listening to the State's presentation, it
11 sounds to me like there are two reasons that the
12 thing is being offered. One -- I say two reasons
13 that the subset of it, my dad did this to me
14 subset of it. One is that it is part of the
15 confession that explains why he did it and the
16 other is it seems like a little bit of a request
17 that he not be arrested for it. He might not
18 have known whether they called the police or not
19 but he clearly admitted he had not been arrested.

20 If I conclude that that is why it is being
21 offered, legitimately that that is why it is
22 being offered, it might result in propensity
23 evidence which of course is the prejudice prong
24 of 403 and something that can be handled in a
25 limiting instruction. It would not be included

1 excluded under 404 if that is not the purpose for
2 which it is being offered.

3 MR. SCALZO: Okay. With regard to some other
4 issues so the Court knows, the transcript that
5 you have in your hand about the telephone
6 conversation, I don't know if they're going to
7 offer it or not. We would object because there
8 is the audiotape. The best evidence is the
9 audiotape. That is transcribed by the
10 Solicitor's Office.

11 THE COURT: Have you listened to the audio
12 tape while reading the transcript?

13 MR. SCALZO: Yes, you will see that --

14 THE COURT: Is a pretty accurate?

15 MR. SCALZO: Well there are --

16 THE COURT: As for right now, the reason I
17 ask this, I'm just figuring out the way for me to
18 understand what is in the phone conversation. If
19 you think it is better for me to take the audio,
20 then I will take the audio. If you think it is
21 reasonably accurate and I that I won't really
22 miss anything major or even miss anything
23 important, I would just assume read it. We will
24 deal with what goes to the jury later.

25 MR. SCALZO: I guess we would miss out of

1 potentially, I guess, the context of the words.
2 There are sections in that transcript that say
3 inaudible. That is connected to our motion on
4 the jury not having the testimony but listening
5 to the best evidence which is the tape. That is
6 one issue that we will have.

7 The other, as the Court knows because I
8 raised it, he was incarcerated in both the jail
9 here as well as in the Department of Corrections.
10 The Department of Corrections has contacted me.
11 I have a letter from them that they faxed me
12 yesterday. They would like to not have somebody
13 have to come out here to have to testify for the
14 record, the Custodian of Records to come out --

15 **THE COURT:** You don't mind stipulating to
16 when he was in the Department of Corrections, do
17 you?

18 **MRS. SUSTAKOVITCH:** No, Your Honor, I guess
19 don't. I would have an issue with this little
20 handy chart that he has put together. Some of
21 the dates are prior. If he wants to put in
22 records, I guess what he's trying to do is --

23 **THE COURT:** Why don't y'all just stipulate to
24 when he was in the Department of Corrections. It
25 can't be that difficult to ascertain with

1 certainty when he was in and when he wasn't.

2 **MRS. SUSTAKOVITCH:** I think this document
3 here --

4 **THE COURT:** Y'all can just work on that
5 before you leave tonight and reach an agreement
6 as to the dates he was incarcerated and you can
7 present that to the jury as a stipulation.

8 **MR. SCALZO:** The only --

9 **THE COURT:** If not, I think I'll just -- if
10 y'all can't do it, I think I'll review the
11 records myself and take judicial notice of when
12 he was in the Department of Corrections or the
13 Greenville County Detention Center.

14 **MR. SCALZO:** Our only issue with that, Judge.
15 My concern is telling the jury he was in the
16 Department of Corrections, telling the jury he
17 was in jail is not something that he should have
18 to do simply because they are claiming the time
19 period that he has to now cover because they had
20 not been specific. There are obviously 403, Rule
21 403 problems with saying he was in jail, he was
22 in the Department of Corrections.

23 **THE COURT:** What you want --

24 **MR. SCALZO:** My proposal would be that
25 whether you took judicial notice --

THE COURT: You want me to take judicial

notice of the fact that it was absolutely

impossible for him to have committed the crime on

certain days.

MR. SCALZO: Yeah and that the jury be told

the dates that would be impossible for him to

have done it and not told where he was or why so

that they would not have to concern themselves

with those dates in regards to the State's case

or its proof.

MRS. SUSTAKOVITCH: Your Honor, can I

respond? Or do you need anything? I would

vehemently object. I would say if defense counsel

wants --

THE COURT: Vehemently object?

MRS. SUSTAKOVITCH: I would just object and

say if they want to put in evidence in that case,

they can do that. I would not object to this, to

the Department of Corrections. That will be fine

if he wants to introduce that in his case. I

would object to him asking that Court put in --

I'm not certain of what he is trying to say.

MR. SCALZO: The point of being it goes back

to my original motion. It is the State's burden

to prove this happened. For the State to get

away with saying we are going to prove this

happened even though we know it is impossible for him to do this on these dates, which they are

aware of, and kind of avoid that issue and force

the Defendant to have to put that into an issue

without ever really saying any real specific

date, I think that is a burden shift. It is

also --

THE COURT: I think the burden shifting

argument is just misplaced. But why do you even

want to bother with it. How many days was he

incarcerated over the two-year period? 200 and

something.

MR. SCALZO: From 2000 to 2002, it is probably

200 almost 300.

THE COURT: Let's call it 300 out of almost

700. How does it help you in responding to the

allegation that something happened on one

particular day during a two-year period, how does

it help you to say that on half of those days it

could not have happened? That simply leaves the

other half of those days on which it could have

happened.

MR. SCALZO: That is my --

THE COURT: I know that you are saying that

1 in framing their allegations this way, they are
2 denying the Defendant of what could be a
3 legitimate alibi defense and they are doing so in
4 violation of his due process rights. But this is
5 not a situation where this child does not know
6 this Defendant, right? If it were some stranger,
7 then you might be looking at it a little
8 differently.

9 When there is a clear opportunity for this to
10 have happened during a two-year period of time
11 when he was not in prison, right? No doubt about
12 it. The question is not alibi. The question is
13 whether the little girl is telling the truth.
14 Not telling the truth about who did it because
15 the question --

16 **MR. SCALZO:** It is not a whodunit.

17 **THE COURT:** She's telling the truth about
18 whether it happened. The defense is simply not,
19 I mean, I'm not saying that you can't present, I
20 am not forbidding you from attempting to present
21 an alibi defense. I'm simply observing that is
22 not the issue in this case. I don't know really
23 see how it helps you to present that evidence.

24 You're then turning around and saying that
25 evidence you intend to present which has little

1 probative value has such high potential for
2 unfair prejudice that I should exclude some of
3 it. It is an argument that starts out backwards
4 and ends up remaining backwards.

5 MR. SCALZO: I don't agree that it is not
6 probative because it is a bootstrapping argument
7 for the State. They are saying believe her about
8 this but it tied to the believability of it -- if
9 she were to say it was May 1st and he was in
10 prison, she would have a direct credibility issue
11 about whether it could have happened. But
12 because the State is not being specific about it,
13 they --

14 MRS. SUSTAKOVITCH: She does not know when it
15 happened.

16 THE COURT: Wait a minute. You're excited.
17 That is good. I'm glad you are excited about
18 your case but do not argue over another lawyer.
19 Basically, when I need to hear from you, I will
20 let you know. That is the procedure that we're
21 going to follow during the course of this trial.

22 MR. SCALZO: Essentially what the State would
23 say, for instance, if the Defendant has to put
24 that evidence in, what the State would end up
25 saying that she said it happened although she can

1 not tell a more specific date than the window of
2 time that they alleged in their indictment. Part
3 of her credibility issue is when did it happen.
4 We know when the State knows the impossibility of
5 him having done it during that period of time.
6 For the State to say because you can show it is
7 impossible, therefore she must be saying it
8 happened on the day he was out, that is a
9 complete bootstrapping argument by the State.
10 They are not offering evidence that it
11 occurred --

12 **THE COURT:** I'm not smart enough to figure
13 out what a bootstrapping argument is. But you
14 have articulated a relationship between this
15 incarceration evidence and an argument about the
16 credibility of the victim or really as much the
17 credibility of the victim as it is the, uh, it is
18 like a sufficiency of the evidence argument
19 almost towards the State itself.

20 I'm going to see if I can figure out a way --
21 I will think about it. I think that perhaps --
22 you are saying that the accusation is made in the
23 first place by the victim and the family knowing
24 that a substantial portion of the period of time
25 in which this supposedly occurred, he was in

1 prison. Therefore, it couldn't happen. That is
2 the reason why the vagueness is there in terms of
3 what the victim says about what it happened.

4 It is an argument. I'm not going to say
5 whether I think it is a great one or not but it
6 is one that you claim you're entitled to make and
7 I'm not prepared to say I disagree with you at
8 this point. You want to be able to make that
9 argument without having to reveal that the reason
10 half the time is taken out of the picture is
11 because he was in prison and you think it is
12 unfair prejudice.

13 **MR. SCALZO:** That is correct except I am not
14 characterizing their belief that you were
15 referring to the child and I guess the family's
16 belief about when it happened. I don't know.
17 There is not any evidence in terms of what they
18 would testify to regarding when other than the
19 child saying this time frame.

20 There is not a statement that I've seen that
21 said my dad was in prison during this time, so,
22 yes, I don't remember it happening at that time.
23 It is simply a window of time. That is all that
24 was given in terms of memory because that's
25 obviously tied to believability of the child.

1 There is not testimony about the memory. There
 2 is just testimony that say this happened --
 3 **THE COURT:** You need to think that argument
 4 through. You just shot yourself in the foot.
 5 All right. I'm going to, uh, -- anything else?
 6 **MRS. SUSTAKOVITCH:** No, Your Honor. Did you
 7 want an audio copy of this interview?
 8 **THE COURT:** Yes please.
 9 **MRS. SUSTAKOVITCH:** Thank you, Judge.
 10 **THE COURT:** Actually, I'd like the DV --
 11 which is -- I want the video copy.
 12 **MRS. SUSTAKOVITCH:** I'm sorry. This is the
 13 audio tape between the little girl and the
 14 Defendant.
 15 **MR. SCALZO:** That's the telephone
 16 conversation.
 17 **MRS. SUSTAKOVITCH:** There is a lot of
 18 inflection.
 19 **THE COURT:** I don't want that. I want the
 20 video of the interview. Anything else for
 21 tonight?
 22 **MRS. SUSTAKOVITCH:** No, sir, Your Honor.
 23 **MR. SCALZO:** No, sir.
 24 **THE COURT:** We will start at nine o'clock in
 25 the morning. Tell me how long you think it will

1 take you to put up your case.

2 **MRS. SUSTAKOVITCH:** I would say probably a
3 day and a half depending on how everything goes
4 with his objections to the tape. A day and a
5 half.

6 **THE COURT:** A day and half?

7 **MRS. SUSTAKOVITCH:** To two days, I would say.
8 If we start tomorrow, I can definitely see us
9 going into Wednesday.

10 **THE COURT:** Uh, tell me, uh, -- that
11 surprises me.

12 **MRS. SUSTAKOVITCH:** Some of those witnesses
13 -- I put on some reply witnesses which I did not
14 necessarily have to do. I did that out of
15 abundance of caution.

16 **THE COURT:** I don't think that you could
17 possibly take more than half to three quarters of
18 a day to put this case up.

19 **MRS. SUSTAKOVITCH:** Okay.

20 **THE COURT:** I'm not telling you can't. I
21 just want you to explain to me why.

22 **MRS. SUSTAKOVITCH:** Your Honor, I just
23 anticipated additional wrangling over the tape.
24 I did anticipate possibly, depending on what his
25 arguments are on the tape, us having to possibly

1 listen to it. That would be contextual inflection
2 in this Defendant's voice, when he is crying.
3 Just depending on what defense counsel wants to
4 say, it could elongate the process. I could try
5 to get it done in a day.

6 **THE COURT:** Do you anticipate putting up a
7 lengthy defense?

8 **MR. SCALZO:** Nah, not lengthy.

9 **THE COURT:** Okay. We need to, we need to --

10 **MR. SCALZO:** Less than half a day, I would
11 think. Obviously depends on how things go.

12 **THE COURT:** Okay. We are either going to
13 argue to the jury at about two o'clock on
14 Wednesday or at about nine o'clock in the
15 morning. Y'all can schedule your presentation of
16 evidence accordingly.

17 **MRS. SUSTAKOVITCH:** I will move quickly.

18 **MR. SCALZO:** The only other issue is he is
19 out on bond. He has been out on bond since --

20 **THE COURT:** Well, when we swear the jury, he
21 is in custody. The question is what is up with
22 him tonight. Since the jury has not been sworn,
23 unless there is some concern brought to my
24 attention, he is going to be free tonight.

25 **MRS. SUSTAKOVITCH:** Right.

1 MR. SCALZO: Thank you.

2 THE COURT: But, Mr. Whitner, --

3 MR. WHITNER: Sir?

4 THE COURT: -- You must be here in the morning when we start at nine o'clock. If you are not here in the morning, we are going to proceed without you. We will proceed all the way to verdict. You know to be here. You have the opportunity to be here. If you're not here, the trial is not going to stop. You understand?

11 MR. WHITNER: Yes, sir.

12 THE COURT: Any questions about that?

13 MR. WHITNER: No, sir.

14 THE COURT: If you have any, you can certainly ask them of Mr. Scalzo tonight before you all leave.

17 MRS. SUSSTAKOVITCH: Thank you, Judge.

18 MR. SCALZO: Nine o'clock, right?

19 THE COURT: Nine o'clock. The jury is coming back at 9:30.

21 (WHEREUPON, a recess is taken at approximately 5:39 PM.)

23 (WHEREUPON, the Court resumes on the 3rd day of November, 2009 at approximately 9:20 AM.)

25 THE COURT: Any further argument on the

1 admissibility of the forensic interview?

2 **MRS. SUSTAKOVITCH:** None from the State, Your
3 Honor.

4 **MR. SCALZO:** Yes, sir. We talked about the
5 topic of references in that video to the sexual
6 abuse of my client by his father. There is also
7 statements made by, uh, JW in the video
8 where she is basically testifying in the video to
9 her opinion about what he meant by certain
10 statements. Let me see if I can find that.

11 **THE COURT:** I think that it is pretty clear
12 by the overall context of the statute and from
13 several specific sections of the statute
14 including in subparagraph (a)(3) where the
15 requirement is set forth that the child be
16 subject to cross-examination on the elements of
17 the offense and then in subsection (b)(3) when
18 the statute, when the requirement refers, when
19 the statute refers to the requirement that the
20 statement contain a detailed account of the
21 alleged offense and, to some extent, in (c)(2)
22 when the victim is identified as a victim of or a
23 witness to a criminal act and then particularly
24 considering the title of the act which is the Sex
25 Offender Accountability and Protection of Minors

1 Act, that the purpose of this statute is to allow
2 in statements that relate to the details of the
3 offense and nothing more.

4 So statements that the child may have made
5 about, that you just referred to about what the
6 child believes the Defendant meant, statements
7 about a phone conversation that occurred later,
8 those might be admissible under some other rule
9 of evidence, but they are not admissible under
10 this statute. What the statute does is allows a
11 child who meets, allows a statement by a child
12 who meets these definitions to be admissible to
13 the extent that it refers, to explain, so forth,
14 the event and nothing further. So, that is going
15 to be my ruling or at least the first step in the
16 ruling. Then if you have any further argument
17 beyond that, I will you.

18 **MR. SCALZO:** So I understand what your ruling
19 is, are you saying that --

20 **THE COURT:** All I'm saying right now -- I have
21 not gotten to ruling on the admissibility of what
22 the statute covers. What I'm saying is that my
23 interpretation of this statute is that it allows
24 into evidence when the conditions and
25 requirements of the statute are met, an out-of-

1 court statement by a child that meets these
2 definitions that relates to the event, the crime.
3 You can see -- it is implied in the statute.
4 For example, if at the end of the interview if
5 the interviewer were to have said, JW do
6 you, uh, are you familiar with your father's
7 reputation for truthfulness and veracity in the
8 community and if she were to say yes and if the
9 interviewer were to go on and lay out, as a
10 lawyer might do, the foundation for admissibility
11 of this witness' opinion of her father's
12 truthfulness under Rule 405 or this witness'
13 knowledge of her father's reputation for
14 truthfulness under Rule 405 and then if the
15 Defendant were to take the stand and or some
16 other witness were to get up and put the
17 Defendant's reputation or character for
18 truthfulness into dispute under 404, it would be
19 preposterous to suggest that the State might then
20 come back in response to that and introduce this
21 forensic interview as evidence of the Defendant's
22 character. That would be a ridiculous thought.

23 Rather, the witness would have to get on the
24 stand and testify about, in response under Rule
25 404 as to the father's reputation or as to that

person's opinion for truthfulness. The same, there has got to be a line somewhere between

those two extremes. Clearly, the statute applies to the details of the event, the elements of the crime. Clearly, it does not apply to something that is so far afield as the witness' opinion on the Defendant's character. There has got to be a line. The line, I can clearly see from reading this statute carefully and in its entirety is those portions of the victim's statement that relate to the crime, the details of the crime, the elements of the offense. Nothing further.

MRS. SUSIAKOVITCH: May I address that, Your Honor?

THE COURT: No, I have ruled. What would you like to address about what I just ruled on?

MRS. SUSIAKOVITCH: I just, uh, I guess I wanted clarification. Do you want the State to make an effort to get this redacted and try to --

THE COURT: That's up to you. That's up to you. You can present your evidence in the fashion you see fit.

MRS. SUSIAKOVITCH: Right. We are going to, based on your Honor's ruling, uh, try to get Lieutenant Mike Peterson in forensics to try to

1 do that. I just wanted to give him the proper
2 direction in the forensic interview what to do
3 because it is a lengthy one. So the statements
4 you said about JW perception of what the
5 Defendant meant when he cried, that part is not
6 admissible?

7 THE COURT: He cried in a phone conversation
8 that occurred years later, right?

9 MRS. SUSTAKOVITCH: Yes, sir. Yes, sir.

10 THE COURT: He is not been charged for crying
11 on the phone, is he?

12 MRS. SUSTAKOVITCH: No, sir.

13 THE COURT: He's been charged for a sexual
14 assault that occurred sometime between December
15 the 28th of 2000 and December the 28th of 2002.
16 So what is admissible in this forensic interview
17 are those portions of it that relate to the
18 criminal act by the Defendant within the confines
19 of the date set forth in the indictment.

20 MRS. SUSTAKOVITCH: Okay. Any details about
21 why she disclosed would be inadmissible as well?
22 There is a portion there where she explains, the
23 forensic interviewer asked her why she disclosed.
24 She goes into what triggered her. That is, uh, --

25 THE COURT: When did that all occur?

1 **MRS. SUSTAKOVITCH:** She disclosed in August
2 of 2007.

3 **THE COURT:** Is that after December 28th of
4 2002?

5 **MRS. SUSTAKOVITCH:** That she disclosed?

6 **THE COURT:** Yeah.

7 **MRS. SUSTAKOVITCH:** Yes, sir. She disclosed
8 five to seven years later. In the forensic
9 interviewer, interview, she is explaining why.
10 So I just wanted clarification if that needs to
11 be taken out.

12 **THE COURT:** Absolutely. It does not fit the
13 definition that I just clearly expressed. If the
14 statement relates to the event, the crime that
15 occurred, if the statement describes the crime,
16 then it is admissible, it is covered by the
17 statute. I still have not ruled on its
18 admissibility.

19 **MRS. SUSTAKOVITCH:** Okay.

20 **THE COURT:** So is there anything else that
21 you want to argue, Mr. Scalzo?

22 **MR. SCALZO:** I think I would have to make a
23 motion that in and of itself, regardless of the
24 way the Court has limited this specific piece of
25 evidence, but that the interview itself I think

1 is bolstering of a witness. I understand Your
2 Honor will admit it any way. I think it is
3 improper bolstering. The witness is going to
4 have to get up and testify.

5 **THE COURT:** I overrule that objection.

6 **MR. SCALZO:** For my grounds, to the extent
7 that the statute seems to allow it, I would say
8 that the statute is in itself unconstitutional.
9 I want to make sure that --

10 **THE COURT:** There is nothing in the
11 Constitution that prevents bolstering of
12 witnesses. In the hierarchy of law, the only way
13 that bolstering fits in is under the Rules of
14 Evidence. The statute would clearly override the
15 Rules of Evidence. When the Legislature decided
16 to pass this statute, to the extent that they
17 thought it might corroborate or help the jury or
18 factfinder to believe what the victim testified
19 to on the stand, they clearly see that it would
20 have the affect of bolstering. It is, uh, -- I
21 overrule that objection.

22 **MR. SCALZO:** For clarification -- the reason
23 I say it is --

24 **THE COURT:** I overruled that objection.

25 **MR. SCALZO:** I understand, Judge. I'm not

1 rechallenging it. I just want to make sure I am
2 clear on what my position was. The reason I said
3 it was constitutional is that it does go to the
4 right of confrontation. It does go to due process
5 in that that is where the rule is coming from.
6 That is where my position come from. I'm not
7 rechallenging it, Judge.

8 **THE COURT:** Okay.

9 **MRS. SUSTAKOVITCH:** Your Honor, I just wanted
10 to offer for the record this issue was addressed
11 by Court of Appeals in May. The Court of Appeals
12 specifically found what Your Honor just did if
13 you would like a copy.

14 **THE COURT:** No.

15 **MRS. SUSTAKOVITCH:** No. Okay. It addresses
16 improper bolstering of forensic interviews and
17 goes to the legislative intent on that.

18 **THE COURT:** Okay. Then as far as the
19 portions of the statement that I have said are
20 covered by the statute, requirement (a)(1) is
21 met, requirement (a)(2) is met. I'm assuming
22 that the child is going to testify and will be
23 available for cross-examination not only as to
24 the elements and details of the offense but also
25 as to the circumstances and making of the

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1 statement.

2 And under (a)(4), I have considered the
3 elements under subsection (b). The statement
4 does not appear to me to have been elicited by
5 leading questions. There are some leading
6 questions on there. But they are, without
7 exception, circumstances in which the interviewer
8 is clarifying that this is what the witness just
9 said. There are numerous places on there when
10 JW is difficult to understand. She kind of
11 mumbles which is, of course, understandable and
12 then the interviewer comes back and clarifies it.
13 You just said this. Which is a leading question
14 but it is permissible. The statements were not
15 elicited by leading questions.

16 The foundation has been adequately set forth
17 that the interviewer is trained in conducting
18 investigative interviews of children. The
19 statement does appear to represent a detailed
20 account of the alleged offense. In making that
21 finding, I have taken into consideration that
22 there are many times in which you can't
23 understand what she says. Perhaps there are a
24 couple of exceptions. But as to all the important
25 details, the interviewer has gone back and asked

1 for the answer to be clarified. When considered
2 as an whole, the statement does represent a
3 detailed account of the offense.

4 Whether the statement has internal coherence,
5 there was some discussion on the record here as
6 to what the witness thought that meant. That is
7 a legal question. What I think that means is is
8 it internally consistent, does it contradict
9 itself as to what happened, are there
10 inconsistencies that can't be reconciled. I
11 don't think that there are. I think it is a
12 fairly logically presented account of what
13 happened. I believe that the statement does have
14 an internal coherence.

15 Under (b)(5), I suppose that the only thing
16 that is to be considered under there is the
17 testimony of the interviewer which I have heard
18 in camera and will hear again before the
19 interview is actually admitted. Do you plan to
20 put this interview in before or after the victim
21 testifies?

22 **MRS. SUSTAKOVITCH:** Your Honor, in the
23 interest of trying to redact it, I would say it
24 would probably be after now because I need to
25 give --

1 **THE COURT:** Okay.

2 **MRS. SUSTAKOVITCH:** -- Mike Peterson time.

3 **MR. SCALZO:** Your Honor, with regard to that,
4 I would move the ability to cross-examine the
5 witness regarding the video which the statute
6 specifically says I am supposed to have the
7 opportunity to do.

8 **MRS. SUSTAKOVITCH:** And my response -- I'm
9 sorry.

