

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Letitia H. Verdin, Circuit Court Judge

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S.C. Supreme Court

JOSEPH PAUGH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-000072

APPENDIX

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS
2009-GS-23-8144

STATE OF SOUTH CAROLINA,

vs.

JOSEPH PAUGH,
DEFENDANT.

TRANSCRIPT OF RECORD

ORIGINAL

October 13 and 14, 2010
Greenville, South Carolina

B E F O R E:

THE HONORABLE D. GARRISON HILL, JUDGE; and a jury.

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

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Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(SW) - Denotes State's Witness
 (DW) - Denotes Defense Witness
 (IC) - Denotes In Camera

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Greenville County.

P R O C E E D I N G S

1
2 THE COURT: We are on the record in the case
3 2009-GS-23-8144, the State v. Joseph --

4 Is it "Paugh"? Is that right?

5 DEFENDANT PAUGH: Yes, sir.

6 THE COURT: Okay. It's the case of State v. Joseph
7 Paugh.

8 And any matters before we bring the jury panel up for
9 selection?

10 MS. SEAY: Nothing from the State.

11 MR. SCALZO: Your Honor, I did put up some proposed
12 voir dire for the jurors.

13 THE COURT: Okay.

14 MR. SCALZO: I would ask that we speak about that.

15 THE COURT: What's the State's position on that?

16 MS. SEAY: Your Honor, my position is I think number
17 one and number four are normally things that you ask, are
18 they not?

19 THE COURT: Yes.

20 MS. SEAY: Okay. And I do not see the relevance of
21 two, three, five, six, and seven, as far as voir dire
22 would be concerned.

23 THE COURT: Okay. How about that, Mr. Scalzo?

24 MR. SCALZO: Yes, Your Honor.

25 May it please the Court.

1 Your Honor, the case involves -- the allegation is
2 that Mr. Paugh sexually abused his daughter.

3 THE COURT: Okay.

4 MR. SCALZO: There is a breakup, a separation,
5 ultimately, a divorce in the case. He lived out of state
6 for a period of time, actually, when the allegation came
7 out. The reason for the voir dire is divorce, separation,
8 child custody issues, those are very, obviously, emotional
9 issues for any family to go through.

10 It, certainly, would be important for the Court and,
11 obviously, the parties to know whether or not jurors may
12 have a bias that they may think they can overcome, but
13 they, actually, cannot overcome and be fair in a case
14 where that is an important issue in the case. So that's
15 really the focus of those questions.

16 THE COURT: Well, I don't intend to go into those
17 questions, two, three, five, six, and seven. I understand
18 your point and the possible relevance. However, I don't
19 think that the link is strong enough to merit or warrant
20 inquiry at the voir dire stage, or any stage really, of
21 potential jurors.

22 I would be glad to ask if anyone has ever been the
23 victim of or accused of a sexually-related offense, or
24 accused of sexual abuse, or if anybody in their immediate
25 family has been the victim of or accused of sexual abuse.

1 That would seem to cover the issue.

2 MS. SEAY: I have no objection to that.

3 MR. SCALZO: I don't have an objection to the
4 question just affirmatively. But I would, obviously,
5 request mine.

6 THE COURT: Right.

7 MR. SCALZO: And I would ask that my request be made
8 a part of the Court record.

9 THE COURT: Sure.

10 Anything further?

11 MS. SEAY: No, sir.

12 THE COURT: Okay. You can bring the panel on up.

13 MS. SEAY: Judge, may I inquire about what time you
14 normally take a lunch break?

15 I'm trying to coordinate some of my expert witnesses.
16 And I sort of needed an idea of what to tell them.

17 THE COURT: You know, usually, I try to do it
18 sometime between 12:30 and 1:00.

19 MS. SEAY: Okay. That helps.

20 Thank you.

21 (WHEREUPON, the jury panel entered the courtroom.)