10 **THE COURT:** It does not mean that. You can
11 ask the child about the video in your initial
12 cross-examination. You also have the option of
13 asking the child about the video after it has
14 been presented. You can put -- you can or I can
15 or I can require the State to put the victim back
16 up on the stand so that you can ask questions
17 about it. Okay?

18 **MR. SCALZO:** All right. My concern with that
19 is that is what it ends up doing, the jury is
20 listening to it. It's not just my questioning.

21 **THE COURT:** I don't, I don't think there is
22 any room for discussion about it. She is the one
23 that makes the decision about the order in which
24 to put up the State's evidence. Not me, not you.
25 She's told me that she's going to put it up last.

1 I see nothing wrong with that. I'm going to
2 permit it. I will permit you to cross-examine
3 that witness in all or any of the fashions that I
4 just outlined or others if you can suggest it to
5 me.

6 MR. SCALZO: I just think that it undermines
7 my ability to cross-examine the witness because
8 it breaks up the cross-examination unnecessarily.

9 THE COURT: That is your choice. There is
10 nothing in this statute, if there is anything in
11 this statute that suggests the order between
12 witness testimony and forensic interview, it
13 would be that the statute appears to require the
14 witness to testify before the interview is
15 admissible which helps you because the found,
16 part of the foundation for its admissibility is
17 the witness testifies.

18 MR. SCALZO: I think the --

19 THE COURT: I have ruled. Any further
20 argument on the admissibility of the forensic
21 interview?

22 MR. SCALZO: No, sir.

23 MRS. SUSTAKOVITCH: No, sir.

24 THE COURT: Okay. Then we will, uh, --

25 MRS. SUSTAKOVITCH: I apologize. I wanted to

clarify. Assistant Solicitor Leigh Poalletti is

going to help me redact this while we are in

trial. The very beginning part which is the

rapport part of the interview where they are just

basically saying hi and where do you go to

school, that is permissible, correct? Because she

is going to testify, the interviewer is going to

testify that under the RATAC method which she

does go into describing, that is how a forensic

interview is conducted.

It is just an ice breaking method where the

child does give some little details so she does

not just start out of the gate talking about this

formal event. I don't recall anything in the

rapport, ice breaking part that would violate

what Your Honor has ruled on but I just wanted to

give her direction with Lieutenant Peterson.

THE COURT: I think that the types of things

that you just described relate to the

circumstances of the statement and that they are

permitted, they are admissible under the statute.

MRS. SUSIAKOVITCH: Thank you, Judge.

MR. SCALZO: I don't know if it would help

but I wrote down some of the times when the

interview shifted in terms of the topics. It

1 seemed to me at about 21 minutes, the topic
2 shifted from the interview about the elements of
3 the alleged crime, what took place to her,
4 JW talking about the conversation with her
5 father and then obviously the issues that go
6 along with that. I wrote down about 21 minutes
7 when that started. I don't know if that helps
8 with the redaction.

9 **THE COURT:** All right. I'm sure that will
10 help them. Okay. We will take a short break and
11 then we'll come back and bring the jury in. When
12 we bring the jury in, we're going to swear them.
13 I will talk to them for a minute and then opening
14 statements.

15 **MRS. SUSTAKOVITCH:** Your Honor, I do --

16 **THE COURT:** So if you go to file another
17 Notice of Appeal, you better file it quickly.

18 **MRS. SUSTAKOVITCH:** I will not. There were a
19 few things that did come up overnight that I
20 wanted to just clarify before we swear the jury.
21 One, the State stated yesterday that we did not
22 intend to introduce the statements that the
23 Defendant gave Detective Bobby Bradford. In the
24 interest of moving in this trial along, he is one
25 of our possibly first three witnesses.

1 I understand Your Honor's position to rule on
2 the statements. The State's position is we would
3 rather put them in then have us be in a position
4 where we don't elicit them and then he jumps up
5 and start going into it and I have to in front of
6 the jury make all of these objections. We are
7 fine putting them in.

8 So if defense counsel wants a Jackson v.
9 Deno, I would ask to do that quickly. His
10 statements are three very brief statements. We
11 would just put them in through Bobby Bradford.

12 **THE COURT:** It does not work that way. You
13 decide whether or not you are going to offer the
14 statements in your case-in-chief. If you're
15 going to, then we have a Jackson v. Deno hearing.

16 **MRS. SUSTAKOVITCH:** Okay. We have decided
17 that we are going to, Judge.

18 **THE COURT:** All right. Put your first witness
19 on the stand.

20 **MRS. SUSTAKOVITCH:** Thank you, Judge. The
21 State calls Detective Bobby Bradford.

22 **BOBBY BRADFORD,**
23 is first duly sworn and then testifies as follow:

24 **DIRECT EXAMINATION**

25 **BY MRS. SUSTAKOVITCH:**

1 Q Good morning, Detective.

2 A Good morning.

3 Q Where are you employed, sir?

4 A Greenville Police Department.

5 Q What is your position?

6 A I'm a juvenile detective.

7 Q How long have you been employed at the
8 Greenville Police Department?

9 A Over 22 years.

10 Q Have you been assigned to investigate sex
11 crimes?

12 A I investigate juvenile crimes. Part of that
13 is sex crimes involving juveniles.

14 Q As part of a sex crime investigator, what
15 are your duties?

16 A We investigate sexual assaults, things of
17 that nature.

18 Q Was this Defendant served with warrants on
19 this charge and did you later attempt to talk with
20 him?

21 A Yes, ma'am. I did. He was served.

22 Q Okay. Let me show you what is marked as
23 State's Exhibit 9. Do you recognize that item?

24 A Yes, ma'am, I do.

25 Q What is that item?

1 A It's a waiver of rights form.

2 Q How do you recognize it? Do you see your
3 initials or case number?

4 A I see my signature and the case number.

5 Q All right. When did you speak with the
6 Defendant?

7 A I believe it was September 19th of 2007.

8 Q Where did this take place?

9 A It took place in my office in the Law
10 Enforcement Center.

11 Q Can you describe the room?

12 A It is just a basic room. It is a room for a
13 desk and myself and my partner and chairs for others
14 to sit in.

15 Q When you brought this Defendant into the room,
16 was he denied any comforts, meaning, something to
17 drink, go to the restroom, that type of thing?

18 A No.

19 Q Was he handcuffed at the time?

20 A When we first came in, he was. We have to
21 handcuff from the detention center over to the Law
22 Enforcement Center. If I am not mistaken, once he was
23 in our office, I usually take a cuff off of at least
24 one hand so they can take their hands from behind
25 their backs.

1 Q Was anyone else present when you spoke with
2 him?

3 A No, ma'am.

4 Q This form that list the rights, is that what
5 you informed the Defendant of?

6 A Yes, ma'am.

7 Q Can you tell the Court of what rights you
8 informed the Defendant of?

9 A I read just right off of the form. It says
10 before we ask you any questions, you must understand
11 your rights. You have a right to remain silent.
12 Anything you say can be used against you in court.
13 You have a right to talk to a lawyer for advice before
14 we ask you any questions and to have him with you
15 during questions.

16 If you have no money to pay a lawyer's fee,
17 the Court will appoint one to represent you without
18 cost if you wish. If you decide to answer questions
19 now without a lawyer present, you still have a right
20 to stop answering at any time. You also have a right
21 to stop answering at any time until you talk to an
22 attorney.

23 Also I would like to add that before I give
24 an individual his rights, I ask them their age, what
25 level of education they had and if they can read.

1 Once I have given them their rights below, there is a
2 paragraph called Waiver of Rights where the accused
3 can read. It states, I have read the statement of my
4 rights. I understand what my rights are. I am
5 willing to make a statement and answer questions.. I
6 do not want a lawyer at this time. I understand and
7 know what I am doing. No promises or threats have
8 been made to me. No pressure or coercion of any kind
9 has been used against me.

10 Then what I do is we go over the word "coercion".
11 Like I tell the Defendant, I don't know the Webster's
12 meaning but it means that he or she has the right to
13 talk to me if they wish. If they don't, they don't
14 have to. I'm not promising them anyway. I'm not
15 saying if you don't talk to me I'm going to do this or
16 if you will talk to me I will do something. If you
17 don't want to say anything, you don't have to.

18 Q After you went through this entire form with
19 him, did you feel that he understood his rights?

20 A Yes, ma'am.

21 Q Were there any markings made on that form to
22 indicate that by the Defendant?

23 A Yes, ma'am. I always ask if they will put
24 their initials by the sentences on the right to show
25 that they read the rights or read the rights

1 themselves by the word "coercion" and sign where it
2 says sign.

3 Q Did he appear drunk or under the influence of
4 anything at the time he gave his statement?

5 A No ma'am.

6 Q Any threats or promises made to get him to
7 sign that form?

8 A No, ma'am.

9 Q Was there any intimidation on him?

10 A No, ma'am.

11 Q Was his waiver of rights voluntary?

12 A Yes.

13 Q Did the Defendant indicate that he wanted or
14 wished to give you any form of a statement?

15 A Yes.

16 MRS. SUSTAKOVITCH: Your Honor, at this time,
17 for purposes of this hearing, moves to admit
18 State's Exhibit 9.

19 MR. SCALZO: No objection with regard to this
20 hearing.

21 BY MRS. SUSTAKOVITCH:

22 Q Was the statement that the Defendant made
23 oral or written?

24 A It was oral.

25 Q Okay. And can you tell the Court how that

1 went when you talked with the Defendant?

2 A Basically after I had given Mr. Whitner his
3 rights and asked him if he wanted to talk with me, he
4 stated that he would like to. I told Mr. Whitner I
5 would like to give him an opportunity to give a
6 statement on his own behalf or tell his side of the
7 story. Mr. Whitner asked me, uh, what was on the
8 tape.

9 After that I asked Mr. Whitner, I said, Mr.
10 Whitner, what did you mean when you said to JW
11 that when I did what I did, I wasn't in my mind right
12 mind, I was on drugs and I did not know what I was
13 doing. Shortly after that Mr. Whitner said that I had
14 only been given parts of the tape that the mother,
15 Mrs. Anna Grady, wanted me to hear and that I had not
16 heard the whole conversation.

17 Q All right. And his specific words were you
18 had not heard the whole conversation and that the
19 mother only given you the part of the conversation
20 that she wanted, correct?

21 A That is correct.

22 Q Did you at that point get to inform him that
23 you had the entire 26-minute from hello to goodbye
24 conversation between the Defendant and the child?

25 A No, ma'am. I didn't. There were a few more

1 things said between us. At some point, Mr. Whitner
2 decided he wanted an attorney. At that point, my
3 questions, my questioning ended because he has a right
4 to speak to an attorney. And at that point, we stopped
5 questioning. I basically got ready to take Mr.
6 Whitner back to the detention center.

7 **MRS. SUSTAKOVITCH:** Your Honor, those will be
8 the statements the State would be introducing.

9 **THE COURT:** It was simply that he asked you
10 what was on the tape.

11 **THE WITNESS:** Yes, Your Honor. He asked me
12 what was on the tape. After that, I asked Mr.
13 Whitner what did he mean when he told JW
14 when I did what I did, I wasn't in my right mind,
15 I was on drugs and I wasn't myself. Mr. Whitner
16 shortly after that told me that I had not been
17 given the whole conversation, that I had only
18 been given the parts of, I guess, the tape that
19 the mother wanted me to hear.

20 **THE COURT:** So the two statements that are
21 made by the Defendant are, one, that he asked the
22 question what is on the tape and, second, in
23 response to your question what did he mean when
24 he said this, he said I had only been given parts
25 of the statement the mother wanted me to hear?

1 **THE WITNESS:** Yes, sir. There might have
2 been one or two more exchanges between that but
3 basically it followed shortly after that.

4 **THE COURT:** Cross-examination?

5 **MR. SCALZO:** Briefly, Judge.

6 **CROSS-EXAMINATION**

7 **BY MR. SCALZO:**

8 **Q** With regard to when you began your
9 questioning, when did you begin your questioning,
10 after the initial or at what point?

11 **A** After he signed, initialed and signed the
12 Waiver of Rights.

13 **Q** When is it that you said I have an audio tape
14 or made him aware of this audiotape?

15 **A** It had to be shortly after that. I don't
16 know exactly when it was but it was shortly after
17 that. I do not discuss anything until after I made, I
18 fully understood that Mr. Whitner wanted to talk to me
19 and that the Waiver of Rights were signed.

20 **MR. SCALZO:** Okay. That is all I have,
21 Judge, as far as questioning.

22 **THE COURT:** Any redirect questions?

23 **MRS. SUSTAKOVITCH:** No, sir, Judge.

24 **THE COURT:** Okay. Sir, you can step down.

25 **THE WITNESS:** Thank you, Your Honor.

1 THE COURT: Anything else from the State?

2 MRS. SUSTAKOVITCH: Related to this matter or

3 other matters?

4 THE COURT: Let's finish the Jackson v. Deno

5 hearing before we do anything else.

6 MRS. SUSTAKOVITCH: Nothing further, Your

7 Honor.

8 THE COURT: Okay. Any evidence from the

9 defense?

10 MR. SCALZO: No evidence from the defense,

11 Judge, on this issue.

12 THE COURT: Okay. Uh, any argument that

13 either side wants to make?

14 MRS. SUSTAKOVITCH: Related to Jackson v.

15 Deno?

16 THE COURT: Yes.

17 MRS. SUSTAKOVITCH: No, sir.

18 MR. SCALZO: Not as to the voluntariness,

19 Judge.

20 THE COURT: You concede that it is voluntary.

21 MR. SCALZO: I concede that it was voluntary.

22 My issue is the testimony. Part of his

23 questioning is that he is referring to a tape.

24 Obviously, I'm going to object to the reference

25 of the tape. And whether you want to handle that

1 now versus when he's testifying.

2 **THE COURT:** The statement, although I can't
3 figure out it's significance actually, is
4 admissible. If it is no challenge to the
5 voluntariness of it, then, of course, Jackson v.
6 Deno hearing is unnecessary and so there is
7 really nothing else to decide. The officer made
8 several statements in describing the context of
9 the interview, like, I wanted to make sure I gave
10 him an opportunity to give his side of the story.
11 You can't say that. You can say I asked him this
12 question, he gave this answer.

13 You can describe the circumstances of the
14 explanation of his rights, the waiver of his
15 rights and things of that nature. But especially
16 given the fact that he later asserted his right
17 to counsel, then these comments like why you did
18 what you did, I wanted to give him a chance to
19 give his side of the story, would not be
20 admissible. Anything else?

21 **MRS. SUSTAKOVITCH:** Briefly on a few other
22 matters. One, yesterday, there is an issue that
23 the mother in this case who was going to testify
24 first was 14 when she gave birth to the
25 Defendant. I did state to the Court we are not

1 going to bring out the fact that by the birth of
2 the victim this Defendant committed statutory
3 rape. That's what the grandmother called it, so I
4 did say that to the Court.

5 I did last night wanted to make sure. Upon
6 further thinking of it, the mother is going to
7 testify as to the general background of the
8 relations between this Defendant and her. She is
9 going to testify to the statement, elicit
10 testimony that she did have JW when she was
11 in high school, 14 years old. She was living at
12 home with her mother. This Defendant had, he
13 would come over and visit but they never were
14 married. Generally to provide a background of
15 what life was like at the beginning of this child
16 being here.

17 We believe it is relevant and will give the
18 jury an idea of their relationship. And I did not
19 want her to testify to that if there was an
20 objection to it without bringing it to the
21 Court's attention.

22 **THE COURT:** The objection is to the
23 introduction of evidence of the unconvicted prior
24 bad act of statutory rape on the conception of
25 this child. And, uh, I can't imagine how it is,

1 how it is admissible for any of the purposes set
2 forth in the second half of 404(b). So, it seems
3 to me as though it is inadmissible. You can
4 describe all the other details of their
5 relationship that you would like. But if you
6 elicit the age of the Defendant, I mean, the
7 victim's mother at the time she conceived the
8 child, it is going to be in violation of 404(b)
9 and I'm going to exclude it.

10 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.
11 Next, the State is aware that the Defendant's
12 twin sister is in the courtroom as well as his
13 fiancé. We have a motion to sequester the
14 witnesses. I have spoke with the victim's
15 parents, her mother and stepfather. They have no
16 problem with that. My concern is these two
17 witnesses are on the Defendant's witness list. I
18 would be concerned that they would be conforming
19 their testimony to what they hear. That would be
20 my motion.

21 **THE COURT:** I deny that motion.

22 **MRS. SUSTAKOVITCH:** Thank you. The final two
23 things were I did want to let Your Honor know, I
24 know you were considering the tape and you read
25 the transcript. I wanted to get direction on

1 what, if any, ruling you had throughout the tape
2 where the Defendant talks about the fact of why
3 he did this to the child. The State does intend
4 during its opening --

5 **THE COURT:** The tape of the phone call?

6 **MRS. SUSTAKOVITCH:** The transcript -- Yes,
7 sir -- that you read where he talks about the
8 fact that the reason it happened is that he was
9 assaulted by his father and that he went on drugs
10 really bad and that at the time he did this to
11 JW he was out of his mind on drugs.

12 **THE COURT:** Aren't you offering the tape into
13 evidence?

14 **MRS. SUSTAKOVITCH:** Yes, sir. We are. Defense
15 counsel made a motion yesterday to exclude all
16 mention of the fact that the Defendant was
17 sexually assaulted by his father on the tape.
18 Maybe I misunderstood you. I thought you were
19 considering that last night. I just wanted to
20 make sure I did not go into that if, uh -- we do
21 intend to introduce the entire tape.

22 **THE COURT:** You have not made any kind of
23 pretrial objection to the contents of the phone
24 conversation, have you?

25 **MR. SCALZO:** I assume --

1 **THE COURT:** Other than the one that is
2 contained in your motion to the Court of Appeals.

3 **MR. SCALZO:** From a wiretap standpoint, yes.
4 I did raise yesterday the issue. And I guess it's
5 sort of a global issue of the forensic issue as
6 well as the tape, on the subject matter of his
7 father's sexual abuse of the Defendant. I did
8 make that motion. I don't think Your Honor
9 ruled. I think Your Honor said you would look
10 something over and we would discuss the issue.

11 **THE COURT:** Okay.

12 **MR. SCALZO:** To the extent I need to be
13 clear, yes. I would be making that motion to
14 apply to the audiotape as well. There is obvious
15 the sections of it that refer to it.

16 **THE COURT:** All right. I going to take a
17 short break and I will come back and rule on
18 that.

19 **MR. SCALZO:** Okay.

20 (WHEREUPON, a recess is taken at approximately
21 9:59 AM.)

22 (WHEREUPON, the Court resumes at approximately
23 10:04 AM.)

24 **THE COURT:** The objections to the
25 admissibility of the recorded phone call that

1 relate to its alleged violation of the wiretap
2 statute, that had been addressed by the Court of
3 Appeals. The objection to the admissibility of
4 phone conversations based on evidentiary law are
5 that it contains character evidence that is
6 inadmissible under Rule 404. That objection is
7 overruled because even though the statements that
8 the Defendant makes and the context of the
9 conversation might relate to the person, the
10 Defendant's character, the statements are not
11 offered for the purpose of showing conformity
12 with those particular character traits on a
13 specific occasion. They are offered rather to
14 show that the Defendant confessed to the crime in
15 the phone conversation. It is not inadmissible
16 under Rule 404(a).

17 The other objection -- what was the other
18 one?

19 MR. SCALZO: I guess the other objection would
20 be 404(b).

21 THE COURT: Oh, oh, oh. The other -- no, the
22 other objection was first that there are, there
23 is information in there about drug use and prior
24 sexual assault by his father against him. That
25 is the one I just addressed. The drug use stuff,

1 I mean all of this is part of not only a
2 confession but also an effort to keep the crime
3 from being reported to the police. It is all
4 admissible.

5 In terms of Rule 403, I think the probative
6 value of the conversation is very high. The
7 unfair prejudice is almost nonexistent. There is
8 a little unfair prejudice perhaps in this
9 information in there about him being assaulted by
10 his father. There is a little bit of unfair
11 prejudice in there. But the probative value of
12 that portion of it is very high because of the
13 fact that he is clearly trying to get the victim
14 to not report it to law enforcement. Under Rule
15 403, the potential for unfair prejudice does not
16 substantially outweigh its probative value. So I
17 overrule the Rule 403 objection.

18 **MR. SCALZO:** Yesterday we talked about
19 perhaps giving an instruction to the jury on how
20 to utilize the information. Do you still intend
21 to do that?

22 **THE COURT:** I was giving you the option to
23 request that. You don't have to request it now.

24 **MR. SCALZO:** I'm going to think about it.

25 **THE COURT:** Bring in the jury please.

1 **MRS. SUSTAKOVITCH:** One last thing I have -- I
2 apologize -- was just to clarify the State and
3 defense counsel have spoken about this SCDC
4 record that he has certified. The State has no
5 objection, if he wishes to introduce that in his
6 case, to him just putting in the certified
7 document and SCDC not having to bring up a
8 Custodian of Records. I did want you to know we
9 discussed that.

10 (WHEREUPON, the jury enter at approximately 10:09
11 AM.)

12 **THE COURT:** Good morning.

13 Ma'am, I apologize for almost running over
14 you this morning when you were walking into the
15 courthouse. Good. You didn't realize it was me.

16 Swear the jury please.

17 **THE CLERK:** Please stand to be sworn in.
18 Raise your right hand. The response to the oath
19 is "I will". You shall truly -- excuse me. You
20 shall well and truly try case 2009-23-1072, State
21 versus Samuel Lamont Whitner indicted for
22 Criminal Sexual Conduct with a Minor first degree
23 and a true verdict render according to the law
24 and the evidence so help you God.

25 (WHEREUPON, each juror responds.)

1 **THE CLERK:** Thank you. You may be seated.

2 **THE COURT:** Ladies and Gentlemen, we are now
3 ready to begin with the trial in the State of
4 South Carolina versus Samuel Lamont Whitner who
5 has been indicted in Indictment 2009-GS-23-1072
6 for Criminal Sexual Conduct with a Minor in the
7 first degree. In the indictment, it is alleged
8 that Samuel Lamont Whitner did in Greenville
9 County between the 28th of December 2000 and the
10 28th of December 2002 commit a sexual battery on
11 JW who was less than 11 years of age. This is in
12 violation of section 16-3-655(a)(1) of the South
13 Carolina Code of Laws.

14 Ladies and Gentlemen, as I mentioned to you
15 yesterday, the indictment that I just read to you
16 is not in any sense evidence of the allegations
17 that are contained within that indictment. The
18 indictment is simply the formal document that
19 contains the allegations that have been made
20 against the Defendant and the indictment serves
21 to process the case and bring it into this Court
22 for trial.

23 The Defendant has pled not guilty to this
24 indictment. The plea of not guilty cast the
25 burden on the State to prove the Defendant guilty

1 beyond a reasonable doubt. That will be your job
2 to determine whether or not the State has met
3 that burden of proof.

4 Ladies and Gentlemen, it is a very important
5 rule of law in our country that a Defendant in a
6 criminal trial will always be presumed to be
7 innocent of the crime with which he has been
8 charged unless and until his guilt has been
9 proven by evidence that has satisfied you of that
10 guilt beyond a reasonable doubt. That, of
11 course, is what we refer to as the presumption of
12 innocence.

13 The presumption of innocence is not just a
14 legal theory. It is not a just a legal phrase
15 that we use. It is a substantial constitutional
16 right to which every Defendant is entitled. The
17 presumption of innocence accompanies the
18 Defendant from the time he is charged, throughout
19 the trial and into the jury room until you have
20 reached a verdict of guilt that's based on
21 evidence that has satisfied you of that guilt
22 beyond a reasonable doubt.

23 The trial of this case, just like any other
24 trial, can be divided up into five basic phases.
25 We going to start the first phase in just a

1 moment, which is the opening statements when the
2 lawyers will stand before you and they will
3 explain to you what this case is about. They
4 will tell you what the issues are in the case and
5 how each side stands on those issues. And they
6 will also go over for you some of the evidence
7 that you can expect to see that will relate to
8 those issues.

9 After the opening statements, we will enter
10 the second phase or what some people call the
11 evidentiary phase when witnesses will come here
12 to this witness stand. You will hear their
13 testimony and you will also see other evidence
14 that might include documents or photographs or
15 physical exhibits or things of that nature.

16 After all the evidence has been admitted, we
17 will start the third phase which is the closing
18 arguments where the lawyers will stand before you
19 again. This time, they will argue to you as to
20 whether or not the State has met its burden of
21 proof. After the closing arguments, I will
22 explain the law. That's the fourth phase. We call
23 that the jury charge. Then in the fifth phase,
24 you will go back into the jury room and you will
25 deliberate.

1 It is very important that you not discuss the
2 case, just as I mentioned to you last night, that
3 you do not discuss this case until I have given
4 you permission to begin with your deliberations.
5 It is also important that you not begin to make
6 up your mind about whether or not the State has
7 met its burden of proof until you been through
8 all five of those phases that I have outlined for
9 you.

10 As members of the jury, you are the exclusive
11 judges of the facts. I am not permitted to
12 indicate to you how I feel about the facts. If I
13 say anything or if I do anything that might lead
14 you to believe that I have an opinion about the
15 facts, then you should disregard that.

16 On the other hand, I am the exclusive judge
17 of the law. If you have some idea of what the
18 law is or what the law should be and if that were
19 to differ from what I will explain to you is the
20 law, then you are obligated under the oath that
21 you have just taken as jurors to set your notion
22 of the law aside and to accept and apply the law
23 precisely as I will explain it to you.

24 One other role that I play is to decide on
25 the admissibility of evidence. From time to time,

1 I expect that the lawyers will make objections
2 when evidence is offered that they believe does
3 not comply with our rules of evidence. When that
4 happens, that is not an attempt on the part of
5 the lawyer to hide anything from the jury. That
6 is simply the way our system of evidence works.
7 And it will become my responsibility to rule on
8 the objection.

9 If I sustain the objection, then that means
10 that I believe the evidence is not admissible and
11 I will not allow it in for you to consider. If I
12 overrule the objection, that means I believe the
13 evidence is admissible and I will allow it in and
14 you should consider it. Most of the time, I will
15 be able to do that just I am sitting here.

16 You will hear the lawyers say objection.
17 They might then state the grounds for their
18 objection. You will hear me say either
19 "sustained" or "overruled". Sometimes I might
20 ask the lawyers to come up to the bench so that I
21 can briefly discuss the evidence question with
22 them before I rule. Sometimes I might even have
23 to ask you folks to step back in the jury room so
24 that we can openly discuss the evidence question.
25 Sometimes I might have to listen to the testimony

1 before I can decide whether or not you can listen
2 to it.

3 All right. Mrs. Sustakovitch, you may
4 proceed.

5 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.
6 May it please the Court.

7 Good morning. This case is about a crime
8 against a young child. When JW was
9 between five and six years of age, she was like
10 most young girls. She went to school. She liked
11 playing outside. She played with dolls. The
12 evidence in this case will show that JW
13 innocent life was changed when she was instructed
14 to perform oral sex on this man, Samuel Lamont
15 Whitner, her biological father.

16 My name is Christy Sustakovitch. I'm an
17 Assistant Solicitor with the Greenville County
18 Solicitor's Office. As a prosecutor, it is my
19 job to present to you the evidence in this case,
20 to prove to you beyond a reasonable doubt that
21 this Defendant is guilty of the crime of Criminal
22 Sexual Conduct with a Minor.

23 I want to warn you from the outset that it is
24 an ugly crime. Many of the words we have to use
25 are upsetting. The thoughts that you have to

Opening Statement by Mrs. Sustakovitch

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1 think about are disturbing. Everyone in this
2 courtroom appreciates your service.

3 Very briefly, I wanted to explain to you what
4 Criminal Sexual Conduct with a Minor in the first
5 degree is. Judge Few is going to instruct you on
6 the law. He is the sole instructor of the law.
7 He will do that at the end of the case. Just so
8 you understand what that crime is as you listen
9 to the evidence, Criminal Sexual Conduct with a
10 minor in the first degree is essentially this, it
11 is when a person, this Defendant, engages in a
12 sexual battery with a child who is under the age
13 of 11. A sexual battery under the law can either
14 be anal intercourse, vaginal, penile intercourse
15 or engaging in oral sex with a child under the
16 age of 11.

17 The evidence in this case will show that it
18 was oral sex that this child had to engage in
19 with her father. Evidence comes in many forms.
20 In many cases, it can be physical evidence like a
21 gun or a knife. In some cases, it is
22 circumstantial evidence. In many cases, it is
23 going to be direct evidence from the witness
24 stand.

25 Much of what you will hear in this case,

1 because of the nature of the crime, will come
2 directly from the witness stand as direct
3 evidence from the witnesses themselves. The
4 essential question at the end of the day that you
5 will have to answer is do you believe the State
6 met its burden to prove that this Defendant had
7 his daughter perform oral sex on him.

8 I want to give you brief background of what
9 you will hear. You will hear about how this
10 Defendant and Anna Grady had JW
11 JW mother and this Defendant were never
12 married. From the very beginning, this Defendant
13 would visit her. Off-and-on, when he was
14 available, he would come and see her. Anna will
15 tell you about those first years of life.

16 Anna will tell you that when she was about
17 two or three, she met Jeffrey, her husband of
18 almost 11 years now. And how essentially,
19 JW had two dads, her biological father, this
20 Defendant, and then Jeff, her stepdad. You will
21 hear from him. He will testify to you how he
22 considers her as one of his own children but
23 always respected this Defendant as her biological
24 father.

25 You will hear from the child what happened.

1 She will tell you how she used to go visit her
2 dad sometimes at this Defendant's twin sister's
3 house, Aunt Sharon's house. Sometimes at his
4 other sister's house. But during one of these
5 visits, JW will tell you about how she was
6 sleeping, her father came in, woke her up, asked
7 her to have she wanted to meet his little buddy.
8 She closed her eyes. When she opened them, it
9 was this Defendant with his penis. He asked her
10 to perform oral sex on him which she did. It
11 occurred twice that night.

12 You will hear how this child did not tell.
13 She did not tell for several years. This deep
14 secret of hers was keep real deep down. But as
15 you will hear from the child, as the years went
16 on, it never went away. It bothered her.

17 Then you will hear a little over two years
18 ago, at the age of 11, JW will testify that
19 she read a book, a book about good secrets and
20 bad and what kind of secrets you should get help
21 if you have inside you. If you have a bad
22 secret, you should get an adult to help you.
23 Because of reading that book, JW decided to
24 tell her mother.

25 Anna Grady will testify to that disclosure

1 and what transpired afterwards. Anna will tell
2 you how she did not know what to do. She
3 instructed her child, you tell your father you
4 know what he did, you remember. Anna and JW
5 will testify that they confronted this Defendant
6 on the phone where he denied the allegation, said
7 it didn't happen.

8 A swirl of uncertainty ensued in the next few
9 days. You will hear how Anna told her husband
10 Jeff Grady about the allegation. At that point,
11 you will hear how, with the Defendant denying the
12 allegation, Anna and her husband began recording
13 phone conversations coming in and out of the
14 house. JW will tell you about one key phone
15 conversation that she had with this Defendant.
16 In that conversation, the Defendant goes on to
17 explain to her what happened, why it happened.
18 He asked her to forgive him.

19 Ladies and Gentlemen, this trial should be
20 relatively short. It is critically important to
21 everyone in this courtroom. The burden of proof
22 is very important in this case. It is beyond a
23 reasonable doubt. The State welcomes that burden.
24 This is an ugly crime. It's hard to listen to
25 the evidence.

1 We all have our jobs. My job is to present
2 that evidence to you and prove beyond a
3 reasonable doubt this Defendant's guilt. The
4 defense attorney's job is to zealously defend his
5 client within the bounds of the law. Judge Few is
6 the instructor of the law.

7 With all deference to Judge Few, you alone
8 have the most critical job in this courtroom.
9 You alone will determine what happened to the
10 JW when she was a little girl. As
11 you embark on this journey, I ask that you use
12 the one tool that every single one of you came
13 into this courtroom with. It is your common
14 sense. Let that guide you. At the end of this
15 trial, the State will ask that you return a
16 verdict that speaks the truth and ask that you
17 convict this Defendant. Thank you.

18 **MR. SCALZO:** May it please the Court, Your
19 Honor.

20 Good morning. I will introduce myself. My
21 name is Chris Scalzo. I am an Assistant Public
22 Defender. I have been appointed to represent
23 Samuel in this case. Having done this a lot of
24 times and after I've actually been on that side
25 of it, my observation is a very strange way to

1 learn about a defense. You have the hardest job,
2 I think next to the Court Reporter, in this case
3 because you can't talk to me, I can't talk to
4 you, you can't talk to the witnesses.

5 Plus, you are being asked to do something
6 that you don't really do every day. You are
7 being asked to not make assumptions. You are
8 being asked to take in information, to talk about
9 or hear about subjects that you don't hear about
10 every day. You don't get very in depth.

11 I want to talk to you about, not so much the
12 evidence that you are going to hear. I think as
13 has been said several times, you are the judges
14 of the evidence. Let's let you take the evidence
15 in and we will talk more about what the evidence
16 means at the end of the trial. I think there are
17 a couple of important points about what your role
18 is and how it's been described by the judge and
19 the prosecutor in this case. That really needs to
20 be clear.

21 Let's begin with something that the
22 prosecutor said. The prosecutor said that what
23 your sole job is going to be to determine what
24 happened to JW That is not really entirely
25 accurate. Your job is going to be to determine

1 whether or not the evidence put up by the State
2 proves beyond a reasonable doubt what they, the
3 State is saying happened. It may not be that you
4 ever figure out what happened. It may be that
5 you do. It is not your job to figure that out.
6 It is your job to evaluate the evidence and see
7 and determine whether or not the burden of the
8 State has been met. It is very different than
9 what you are probably used to doing.

10 Another issue that we should lay on the table
11 as kind of the elephant in the room is this is a
12 Criminal Sexual Conduct case, a child sexual
13 assault case. We see that on the TV. We have a
14 certain kind of reaction, an every day reaction.
15 We can't ignore the fact that we might have that
16 same reaction here. What you are going to have
17 is, and you have part of it, is instructions on
18 how to, what your role is now as opposed to when
19 you're sitting in front of the TV and you hear an
20 allegation.

21 All of us have the luxury when we hear an
22 allegation is to believe it or not believe it,
23 jump to a conclusion, do whatever we want with
24 it. What is so difficult for you is that you
25 don't have that luxury anymore. You don't have

1 the luxury of jumping to a conclusion. The
2 rubber is hitting the road for y'all. It is going
3 to be a difficult job for you to do.

4 It is an uncomfortable subject matter. We
5 need to acknowledge that. It is okay that you
6 feel uncomfortable. That is part of doing your
7 job. As the evidence is presented to you, your
8 role is to evaluate it and, at the end, actually
9 discuss it based on the judge's order and the
10 law.

11 But, we have all heard this beyond-a-
12 reasonable-doubt line probably most of our lives.
13 This is actual time when you're actually trying
14 to put it into play. It is very easy in our
15 everyday life to assume. Here is the allegation.
16 That's a horrible allegation. What do we say to
17 ourselves or even out loud some times? How could
18 that person have done that? A lot of times, that
19 is our first reaction to hearing that kind of
20 allegation. It is not our job to evaluate the
21 evidence at that point. That is your role.

22 What I will try to do as best as I can do is
23 to try to elicit evidence through questions
24 obviously that will help you to evaluate the
25 evidence that the State is presenting to you. At

1 the end of the case, what you're going to have to
2 figure out is does this evidence match up to what
3 the State said it matches up to? Does it equal
4 what it says it does? It may not. It may. But
5 the emotional story that you just heard from the
6 prosecutor on what she intends to prove may not
7 be at all what you hear. That's why all this
8 talk about you are the judges of the facts.

9 I'm going to ask you to obviously follow the
10 law but I also want to address with you that we
11 acknowledge that this is a difficult task for
12 you. It is not a usual process. It is okay in
13 the beginning because you have not thought about
14 it probably until you sit here now that you are
15 going to be doing things differently than you
16 probably would do at other stages of your life.
17 Want you to keep that in mind. Obviously I will
18 come back and talk to you at the end of the
19 trial. Thank you.

20 **MRS. SUSTAKOVITCH:** The State calls Anna
21 Grady.

22 **ANNA GRADY,**
23 is first duly sworn and then testifies as follow:

24 **THE CLERK:** Would you please state your
25 name for the record.

1 **THE WITNESS:** Anna Grady.

2 **THE CLERK:** Thank you.

3 **DIRECT EXAMINATION**

4 **BY MRS. SUSTAKOVITCH:**

5 **Q** Good morning, Mrs. Grady.

6 **A** Good morning.

7 **Q** Where do you live?

8 **A** In Greer, South Carolina.

9 **Q** You always lived in Greenville County?

10 **A** I have.

11 **Q** Are you related to JW

12 **A** I am.

13 **Q** How are you related to JW

14 **A** I am her mother.

15 **Q** Do you know the Defendant, Samuel Whitner?

16 **A** I do.

17 **Q** How do you know this Defendant?

18 **A** He is her biological father.

19 **Q** When you became pregnant with JW did
20 you and this Defendant -- were you dating at the time?

21 **A** That's when I became pregnant when we were
22 dating.

23 **Q** When JW was born, were you still dating?

24 **A** No, we were not.

25 **Q** I want to give the jury some background about

1 your relationship with this Defendant. In the early
2 years of JW life, what was the relationship
3 between you and this Defendant, Samuel Whitner?

4 A I mean, it was okay. He could come see her
5 whenever he wanted to.

6 Q When you say he would see her, where would he
7 see her?

8 A Either he would come to my mom's house to see
9 her or he would see her over at his sister's house.

10 Q His sister, what is her name?

11 A Sharon Whitner.

12 Q Sharon Whitner. During the first few years,
13 he would see her when he wanted to at those locations,
14 correct?

15 A Yes, he did.

16 Q Who is Jeff Grady?

17 A He is my husband.

18 Q How long have you known Jeff?

19 A 11 years.

20 Q How old was JW when Jeff came into your
21 life?

22 A She was 2.

23 Q How long before you married?

24 A By the time we were married, she was 3.

25 Q Okay. With Jeff, do you have any other

1 children with Jeff?

2 A I do.

3 Q How many other children?

4 A We have another daughter and we have two
5 sons.

6 Q What is Jeff's relationship with JW
7 Meaning, how does he consider her in relation to the
8 other children in the family?

9 A She is like his oldest daughter. He is like
10 a father to her.

11 Q Okay. Going back to this Defendant, once you
12 married Jeff, did this relationship continue that the
13 Defendant could still see JW when he wanted at
14 those locations?

15 A Yes. He was still able to see her whenever
16 he wanted to.

17 Q I want to talk about this Defendant's side of
18 the family. Did you get to know any of them?

19 A I did.

20 Q Were you close with any of them?

21 A Yes.

22 Q Which members did you know?

23 A I knew his sister, Pookie, Sand, which also
24 was Sharon. His oldest sister, we call her Bug. I
25 knew his mother also.

1 Q Did JW spend time with any of them?

2 A She did.

3 Q Who did she spend time with?

4 A His mom, his sisters.

5 Q Specifically, did he spend time, did she
6 spent time with Sharon Whitner?

7 A She did. She spent a lot of time with Sharon.

8 Q What was her relationship with Sharon?

9 A She was close to her. She still is close to
10 her.

11 Q Okay. Does Sharon Whitner have a nickname?

12 A Yes. We call her Sand.

13 Q You call her Sand?

14 A Uh-huh.

15 Q I want to go back in time to when JW
16 first started school, kindergarten, first grade, those
17 years. Did she visit this Defendant's sister ever
18 during that time?

19 A She did.

20 Q Where did she visit this Defendant's sister?

21 A She visited Sand when she stayed on Pasadena
22 Avenue. Sometimes she would visit the other sister
23 Pookie also.

24 Q To clarify, Aunt Sand is Sharon Whitner?

25 A Yes.

1 Q You stated that she would visit her on
2 Pasadena Avenue?

3 A Uh-huh.

4 Q The other sister, I believe you stated
5 Pookie?

6 A Pookie.

7 Q Where did she live in relation to Aunt Sand?

8 A A few doors, a couple of streets over on
9 Tasha Street, Tasha Drive.

10 Q Are both of those locations within Greenville
11 County?

12 A They are.

13 Q Through the years that, when JW was
14 five, six years old, how often would she go over to
15 Aunt Sand's house?

16 A A few times a month.

17 Q How would she get over to visit Sharon
18 Whitner, Aunt Sand?

19 A We would take her or they would come pick her
20 up or my mom would take her over there.

21 Q Did this Defendant come to your house and
22 pick her up?

23 A Sometimes he did, yes.

24 Q Where there ever any issues when he would
25 come over and pick her up?

- 1 A Sometimes.
- 2 Q What would they be related to?
- 3 A Him getting her back and forth.
- 4 Q Him getting her back and forth?
- 5 A Yes.
- 6 Q What you mean by that?
- 7 A Bringing her home, being able to bring her
- 8 home or coming to pick her up.
- 9 Q So there would be issues with when she would
- 10 go and spend the night over there at Aunt Sand's house
- 11 and then she would not have a ride back? Is that what
- 12 you're saying?
- 13 A That's what I am saying, yes.
- 14 Q All right. I want to go back to JW
- 15 How old is she now?
- 16 A She is 13.
- 17 Q What is her date of birth?
- 18 A _____.
- 19 Q When did JW turn five?
- 20 A December 2000.
- 21 Q December 2000? So December 2000, she turned
- 22 five. When did she begin kindergarten?
- 23 A When she was five, in 2001.
- 24 Q Do you remember around about in 2001 when she
- 25 started kindergarten?

- 1 A In August.
- 2 Q Do you remember where she started
- 3 kindergarten?
- 4 A Paris Elementary.
- 5 Q She began August 2001 at Paris Elementary. Do
- 6 you recall where she went to first grade?
- 7 A She went to Paris Elementary also.
- 8 Q How old would she had been when she started
- 9 first grade?
- 10 A She was six when she started first grade.
- 11 Q All right. In the time back when JW was
- 12 five and six, did you have any thoughts that she had
- 13 been sexually abused in any way?
- 14 A I didn't.
- 15 Q All right. I'm sorry.
- 16 A I didn't have any thoughts. I just had a
- 17 dream one time. I had a dream one time.
- 18 Q You had a dream one time?
- 19 A Yes.
- 20 Q What did you dream?
- 21 A I just dreamed that someone had been messing
- 22 with her.
- 23 Q As far as this Defendant, you did not believe
- 24 he had sexually assaulted her?
- 25 A No.

1 Q I want to go back to this Defendant. I will
2 ask you that in a moment. When did you find out that
3 your daughter had been sexually abused?

4 A In 2007.

5 Q In 2007. I want to go back to that period of
6 time. Do you recall, was it in the fall, summertime?
7 Do you have any recollection on when she disclose?

8 A It was in summertime.

9 Q It was in summertime. I want to show you
10 what is marked as State's Exhibit 5. Do you recall
11 this document?

12 A I do.

13 Q What is that?

14 A That is my statement I gave to Detective
15 Bradford.

16 Q If needed to refresh your recollection, I
17 will pass that to you. Before JW disclosure, I
18 wanted to discuss did this Defendant have access to
19 JW prior to her disclosing that summer of 2007
20 that she had been sexually assaulted?

21 A She did.

22 Q Tell me about that. What grade in school do
23 you recall that would have been?

24 A I think she was, she would have been going to
25 the sixth grade.

1 Q And going back to, uh, this disclosure came
2 out in summer 2007, what was the contact with this
3 Defendant prior to that?

4 A She would go over to his sister's house a
5 lot.

6 Q All right. Specifically, in April of 2007,
7 will you tell the jury did she spend a weekend with
8 him in April of 2007?

9 A She did. He came and picked her up one
10 weekend. She was supposed to stay the weekend but she
11 didn't. She ended up staying longer.

12 Q By longer, what do you mean by that?

13 A He did not have a ride back home.

14 Q All right. He did not have a way to get her
15 back home. Did JW end up switching schools for
16 some reason at that point?

17 A Yes, she did.

18 Q Why did that happen?

19 A I guess because he could not get her back
20 home, he took upon himself to withdraw her from
21 school.

22 Q Did you okay him withdrawing her from school?

23 A I did not. I was very upset about it.

24 Q All right. So when he advised you that he had
25 withdrawn her from school and she was still at his.

1 house, did you and Jeff discuss this whole situation
2 together?

3 A We did. We discussed it. I talked to
4 JW Since it was okay with her, she did not
5 mind, then I allowed her to stay. It was only a few
6 more weeks of school left. She was in fifth grade.

7 Q All right. Would it surprise you if she was
8 in the fourth grade?

9 A No, it wouldn't. I was just getting ready to
10 say she was in the fourth grade. I remember her
11 teacher.

12 Q Do you have issues with dates sometimes?

13 A I do. She was in fourth grade. I was
14 thinking about the time when she first told me. That
15 is what I was thinking.

16 Q Going back to when she was staying with this
17 Defendant in April of 2007, he switched her to a
18 different school. How long does she stay over to his
19 house?

20 A Maybe about three weeks.

21 Q Had she ever stayed over with him that long?

22 A No, never that long.

23 Q You and Jeff decided it was okay because she
24 said it was okay --

25 MR. SCALZO: Objection, Your Honor, to

1 leading.

2 THE COURT: Sustained.

3 MRS. SUSTAKOVITCH: Thank you.

4 BY MRS. SUSTAKOVITCH:

5 Q How did JW end up -- well, during that
6 time period, did you see JW

7 A I did. I seen her every weekend.

8 Q Did everyone come with you when you would see
9 her?

10 A Me, Jeff, and her brother and her sister.

11 Q All right. Did JW end up coming back to
12 stay permanently with you?

13 A She did.

14 Q How did that come about?

15 A She went to the emergency room because her
16 appendix had burst when she was staying with the
17 Defendant. After she got out of the hospital, I took
18 her home and kept her with me.

19 Q So that would've been at the end of school
20 year in 2007?

21 A That is correct.

22 Q Without naming the person if she gave you a
23 name, in that summer of 2007, did Jasmine JW lose to
24 you that she had been the victim of sexual abuse?

25 A She did.

1 Q Can you describe her demeanor when she
2 disclosed this to you?

3 A She was really sad. She was crying.

4 Q How old was she at the time?

5 A At the time, she was 11.

6 Q Would you scoot up a little bit to the
7 microphone. Do you remember the day that she
8 disclosed this to you? Can you describe to the jury
9 what you recall about it?

10 A I was laying in the bed sleeping. She came
11 in the room. She said, Mama, wake up. I said, I'm
12 up. She said, Mama, please wake up. She said, I have
13 something to tell you. It is very important.

14 MR. SCALZO: Objection, Your Honor, that's
15 going to be hearsay. I guess what she's about to
16 say.

17 MRS. SUSTAKOVITCH: Your Honor, I'm going to
18 structure these questions not to go outside of
19 time and place.

20 THE COURT: Okay.

21 BY MRS. SUSTAKOVITCH:

22 Q Mrs. Grady, if you'll listen to my --

23 A I was just going to say that's when I woke
24 up. I mean, that's when I really woke up so I could
25 hear her.

Anna Grady - Direct Examination by Mrs. Sustakovitch

1 Q Okay. So you woke up so you could
2 Again, without stating name, if she gave you one, did
3 she disclose that she had been sexually assaulted?