22 THE COURT: Good morning, ladies and gentlemen.

23 We are going to select a jury in the case of the
24 State v. Joseph Paugh. And I'm going to read the
25 indictment that this trial will be about. But, before I

1 do that, I want to explain some things about criminal
2 cases, and this is a criminal case, that apply.

3 The first thing I want to explain is this indictment
4 I'm about to read is simply a piece of paper. It's not
5 evidence of anything. It's simply the way a case begins
6 and the formal way that the State presents its case
7 against a citizen. The indictment is merely an
8 allegation.

9 Mr. Paugh has pled not guilty to the indictment. And
10 that puts the burden of proof on the State. The State has
11 the burden of proof. Mr. Paugh doesn't have the burden to
12 do anything during his trial. He doesn't have to offer
13 any evidence or explanation whatsoever. In fact, he's
14 presumed innocent. That's what the law requires, that he
15 be presumed innocent now, and even throughout the trial,
16 and even into your deliberations.

17 And he can only be found guilty if you, the jury,
18 find unanimously the State has proven each and every
19 element of the crime beyond a reasonable doubt. The
20 indictment doesn't even create a suspicion of guilt. It's
21 simply the way a citizen is informed of what he's charged
22 with, and that is all it is.

23 This indictment alleges that Mr. Paugh did in
24 Greenville County between the 25th day of November, 1998,
25 through November of 2004, commit a sexual battery on C.P.,

1 who was less than 11 years of age. This is in violation
2 of Section 16-3-655(a) (1) of the South Carolina Code of
3 Laws. Again, this is the allegation in the indictment.
4 And it is simply nothing more than that at this stage, an
5 allegation.

6 JURY QUALIFICATION

7 THE COURT: Now, before we begin the trial, we have
8 to, of course, select a jury that can be fair and
9 impartial in this case and can decide the case without any
10 kind of bias, or preconceived notion, or any prejudice.
11 So, to that end, I have a number of questions I need to
12 ask.

13 And the first question is, is there anyone related by
14 blood, or marriage, or kinned to in any way Mr. Joseph
15 Paugh?

16 And, Mr. Paugh, if you would, stand up so everybody
17 can see you, sir.

18 All right. Thank you.

19 Does anyone have any business, social, or personal
20 relationship with Mr. Paugh? If so, please, stand.

21 (There was no response.)

22 THE COURT: The people who may testify in this case
23 include C [REDACTED] P [REDACTED], K.P. [REDACTED], Angela Paugh,
24 Lorraine Henderson, Nancy Henderson, and Shauna
25 Galloway-Williams. Is there anyone who is related by

1 blood, or marriage, or kinned to any of those potential
2 witnesses? If so, please, stand.

3 (There was no response.)

4 THE COURT: Does anyone have any business, social, or
5 personal relationship with any of those people I just
6 listed?

7 Okay. Yes, ma'am. If you'll just tell me your name.

8 JUROR #3, PATRICIA AGUDELO: Yes, Patricia Agudelo.

9 THE COURT: I couldn't hear your last --

10 JUROR #3, PATRICIA AGUDELO: Patricia Agudelo.

11 THE COURT: Thank you.

12 Who are you --

13 JUROR #3, PATRICIA AGUDELO: I work at the Department
14 of Social Services. I know the people that would be
15 testifying for the rape case. And I have worked many
16 cases with Investigator Henderson.

17 THE COURT: Okay. Well, I'm going to excuse you from
18 this case.

19 Thank you.

20 Do you know your juror number, ma'am?

21 JUROR #3, PATRICIA AGUDELO: I'm sorry.

22 THE COURT: Do you know your juror number?

23 JUROR #3, PATRICIA AGUDELO: Three.

24 THE COURT: Okay. Thank you.

25 I'm going to ask the lawyers who are going to be

1 involved in this case to identify themselves and the
2 people at their table.

3 Yes, ma'am, Ms. Seay.

4 MS. SEAY: Thank you, Your Honor.

5 My name is Bryna Seay. I'm an Assistant Solicitor in
6 the Thirteenth Circuit. I'm employed by Solicitor Bob
7 Ariail. And seated with me is Andrea Phillips with the
8 Solicitor's Office. And this is Investigator Lorraine
9 Henderson with the Greenville County Sheriff's Office.