4 A She did.

5 Q Did she disclose to you the time frame that
6 this assault had occurred?

7 A She did.

8 Q What was the time frame she said the assault
9 had occurred within?

10 A When she was five or six.

11 Q Did she state to you the place or places that
12 this assault happened?

13 A She did.

14 Q What was that? Where did she state that it
15 had happened?

16 A She said at Aunt Sand's house.

17 Q Aunt Sand being Sharon Whitner?

18 A That is correct.

19 Q I am showing you what is marked as State's
20 Exhibit 6. Do you recognize this item?

21 A I do.

22 Q How do you recognize this item?

23 A That is the book I checked out at the
24 library.

25 Q When did you check this out? Before or after

1 JW told you what had happened to her?

2 A Before.

3 Q Which library did you check this out of?

4 A Uh, the Taylor's Library:

5 Q Do you regularly check out books for your
6 children?

7 A I do.

8 Q How did you go to check out this book?

9 A It was laying on top of the bookcase. I just
10 grabbed it and looked through it. I thought this would
11 be a good book for my youngest daughter.

12 Q Your youngest daughter being who?

13 A Jade Grady.

14 Q Did you ever read that book to JW

15 A No, I didn't.

16 Q Are you aware of what triggered her to come
17 talk to you?

18 A Yes, I am.

19 Q What was that?

20 A It was the book. She told me she read it.

21 MR. SCALZO: Objection, Your Honor, that's
22 hearsay.

23 THE COURT: Overruled as to hearsay.

24 BY MRS. SUSTAKOVITCH:

25 Q Did she -- are you aware of what triggered

Anna Grady - Direct Examination by Mrs. Sustakovitch

1 her to come and disclose?

2 A I am.

3 Q What is this book about? -- What is the subject,
4 matter of the book?

5 A It's about good secrets and bad secrets and,
6 types of secrets that are okay and not okay to keep.

7 Q When Jasmine was disclosing this to you, did
8 you become aware of whether or not this book was a
9 triggering event from her?

10 A I did.

11 Q How did you become aware of that?

12 A She told me she read it.

13 Q When she disclosed this information, what was
14 your reaction?

15 A When she told me that she read the book?

16 Q Well, you can answer that and also just when
17 you found out that she had been sexually assaulted,
18 what was your reaction to that?

19 A I could not believe it. It was -- I was
20 really sad.

21 Q After you found out this information, did
22 you, what did you then decide was the next course of
23 action?

24 A I told Jasmine that she needed to let him
25 know that she remember.

1 Q She needed to let -- I'm sorry?

2 A She needed to let him know that she remember
3 what he did.

4 Q At this point, where you absolutely certain
5 what you would end up doing as far as the police or
6 that?

7 A No, I did not.

8 Q You did not know. So, did, did you confront
9 this Defendant with the allegation?

10 A I did.

11 Q Did Jasmine confront the Defendant with the
12 allegation?

13 A She did.

14 Q Where you present when the conversation
15 happened?

16 A I was.

17 Q How did it happen? Was it in person?

18 A On the phone.

19 Q It was on the phone.

20 Beg the Court indulgence. (Pause).

21 Tell me about that initial confrontation with
22 the Defendant, where JW tells him that she
23 remembers and you also confront him.

24 A When Jasmine was on the phone, she told him
25 that she remembered and --

Anna Grady - Direct Examination by Mrs. Sustakovitch

1 MR. SCALZO: Objection, Your Honor.

2 MRS. SUSTAKOVITCH: I'm sorry.

3 Were you present on the phone when this
4 happened?

5 THE COURT: Well --

6 MRS. SUSTAKOVITCH: I'm sorry. I --

7 THE COURT: You don't want me to rule on the
8 objection?

9 MRS. SUSTAKOVITCH: Go ahead. I'm sorry.

10 THE COURT: I sustain the objection.

11 MRS. SUSTAKOVITCH: Yes, sir.

12 BY MRS. SUSTAKOVITCH:

13 Q Please only testify to what the Defendant
14 said personally to you.

15 A Personally to me.

16 Q Yes. When you spoke to the Defendant on the
17 phone, what, if anything, did he say to you?

18 A He said he didn't do it. He said that if he
19 did it, then he would say that he would do it -- that
20 if he did do it, he would say that he did do it but he
21 didn't do it. I said, I asked him, I said are you
22 saying that Jasmine is lying. He said no, that's not
23 what I am saying.

24 Q JW also talked with him on the phone?

25 A She did.

1 Q After the two of you confronted him, what, if
2 any, reaction did JW have to his answers to her
3 on the phone about that she remembered?

4 A She was just crying real bad.

5 Q Had you told your husband Jeff about what
6 JW had told you?

7 A Not then, I didn't.

8 Q Did you at some point decide to tell your
9 husband Jeff?

10 A I did.

11 Q Why did you tell Jeff?

12 A I did not really know what to do. I did not
13 know how to handle it.

14 Q When you told Jeff, was JW home?

15 A No, she wasn't home when I told him.

16 Q Where was she?

17 A She was at my mom's house.

18 Q Why did you send her over there?

19 A Sometimes they go and spend the night at my
20 mom's house on the weekend.

21 Q When you talked to Jeff about the allegation,
22 what, if any, was his reaction?

23 A He was really, really sad.

24 Q Did you at some point after that decide to
25 record phone calls with his Defendant?

Anna Grady - Direct Examination by Mrs. Sustakovitch

- 1 A We did.
- 2 Q When you say "we did", you and who?
- 3 A Me and Jefferson, me and Jeff.
- 4 Q Why did y'all begin recording the phone
- 5 (calls?)
- 6 A I do not know what he was saying to her. I
- 7 (did not know. I do not know what he was saying to,
- 8 her. I had to make sure. I did not want her to still
- 9 be around him like that. I guess I just to see -- try
- 10 to get to the bottom of it. I guess to try to see what
- 11 went on, what happened.)
- 12 Q All right. How did the recordings take
- 13 place?
- 14 A The first recording, I was returning -- I
- 15 called him. He called earlier. I was returning his
- 16 phone call. Another recording, we didn't talk on the
- 17 phone. He had to call me back. It was late. Another
- 18 time, I believe he called me back and I was telling
- 19 him that she was sad and crying a lot. She was going
- 20 to need more than me. Another time, Jasmine and the
- 21 Defendant had a phone conversation.)
- 22 Q Okay. In the phone conversation with the
- 23 Defendant, were you personally on the phone for that?
- 24 A I was not.
- 25 Q I'm showing you what is marked as State's

1 Exhibit 2. Do you recognize that item?

2 A I do.

3 Q How do you recognize that item?

4 A It is a recording of the phone conversation.

5 I signed it.

6 Q Which phone conversations?

7 A The first and second one.

8 Q Between you and the Defendant?

9 A Between me and the Defendant.

10 Q Do you recognize your voice on the tape?

11 A I do.

12 Q Do you recognize the Defendant's voice on
13 this tape?

14 A I do.

15 MRS. SUSTAKOVITCH: Your Honor, at this time,
16 the State moves to introduce State's Exhibit
17 Number 2.

18 MR. SCALZO: No objection if those are just
19 the two initial phone conversations.

20 MRS. SUSTAKOVITCH: They are. The State has
21 separated the third.

22 THE COURT: There are admitted.

23 (WHEREUPON, State's Exhibit 2 is admitted into
24 the record.)

25 MRS. SUSTAKOVITCH: Your Honor, I'm going to

Anna Grady - Direct Examination by Mrs. Sustakovitch

1 play this to the best of my ability using this
2 microphone.

3 (WHEREUPON, State's Exhibit 2 is played for the
4 jury at approximately 10:51 AM.)

5 (WHEREUPON, State's Exhibit 2 concludes at
6 approximately 10:58 AM.)

7 BY MRS. SUSTAKOVITCH:

8 Q Anna, when you stated that she was crying a
9 lot, did you offer, did you talk with her about how to
10 get help for her? Did you think of counseling and that
11 type of thing?

12 A I did.

13 Q And did you get JW into counseling?

14 A Not at that moment, I didn't.

15 Q But she has been in counseling, is that
16 correct?

17 A She has been.

18 Q Is she currently in counseling?

19 A She is currently still in counseling.

20 Q I want to ask you about the phone
21 conversation you mentioned between JW and this
22 Defendant. Did that occur before or after the one we
23 just heard?

24 A That conversation occurred after our
25 conversation.

1 Q You stated you weren't on the phone when this
2 call was recorded. Where were you when this call was
3 recorded?

4 A I was sitting beside her in the living room
5 playing a game.

6 Q Playing -- I'm sorry.

7 A Playing a game.

8 Q What game were you playing?

9 A Tetris.

10 Q Playing Tetris. But you were aware that the
11 next call was recorded?

12 A I was.

13 Q How was it being recorded?

14 A Jasmine was in one room on the phone. Jeff
15 was in another room with a hand-held tape recorder.
16 He had the other phone on speakerphone. That is how
17 he recorded the phone conversation.

18 Q After this phone conversation between JW
19 and her father, did you listen to that phone
20 conversation?

21 A Yes.

22 Q Did -- I'm sorry. I think you just testified
23 Jeff was listening to it as it was happening?

24 A Yes, Jeff was.

25 Q What was Jeff reaction to what he heard on

1 the tape, excuse me, on the phone?

2 MR. SCALZO: Objection, Your Honor. I don't
3 see how his reaction is relevant.

4 MRS. SUSTAKOVITCH: Your Honor, his initial
5 reaction after listening to the phone call, I
6 think she can testify to. He is going to testify
7 as well. I can rephrase, Your Honor.

8 THE COURT: I would have to -- I would have
9 to -- if you want to come up and talk to me for a
10 second, perhaps I will, uh, --

11 (WHEREUPON, a bench conference is held off the
12 record at approximately 11:01 AM.)

13 (WHEREUPON, the bench conference concludes at
14 approximately 11:02 AM.)

15 THE COURT: Overruled.

16 BY MRS. SUSTAKOVITCH:

17 Q Anna, just very briefly. What was your
18 observation of Jeff's reaction to listening to that
19 phone call?

20 A He was just really sad. He could not believe
21 it.

22 Q All right. After the last phone call between
23 Jasmine and this Defendant, what, if anything, did you
24 decide, what did you and Jeff decide to do at that
25 point?

1 A After we taped the phone conversation?

2 Q Yes?

3 A Well --

4 Q My question is did you go to the police or
5 did you try to deal with it in the family, how did you
6 deal with this situation?

7 A Jeff talked with his dad about it, his mom
8 and his dad. I talked to my uncle and my aunt about
9 it also.

10 Q ~~What was the end result, what was your~~
11 ~~decision as far as whether to go to the police or not?~~

12 A What was my decision?

13 Q ~~(Did you go to the police or not?)~~

14 A ~~(I did.)~~

15 Q Who went with you to the police?

16 A Me and JW

17 Q You and JW

18 A Yes.

19 Q I am showing you what is marked as State's
20 Exhibit 12. Do you recognize this item?

21 A I do.

22 Q How do you recognize that? What is that?

23 A It is a small cassette tape that we recorded
24 it on.

25 Q Who recorded it on?

1 A Jeff recorded it on.

2 Q This is the cassette tape that he recorded
3 that phone conversation on?

4 A That is correct.

5 Q The conversation with JW and the
6 Defendant?

7 A Yes, that's correct.

8 Q When you went to the police, did you take
9 this with you?

10 A I did.

11 Q When you went to the police, do you recall
12 who you spoke with?

13 A Detective Bradford.

14 Q Between the time that you got this from Jeff
15 and took it to the police, did you make any
16 alterations, deletions, changes to this microcassette
17 tape?

18 A I did not.

19 Q Before you handed it to Bobby Bradford?

20 A I did not.

21 Q At the police station, did you talk to Bobby
22 Bradford about what you had learned?

23 A I did.

24 Q JW you stated, was with you, correct?

25 A She was.

1 Q Are you aware of whether JW had to have
2 a medical exam?

3 A I was aware.

4 Q Who took her for that?

5 A I went to work that day. Jeff took her that
6 day.

7 Q Jeff took her for the medical?

8 A Yes.

9 Q Did JW have what is considered an
10 interview with an interviewer that talks to kids about
11 sexual assaults?

12 A She did.

13 Q All right. Finally, since JW disclosed
14 this a little over two years ago, have you noticed any
15 change in her demeanor since she disclosed this?

16 A Yes.

17 Q What's her change?

18 A I mean, in a way, she seems like, in a way
19 she seems like she has lifted a load off of her.
20 Also, she is still sad.

21 Q Do you -- well, no questions further
22 questions. Please answer any questions defense
23 counsel has.

24 MR. SCALZO: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. SCALZO:

2 Q You described how, early on, JW was born
3 but you and Sam were not together as a couple at that
4 point?

5 A Correct.

6 Q Pretty quickly, I guess when she was about
7 two or three is when you got married to Jeff?

8 A Yes.

9 Q You described how there was shuffling back
10 and forth of visitation of JW between you and Sam
11 and as well as his family?

12 A That is correct.

13 Q You described that sometimes it did not go
14 smoothly. I think you are referring to -- and tell me
15 if I'm wrong but I think you were referring to kind of
16 the transporting back and forth for visitation?

17 A Yes.

18 Q I guess the point I am getting at is you all
19 weren't friends and all hung out together even after
20 JW was born?

21 A That is correct.

22 Q And as sometimes happens, even though you
23 weren't divorce, it was like being divorced, you had a
24 child in common. Would you agree that sometimes
25 tensions came into play over visitation and things of

1 that nature?

2 A I guess. I mean, I did not ever have a
3 problem with him coming to get her or seeing her.

4 Q All right. You testified that you did not
5 have a problem with him seeing her, is that what you
6 mean?

7 A Yeah, he could come and get her whenever he
8 wanted to.

9 Q What you were describing earlier, I think,
10 and I thought we agreed that you were having, there
11 was sometimes problems about the actual transportation
12 and stuff like that?

13 A Yes.

14 Q There was sometimes tension over that?

15 A Yeah, I guess.

16 Q If there wasn't, tell me. I'm trying to
17 understand what you meant.

18 A Either his sister came and got her or he did
19 or my mom did. So I guess there was tension when he
20 was not able to bring her back.

21 Q You are talking about in April of 2007?

22 A Not just then, any other times when he was
23 not able to bring her back.

24 Q And you said that there were times when
25 JW would go to visit Sam's mother?

1 A She would be with his sister and they would
2 go over there and see his mom.

3 Q Okay. So primarily, what you were describing
4 is she would visit with Aunt Sand or Aunt Sharon?

5 A Yes.

6 Q That is Sam's sister?

7 A Yes.

8 Q You described back in 2000 and 2001 when
9 JW was five or six years old. Those are the two
10 years, correct?

11 A Correct.

12 Q That she did go to Aunt Sand or Aunt Sharon's
13 house?

14 A Yes.

15 Q Did you know when that was during the two
16 years?

17 A Do I know when that was?

18 Q Yeah. Was it Christmas? Was it Thanksgiving?
19 Do you know when?

20 A No, just different times.

21 Q Was it a set visitation?

22 A No.

23 Q So, if JW wanted to go or how did that
24 work?

25 A I mean, if she wanted to go, she would call

1 one of them and they would try to get a ride or either
2 my mom would take her or sometimes we would take her.

3 Q Okay. The prosecutor asked you about where
4 Aunt Sand or Aunt Sharon lived. You had said that she
5 lived at, was it Pasadena?

6 A Yes.

7 Q She lived at the Pasadena house in 2001, is
8 that correct? Or the end of 2001 going into 2002, is
9 that correct?

10 A I am assuming. I assume she did.

11 Q I am asking you if you remember?

12 A At that time, yes, she did. She stayed
13 there.

14 Q All right. And she asked you about an Aunt
15 Pookie. Where did she live?

16 A She stayed a couple of streets over on Tasha
17 drive.

18 Q All right. The April -- let's kind of jump
19 forward a little bit to April of 2007. The prosecutor
20 asked you about that, that JW had gone to have a
21 visitation with Sam, is that correct?

22 A Uh-huh. That is correct.

23 Q Okay. And, at that time, Sam was dating Danni
24 who you know?

25 A That is correct.

1 Q You have known her for some years?

2 A I have known her, known of her.

3 Q Okay. And JW goes to visit and ends up
4 staying with Sam and Danni?

5 A That is correct.

6 Q What was the -- in other words, how did she
7 get there? Let's start there.

8 A They came and picked her up that weekend.

9 Q What was the plan as far as when she was
10 coming back?

11 A They were going to bring her back that
12 Sunday.

13 Q You are saying that the plan was they were
14 going to bring her back?

15 A Yes.

16 Q And is it not true that you were all going to
17 come pick her up?

18 A No. That we were going to pick her up?

19 Q Yes.

20 A If she would have said, no, mama, I don't
21 want to stay here, yes, I would have come and picked
22 her up but she said it was okay.

23 Q But she did not say that. And you are
24 talking about when you called her cause you said you
25 called her?

1 A Yeah, I talked to her.

2 Q Before we get to that part, what I'm asking
3 is wasn't it the plan that you would eventually come
4 and pick her up?

5 A No, that wasn't the plan.

6 Q When she stays beyond what you said when she
7 was supposed to stay, you said that -- let me make
8 sure I get it right. You said she stayed longer than
9 she was supposed to, right?

10 A That is correct.

11 Q And then her school was switched by Sam?

12 A Yes.

13 Q You said that you were upset by it?

14 A Yes.

15 Q Y'all did not go out there to pick her up?

16 A No.

17 Q It was not a situation where you showed up at
18 Sam's door and said bring her out?

19 A That is correct.

20 Q And, she was staying there, it is April.
21 Schools switched, right?

22 A Right.

23 Q You talked to Sam about this, the switching
24 of the school?

25 A No, I did not. Well, he told me that he

1 already switched the school, that he enrolled her at
2 Grove Elementary.

3 Q Isn't it true that he told you because he
4 thought y'all didn't come back to pick her up in
5 enough time to get her back to the school she was
6 going?

7 A When he didn't bring her Sunday, he said he
8 was going to bring her Monday in time for school and
9 he didn't. I just got a phone call saying he switched
10 her school.

11 Q You are saying you did not have a
12 conversation with him about him saying y'all did not
13 come to pick her up and it's taking too long and she
14 needs to go to school?

15 A He might have said y'all didn't pick her up.
16 I don't know but it was him that was supposed to bring
17 her back.

18 Q I understand that. My question is, isn't it
19 true that you had a conversation with him where he
20 says --

21 MRS. SUSTAKOVITCH: Your Honor, objection.
22 This is hearsay where he is trying to testify for
23 the Defendant.

24 THE COURT: Overruled. The question is just
25 whether or not -- at this point, is just whether

1 or not a conversation occurred.

2 MRS. SUSTAKOVITCH: I thought he was --

3 THE COURT: Overruled.

4 MRS. SUSTAKOVITCH: Thank you.

5 BY MR. SCALZO:

6 Q My question is, is it in fact true that you
7 had a conversation between you and Sam where he is
8 saying y'all did not come pick her up, --

9 A No.

10 Q -- she had to change school?

11 A Yes, he said y'all didn't pick her up so I
12 transferred her to another school.

13 Q Okay. That is what I was trying to get clear.
14 Then it is -- is it in May or June when she has to go
15 in to the hospital for her appendix?

16 A It was May.

17 Q So she in school still, the school that Sam
18 had put her in?

19 A Uh-huh. That is correct.

20 Q Sam gets her to the hospital. He is involved
21 in her being in the hospital at that point?

22 A Yes.

23 Q You obviously learned about her being in the
24 hospital and then came over to see her in the
25 hospital, isn't that correct?

1 A That is right.

2 Q She is there for how long?

3 A I'm not sure. Maybe a week. Four or five
4 days. I'm not sure.

5 Q Then she is released. When she is ready to
6 be released, the plan was that she would go with you?

7 A Yes. I decided to take her back with me.

8 Q Isn't it true that Sam, at that point, he
9 said that he wanted to --

10 MRS. SUSTAKOVITCH: Objection, Your Honor.

11 THE WITNESS: No, he did not.

12 MRS. SUSTAKOVITCH: Objection, it is hearsay.
13 He is testifying for his client. He is stating
14 statements that this Defendant, he is saying,
15 said which the State not -- can we approach
16 briefly?

17 THE COURT: Yes.

18 MRS. SUSTAKOVITCH: Thank you.

19 (WHEREUPON, a bench conference is held off the
20 record at approximately 11:17 AM.)

21 (WHEREUPON, the bench conference concludes at
22 approximately 11:18 AM.)

23 THE COURT: Sustained.

24 BY MR. SCALZO:

25 Q Isn't it true that there was a disagreement

1 -- we are back to the hospital and JW is being
2 released as far as where we are in time. Okay?

3 A Okay.

4 Q Isn't it, in fact true that there was a
5 disagreement about which one of you wanted JW to
6 come stay and come live with?

7 A No, that was not the disagreement.

8 Q You are saying from your side there was no
9 disagreement?

10 A No, he never mentioned to me that he wanted
11 to take her after she left the hospital.

12 Q Okay. The book that the prosecutor showed
13 you, State's 6 that you said that you remember, the
14 one about the secrets, you remember that?

15 A I do.

16 Q You said you checked that out of the library?

17 A I did.

18 Q That was you that checked it out?

19 A Yes.

20 Q That was when?

21 A Sometime in July.

22 Q You think it was sometime in July?

23 A Yes, I'm thinking sometime in July?

24 Q You thought it was a good book for your
25 younger daughter. You weren't getting it for JW

1 A No, JW was not there at the time. She
2 was either over at Sand's house or over at the
3 Defendant's house. I got it for my younger daughter
4 and my niece.

5 Q All right. How old are they? They are
6 younger than JW

7 A Yes, they are much younger. She is five
8 years younger than JW My niece is -- well, I
9 guess it doesn't matter. But they are --

10 Q Okay. They are younger?

11 A Yes, they are younger.

12 Q The book, when you are taking the book out of
13 the library, it was clear to you what the book was
14 about, correct?

15 A Yes.

16 Q The book does not explicitly say, does not
17 say this is about abuse or sexual abuse or child
18 abuse. You would understand that that is what the
19 book is about?

20 A Yes.

21 Q You also described that at the point -- let's
22 talk about the timing. I am not sure you talked about
23 when the disclosure that we've been talking about
24 occurred. When is it that you had this conversation
25 with JW about her claiming that Sam did this to

1 her?

2 A It was in August.

3 Q You are saying it was in August?

4 A Yes.

5 Q It was not in June or July?

6 A No.

7 Q When you had that conversation, you also
8 described that you wanted her to confront him about
9 it?

10 A Yes.

11 Q Is that right?

12 A Yes.

13 Q At the point at which he calls the house on
14 this phone conversation that they had, the one that is
15 not recorded, that is the one I'm talking about, okay?

16 A Okay.

17 Q That was Sam calling the house. He does not
18 know about the disclosure, is that correct, as far as
19 you knew?

20 A As far as I know, I don't know that JW
21 had said anything to him then.

22 Q Okay.

23 A I am not sure if he called or she called.

24 Q Okay.

25 A I can't remember.

1 Q You are aware of the phone ringing or them
2 being on the phone together?

3 A I am aware of them being on the phone
4 together. Yes.

5 Q Was this an instruction to JW or did you
6 just allow it to happen as far as her confronting Sam
7 about what she claimed happened?

8 A Could you say that one more time?

9 Q Sorry. Basically I am asking did you tell
10 her confront your dad or did you allow it to just
11 happen that they talked about it?

12 A Told her that she needed to let him know that
13 she remembers.

14 **THE COURT:** Mr. Scalzo, let's take a short
15 break.

16 Ladies and Gentlemen, we going to take a
17 short break. I'm going to ask you to step back
18 into the jury room for a few minutes and we will
19 have you back out here you shortly.

20 (WHEREUPON, the jury exit at approximately 11:22
21 AM.)

22 **THE COURT:** All right. We will take a short
23 break.

24 Ma'am, you can go to the restroom but you can
25 not talk to anybody about your testimony, okay?

1 **THE WITNESS:** Okay.

2 (WHEREUPON, a recess is taken at approximately
3 11:23 AM.)

4 (WHEREUPON, the Court resumes at approximately
5 11:39 AM.)

6 **THE COURT:** All right. Bring the jury in.

7 (WHEREUPON, the jury enter at approximately
8 11:40 AM.)

9 **CROSS-EXAMINATION (con't)**

10 **BY MR. SCALZO:**

11 **Q** Mrs. Grady, I think we were talking about the
12 phone conversation between JW and Sam that was
13 recorded. Let's kind of get back on that topic for a
14 little bit.

15 **A** Okay.

16 **Q** You described for -- I am sorry, it has been
17 a while. We actually were talking about the very
18 first conversation where she confronted Sam. You had
19 said that -- I was trying to find out did you permit
20 her to call him or did you tell her to confront him,
21 do you remember that?

22 **A** I told her she needs to let him know.

23 **Q** Okay. And you said you can not remember
24 whether he called or whether she called him?

25 **A** Yes.

1 Q All right. Let's talk about that conversation
2 for a minute. You were involved in the conversation
3 at some point, is that right?

4 A That is correct.

5 Q You did not start the conversation. The
6 conversation started out between JW and Sam.

7 A That is correct.

8 Q You are listening or standing next to her?
9 Where are you?

10 A I am sitting down right beside her.

11 Q Do you hear both sides of the conversation or
12 just hers?

13 A I hear both sides of the conversation.

14 Q At this point, in letting her speak, you
15 wanted her to confront him?

16 A Yes.

17 Q In that conversation, he denies the
18 allegation that she makes to him, isn't that right?

19 A That is correct.

20 Q Eventually in that conversation, he gets
21 upset about the allegation?

22 A Yes, I would say so.

23 Q Eventually you get on the phone with him?

24 A He did not seem upset when he was talking to

25 JW

1 Q He did not?

2 A It did not seem like he got upset.

3 Q Okay. But eventually, he get on the phone
4 with you?

5 A Yes.

6 Q Was he upset during your conversation?

7 A I guess he may have been -- you can call it
8 stress. I don't know. He was not like --

9 Q Did you have an argument?

10 A No, we didn't.

11 Q So you are talking on the phone and he is
12 saying again to you that he denied the allegation,
13 correct?

14 A Yes, he is saying that he denied the
15 allegations.

16 Q Isn't it true that he ends up getting off the
17 phone, like, I got to get off the phone now, I can't
18 talk anymore?

19 A I am thinking he got off --

20 Q Cause he was upset. You don't know if he was
21 frustrated, angry or what but he was upset and wanted
22 to get off the phone, isn't that true?

23 A He wanted to get off the phone.

24 Q The phone conversation that we heard the
25 recording of just a little while ago -- there was two

1 -- one where you tried to call and you did not
2 actually talk to him, right?

3 A Right.

4 Q Another phone conversation. It was kind of
5 short but you ended up talking to Sam?

6 A Yes.

7 Q You were listening to that. You remember
8 that?

9 A Yes.

10 Q In your discussion in the conversation with
11 Sam, you were, I guess, trying to convey to him some
12 information about her being upset about the situation.
13 Isn't that fair to say?

14 A Yes. I was telling how she felt.

15 Q Okay. Your observations of what you were
16 seeing in her?

17 A Yes.

18 Q Isn't it true -- we heard but tell me if you
19 heard it the same way. But he said in the tape "I know
20 your opinion". You remember that phrase in the tape?

21 A Yes.

22 Q He was talking about you?

23 A Yes.

24 Q And your opinions were about this subject,
25 isn't that correct, of how you took it in that

1 conversation?

2 A That is how I took it in the conversation.

3 Q He also said that he was not saying he was
4 guilty of anything in the conversation?

5 A Yes. That is what he said.

6 Q Essentially, he is saying, look, I don't want
7 to fight with you about this issue, right? He said I
8 don't want to fight with you about it?

9 A He said he did not want to fight about it.

10 Q Okay. He is also telling you, look, if
11 JW wants to call me, that is okay. And if she
12 does not want to call me, that is okay. I don't want
13 to fight about it?

14 A Yes.

15 Q Now, let's move on. Now, there is a couple of
16 days between the phone conversation between JW
17 and Sam where she first makes the allegation and then
18 these other conversations that are recorded, isn't
19 that right?

20 A Say that again.

21 Q You have the first conversation between
22 JW and Sam where she makes the allegation and he
23 denies it?

24 A Correct.

25 Q That one is not recorded?

1 A No, that one is not recorded.

2 Q The other conversations that are recorded
3 come after that, a couple of days after that, is that
4 right?

5 A It may have -- maybe a couple of days, maybe
6 the next day.

7 Q Okay. In the conversation that is recorded,
8 the one that we have not heard yet, you describe how
9 you end up speaking with your husband Jeff about the
10 allegation?

11 A Yes.

12 Q I think you said we decided we were going to
13 tape record the conversations?

14 A Yes.

15 Q Am I right about that?

16 A Yes, we decided together. We discussed it
17 and decided.

18 Q That was not the first time -- let me say it
19 this way. Let's not -- we are not talking about this
20 incident about the phone calls right now. There have
21 been other times when you and Jeff have either
22 recorded a conversation between JW and Sam or
23 listened in on the conversation, is that not true?

24 A That's not true.

25 Q That's not true. You never listened in on

1 the conversation or Jeff?

2 A No. Not except the time when I told her to
3 confront him. I sat beside her. I could hear some of
4 what he was saying. But whenever he called her in the
5 past, I don't be on the other line trying to see what
6 he was saying.

7 Q I'm not saying every day.

8 A No, it's not recorded. We have not recorded
9 their conversations before then?

10 Q You are saying you never recorded a
11 conversation or listened to a conversation before?

12 A Not with the Defendant and JW Before
13 that, no.

14 Q Jeff never came in on a conversation between
15 JW and Sam before, either picked up the line or
16 recorded to your knowledge?

17 A No, he has not.

18 Q Okay.

19 A Not before that.

20 Q You, uh, said that when you decided to record
21 the conversation, your purpose in recording the
22 conversation was to find out what happened? Let me
23 see if I got the quote right.

24 A I just didn't, I didn't know what he was
25 saying to her. She had confronted him. I did not

1 know what he was saying or what he was going to be
2 saying to her afterwards.

3 Q All right. The first conversation, you said
4 you could hear. The one that was not recorded, you
5 were sitting next to her. You said you could hear
6 that, right?

7 A I could hear some of the conversation. Not
8 the whole conversation, just when he was really loud
9 on the phone.

10 Q All right.

11 A Or she was taking the phone away because she
12 was crying so much.

13 Q Okay. You also said one of the reasons why
14 you were recording is you did not want him to be
15 around her?

16 A If he -- I do not want him to be around
17 her --

18 Q Okay.

19 A -- if he did that to her.

20 Q Okay. In the conversation that is recorded
21 between JW and Sam, it was not the situation
22 that, you never told JW don't call Sam after the
23 first confrontation about the allegation. You didn't
24 say to her don't call him on the phone and don't take
25 the phone call?

1 A No, I did not say that.

2 Q It was not as if Sam called or she called Sam
3 and you don't know the conversation was going to take
4 place or you wanted to record it to make sure of what
5 had happened, correct?

6 A Say that one more time.

7 Q The situation was not that they were talking
8 to each other on the phone without your knowledge and
9 you could not stop her from calling him or him from
10 calling her so you needed to record it to see what
11 they were talking about.

12 A No, that wasn't the case. No, that wasn't the
13 case.

14 Q Okay. You describe that you're sitting
15 there. During this conversation, you were sitting next
16 to JW

17 A Which conversation?

18 Q The recorded one?

19 A Yes, I was sitting beside her.

20 Q You said you were playing Tetris?

21 A Yes, I was.

22 Q You spoke with, uh, -- DSS ended up having an
23 investigation after you went to the police and some
24 time went on. DSS eventually had an investigation.

25 A Yes.

1 Q You ended up speaking to DSS workers, social
2 workers or caseworkers?

3 A That is right.

4 Q You ended up telling them that you asked your
5 children monthly about whether or not someone had
6 touched them?

7 A Not monthly. Just every once in a while, I
8 would ask them.

9 Q So if the caseworker have written down that
10 you had asked monthly if anyone touched them, that is
11 not what you would have said or that is what you said?

12 A Maybe I said monthly. It doesn't seem like
13 every month I asked them. Just every now and then if
14 I feel like they might. I don't know. It just depends.

15 Q Okay. What I am trying to understand from
16 that statement is you were doing that before this all
17 came up?

18 A Yes, I was.

19 Q Okay. And when the prosecutor was asking you
20 questions early on, you said something about -- where
21 is it? She was asking you before JW had ever made
22 the allegation that you had never, I think your
23 testimony was that you never thought that Sam had done
24 this?

25 A No.

1 Q Then you said something about having a dream
2 that someone might have done something to JW

3 A Yes.

4 Q Am I right? I want to try to understand.

5 A Yes, you are right. I did.

6 Q And when you talked about the book. You said
7 you were getting the book, not for JW but for
8 the, uh, --

9 A My niece and my younger daughter.

10 Q Your niece and her younger daughter. Okay.

11 A Uh-huh.

12 Q All right. Uh, you talked about with the
13 prosecutor that JW would visit Sam's family,
14 other members of his family, not only Sharon or Aunt
15 Sand, correct?

16 A Yes.

17 Q She had, in her lifetime, had been around
18 Sam's mother?

19 A Yes.

20 Q Father and all of his sisters?

21 A Yes.

22 Q All right. Spent time not just like we come
23 over to visit. Might have even spent overnight or
24 weekend with other members of the family besides
25 Sharon?

1 A Mainly his sister, mainly his other sister,
2 Pookie.

3 Q Okay. What about mom, dad or anyone else?

4 A I'm not sure about his mom. His dad, I'm not
5 really sure.

6 Q Do you remember telling the DSS worker that
7 Sam had left JW at times with Sam's father?

8 A Yes, I do remember that. That's when I
9 called Samuel up or called the Defendant up and told
10 him that I would just come and get her because I did
11 not want him leaving her with his dad.

12 Q Okay. Were there any other members of the
13 family? Did we cover everybody in the family?

14 A I guess. I am assuming. There is his --

15 Q I just want to -- I'm just making sure I
16 covered everybody in the family that you can think of.
17 It's okay?

18 A Yeah.

19 Q I just want to make sure we are on the same
20 page. Bear with me one moment. I'm sorry. (Pause).

21 That is all that I have right now, Judge.

22 MRS. SUSTAKOVITCH: Just a few follow-up
23 questions.

24 REDIRECT EXAMINATION

25 BY MRS. SUSTAKOVITCH:

1 Q Uh, Mrs. Grady, defense counsel just asked
2 you about this Defendant's father. You stated when
3 you found out that JW had been left with his
4 father, you said I'm picking her up. Why was that?

5 A Because I knew that the Defendant's father
6 had -- that he had issues with him when he was growing
7 up.

8 Q Did you have knowledge that the Defendant's
9 father, according to the Defendant had sexually
10 assaulted him?

11 A Yes, I did.

12 MR. SCALZO: Objection, Your Honor. It is
13 leading as well as I have a prior motion.

14 THE COURT: Uh, overruled.

15 MRS. SUSTAKOVITCH: Thank you, Your Honor.

16 BY MRS. SUSTAKOVITCH:

17 Q So when you found out that JW had been
18 left with this Defendant's father and you had this
19 personal knowledge that he had, according to the
20 Defendant, sexually assaulted him, you wanted JW
21 home, correct?

22 A Correct.

23 Q Going back to this book, you stated that you
24 would ask your kids periodically if anybody assaulted
25 them. Isn't it a fact that you too were a victim of

1 sexual abuse?

2 A I was. I was not able to come to my mom and
3 talk to her about it. That's why wanted my kids to be
4 able to come and talk to me about it. That's why
5 would ask them periodically.

6 Q So what had happened to you played into you
7 getting the book and wanting to make sure that your
8 children were protected, is that correct?

9 A That is correct.

10 Q Just to follow up. As far as the time that
11 JW was born to when this allegation came out, had
12 you and this Defendant ever been to Family Court to
13 have some official custody agreement set in place?

14 A No, no custody agreement.

15 Q Isn't a fact that JW stayed primarily
16 with you, is that correct?

17 A That is correct.

18 Q And your testimony was that you allowed him
19 to see her whenever he wanted?

20 A That is correct.

21 MR. SCALZO: Judge, can I have some recross?

22 THE COURT: Sure.

23 **RECROSS-EXAMINATION**

24 BY MR. SCALZO:

25 Q Prosecutor just asked you about yourself

1 being a victim of sexual assault?

2 A That is correct.

3 Q Let me ask you this. In talking about it, we
4 talked about you having asked your children and you
5 said periodically, it may not have been monthly but
6 periodically about potentially having been touched.
7 You wanted to have this open conversation or line of
8 communication. Is that what you're saying?

9 A Yes. I wanted them to just be able to know
10 that if something ever happened to them, if someone
11 physically abused them or sexually abused them, they
12 could always come to me and talk to me about it.

13 Q Okay. At what age did you start having these
14 conversations or try to open up this line of
15 communication?

16 A Maybe since they were about three, when they
17 can talk. Maybe younger, I'm not sure.

18 Q Would that apply to all of your children
19 including JW

20 A All of my kids.

21 Q Okay.

22 A All of them.

23 Q Okay. They had never said anything during
24 your questioning or tried to open up that line of
25 communication up until JW makes this allegation

1 in 2007. They never said anything? Or let's talk
2 about JW never said anything?

3 A Not true.

4 Q Not true?

5 A Not true.

6 Q She said something before?

7 A She might have told me that her cousin might
8 had said something or she was using the bathroom and
9 her cousin opened the door on her or something like
10 that.

11 Q Okay.

12 A Before then, no. It was -- no.

13 Q Nothing like the type of allegation she made
14 against her father?

15 A No.

16 Q Okay.

17 That is all, Judge. Thank you.

18 THE COURT: All right. Ma'am, you can step
19 down.

20 THE WITNESS: Thank you.

21 MRS. SUSTAKOVITCH: Your Honor, the State
22 calls Lieutenant Mike Peterson.

23 MICHAEL PETERSON,
24 is first duly sworn and then testifies as follow:
25 THE CLERK: Would you please state your

1 full name for the record.

2 THE WITNESS: Michael Peterson.

3 THE CLERK: Thank you.

4 DIRECT EXAMINATION

5 BY MRS. SUSTAKOVITCH:

6 Q Good afternoon, Lieutenant Peterson. Where
7 are you employed?

8 A Greenville County Department of Public
9 Safety.

10 Q What is your position in there?

11 A I am actually the Lieutenant over the Crime
12 Scene Unit which is the forensic division which is a
13 part of the Department of Public Safety.

14 Q Did you become involved in this case in some
15 manner?

16 A Yes, I did.

17 Q How did you come involved? What was your
18 involvement?

19 A I was asked to evaluate a microcassette tape
20 for possible audio enhancement and to also make some
21 CDs.

22 Q To make some CDs?

23 A CDs.

24 Q To make some copies.

25 A CDs of the recordings.

1 Q All right. Showing you what is marked as
2 State's Exhibit 12, 1 and 2. Would you first look at
3 State's Exhibit 12. Do you recognize that item?

4 A Yes.

5 Q How do you recognize that item?

6 A My initials are on it.

7 Q All right.

8 A And the case number.

9 Q Where did you get that item from?

10 A I got it from Property and Evidence.

11 Q What is that item to your knowledge?

12 A This is a microcassette audiotape.

13 Q What is contained on the audiotape?

14 A What I have found on here was a series of
15 phone conversations.

16 Q All right. Were you requested to transfer
17 those to a CD format?

18 A Yes, I was.

19 Q For purposes to hear them in court, is that
20 correct?

21 A That is correct.

22 Q How do you go about taking what's on that
23 microcassette tape and putting them on -- let me show
24 you first State's Exhibit 2 and State's Exhibit 1. Do
25 you recognize these items?

1 A Yes, I do.

2 Q First, State's Exhibit two, what is that?

3 A This is a CD containing two phone calls that
4 I extracted from the audiotape. My initials are
5 there.

6 Q Were you requested to put this on a CD for
7 Court purposes?

8 A Yes, I was.

9 Q Showing you State's Exhibit 1. You recognize
10 that item?

11 A Yes, I do.

12 Q What is that?

13 A That is another phone conversation that was
14 extracted from the audiotape of a phone conversation.

15 Q When you were asked to make it a dub or a
16 copy, how did you go about taking this microcassette
17 tape and putting, I guess, two phone calls on this and
18 the other phone call on this, how do you go about
19 doing that?

20 A We have what is called a video analyst
21 system. The video analyst system also does audio
22 work. What we do is we take analog sound or analog
23 video and we digitize it. We just save it into a
24 computer. Once we get it into digital format, we can
25 do enhancements and things of that nature as well as

1 record CDs.

2 Q Once you put what was, the contents, I
3 believe you stated three phone calls or so on this.

4 A Yes..

5 Q Once you put it into the video enhancer, did
6 you then listen and determine whether you needed to
7 enhance or whether you could enhance the calls at all?

8 A There was some indication that there may be
9 some audio problems with it. But once I digitized it
10 and was able to listen to it, I did not feel like
11 anything needed to be done with it except to create a
12 CD.

13 Q This is the best that you could get it, is
14 that correct?

15 A I did nothing to it.

16 Q Then, to clarify, you recorded -- did you
17 record the first two conversations onto this CD?

18 A Yes, I did.

19 Q Did you make any changes or deletions or
20 alterations to what is on this State's Exhibit 12
21 microcassette to what is on State's Exhibit 2?

22 A No, I did not.

23 Q As to State's Exhibit 1, the one phone call,
24 did you make any changes, deletions, alterations from
25 what is on the microcassette to what is State's

1 Exhibit 1 for court purposes?

2 A No.

3 Q All right. I have no further questions.

4 MR. SCALZO: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. SCALZO:

7 Q Just quickly, you did not do any analysis of
8 it, sounds like what you were saying?

9 A Analysis?

10 Q You described that the machine could do,
11 enhancements or I'm guessing it could do a lot more
12 than just a copy?

13 A Yes.

14 Q What you are saying is you did not analyze
15 the actual mini cassette to see if anything had been
16 done to it?

17 A No.

18 Q Okay. You just said here is the mini
19 cassette, let me digitize what is on there and take a
20 look at what I get?

21 A That is correct.

22 Q When you take a look at what you got, you
23 determined you did not need to hear it, did not do
24 anything to it?

25 A That is correct.

1 Q You took that and just copied it off to CDs?

2 A Yes.

3 Q That is all that I have.

4 MRS. SUSTAKOVITCH: Nothing further, Your
5 Honor.

6 THE COURT: You can step down, sir.

7 MRS. SUSTAKOVITCH: Beg the Court indulgence
8 for one second, Your Honor. (Pause).

9 The State calls Jeff Grady.

10 JEFF GRADY,

11 is first duly sworn and then testifies as follow:

12 THE CLERK: Thank you. You may be seated.

13 Would you please state your name for the record?

14 THE WITNESS: Jefferson Grady.

15 DIRECT EXAMINATION

16 BY MRS. SUSTAKOVITCH:

17 Q Good afternoon, Mr. Grady. How are you
18 related to JW

19 A She is my stepdaughter.

20 Q How are you related to Anna Grady?

21 A She is my wife.

22 Q What did you first meet Anna?

23 A In 19, uh, I think '98.

24 Q How long you been married?

25 A 11, uh, 10 and a half years.

1 Q Around what age was JW when you guys
2 first got married?

3 A She was 2.

4 Q Can you relate to the Court what your
5 relationship has been with JW as your
6 stepdaughter?

7 A She is my daughter.

8 Q All right. In relation to this Defendant,
9 Samuel Whitner, what have you considered his
10 relationship with JW

11 A That is her daddy.

12 Q Did you ever have an issue with the fact that
13 this was JW biological father?

14 A No.

15 Q Can you describe for the jury -- from the
16 time JW was around 2, you stated you got married.
17 Give the jury some background on your relationship
18 with this Defendant Samuel Whitner? How did it go
19 those years?

20 A I knew nothing of him until after I got
21 married to my wife. It was up-and-down. It was not
22 always good. It was not always bad. I just tried to
23 stay out of the way. I didn't try to neglect him
24 seeing his daughter or try to get in his way of him
25 seeing his daughter.

1 Q You said you did not try to get in the way of
2 him seeing his daughter?

3 A Yes.

4 Q Can you just explain a little further on
5 that?

6 A We always had confrontation about it. He
7 would say that he is her real daddy. I wasn't trying
8 to take his daughter away from him or anything like
9 that. That was his daughter. I just tried to stay
10 out of the way as best I could and still be there for
11 her best I could. Like I said, that is my daughter.
12 She would say she has two daddies.

13 Q It was like she had two daddies?

14 A Yeah.

15 Q You said it would be times that it would be
16 up-and-down. What parts would be up and down? When
17 would you have issues with the Defendant?

18 A If you didn't do what say, he would kind of
19 get upset if he could not control the situation. If
20 he said bring her down there, when I said no, it
21 should go both ways, he would get upset or, you know,
22 kind of get mad and start cussing me and stuff. He
23 not no bad person. I'm not trying to make him out
24 like that. It was not always good with us. I just
25 tried to keep my peace about it.

1 Q Talk to me about did JW to your
2 knowledge, have relations with this Defendant's side
3 of the family, any members on his side of the family?

4 A Yeah, her Aunt Sand.

5 Q Her aunt what?

6 A Her Aunt Sand.

7 Q Who was her Aunt Sand again?

8 A Sharon.

9 Q All right.

10 A She love her Aunt Sand. She do. She go to
11 Aunt Sand before she go to her own daddy. Sand picked
12 her up a lot. That's all. I knew of his side of the
13 family that I thought cared about her.

14 Q You thought -- I'm sorry?

15 A I said, on that side of the family, I thought
16 Sand was really the only one that I thought cared
17 about her even more than her daddy.

18 Q You felt like Aunt Sand's relationship with
19 her, they were tight, is that correct?

20 A Yeah. They was -- that was all she talked
21 about.

22 Q To your knowledge, does JW still love
23 her?

24 A Oh, yeah. She miss them.

25 Q To your knowledge, does she still love her

1 father?

2 **A:** Oh, yeah. She do.

3 **Q:** I want to take you back to the years between
4 2000 and 2002. Back then, did JW have contact
5 with the Defendant, her father?

6 **A:** Yes, she did.

7 **Q:** How would she see him from what you can
8 remember?

9 **A:** Either we would take her down there or he
10 would come and pick her up. Mostly, like I said, Sand
11 would come and get her.

12 **Q:** Do you recall where Sand lived?

13 **A:** Yes. In, uh, -- down by, uh, -- it's in
14 District 25. That is what they called it. I know
15 where it is but -- Pasadena Avenue.

16 **Q:** All right. Between those years of 2000 and
17 2002, up until JW disclosed this abuse, did you
18 have any clue that she had been sexually assaulted?

19 **A:** None.

20 **MR. SCALZO:** Objection, it assumes facts not
21 in evidence.

22 **MRS. SUSTAKOVITCH:** It is his personal
23 knowledge of whether he had any evidence that
24 this occurred.

25 **THE COURT:** Overruled.

1 MRS. SUSTAKOVITCH: Thank you, Your Honor.

2 BY MRS. SUSTAKOVITCH:

3 Q When did you find out --

4 THE COURT: Well --

5 MRS. SUSTAKOVITCH: I'm sorry, Your Honor.

6 THE COURT: Go ahead.

7 BY MRS. SUSTAKOVITCH:

8 Q Mr. Grady, when did you find out the
9 allegation that JW had been sexually assaulted?

10 A In August 2007.

11 Q Who told you about what happened to JW
12 those years before?

13 A My wife.

14 Q Did JW ever personally come to you and
15 tell you?

16 A No.

17 Q It was from your wife that you found this
18 out. Can you describe to the jury your just gut
19 reaction once you heard that JW had been sexually
20 abused?