10 THE COURT: Mr. Scalzo.

11 MR. SCALZO: Thank you, Your Honor.

12 Good morning.

13 My name is Chris Scalzo. I'm a Public Defender here
14 in Greenville County. I've been appointed by the Court to
15 represent Joseph. And you just met Joseph.

16 THE COURT: Thank you.

17 Is there anyone related by blood or marriage to
18 either Mr. Scalzo, or Ms. Seay, or anyone that they
19 introduced? If so, please, stand.

20 (There was no response.)

21 THE COURT: Does anyone have a personal, social, or
22 business relationship with any of the people who
23 introduced themselves, or the Court introduced? If so,
24 please, stand.

25 (There was no response.)

1 THE COURT: Is there anyone who has ever been
2 employed by or had a member of their immediate family be
3 employed by the Solicitor's Office or the Public
4 Defender's Office? If so, please, stand.

5 (There was no response.)

6 THE COURT: Is there anyone who has ever been
7 involved in a dispute, or a lawsuit, or any other matter
8 where they were represented by the Solicitor's Office or
9 Mr. Scalzo's office, the Public Defender's Office, or
10 where the other side was represented by one of those
11 individuals or bodies? If so, please, stand.

12 (There was no response.)

13 THE COURT: Does anyone know anything about this
14 case, other than what you've heard from me here this
15 morning? If so, please, stand.

16 (There was no response.)

17 THE COURT: Is there anyone who contributes, whether
18 it's your time or your money, to an organization whose
19 primary purpose is the promotion of victim's rights or
20 more aggressive law enforcement? If so, please, stand.

21 (There was no response.)

22 THE COURT: All right. I'm going to ask just a
23 couple of questions, at this time, and they do ask for
24 some personal information. So, if you need to respond,
25 I'm going to ask that you just come down here and talk to

1 me with the court reporter and the lawyers in a more
2 private atmosphere. And we'll form a line, if we need to,
3 right here in the middle of the bar.

4 And the questions are as follows: Is there anyone
5 who has been a member of MADD, Mother's Against Drunk
6 Driving, or any organization related to the prevention of
7 sexual abuse or sexual crimes?

8 And is there anyone who has ever been a victim of, or
9 accused of, or arrested for a crime that is a violent
10 crime or a crime that involved sexual allegations?

11 And, in addition to that, is there anyone who has
12 been the victim of sexual abuse or has been accused of
13 sexual abuse?

14 And these questions would apply to any member of your
15 immediate family, as well as a parent, child, spouse, or
16 siblings.

17 If you've ever had a member of your immediate family
18 be accused of, or be a victim of, or be arrested for, or
19 convicted of a -- either a violent crime or a crime that
20 has sexual aspects to it.

21 So those are the questions. If anyone needs to
22 respond, we're just going to form a short line, hopefully,
23 in the middle.

24 (There was no response.)

25 THE COURT: Is there any further voir dire from

1 either side?

2 MS. SEAY: Nothing further from the State.

3 THE COURT: From the Defense?

4 MR. SCALZO: No, Your Honor.

5 THE COURT: All right. We will now go forward with
6 jury selection.

7 And, yes, ma'am, Ms. Kelley.

8 JURY SELECTION

9 THE CLERK: As I call your name, please, stand.
10 Number 158, William Barnes.

11 (William Barnes, a white male, stood.)

12 THE CLERK: What says the State?

13 MS. SEAY: Please present this juror.

14 THE CLERK: What says the Defendant?

15 MR. SCALZO: Please excuse the juror.

16 THE CLERK: Thank you.

17 You are excused from this case.

18 Number 31, Loree Davis.

19 (Loree Davis, a white female, stood.)