21 MR. SCALZO: Objection, Your Honor, his
22 reaction is irrelevant.

23 MRS. SUSTAKOVITCH: What was --

24 THE COURT: Repeat the question.

25 BY MRS. SUSTAKOVITCH:

1 Q When you found out this information, what was
2 your reaction to it?

3 A I was very mad.

4 Q I'm sorry. You said you were very mad.
5 Anything else?

6 A I was, uh, hurt by the situation.

7 Q You were mad and hurt by the situation. Were
8 you aware that this Defendant had denied to JW
9 that he had done anything to her and to your wife?

10 A Yes, I was.

11 Q Based on this information, did you decide to
12 start recording phone calls with -- did you decide to
13 start recording phone calls that came in and out of
14 your house?

15 A I did.

16 Q I'm sorry?

17 A Between her and him, I did.

18 Q Did Anna take any part in making that
19 decision?

20 A She did.

21 Q Why did you and Anna think, why did you think
22 it was important to start recording the phone calls?

23 A Because I was not going to let my daughter go
24 down that ride of something like that if I can help
25 it. I was wanting to see what was going on and get

1 everything in place to make the right decision. It was
2 not to get back at him or none of that stuff. I just
3 wanted to see as a father, as a parent, what to do.
4 Never been in that situation before. I kind of wanted
5 to say she was dreaming.

6 Q You wanted to say she was dreaming?

7 A Yeah.

8 Q All right. Go ahead. All right. So when you
9 made the decision with Anna to start recording these
10 calls, it's your testimony that you were hoping it
11 wasn't true, is that correct?

12 A Yes.

13 Q Tell me how that, logistically, you guys went
14 about trying to record the phone calls in and out of
15 the house?

16 A We had two phones. One was a cordless phone.
17 One was a regular phone. JW was on the phone. I
18 was on another phone in a different room recording the
19 conversation. I was just trying to make a good
20 decision with what I had. Not just by what she said
21 or what I heard from my wife. Tried give him a fair
22 chance. I did not want to respond wrong. That's why
23 I decided I wanted to do that to make sure I was
24 making the right choice. Then when I heard it, I did
25 not expect hear all of that stuff. When I heard it, I

1 almost didn't respond right.

2 Q You said you heard the phone call between
3 your daughter and this Defendant, you almost didn't
4 respond right. What does that mean?

5 A I had to call my mom and my dad versus, boom,
6 what I felt right then which wouldn't have been right.
7 He probably wouldn't even be here.

8 Q You are saying you had to contact your mom
9 and dad versus what you were feeling which would not
10 have been right. Your initial feeling was to go do
11 what?

12 A Confront him period.

13 Q All right. But this was after you heard the
14 phone call between the Defendant and your daughter?

15 A Yep.

16 Q After speaking with your parents though and
17 getting advice on the matter, what did you decide to
18 do?

19 A I did what they wanted me to do. After I got
20 calmed down and them talking to me about what was
21 right for the whole situation, I'm here for her. We
22 are here right now because I want to do what was right
23 for her, not for me.

24 Q What was the decision at that point?

25 A I told Anna to just go to the police and let

1 them handle it because I can't, It hurt me. How
2 could I protect her from him?

3 Q I'm showing you what is marked as State's
4 Exhibit 12, Mr. Grady and State's Exhibit 1. Do you
5 recognize State's Exhibit 12?

6 A I do.

7 Q What is State's Exhibit 12?

8 A It is a mini cassette.

9 Q Where is that mini cassette from?

10 A My mini cassette recorder.

11 Q Could you just scoot up a little bit. It is
12 from where?

13 A My mini cassette recorder.

14 Q What is on this tape?

15 A A conversation I recorded.

16 Q Between who?

17 A Man and JW and Anna.

18 Q Between Man and JW and Anna and Man.

19 When you say "Man"?

20 A Samuel.

21 Q Is Man a nickname for --

22 A Yes.

23 Q That is his nickname. So I believe you
24 explained to the jury but just to clarify for me, Anna
25 was not in the room with you when you recorded this,

1 correct?

2 A She wasn't.

3 Q She what?

4 A She wasn't.

5 Q You were where?

6 A Yes, I was.

7 Q No, where were you when this was recorded?

8 A In another room. In the bedroom.

9 Q Were you on the phone listening as the
10 Defendant was talking to JW

11 A I was.

12 Q Is this audiocassette the phone call between
13 the two of them?

14 A It is.

15 Q And the phone call between your wife and the
16 Defendant, correct?

17 A Correct.

18 Q Did you -- when you took this out of your
19 recorder, did you alter it, delete anything, change
20 anything on this when you handed on this
21 microcassette?

22 A No, I didn't.

23 Q After you heard the phone call between the
24 Defendant and JW who did you give this -- when
25 you decided to go to the police, who did you give this

1 cassette tape to?

2 A Anna.

3 Q To who?

4 A Anna.

5 Q Showing you State's Exhibit 1, do you
6 recognize that item?

7 A I do.

8 Q How you recognize it?

9 A My signature is on it.

10 Q Have you listened to this?

11 A I have.

12 Q What this?

13 A The same thing that is on here.

14 Q What phone conversation is on that?

15 A The conversation between JW and Man.

16 Q Do you recognize the voices on the tape?

17 A I do.

18 Q Is there anything that's been changed from
19 this microcassette as you listen to it in that bedroom
20 to this dub?

21 A No.

22 Q I have no further questions.

23 CROSS-EXAMINATION

24 BY MR. SCALZO:

25 Q Mr. Grady, you describe some confrontations

1 before this allegation comes out. You talk about some
2 confrontations that you had with Sam before, is that
3 right?

4 A I did not describe any confrontation. I just
5 said that we weren't cool sometimes. I would not call
6 it confrontations. That's not what I would call
7 confrontation.

8 Q Maybe I misunderstood. You said that -- let
9 me see if I got it.

10 A When you say confrontation, what do you mean?

11 Q I'm trying to understand what you said. Let
12 me get to my notes on what I heard you say. You said
13 there was a point, I guess you were describing an
14 incident where you and he talked and he said something
15 to the affect that he was her real daddy. Do you
16 remember describing that?

17 A Yeah, but that was not a confrontation. That
18 is what I heard from her. I did not hear that from
19 him. That came from him. He was getting on her about
20 that. She would come and tell me. She was about six
21 or seven years old, maybe younger. I don't remember
22 but she came to me one time and was like, he said you
23 not my real daddy. I did not confront him about that.
24 That was no confrontation. That was something she
25 said. He planted it in her head. He said that for

1 about two years.

2 Q When the prosecutor was asking you questions
3 and you were describing, I guess I thought you were
4 describing a confrontation but you are saying I was
5 incorrect about that. The statement he was her real
6 daddy, you are saying that is not what you heard. You
7 are saying that's what JW said to you that he
8 said?

9 A Yes.

10 Q Okay. But then you also is talked about the
11 Defendant being upset about visitation. I think you
12 said sometimes he would cuss or get upset?

13 A It was not just about visitation. He was
14 controlling. If I did not do what he wanted me to do,
15 that is what one of the confrontations was. He wanted
16 me to bring her down there. I told her we couldn't.
17 He got upset about it and started fussing and cussing.
18 Once you get me past a certain point, I thought he was
19 being disrespectful to me, cussing me out. So it went
20 from him not getting her down there to now he started
21 being disrespectful to me. That is when I started
22 having my wife talk with him. I was not going to take
23 none of that stuff.

24 Q This is something that took place on the
25 phone?

1 A Yes.

2 Q Between you and him?

3 A Yeah.

4 Q This is before any of these allegations that
5 we are here on today?

6 A This is years before that. This is an up-
7 and-down thing. This is not like it just happened.
8 This was all the time.

9 Q So in fact there were some, you just use the
10 word confrontation. I want to make sure we on the
11 same page.

12 A A confrontation is when a person comes
13 directly to me about a situation. He came directly to
14 me by cussing me out because I would not do what he
15 asked me to do. So yes, to me, that is a
16 confrontation when he came directly to me or I would
17 come directly to him. That is confronting a
18 situation, yes, sir.

19 Q Let's talk about -- well, let me ask. In that
20 conversation that we were just talking about when you
21 said he came to you and you said this was on the
22 phone, right?

23 A Yes.

24 Q Did it start out a phone call between you and
25 Sam or between Sam and JW

1 A I don't remember. I try to forget stuff like
2 that to be honest. I can't tell you. I don't
3 remember.

4 Q All right. Jumping forward to talking about
5 the decision to make the recording of the
6 conversations.

7 A Yes.

8 Q You said that -- actually the prosecutor
9 asked you about recorded conversations that came to
10 the house. You just said you just wanted to record
11 conversations between JW and Sam?

12 A I did.

13 Q Okay.

14 A That was the core of the situation that
15 happened right then. It was not like I was recording
16 everybody that we talked to. I wanted to know what
17 was going on. I did not want to talk to him at that
18 point. I felt like I would have been assuming versus
19 trying to get all of the facts straight. Honestly, I
20 thought it was a dream. I did not want to believe it.

21 Q You did not tell and I'm assuming also Anna
22 didn't tell JW that you were going to record the
23 conversation?

24 A No.

25 Q Then you described that you went into another

1 room?

2 A Yes.

3 Q Part of that was so that JW would not
4 see you recording the conversation?

5 A No, that wasn't the reason.

6 Q Okay.

7 A I just decided to go in another room --

8 Q Okay.

9 A -- because it was quieter.

10 Q All right. And you had access to a phone in
11 that room to make the recording?

12 A We had a cordless phone. It could go either
13 way.

14 Q Okay. Was it part of the plan that Anna would
15 sit next to her?

16 A No.

17 Q That is just how it happened?

18 A That is just how it happened.

19 Q So, you are recording the conversation. Have
20 you ever instructed JW -- I'm talking about after
21 you found out about the allegation. That is what we
22 are talking about now. After you learned about that,
23 have you ever instructed JW Do not have a
24 conversation with your dad, Don't get on the phone
25 with your dad anymore?

1 A Honestly, I didn't know what I was thinking.
2 I did not tell her nothing. I did not say nothing to
3 her.

4 Q Okay. So you never instructed her not to have
5 a phone conversation with her dad?

6 A I did not say nothing.

7 Q All right. Now when your wife tells you
8 about the allegation, you understood at the time that
9 she is telling you that JW made this allegation,
10 that JW actually said this a couple of days
11 before?

12 A No, I think she told me, I found out, I
13 think, that Friday. I think it happened that
14 Thursday. I was at work. She couldn't tell me. I
15 work second shift. When I got home, it was the next
16 day. I got off at 12:00. I came home. She did not
17 say anything to me. She told me the next day when I
18 woke up the next day, during the evening.

19 It is not like we waited a day or two or two
20 or three days or something like that. She told me the
21 following day that it happened. I guess what you're
22 trying to say is that she waited a couple of days.
23 She told me, from what I could understand, the very
24 next day.

25 Q That's not what I'm trying to say. I'm just

1 trying to find out what happened. My understanding
2 from what you just said is that you learned about it
3 the next day before you went to work. It sounded like
4 you said before you went to work?

5 A Yeah.

6 Q Okay. You were at work on Thursday when Anna
7 found out, right?

8 A I guess.

9 Q You came home, right?

10 A She told me that Friday. She told me Friday.

11 Q Right.

12 A That is when she told me.

13 Q It was after you came home from work and
14 before you went back to work?

15 A I did not go back to work the next day.

16 Q Oh, okay. All right. I'm sorry. Uh, you
17 described making the recording, were you going to the
18 police at that point or after you got the recording?

19 A I was not going to go to the police.

20 Q Okay. You are talking about, with the
21 prosecutor, JW visiting Sharon, Aunt Sharon, Aunt
22 Sand. You said she had lived on Pasadena. Do you
23 remember that?

24 A I do.

25 Q The prosecutor asked you between the years

1 2000 and 2002 that was what -- do you remember that as
2 the timeframe?

3 A Yes, that is what she said.

4 Q Okay. You are aware that it is December of
5 2001 when Sharon actually moves into the Pasadena
6 address, isn't that correct?

7 A I'm not aware. I did not know -- I'm not
8 good with dates. I can't tell you when. I just know
9 what she stated.

10 Q Okay.

11 A It was between those years.

12 Q Say that again?

13 A Between those ages. When JW was between
14 five or six.

15 Q Okay. Your memory of Pasadena Avenue, had
16 you gone there or you just know that is the address?

17 A I have gone there. I have taken JW
18 there.

19 Q Okay. So you actually went to that location
20 in terms of transporting JW to Sharon's house?

21 A Yes.

22 Q At Pasadena?

23 A Yes.

24 Q During the period of 2000 to 2002, you said
25 you don't know if during 2000 it was at Pasadena?

1 A What are you saying?

2 Q I'm trying to understand if you remember
3 whether or not you were taking her to Pasadena in
4 2000, 2001 or 2002. Do you remember?

5 A Between those years of her being five and
6 six, I remember taking her to Pasadena because I had a
7 '64 Coupe Deville, uh, '64 Impala that I parked in her
8 driveway that almost didn't fit. I got lost trying to
9 find Pasadena. That is the only way I remember the
10 Pasadena address.

11 Q All right. Okay. We are talking about five
12 or six years old, 2000 to 2002. That is what you just
13 said. Am I understanding you correctly?

14 A Yes.

15 Q All right. One moment, judge. (Pause).

16 That is all that I have right now, Judge.

17 MRS. SUSTAKOVITCH: Very quickly on redirect.

18 REDIRECT EXAMINATION

19 BY MRS. SUSTAKOVITCH:

20 Q You stated you were hurt and sad when you
21 found this out, correct, Mr. Grady?

22 A Yes.

23 Q Bottom line question for you is were you any
24 part of colluding with your daughter to make up some
25 allegation like this against this Defendant?

1 **A** No, ma'am.

2 **Q** Were you and Anna, in your recording of this
3 phone conversation, in any part of some big plan to
4 make up an allegation of sexual abuse?

5 **A** No, ma'am. My daughter does not lie.

6 **MR. SCALZO:** Objection, Your Honor.
7 Credibility.

8 **THE COURT:** Sustained.

9 **MRS. SUSTAKOVITCH:** That is fine. I was not
10 trying to go there. I have nothing further.

11 **MR. SCALZO:** I would ask that you offer
12 instruction to the jury.

13 **THE COURT:** Ladies and Gentlemen, the last
14 portion of that answer is inadmissible. It is
15 not something that you can consider. I instruct
16 you to disregard it.

17 **MRS. SUSTAKOVITCH:** Thank you, Your Honor.

18 **MR. SCALZO:** Thank you, Your Honor.

19 **MRS. SUSTAKOVITCH:** I have nothing further.

20 **MR. SCALZO:** I don't have any recross.

21 **THE COURT:** All right. Sir, you can step
22 down.

23 Ladies and Gentlemen, we're going to break
24 for lunch. I would like to you to be back in the
25 courtroom at 1:45. We will see you at that time.

1 I'm sorry, did I say courtroom? I meant jury
2 room. Be back in the jury room at 1:45.
3 Hopefully, you will be back in the courtroom at
4 1:45.

5 (WHEREUPON, the jury exit at approximately
6 12:33 PM.)

7 MRS. SUSTAKOVITCH: Your Honor, I apologize.
8 That last question I did not expect that.

9 THE COURT: I understand. Here. I want you
10 to come up here and read the second -- you have a
11 rule book there?

12 MR. SCALZO: I have one.

13 THE COURT: Y'all both read the second
14 sentence of Rule 43(i).

15 MR. SCALZO: Of criminal procedure?

16 THE COURT: Rules of Civil Procedure. Even
17 though this is not a civil case, it is a
18 principle that is applicable to this case. I
19 will see y'all after lunch.

20 (WHEREUPON, a recess is taken at approximately
21 12:34 PM.)

22 (WHEREUPON, the Court resumes at approximately
23 1:45 PM.)

24 THE COURT: I don't even know what self-
25 serving hearsay is. I'm sorry.

1 **MRS. SUSTAKOVITCH:** Essentially, my argument
2 is that if they are elicited through Bobby
3 Bradford, the Defendant has no need to explain
4 them and that that is part of his defense is that
5 we would have to put that in for him in our case-
6 in-chief.

7 **THE COURT:** You just decide if you are
8 putting it in or not.

9 **MRS. SUSTAKOVITCH:** I guess my question was I
10 object on the ground that they are hearsay --

11 **THE COURT:** You object to your own evidence?

12 **MRS. SUSTAKOVITCH:** Perhaps I'm not explaining
13 it right.

14 **THE COURT:** You've got a statement that
15 the Defendant made.

16 **MRS. SUSTAKOVITCH:** Yes, sir.

17 **THE COURT:** It's your case. You have the
18 floor. You are putting in evidence as you see
19 fit. If you want to put it in, put it in. If you
20 don't, then you don't have to. You're, you're,
21 uh, trying to, uh, think too far ahead. Just put
22 it in if you want to put it in. If you don't,
23 don't. Don't worry about it. If he tries to put
24 it in and is successful, don't worry about.

25 **MRS. SUSTAKOVITCH:** That's what I wanted.

1 **THE COURT:** It's not that big a deal. You
2 can't do like that though. I don't know if you
3 are a football fan. But you can't ask the
4 football coach on the other side of the field
5 what types of plays he plans to run in the forth
6 quarter so you can decide how to design your
7 strategy for the first quarter. You can't do
8 that. It doesn't work that way.

9 Bring in the jury.

10 (WHEREUPON, the jury enters at approximately
11 1:47 P.M.)

12 **THE COURT:** Call your next witness.

13 **MRS. SUSTAKOVITCH:** Thank you, Your Honor. The
14 State calls Detective Bobby Bradford.

15 **BOBBY BRADFORD,**
16 is first duly sworn and then testifies as follow:

17 **THE CLERK:** Would you please state your
18 name for the record.

19 **THE WITNESS:** Thank you. Uh, Robert
20 Bradford.

21 **THE CLERK:** Thank you.

22 **DIRECT EXAMINATION**

23 **BY MRS. SUSTAKOVITCH:**

24 Q Good afternoon, Detective.

25 A Good afternoon.

1 Q Where are you employed?

2 A Greenville Police Department.

3 Q What is your position with the Greenville
4 Police Department?

5 A I am a juvenile detective.

6 Q In your position as a juvenile detective, do
7 you have occasion to investigate juvenile sex crimes?

8 A Yes, ma'am. I do.

9 Q How long have you been with the Greenville
10 Police Department?

11 A Over 22 years.

12 Q How long have you been investigating
13 juveniles? Crimes against juveniles rather.

14 A Since 1994.

15 Q Can you give the jury an idea of how sex
16 crime cases come to you as a detective?

17 A Yes, ma'am. Several different ways. Referred
18 by other agencies such as the Department of Social
19 Services. It comes sometimes in a school setting when
20 the schools will report parents, like in this
21 instance, will report. And sometimes on occasion, the
22 victim will report directly themselves.

23 Q And are you familiar with a man by the name
24 of Samuel Lamont Whitner?

25 A Yes, ma'am.

1 Q How did you come in contact with him?

2 A On August 6th of 2007, Mrs. Anna Grady and
3 her daughter JW came to the Law Enforcement
4 Center to make a report of Criminal Sexual Conduct.

5 Q And when Anna Grady came to the Law
6 Enforcement Center, did you speak with the mother?

7 A I did.

8 Q Without stating the name, if she gave you
9 one, did she indicate to you that her daughter had
10 been sexually assaulted?

11 A Yes.

12 Q Did you speak specifically with the child at
13 that point?

14 A No, I did not.

15 Q What did you do in reference to the child and
16 getting a statement from her?

17 A I did not want to speak to the child so she
18 would not have to tell the story over and over again.
19 I made an appointment and referred her to the Child
20 Advocacy Center on White Horse Road, Rape Crisis and
21 Child Abuse Center.

22 Q Why did you refer her over there?

23 A They have professional interviewers and the
24 fact that she may be more comfortable speaking to a
25 female besides me and that the conversations and the

1 interviews are recorded on DVD.

2 Q Did you go, did you view the -- what is the
3 interview called that this victim --

4 A Forensic interview.

5 Q In your capacity as investigating officer,
6 did you observe that?

7 A I did.

8 Q Can you relay the time or time frames that
9 the victim stated the abuse took place?

10 MR. SCALZO: Objection, Your Honor.

11 MRS. SUSTAKOVITCH: This is limited to time
12 and place, Your Honor.

13 THE COURT: Did you read the rule I gave you?

14 MRS. SUSTAKOVITCH: Yes, sir.

15 THE COURT: Repeat the question please.

16 MRS. SUSTAKOVITCH: I'm sorry. Did the
17 victim state the time frame that the abuse took
18 place?

19 THE WITNESS: Uh, yes, ma'am.

20 THE COURT: What is the objection?

21 MR. SCALZO: I said objection to hearsay.

22 THE COURT: Is a yes or no question? Just
23 answer the question yes or no.

24 THE WITNESS: Yes.

25 BY MRS. SUSTAKOVITCH:

1 Q What time frame did she state?

2 MR. SCALZO: Objection.

3 THE COURT: Overruled.

4 MRS. SUSTAKOVITCH: Thank you, Your Honor.

5 BY MRS. SUSTAKOVITCH:

6 Q Go ahead.

7 A Between the ages of five and six.

8 Q Did she state the place or places where the
9 abuse took place?

10 A Yes, ma'am. She did.

11 Q Where did she state?

12 A [REDACTED].

13 Q In the course of your investigation, did you
14 find out who, during that time frame, when the child
15 was five or six, who lived over at Pasadena Avenue?

16 A Yes, ma'am.

17 Q Who lived there?

18 A It was the child's, uh, aunt.

19 Q Do you know what her name is?

20 A Sandra. Sandra, I believe.

21 Q Okay.

22 A She was the sister of the Defendant.

23 Q Would it surprise you if it was Sharon?

24 A Sharon.

25 Q All right. She is what relation to the

1 Defendant?

2 A She is his sister.

3 Q I want to show you one thing. You have a
4 copy of your report up there with you?

5 A No, ma'am.

6 Q All right.

7 BY MRS. SUSTAKOVITCH:

8 Q I'm going to show you what is marked as
9 State's Exhibit 14. Do you recognize this top page?

10 A Yes, ma'am.

11 Q What is that?

12 A That is the initial report. We call it a Code
13 5.

14 Q I want to clarify one thing. When I looked at
15 the incident date, it is stating 7/1/03 to 9/1/03.

16 A Yes, ma'am.

17 Q Again, did you ever get that from the victim
18 in this case?

19 A No, ma'am.

20 Q Did you ever speak specifically with the
21 victim about when this occurred?

22 A No, ma'am.

23 Q Where did you get that?

24 A That was the date that Mrs. Grady and, I
25 guess, Mrs. Grady and I came up with. In retrospect,

1 I should have, I guess, done a time line.

2 Q By that, did you ever go back and look at
3 when the child was born and then look at on a timeline
4 when she actually was five years old and six years
5 old?

6 A No, I did not do that at the time.

7 Q Is that something, in your law enforcement
8 capacity, you, in hindsight, should have done?

9 A I should have done that.

10 Q All right. I want to show you what is marked
11 as State's Exhibit 12. Do you recognize that item?

12 A Yes, ma'am. I do.

13 Q How do you recognize that item?

14 A It has my initials and the case number.

15 Q What do you recognize that item to be?

16 A It's the mini cassette that was given to me
17 by Mrs. Grady.

18 Q Given to you by whom?

19 A Mrs. Grady.

20 Q Mrs. Grady.

21 A Uh-huh.

22 Q And where were you given that microcassette?

23 A At the Law Enforcement Center.

24 Q When she reported with the child, correct?

25 A Yes.

1 Q I'm showing you what is marked as State's
2 Exhibit 2 first, well, 2 and 1. Do you recognize
3 these items?

4 A Yes, ma'am. I do.

5 Q What do you recognize State's Exhibit 2 to
6 be?

7 A It is a recording of the first two phone
8 calls.

9 Q What do you recognize State's Exhibit 1 to
10 be?

11 A A recording of the conversation between the
12 Defendant and the victim.

13 Q When you received the microcassette, did you
14 have an interaction with Lieutenant Peterson to dub
15 these onto these two CDs for court playing purposes?