20 THE CLERK: What says the State?

21 MS. SEAY: Please present this juror.

22 THE CLERK: What says the Defendant?

23 MR. SCALZO: Please excuse the juror.

24 THE CLERK: Thank you.

25 You are excused from this case.

1 Number 86, Xiomara Lopez.

2 (Xiomara Lopez, a white female, stood.)

3 THE CLERK: What says the State?

4 MS. SEAY: Please present the juror.

5 THE CLERK: What says the Defendant?

6 MR. SCALZO: Judge, I don't have her in my packet
7 that I got from the Clerk with the information.

8 You said 86; correct?

9 THE CLERK: That's correct.

10 THE COURT: Let's see if we can't get that
11 information to you.

12 MR. SCALZO: Thank you.

13 (Pause.)

14 THE CLERK: I don't have anything, Your Honor. I
15 could e-mail Judy and have her send it up.

16 THE COURT: All right. May I see that?

17 THE CLERK: Yes, sir.

18 (Pause.)

19 THE COURT: Ms. Lopez, something has occurred with
20 your -- did you fill out the juror information card?

21 JUROR #86 XIOMARA LOPEZ: Yes, I did.

22 THE COURT: Okay. For some reason, it's not in our
23 information. So I'm just going to ask you these
24 questions. And the first thing is, what county and state
25 were you born?

1 JUROR #86, XIOMARA LOPEZ: I was born in Dominican
2 Republic.

3 THE COURT: What part?

4 JUROR #86, XIOMARA LOPEZ: Excuse me?

5 THE COURT: What part?

6 JUROR #86, XIOMARA LOPEZ: Dominican Republic, Santa
7 Domingo.

8 THE COURT: Santa Domingo.

9 Okay. Thank you.

10 And how old are you?

11 JUROR #86, XIOMARA LOPEZ: I'm 34.

12 THE COURT: What's your date of birth?

13 JUROR #86, XIOMARA LOPEZ: [REDACTED].

14 THE COURT: Do you have any children?

15 JUROR #86, XIOMARA LOPEZ: No.

16 THE COURT: And what is your marital status?

17 JUROR #86, XIOMARA LOPEZ: Married.

18 THE COURT: And where do you work?

19 JUROR #86, XIOMARA LOPEZ: I'm self-employed.

20 THE COURT: And what do you do?

21 JUROR #86, XIOMARA LOPEZ: Primos Towing Services.

22 THE COURT: Okay. How long have you had that job?

23 JUROR #86, XIOMARA LOPEZ: For like two months.

24 THE COURT: And how far did you go in school, ma'am?

25 JUROR #86, XIOMARA LOPEZ: I graduated, and some

1 college in New York.