16 A Yes, ma'am.

17 Q Did you go over with Lieutenant Peterson when
18 he was doing this?

19 A Yes, ma'am. I did talk to him about it.

20 Q You have listened to this microcassette?

21 A Yes, ma'am.

22 Q Is what is on the microcassette a true and
23 accurate representation of what has been dubbed onto
24 State's 2 and State's 1?

25 A Yes, ma'am.

1 Q Have there been any alterations, changes,
2 deletions from what you listened to on this tape to
3 what is on these two tapes?

4 A No, ma'am.

5 Q Did you speak with the Defendant related to
6 the allegation?

7 A Yes, I did.

8 Q Where did you speak with him?

9 A In my office.

10 Q Where is that located?

11 A At the Law Enforcement Center.

12 Q And did you advised him of his rights?

13 A Yes, I did.

14 Q Showing you what is marked as State's Exhibit
15 9. Do you recognize that item?

16 A Yes, ma'am.

17 Q What is that item?

18 A It is a Waiver of Rights form.

19 Q What is the purpose of a Waiver of Rights
20 form?

21 A The form has your rights on it so you know
22 what your rights are. Your Miranda rights to remain
23 silent if you choose to do so and things of that
24 nature and to see an attorney.

25 Q All right.

1 A Talk to us or not talk to us.

2 Q All right. Do you see any identifying marks
3 on that that show you that that's what you used with
4 this Defendant?

5 A Yes, ma'am.

6 Q What do you see?

7 A I asked the Defendant to initial by each one
8 of these sentences by the word coercion and he signed
9 Samuel Whitner.

10 Q Can you describe the room that the interview
11 took place in?

12 A Yes, ma'am. It is just an average room just
13 like the rest of the rooms in the Law Enforcement
14 Center, a couple of desks, chairs for myself and my
15 partner to sit in and chairs for others to sit in as
16 well.

17 Q At the time you talked with Mr. Whitner, was
18 there anybody else in the room with you?

19 A No, ma'am.

20 Q Was he denied any comforts or restroom or
21 anything when you spoke to him?

22 A No, ma'am.

23 Q Was he handcuffed or anything when you spoke
24 to him?

25 A Not when I spoke with him, no.

1 Q What did you advise him, what rights did you
2 advise him of reading from form?

3 A From the form -- I always read from the form.
4 Before I ask, I ask the individual questions. I ask
5 him his age, what his educational level is and if he
6 can read and comprehend. Mr. Whitner said that he
7 could. It goes on, before we ask you any questions,
8 you must understand your rights. You have the right to
9 remain silent. Anything you say can be used against
10 you in court. You have a right to talk to a lawyer
11 for advice before we ask you any questions and to have
12 him with you during questioning.

13 If you have no money to pay a lawyer's fee,
14 the Court will appoint one to represent you without
15 cost if you wish. If you decide to answer questions
16 now without a lawyer present, you will still have the
17 right to stop answering at any time. You also have
18 the right to stop answering at any time until you talk
19 to an attorney or lawyer.

20 Below that is the waiver of rights. It reads
21 I have read the statement of my rights. I understand
22 what my rights are. I am willing to make a statement
23 and answer questions. I do not want a lawyer at this
24 time. I understand and know what I am doing. No
25 promises or threats have been made to me and no

1 pressure or coercion of any kind has been used against
2 me.

3 Q In your opinion, did he understand his rights
4 when you spoke to him?

5 A Yes, ma'am.

6 Q At that point, did he give you a statement in
7 this case oral or written?

8 A It was oral.

9 Q What, if anything, did he tell you?

10 A After signing the waiver of rights and Mr.
11 Whitner agreeing that he would talk to me, Mr. Whitner
12 asked me what was on the recording, the microcassette.

13 Q What you had on the recording?

14 A Yes, what we had on the recording.

15 Q All right.

16 A At that time, I asked Mr. Whitner a question,
17 what he meant when he said on the recording that I
18 wasn't in my, when I did what I did I was not in my
19 right mind. That's when he was talking to the victim.

20 MR. SCALZO: Your Honor, I'm going to object
21 on previous grounds that we discussed about that
22 statement.

23 THE COURT: Overruled.

24 THE WITNESS: Mr. Whitner replied at some
25 point shortly after that, he was not talking

1 about, he was talking about something else that
2 had happened and that he was not talking about
3 anything sexual. It may be a few more exchanges
4 between us. Shortly after that, Mr. Whitner
5 expressed that he would like to see an attorney
6 before he said anything else.

7 **MRS. SUSTAKOVITCH:** Okay. All right.

8 **MR. SCALZO:** Objection, Your Honor. Can we
9 approach?

10 **THE COURT:** Sustained.

11 Ladies and Gentlemen, that portion of the
12 conversation has absolutely nothing, absolutely
13 nothing to do with your task in determining
14 whether or not the State has proven the elements
15 of this crime beyond a reasonable doubt. I
16 instruct you to completely disregard that last
17 portion of that answer.

18 **MRS. SUSTAKOVITCH:** Thank you, Judge.

19 **BY MRS. SUSTAKOVITCH:**

20 **Q** Detective Bradford, I'm showing you what was
21 marked as State's Exhibit 14. Just for clarification,
22 would you review that document. I want to be clear
23 about the question that you asked the Defendant.

24 **A** Yes, ma'am. (Reading).

25 Yes, ma'am.

1 **Q** For clarity, can you describe, what your --
2 after he asked you what was on the tape, what you had,
3 what did you ask him again?

4 **MR. SCALZO:** Objection, Your Honor. This has
5 been asked and answered.

6 **THE COURT:** Repeat the question please.

7 **MRS. SUSTAKOVITCH:** I asked him to review his
8 report. I believe what he just testified, he
9 left out part of his question to the Defendant.
10 And I was refreshing his recollection and asking
11 him to review.

12 **THE COURT:** Sustained.

13 **MRS. SUSTAKOVITCH:** Thank you, Judge.

14 **THE WITNESS:** Uh, --

15 **THE COURT:** Sustained. She'll ask you a new
16 question.

17 **BY MRS. SUSTAKOVITCH:**

18 **Q** So after the Defendant -- you asked him what
19 he meant on the tape when he said what he said. He
20 told you that you didn't have the whole conversation?

21 **A** Yes, ma'am. I failed to mention that he did
22 tell me that did not have the whole conversation and
23 that Mrs. Grady had only given me what she wanted me
24 to hear.

25 **Q** Were you able at this point to tell him that

1 you had the entire conversation between the child and
2 this Defendant?

3 A No, I was not.

4 Q All right. At that point, your conversation
5 was ended, correct?

6 A Yes, ma'am.

7 Q Did you refer the victim for a medical exam
8 in this case?

9 A I believe I did.

10 Q Where did she go for that?

11 A The Child Advocacy Center.

12 Q Do you know which doctor did it?

13 A I believe it was Dr. Nancy Henderson.

14 Q In a case like this, what was the purpose of
15 sending her over there?

16 A Well, for a check to make sure that she is
17 okay, does not have any disease or any evidence of a
18 crime that we might be able to find with the machinery
19 that they have and the doctor's experience. They are
20 trained in certain types of medical exams.

21 Q With the disclosure in this case though,
22 essentially, I believe you just stated the exam was
23 for health benefits, is that correct?

24 A Yes.

25 Q I have no further questions.

1 MR. SCALZO: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. SCALZO:

4 Q Mr. Bradford, the prosecutor talked to you
5 about the dates that you had on your report?

6 A Yes, sir.

7 Q And those dates were also reflected on a
8 warrant that you drafted to bring the charge?

9 A I believe so.

10 Q You carried those over into your warrant.
11 The dates being basically 2003, just a couple of
12 months into 2003 is what you had to put down?

13 A Right.

14 Q You indicated that you put that down because
15 as a result of a conversation you had with Ms. Grady,
16 Anna?

17 A Right.

18 Q And from what I heard of your description of
19 your involvement in the investigation, it sounds to me
20 like what you're saying is when they come in to make
21 the report initially, you then make some referrals of
22 some other places where they needed to go, correct?

23 A In a lot of incidences but not in every case.

24 Q Right. But in this case, you made the
25 referral to go see Dr. Henderson?

1 A To the Child Advocacy Center.

2 Q Also consequently -- is it Mrs. Carlberg who
3 did the forensic interview?

4 A Yes, sir.

5 Q Okay. And you took a statement from Mrs.
6 Grady, right?

7 A Yes, sir.

8 Q That was taken the same day that the report
9 was made?

10 A Yes, sir.

11 Q I am assuming this is before you made the
12 referral for them to go to the other places?

13 A Probably so. I saw Mrs. Grady in the
14 afternoon. I probably made the referral the next day.

15 Q Okay. Then, as far as your involvement, you
16 got -- your report kind of spans a couple of different
17 days when the events happened, correct?

18 A Yes, sir.

19 Q You start with your first page of your
20 report. It looks like it is August -- it says August
21 7th but didn't they come to you August 6th?

22 A It was August 6th.

23 Q Okay. Of 2007?

24 A Right.

25 Q You wrote your first report saying they came

1 to see me and made this allegation?

2 A Yes.

3 Q Then different things happened over some days
4 but September 19th of 2007, the report you are
5 referring to when the prosecutor asked you some
6 questions is about when he was arrested for the charge
7 and then you have that conversation about some of
8 these statements?

9 A Yes, sir.

10 Q That were just testified to?

11 A Yes, sir.

12 Q Okay. And I believe it is September 10th when
13 you go and get that DVD from the Rape Crisis Center
14 about the forensic interview?

15 A I guess so.

16 Q Do you have that part of your report? Would
17 that sound about right in terms of the time frame?

18 A I don't have that particular -- I don't have
19 that in front of me. I don't dispute that.

20 Q It happened and it was in September?

21 A Yes, sir.

22 Q There is nothing controversial about that,
23 right?

24 A Right.

25 Q Those are things that you did from the time

1 that it was reported through some of the things that
2 JW ended up going on the interviews, collecting
3 some of the evidence and then meeting with Samuel?

4 A Yes.

5 Q Those are some of the things that you did?

6 A Yes.

7 Q Now, in your investigation of this case, you
8 did not -- let me ask this way. When did you realize
9 that the dates were wrong?

10 A The dates on the initial report?

11 Q Yeah. The date that you had incorrectly put
12 on the dates of 2003 that the prosecutor was asking
13 you about.

14 A I probably did not realize it until I had
15 spoken to the prosecutor.

16 Q Okay. As far as your investigation or your
17 personal role in the investigation in this case, did
18 you ever come up with or develop any evidence
19 regarding a timeframe that is more specific than 2000
20 and 2002 -- to 2002?

21 A No, sir.

22 Q In fact, in this case, 2002 is the endpoint,
23 not into 2003, right? That is your understanding of
24 the allegations?

25 A December 2002.

1 Q Okay. The prosecutor asked you about the
2 conversation you had with Sam. You went over the
3 giving of the Miranda rights and so forth?

4 A Yes, sir.

5 Q It's at the end of that conversation that you
6 indicate to him or you begin to actually ask questions
7 about any subjects, right?

8 A Repeat that please.

9 Q When you go through the Miranda information,
10 you are not asking him questions about what happened
11 or what didn't happen about the actual allegation?

12 A No. I'm reading his rights.

13 Q You're just going through the rights?

14 A Right.

15 Q When you're done with the rights, you begin
16 to try to have a conversation with him?

17 A Right, he agrees that he wants to talk.

18 Q And is at that point that you're indicated to
19 him to have got some kind of tape?

20 A I did ask him about what he said on tape.

21 Q Okay. When the prosecutor asked you did you
22 have the whole conversation -- I think that was the
23 question she had for you.

24 A I had the whole conversation of the tape that
25 was given to me.

1 Q Right. As far as you understood, you believed
2 you had a conversation on tape, right?

3 A Yes.

4 Q You were not a party to the conversation.

5 A No.

6 Q You don't know from personal knowledge
7 whether it was the whole conversation but that's what
8 you believed?

9 A That's what I believed.

10 Q You did not ever convey any of that to Sam?

11 A Right.

12 Q You just said you had a tape.

13 A Right.

14 Q And then you asked him that very specific
15 question about what he meant by something that was on
16 the tape?

17 A That is correct.

18 Q And obviously, you didn't play the whole tape
19 for him at that point?

20 A I don't think I played any of it.

21 Q You do not discuss anything other than that
22 specific question?

23 A Correct.

24 Q Then he did not want to talk anymore?

25 A Right.

1 **Q** Okay.

2 That is all that I have for now, Judge.

3 **MRS. SUSTAKOVITCH:** Your Honor, may we
4 briefly approach?

5 **THE COURT:** You may.

6 (WHEREUPON, a bench conference is held off the
7 record at approximately 2:10 PM.)

8 (WHEREUPON, the bench conference concludes at
9 approximately 2:11 PM.)

10 **MRS. SUSTAKOVITCH:** Nothing further, Your
11 Honor.

12 **THE COURT:** You can step down, sir.

13 **THE WITNESS:** Thank you, Your Honor.

14 **MRS. SUSTAKOVITCH:** The State calls Dr. Nancy
15 Henderson.

16 **NANCY HENDERSON,**
17 is first duly sworn and then testifies as follow:

18 **DIRECT EXAMINATION**

19 **BY MRS. SUSTAKOVITCH:**

20 **Q** Good afternoon, Dr. Henderson?

21 **A** Afternoon.

22 **Q** What is your occupation?

23 **A** I'm a Pediatrician.

24 **Q** Where are you employed as a Pediatrician?

25 **A** Greenville Hospital System.

1 Q In your position as a Pediatrician, can you
2 explain your work experience at the present time?

3 A Yes, I am Director at the Department of Child
4 Abuse and Neglect at the Greenville Hospital System.
5 I am involved with, uh, seeing children at both the
6 Advocacy Center in Spartanburg as well as the Advocacy
7 Center here evaluating children for abuse and neglect.

8 I'm involved with treating medical students
9 and the residents in this area of abuse and neglect.
10 I also am involved with inpatient referrals and
11 consults when children are being admitted when there
12 are concerns about abuse and neglect for an evaluation
13 in regard to that. I am also involved one afternoon a
14 week, I'm in the General Pediatric Clinic again
15 involved with teaching residents and medical students
16 in the general area of pediatrics.

17 Q Can you tell us about the licenses and board
18 certifications? I think we touched on them. What
19 licenses you have and board certifications?

20 A I completed my medical school. I did a three-
21 year pediatric residency. I am board-certified in
22 general pediatrics. I'm also sub-boarded in
23 adolescent medicine. There is not a specific sub-board
24 in the area of child abuse and neglect. Actually,
25 that board will be next week which I am planning on

1 taking for the first time that is being offered as a
2 subspecialty board and license here in the State of
3 South Carolina.

4 Q In the specific area though of sexual assault
5 and abuse, can you describe your training in that?

6 A As I said, I'm going to be taking this exam
7 in the sub-board of abuse and neglect. To sit for
8 this exam, you have to have at least five years of
9 training in this area, 50 percent of your pediatric
10 care has to be involved in the area of abuse and
11 neglect with ongoing continuing medical education in
12 this area. This will be a 10-year certification which
13 has be renewed every 10 years.

14 Q Have you testified in the courts of this
15 state in the area of pediatrics and child sexual
16 abuse?

17 A Yes, I have.

18 Q How many times have you testified?

19 A I am asked to come to court probably about 30
20 to 40 times a year and maybe actually come to court
21 about two-thirds of those times.

22 Q Over the course of your practice, any
23 estimate on how many times you testified?

24 A I do not keep track of that. I have been in
25 South Carolina since 1992. I've been doing this

1 primarily as my main career probably since 1994..

2 Q Have you been qualified as an expert in the
3 courts of this State?

4 A Yes, I have.

5 Q In the area of pediatrics and child sexual
6 assault?

7 A Yes, I have.

8 MRS. SUSTAKOVITCH: Your Honor, at this time,
9 the State moves to introduce Dr. Henderson as an
10 expert in the area of pediatrics and child sexual
11 abuse.

12 MR. SCALZO: No objection, Judge.

13 THE COURT: She is admitted. She is qualified.

14 BY MRS. SUSTAKOVITCH:

15 Q Did you perform an evaluation on JW
16 Whitner, the child involved in this case?

17 A Yes, I did.

18 Q And when did you perform that exam, Doctor?

19 A The 30th of August, 1997 -- 2007, excuse me.

20 Q How did this child get referred to you?

21 A This patient was referred by law enforcement
22 for an evaluation.

23 Q How old was JW when you saw her?

24 A She was 11.

25 Q Are there different kinds of sexual assault

1 exams depending on what the allegation is, the
2 disclosure is? Can you tell the jury about that?

3 A There are two main kinds of exams. One is
4 considered an acute exam when the abuse has happened
5 within the first 72 hours. The child or adolescent
6 discloses it just happened and often those exams are
7 referred to the emergency room for evaluation because
8 of the concern about obtaining DNA and doing what they
9 call a rape kit.

10 When the disclosures occur after that 72
11 hours, it is considered more of a chronic evaluation
12 because of the likelihood of obtaining any type of DNA
13 information really falls off. It really falls off
14 after about 24 hours. But really, the likelihood of
15 finding anything doing the actual rape kit is really
16 diminished. They just can come to the actual Advocacy
17 Center for evaluation.

18 Q Does it make a difference -- naturally, the
19 disclosure and what the medical history is is going to
20 determine whether you are going to expect to have
21 findings in the report, correct?

22 A Well, the medical history is always important
23 for so many reasons in evaluating children in this
24 area. Certainly, that does give some insight into
25 what we may find on examination.

1 Q If the allegation is -- in your practice, if
2 the allegation is vaginal penile intercourse, you're
3 going to be doing a different exam than if it is oral
4 sex, correct?

5 A The actual exam itself is really the same
6 because when we evaluate children for any kind of
7 abuse, we really want to do a complete head-to-toe
8 evaluation. We may not know all the allegations or
9 the initial allegations. It may turn out not to be
10 the complete allegation. When we do an evaluation, we
11 want to make sure that we are not missing anything.

12 The actual medical part of that, the actual
13 physical exam is pretty consistent from patient to
14 patient. We do, I do change what kind of test I might
15 do as far as looking for sexually transmitted diseases
16 and things like that based on the history that is
17 provided by the patient.

18 Q I guess I'm not being clear enough. In a
19 situation where the history that is provided of the
20 assault in each case, that determines what kind of
21 tests you are going to run for sexually transmitted
22 diseases and that type of thing when you have oral sex
23 versus vaginal penile intercourse, correct?

24 A Yes, that really does have an impact on what
25 kind of tests that I may do and the information that

1 is obtained during the actual physical exam that may
2 lead me to one way or the other to decide if there are
3 additional test that do need to be done based on any
4 kind of medical findings.

5 Q If the allegation does not involve vaginal
6 penile intercourse, you still do a pelvic exam?

7 A I always look at the genital area, yes,
8 ma'am.

9 Q And why do you do that?

10 A As I mentioned before, sometimes the initial
11 allegations may not be exactly what happened. There
12 maybe more information forthcoming. Often children
13 don't feel comfortable sharing everything maybe at the
14 time that I'm seeing them. They may not feel
15 comfortable talking about those things. So we try to
16 do the exam in a very child friendly environment that
17 the child does well. They often have a lot of concerns
18 about their body. So the exam provides a lot of
19 information for themselves and the family. I think
20 the complete exam is always very important.

21 Q From a health standpoint, you recommend doing
22 that?

23 A From every standpoint. I think it is
24 important when we evaluate children to make sure that
25 we are looking at all of their needs from top-to-

1 bottom and head-to-toe.

2 Q Did you perform a pelvic exam, a full exam on
3 JW

4 A Yes, I did.

5 Q Did JW relay to you the allegations of
6 the sexual assault?

7 A Yes. As part of these exams, I try to talk
8 to the children, adolescent by themselves to again get
9 an understanding of what's happened, any concerns they
10 may have, any symptoms they are having and what
11 worries they might be having about their body.

12 Q Without stating any name if she gave you one,
13 did she indicate that she had been the victim of
14 sexual assault?

15 A Yes, she did.

16 Q Did she indicate to you the time frame that,
17 the time or times that this would've happened in her
18 life?

19 A She did.

20 Q When was that?

21 A She said when she was five or six.

22 Q Did she report to you the place or places
23 that the assault took place?

24 A She told me it was during a visit.

25 Q Do you remember her telling you where?

1 A I don't have a location. I do have a person
2 that she said she was visiting.

3 Q Who was that?

4 A She said it was her aunt.

5 Q Can you describe JW demeanor when you
6 conducted the exam?

7 A She was very forthcoming during the history
8 as she kind of detailed what had happened. During the
9 exam, the actual genital exam -- like I mentioned, I
10 do a complete head-to-toe physical exam during the
11 genital exam. She did become tearful.

12 MR. SCALZO: Your Honor, can we approach for
13 a second?

14 THE COURT: You may.

15 (WHEREUPON, a bench conference is held off the
16 record at approximately 2:21 PM.)

17 (WHEREUPON, the following bench conference is
18 held on the record at approximately 2:24 PM.)

19 THE COURT: I admit the statement.

20 MR. SCALZO: It is asking for an opinion.

21 THE COURT: It is too late. I sustain the
22 objection. So what do you want me to do?

23 MR. SCALZO: I am asking you to strike it and
24 the instruct the jury that while she is an
25 expert, she is not permitted to make a comment or

1 offer an opinion. That would be improper if she
2 were to offer a comment on that.

3 THE COURT: Are you sure that's what you want
4 me to do? Okay. You have anything to say about
5 that?

6 MRS. SUSTAKOVITCH: I have no problem.

7 THE COURT: Okay.

8 (WHEREUPON, the bench conference concludes at
9 approximately 2:25 PM.)

10 THE COURT: Ladies and Gentlemen, I just want
11 to instruct you that under ordinary
12 circumstances, one witness is not permitted to
13 comment about the credibility of another witness.
14 To the extent that you may have heard this
15 witness give some testimony that could be
16 interpreted as an opinion about the credibility
17 of another witness, that would be inadmissible
18 and you should not consider it. I instruct you
19 not to consider it.

20 Is that sufficient?

21 MR. SCALZO: Yes, Your Honor.

22 BY MRS. SUSTAKOVITCH:

23 Q Dr. Henderson, I'm going back to my
24 question. During the genital exam, what was JW
25 demeanor?

1 A She became tearful during that part of the
2 exam.

3 Q What is entailed when you have to do a
4 genital exam on an 11-year old?

5 A The exam itself is really very non-evasive.
6 We use something called a colposcope. It is a very
7 big instrument. It magnifies the genital area and
8 allows for documentation of that area. It is not
9 anything that goes inside of the patient or anything
10 that hurts the patient during that process.

11 Q As part of your medical treatment of JW
12 as your patient, did you get a medical history from
13 her detailing the actual incident, the assault?

14 A Yes, I did.

15 Q Without going into the details of that --
16 well, first, what were the results of her pelvic exam?

17 A On her genital exam, she did have what was
18 called a prolapsed urethra which is the area where you
19 go to the bathroom was a little bit pushed out, what
20 we call prolapsed. As far as her vaginal area, that
21 part of the exam was normal.

22 Q By normal, did you find any evidence of
23 damage to her vaginal area?

24 A No, there were no tears, no scars, no
25 discharge present at the time of my examination?

1 Q Based on the medical history that JW
2 shared with you, was that finding at all surprising to
3 you?

4 A No, it was not.

5 MRS. SUSTAKOVITCH: I have no further
6 questions. Thank you.

7 CROSS-EXAMINATION

8 BY MR. SCALZO:

9 Q Dr. Henderson, I guess we will start with
10 where you ended off, the prolapsed urethra that you
11 described, so that we are clear on, I think, obviously
12 what you're saying. But that was not an indication
13 that she had been abused sexually?

14 A No, sir, it was not. It was just during my,
15 again head-to-toe examination, that was an additional
16 finding of my examining her genital area.

17 Q Is that a common thing in a girl her age? Is
18 it a common thing?

19 A It is not common but it is not a finding that
20 it is related at all to sexual abuse?

21 Q Okay. And it may have been obvious when you
22 were talking about it, but the nature of the
23 allegation, you would have expected to find physical
24 evidence. Is that fair to say?

25 A Yes, sir.

1 Q JW: being emotional, as you described
2 her, she is 11. To your knowledge, did she, had she
3 had an exam like that before?

4 A Not that I'm aware of.

5 Q Is that something you discussed with patients
6 in that circumstance, whether they ever experienced
7 this kind of thing before as far as examination?

8 A Yes, sir.

9 Q And fair to say, that is a common reaction as
10 far as being tearful or the emotional side of the
11 physical examination?

12 A Most of the kids really do very, very well
13 during the exam because we spend so much time on the
14 front end preparing them, explaining to them what we
15 are going to do but exactly what made her upset during
16 it, you know, I am not sure.

17 Q Because it sounds like your role as a
18 physician was more medical than say psychiatric or
19 psychological, is that right?

20 A Yes, sir.

21 Q Your examination is a physical examination.
22 You're looking for physiological evidence that may be
23 related to abuse?

24 A Well, the medical exam involves the history
25 and the physical exam. It is just not doing the

1 physical exam itself. The history is probably the most
2 important part of these types of evaluations.

3 Q I guess maybe a better question would be,
4 your evaluation of your physical exam, what you find
5 -- like you said, you found a prolapsed urethra, that
6 you are evaluating of a medical standpoint. Okay, I
7 found a prolapsed urethra. In relation to what I know
8 about sexual abuse, is that an indicator or not an
9 indicator. You're doing that kind of examination,
10 aren't you?

11 A Yes.

12 Q You're not a psychiatrist where you're having
13 a conversation, sort of on-the-couch conversation
14 about a full more psychological history where you are
15 gathering that kind of information, you are really
16 primarily focused on physical evidence, aren't you?

17 A No. I am not a psychiatrist but I am a
18 pediatrician. I look at the whole body not just what
19 I see on the physical exam. The medical history again
20 is a very important part of any evaluation when you
21 are evaluating a patient as well as the history.

22 Q All right. The history that we are talking
23 about -- you keep saying history. We want to make
24 sure that we know what that history would be of.

25 A Okay.

1 Q The history would be what somebody says
2 happened to them?

3 A That is part of it.

4 Q So when the prosecutor asked you, for
5 instance, or somebody comes to you and says it was
6 penile vaginal intercourse, that is part of the
7 history, correct?

8 A If that's what the patient provides, yes.

9 Q Right. And if the patient is providing that
10 history, you're using that part of the history partly
11 to have a medical examination?

12 A Yes.

13 Q I understand about some of the history may
14 have psychological or psychiatric implications.

15 A Yes.

16 Q But you are not there really evaluating the
17 psychiatry or psychological implications as -- in this
18 exam?

19 A Right.

20 Q That is kind of what I'm trying to
21 understand.

22 A Okay.

23 MR. SCALZO: That is all that I have, Judge.

24 MRS. SUSTAKOVITCH: Your Honor, I have
25 nothing further for this witness.

1 **THE COURT:** You can step down, ma'am.

2 **THE WITNESS:** Thank you, Judge.

3 **MRS. SUSTAKOVITCH:** The State calls Valerie
4 Bishop.

5 **VALERIE BISHOP,**
6 is first duly sworn and then testifies as follow:

7 **THE CLERK:** Thank you. Be seated. Would you
8 please state your name for the record.

9 **THE WITNESS:** Valerie Bishop.

10 **DIRECT EXAMINATION**

11 **BY MRS. SUSTAKOVITCH:**

12 **Q** Hello, Mrs. Bishop. Where are you employed?

13 **A** I'm employed with the Greenville Library --
14 County Library.

15 **Q** What is your -- I'm sorry.

16 **A** Greenville County Library.

17 **Q** What is your position with the Greenville
18 County library?

19 **A** I am the Integrated Library System
20 Administrator.

21 **Q** What does that mean?

22 **A** I work in the IT department. I take care of
23 the software that keeps all of the patrons, the books.

24 **Q** In your duties at the library, is part of it
25 to maintain a database of records?

1 A Yes, it is.

2 Q How long have you worked for the Greenville
3 Library System?

4 A I began December of last year.

5 Q Now, if someone checks out a book from the
6 library, are you able to track when the book was taken
7 out months or even years later?

8 A Yes. Uh-huh. As long as we had this system.

9 Q How does the library system, the database
10 track that?

11 A The application works in that anytime someone
12 checks out a book or a new patron is given a library
13 card, every event will pop up as an event and is
14 logged. As the Administrator, I am able to run a
15 report to show any events that have happened.

16 Q Do you have access and routinely work with
17 this database tracking the books and knowing when they
18 are checked out?

19 A Yes, I do.

20 Q I'm showing you what is marked as State's
21 Exhibit 3 and 4. Do you recognize these documents?
22 And just take a moment to look at them.

23 A Okay. I do.

24 Q Would you please -- what are those two
25 documents?

1 **A** These are two reports, two different reports
2 that I am able to run as the Administrator. One of
3 them is the report that shows events that have
4 happened. Items checked out, returned, et cetera.
5 And the other one is an individual item listing that
6 shows pertinent information about the item.

7 **Q** Those two records, are those kept in the
8 regularly conducted activity of the library in its
9 internal computer database?

10 **A** It is.

11 **Q** As a regular practice of the Greenville
12 Library System, do they keep and maintain those
13 records? Does the database keep and maintain those
14 records?

15 **A** It does.

16 **Q** And as a function of your job, do you have
17 access to those records?

18 **A** I do.

19 **Q** Is that an accurate copy of records from your
20 database? Does it appear, both of those, to be altered
21 or deleted or changed in any way?

22 **A** No, not at all.

23 **MRS. SUSTAKOVITCH:** Your Honor, at this time,
24 the State moves to admit these two pieces of
25 evidence. That would be State's Exhibits 3 and 4.

1 **MR. SCALZO:** No objection.

2 **THE COURT:** There are admitted.

3 (WHEREUPON, State's Exhibits 3 and 4 are admitted
4 into the record.)

5 **BY MRS. SUSTAKOVITCH:**

6 **Q** Can you tell me first what is State's Exhibit
7 3.

8 **A** This is a report about an item, it is
9 actually a book as opposed to a DVD or something else.
10 The title of the book is "Do You Have a Secret?"

11 **Q** From that document, are you able to tell or
12 is it this document, how can you tell who checked it
13 out and when they checked it out?

14 **A** That would be this report which shows events
15 that have happened and had taken place. This report
16 shows the item individually as a bar code. It is a
17 unique identifier with each item. It shows the User
18 ID which is the library card number of something that
19 has happened with this item. It also shows the
20 library that it was checked or returned to. It shows
21 the date and time.

22 **Q** All right. On that activity screen, what is
23 the name of the book that that report is referring to?

24 **A** It doesn't -- this report doesn't show the
25 title. It shows a barcode. The barcode also shows up

1 on the individual item report.

2 Q So does the barcode match up with as far as
3 the name of the book?

4 A It does. It does. The title of the book is
5 "Do You Have a Secret?"

6 Q Are you able to tell on that report who
7 checked out a book by that title?

8 A I am. The person's library card number is
9 here on this report.

10 Q What is the name of that person?

11 A I did cross-reference the library card to
12 find the person's name. That person was Anna Grady.

13 Q When does your document show that she checked
14 it out?

15 A The date on this report is 6/14/2007, a
16 little after noontime.

17 Q When did she return the book?

18 A The next event was on July 18th, 2007 at two
19 o'clock. This item was returned.

20 Q So it was checked out in June and returned
21 July 18th?

22 A July 18th. Uh-huh.

23 Q Showing you what is marked as State's Exhibit
24 6. Do you recognize that item?

25 A I do.

1 Q What is that?

2 A This is the item "Do You Have a Secret?"

3 Q How can you confirm that that is the actual
4 book that your records state Anna Grady checked out in
5 June of 2007?

6 A The barcode is always physically attached to
7 the item at the library. That barcode identifies
8 uniquely an item. That barcode appears on this
9 report. It is in fact the same.

10 Q All right. I have no further questions.

11 CROSS-EXAMINATION

12 BY MR. SCALZO:

13 Q Mrs. Bishop, real quick, you testified that
14 your records show that Anna Grady checked out the book
15 which was State's 6 on June 14th, 2007?

16 A Uh-huh. That's correct.

17 Q And that it was returned July 18th, 2007?

18 A That's correct.

19 Q You would agree with me that in August of
20 2007, that book was not in Anna Grady's possession any
21 longer, it was in the County Library's possession?

22 A That's correct. This report goes until July
23 18th.

24 Q Thank you. No further questions, Mrs.
25 Bishop?

1 MRS. SUSTAKOVITCH: Your Honor, may we
 2 briefly approach?
 3 THE COURT: Yes.
 4 (WHEREUPON, a bench conference is held off the
 5 record at approximately 2:40 PM.)
 6 (WHEREUPON, the bench conference concludes at
 7 approximately 2:40 PM.)
 8 THE COURT: Ma'am, you can step down.
 9 Ladies and Gentlemen, we going to take a
 10 short break. I'm going to let you step back into
 11 the jury room for just a minute. We should have
 12 you out here shortly.
 13 (WHEREUPON, the jury exit at approximately
 14 2:40 PM.)
 15 MRS. SUSTAKOVITCH: Your Honor, for planning
 16 purposes, I'm advised that they are working on
 17 the forensic interview. Lieutenant Peterson
 18 believes that it is going to take him the rest of
 19 today to finish it but they are working really
 20 hard. I was going to suggest -- I would imagine
 21 JW would take over an hour because the tape
 22 is 31 minutes or a roundabout.
 23 I don't know if Your Honor would want to
 24 break after that. We have two more witnesses.
 25 One of them is a professional who is in sessions

1 right now. We're trying to get her over. If we
2 could finish with JW we would put up our
3 last two witnesses tomorrow.

4 THE COURT: All right. So -- so you want to
5 put up JW today and put the tape on
6 tomorrow?

7 MRS. SUSTAKOVITCH: Yes, sir. Mrs. Poaletti
8 is over with Lieutenant Peterson. I did want a
9 chance to try to view it and to make sure there
10 is nothing that runs afoul of your ruling that
11 would mess things up.

12 THE COURT: That sounds like that would work
13 fine.

14 MRS. SUSTAKOVITCH: Okay.

15 THE COURT: The witness then tomorrow will
16 be relatively short?

17 MRS. SUSTAKOVITCH: Yes, it would be the
18 forensic interviewer and then very briefly it
19 would be Linda Hutton at the very end and that
20 would be the State's case.

21 THE COURT: Okay. All right.

22 (WHEREUPON, a recess is taken at approximately
23 2:43 PM.)

24 (WHEREUPON, the Court resumes at approximately
25 2:51 PM.)

1 THE COURT: All right. Bring in the jury.
 2 You ready, right?
 3 MRS. SUSTAKOVITCH: Yes, sir.
 4 You want to ask about the audiotape?
 5 MR. SCALZO: Judge?
 6 THE COURT: I think the prosecutor intends to
 7 move into evidence the transcript of the audio
 8 tape with this witness. I think I have a pending
 9 objection of the transcript being moved in. You
 10 have the audiotape. The jury should -- it's
 11 going to be moved into evidence. It's been
 12 previously ruled upon by the Court of Appeals. My
 13 objection is the best evidence is the audiotape.
 14 That is a document that is prepared by the
 15 Solicitor's Office. There are several sections
 16 in there that says inaudible by them. I think
 17 the jury should listen to the tape, the CD and
 18 the transcript should not be admitted.
 19 MRS. SUSTAKOVITCH: I did want to let you
 20 know as an officer of the Court, my secretary and
 21 I went through this numerous times. I can not
 22 say that there is not an um or an ah that has
 23 been left out. I can say that every effort to
 24 make it what was on that tape was made. It was a
 25 long, lengthy call. I understand whatever your

1 Honor's ruling on this is. I would say that the
 2 State did go through extra efforts to try very
 3 hard to get this matched up.
 4 **THE COURT:** All right. Okay. Let me just
 5 think for a second. (Pause).
 6 I see that you have a bunch of copies.
 7 **MRS. SUSTAKOVITCH:** Yes, sir. We made them --
 8 **THE COURT:** You were planning to let the jury
 9 read along in the transcript as they listen to
 10 the tape?
 11 **MRS. SUSTAKOVITCH:** Yes, sir.
 12 **THE COURT:** All right. And you definitely are
 13 going to offer the CD into evidence?
 14 **MRS. SUSTAKOVITCH:** Yes, sir.
 15 **THE COURT:** Any objection to that?
 16 **MR. SCALZO:** Well, I obviously have the
 17 objection to preserve the issue but that part
 18 would --
 19 **THE COURT:** Well, the CD is admitted. Any
 20 objection to her allowing the jury to each have
 21 an individual copy of the transcript so that they
 22 could read along if they choose to to assist them
 23 in understanding the audio on the recording?
 24 (WHEREUPON, State's Exhibit 1 is admitted into
 25 the record.)

1 **MR. SCALZO:** Yeah. That is the basis of my
2 oral objection.

3 **THE COURT:** That objection -- what I just
4 said has nothing to do with the best evidence
5 rule. That is simply a tool, a demonstrative
6 tool that she wants to employ to assist in
7 hearing what is on the tape. In doing that, she
8 is not offering to admit the recording into
9 evidence.

10 That is really no different than -- that is,
11 really no different than getting somebody to come
12 in here like has already been done to enhance a
13 recording so that the audio is more audible.

14 **MR. SCALZO:** My understanding of what she
15 requested was to admit it. What you are saying is
16 let them read it while they are listening to it
17 but not admit it into evidence?

18 **MRS. SUSTAKOVITCH:** If that's Your Honor's
19 ruling, that is absolutely --

20 **THE COURT:** That is not a ruling. Just --
21 let's let Mr. Scalzo answer the question.

22 **MR. SCALZO:** I would stand, object to that in
23 essence the same basis that it is the recording
24 that they have to rely upon, not an
25 interpretation of it as made by the State.

1 **THE COURT:** I believe we discussed yesterday
2 that you have reviewed the recording, I mean, the
3 transcript.

4 **MR. SCALZO:** The transcript.

5 **THE COURT:** Did you tell me whether or not
6 you found any material errors in the
7 transcription?

8 **MR. SCALZO:** Not in the language that is
9 quoted. But there are points in there, several
10 points, not just one point where it says
11 "inaudible".

12 **THE COURT:** Okay.

13 **MR. SCALZO:** The concern obviously is do they
14 take inaudible or do they make their own
15 interpretation. I think the point is they have to
16 make their own interpretation. I think that is
17 where it is coming from.

18 **THE COURT:** I'm going to require them to make
19 their own interpretation but I am going to allow
20 them to use the transcript to assist them in
21 listening to the tape. I can address the
22 question of the admissibility of, uh, one of the
23 copies of the transcript later.

24 Bring in the jury.

25 You just let me know when you're going to

1 play the tape. I will instruct them on the use
2 of the transcript.

3 (WHEREUPON, the jury enter at approximately
4 2:56 PM.)

5 MR. SCALZO: Your Honor, can we approach?

6 THE COURT: Sure.

7 (WHEREUPON, a bench conference is held off the
8 record at approximately 2:56 PM.)

9 (WHEREUPON, the bench conference concludes at
10 approximately 2:57 PM.)

11 THE COURT: I know it is not a really long
12 trip from the jury box to the jury room but
13 sometimes juries get a little bit of an
14 opportunity to get some exercise, a little more
15 than you might anticipate, in coming up here to
16 participate in a trial like this. So, here is
17 one of those chances. I'm going to send you back
18 to the jury room for a few minutes. I hope it
19 won't be long. We will get you back out here as
20 soon as we can.

21 (WHEREUPON, the jury exit at approximately
22 2:57 PM.)

23 MR. SCALZO: Judge, we're going to go back
24 there.

25 THE COURT: Sure.

25 A Yes, ma'am.

1 Q Who is that?
2 A My father.
3 Q Where are you in school right now?
4 A Greer Middle.
5 Q I'm sorry?
6 A Greer Middle.
7 Q You might just back up a tiny bit. Say that
8 again.
9 A Greer Middle.
10 Q What are some of the classes that you are
11 taking in school?
12 A Art, English, Math, Social Studies.
13 Q Do you have any plans for when you get out of
14 school, what you want to do?
15 A Yes.
16 Q What is that?
17 A I want to start my own business.
18 Q Business in what?
19 A Fashion.
20 Q JW you said that this person seated
21 next to me is your father. Is he your biological
22 father, your stepfather?
23 A My biological father.
24 Q Do you know the difference in the truth and a
25 lie?

1 A Yes, ma'am.

2 Q Is important to tell the truth?

3 A Yes, ma'am.

4 Q What is the difference in the truth and a
5 lie?

6 A The truth is something that did happen, a lie
7 is something that didn't.

8 Q JW why are you in court today?

9 A Because of something that my father did.

10 Q Before we get into that, have you seen your
11 father in a while?

12 A No, ma'am.

13 Q How long has it been since you seen him?

14 A About two years.

15 Q Do you recognize the lady seated over here in
16 the red sweater?

17 A Yes, ma'am.

18 Q What is her name?

19 A I call her Aunt Sand. I think her real name
20 is Sharon.

21 Q You know her as Aunt Sand?

22 A Uh-huh.

23 Q What relation is she to the Defendant?

24 A His twin sister.

25 Q I want to take you back just a little bit.

- 1 Where did you say you are in school now?
- 2 A Greer Middle.
- 3 Q And going way back, what is your date of
- 4 birth?
- 5 A [REDACTED].
- 6 Q Do you recall where you went to kindergarten?
- 7 A At Paris Elementary.
- 8 Q Do you recall when you started kindergarten?
- 9 Were you five, six, seven? How old were you?
- 10 A Five.
- 11 Q Where did you go to first grade?
- 12 A I think it was Paris.
- 13 Q Do you remember going back to kindergarten?
- 14 Do you remember your kindergarten teacher?
- 15 A Mrs. Hartman.
- 16 Q Going back to kindergarten, do remember
- 17 anything about like recess and what was outside, those
- 18 kind of things?
- 19 A There was a playground. I remember jump
- 20 roping and playing tag with my friends.
- 21 Q Playing tag with who? I'm sorry.
- 22 A My friends.
- 23 Q Did you have any special friends back then?
- 24 A Shelley and Robert.
- 25 Q Shelley and Robert you said?

JW

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1 A Uh-huh.

2 Q Do you recall who your first grade teacher
3 was?

4 A Mrs. Spinike.

5 Q All right. JW I want to go back. You
6 said you were here because of what your dad did.
7 Before we talk about that, can you describe what your
8 relationship -- before anything happened with your
9 biological dad, what was your relationship with him
10 like?

11 A It was good.

12 Q Were you close with any members of your
13 biological dad, Samuel's family?

14 A Yes, ma'am.

15 Q Who were you close with?

16 A My aunt, Aunt Sand.

17 Q The lady in the courtroom?

18 A Yes, ma'am.

19 Q When you were five and you were six, did you
20 ever go over and visit Aunt Sand?

21 A Yes, ma'am.

22 Q Do you recall where you visited her?

23 A Uh, --

24 Q If you don't recall the street, do you recall
25 what the yard looked like or that kind of thing?

1 A I recall what the yard looked like.

2 Q What did the yard look like?

3 A It had a fence around it. It only had a
4 porch. There was the door. That is all that I
5 remember on the outside.

6 Q Besides your Aunt Sand, did you visit any of
7 your father's other sisters and brothers?

8 A No, ma'am.

9 Q Do you have a Aunt Pookie?

10 A Yes, ma'am.

11 Q Who is that?

12 A His sister.

13 Q Okay. And just to be clear, did you ever go
14 to visit her as well?

15 A Maybe once or twice.

16 Q Okay. I want to take you back to you said
17 you are here because of what your dad did?

18 A Yes, ma'am.

19 Q Can you describe to the jury what you recall
20 about -- first, where were you when this happened?

21 A At my Aunt Sand's house.

22 Q What did your dad do to you, with you?

23 A (No Response).

24 Q JW why don't we start with were you
25 awake? Were you asleep? Where were you when this

JW

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1 happened?

2 A I was sleeping.

3 Q Do you recall where you were sleeping?

4 A I think it was Cricket's room.

5 Q You think it was. You are not certain? Yes
6 or no?

7 A I'm not sure.

8 Q All right. So you were sleeping. Was it
9 daytime or nighttime?

10 A Night.

11 Q Tell me what you recall your dad doing.

12 A I was sleeping and he woke me up. He asked
13 me did I want to meet his little friend. I was like
14 yeah. So he turned around. Then he turned back to
15 where I could see him. He had his private part out.
16 He asked me to suck it, so I did. He asked me to do
17 it again. So I did. Then we laid back down.

18 Q JW just to go back just a second. And
19 you are moving a lot in your chair.

20 A I'm sorry.

21 Q Are you nervous right now?

22 A Yes, ma'am.

23 Q Is it hard to be in court right now?

24 A Yes, ma'am.

25 Q You said your father asked you -- what did

1 you call it? If you wanted to see his friend?

2 A Uh-huh. Or his buddy.

3 Q Or his buddy. What did you do at that point?

4 A I'm sorry --

5 Q I am sorry. When he asked if you wanted to

6 see his friend or his buddy, you said he turned

7 around, could you tell me that again so I'm clear.

8 A He turned around so where I could see him.

9 Q And then he had his private part out, is that
10 correct?

11 A Yes, ma'am.

12 Q When you say private part, what do you mean?

13 What is that? On a boy or a man, what is it that

14 you're referring to?

15 A I don't want to be here.

16 Q Okay. JW is his private part also
17 called a penis?

18 A Yes, ma'am.

19 Q You said your dad asked you to suck it one
20 time, did you understand why he was asking you to do
21 that?

22 A No, ma'am.

23 Q When he asked you to suck it a second time,
24 do you recall if you were laying down or what do you
25 recall?

JW

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1 A I was standing up.

2 Q When you sucked it the second time, did you
3 understand why he wanted you to do that?

4 A No, ma'am.

5 Q What do you recall, if anything, him saying
6 when you were doing that?

7 A He said that it felt good.

8 Q He said it felt what?

9 A Good.

10 Q He said it felt good. Okay. Go ahead.

11 A Okay. Then we laid back down. He asked me to
12 move up and down. So I did. And then --

13 Q Let me ask you -- sorry to stop you. What do
14 you mean by up and down? What does that mean?

15 A The motions up and down.

16 Q The motions up and down?

17 A Uh-huh.

18 Q When he asked you to move up and down, were
19 you laying down?

20 A I was laying down.

21 Q Was he -- where was he in relation to you?

22 A Behind him.

23 Q You are laying down and he is behind you.

24 A Yes, ma'am.

25 Q So he asked you to move up and down. So you

1 moved your body up and down?

2 A Yes, ma'am.

3 Q Can you show me with your hands what you mean
4 by up and down?

5 A Up and down. (Demonstrating).

6 Q Okay. Back and forth?

7 A Yes, ma'am. Back and forth.

8 Q When that happened, what, if anything, do you
9 recall? Did you feel his private part --

10 MR. SCALZO: Objection, Your Honor, she is
11 leading.

12 BY MRS. SUSTAKOVITCH:

13 Q Okay. What do you recall?

14 A I recall feeling something warm on my bottom.

15 Q You recall feeling something warm. Did you
16 have your clothes on or were they off?

17 A They were on.

18 Q So did your father's private part go inside
19 your bottom or not?

20 A Not.

21 Q It did not. Okay. JW after that,
22 what, if anything, did your father say to you then?

23 A Start off where I left off?

24 Q Yes, ma'am.

25 A Then I was falling asleep and he woke me up