2 THE COURT: And what's your spouse's name?

3 JUROR #86, XIOMARA LOPEZ: Samuel Lopez.

4 THE COURT: What does he do?

5 JUROR #86, XIOMARA LOPEZ: He's out of the country.

6 THE COURT: What kind of work does he do?

7 JUROR #86, XIOMARA LOPEZ: He used to be in
8 construction.

9 THE COURT: Okay. And who is his employer?

10 JUROR #86, XIOMARA LOPEZ: It was from a long time
11 ago. He's been deported to Mexico.

12 THE COURT: Have you ever served on a civil or
13 criminal jury before?

14 JUROR #86, XIOMARA LOPEZ: No.

15 THE COURT: Have you ever been a party to a civil
16 lawsuit?

17 JUROR #86, XIOMARA LOPEZ: No.

18 THE COURT: Have you ever been convicted of a crime?

19 JUROR #86, XIOMARA LOPEZ: No.

20 THE COURT: Okay. Thank you.

21 I'm sorry for that inconvenience.

22 MR. SCALZO: Thank you, Judge.

23 THE CLERK: What says the State?

24 MS. SEAY: Please present her.

25 THE CLERK: What says the Defendant?

1 MR. SCALZO: Please seat the juror.
2 THE CLERK: Please have a seat in the jury box.
3 Number 82, Hoyt Knox.
4 (Hoyt Knox, a white male, stood.)
5 THE CLERK: What says the State?
6 MS. SEAY: Please present him.
7 THE CLERK: What says the Defendant?
8 MR. SCALZO: Please swear the juror.
9 THE CLERK: Please have a seat in the jury box.
10 Number 15, Hope Bonham.
11 (Hope Bonham, a white female, stood.)
12 THE CLERK: What says the State?
13 MS. SEAY: Please present her.
14 THE CLERK: What says the Defendant?
15 MR. SCALZO: Please excuse the juror.
16 THE CLERK: Thank you.
17 You are excused from this case.
18 Number 70, Darah Huffman.
19 (Darah Huffman, a white female, stood.)
20 THE CLERK: What says the State?
21 MS. SEAY: Please present her.
22 THE CLERK: What says the Defendant?
23 MR. SCALZO: Please excuse the juror.
24 THE CLERK: Thank you.
25 You are excused from this case.

1 Number 117, Angelia Ramage.

2 (Angelia Ramage, a black female stood.)

3 MR. SCALZO: Judge, if I can inquire, I believe I get
4 10 strikes; right?

5 THE COURT: Yes. You have 10 strikes.

6 MR. SCALZO: You said number 17?

7 THE CLERK: It's 117.

8 What says the State?

9 MS. SEAY: Please excuse her from this case.

10 THE CLERK: Thank you.

11 You are excused from this case.

12 Number 42, Jose Febres.

13 (Jose Febres, black male, stood.)

14 THE CLERK: What says the State?

15 MS. SEAY: Please present him.

16 MR. SCALZO: 32 or 42?

17 THE CLERK: 42.

18 MR. SCALZO: I don't see 42. I see 40, 41, and 45.

19 THE COURT: Here it is.

20 MR. SCALZO: Thank you, Judge.

21 (Pause.)

22 THE CLERK: What says the Defendant?

23 MR. SCALZO: Please seat the juror.

24 THE CLERK: Please have a seat in the jury box.

25 Number 27, Nancy Carpenter.

1 (Nancy Carpenter, a white female, stood.)

2 THE CLERK: What says the State?

3 MS. SEAY: Please present her.

4 THE CLERK: What says the Defendant?

5 MR. SCALZO: Please excuse the juror.

6 THE CLERK: Thank you.

7 You are excused from this case.

8 Number 40, Cathy Fallow.

9 (Cathy Fallow, a white female, stood.)

10 THE CLERK: What says the State?

11 MS. SEAY: Please present this juror.

12 THE CLERK: What says the Defendant?

13 MR. SCALZO: Please excuse the juror.

14 THE CLERK: Thank you.

15 You are excused from this case.

16 Number 106, Sean Okane.

17 (Sean Okane, a white male, stood.)

18 THE CLERK: What says the State?

19 MS. SEAY: Please excuse him from this case.

20 THE CLERK: Thank you.

21 You are excused from this case.

22 Number 129, Jessica Shead.

23 (Jessica Shead, a white female, stood.)

24 THE CLERK: What says the State?

25 MS. SEAY: Please present her.

1 THE CLERK: What says the Defendant?
2 MR. SCALZO: Please seat the juror.
3 THE CLERK: Please have a seat in the jury box.
4 Number 160, William Hallums.
5 (William Hallums, a black male, stood.)
6 THE CLERK: What says the State?
7 MS. SEAY: Please excuse him from this case.
8 THE CLERK: Thank you.
9 You are excused from this case.
10 Number 120, Kevin Robinson.
11 (Kevin Robinson, a black male, stood.)
12 THE CLERK: What says the State?
13 MS. SEAY: Please present him.
14 THE CLERK: What says the Defendant?
15 MR. SCALZO: Please present the juror -- or seat the
16 juror.
17 THE CLERK: Please have a seat in the jury box.
18 Number 107, Michael Pakkala.
19 (Michael Pakkala, a white male, stood.)
20 THE CLERK: What says the State?
21 MS. SEAY: Please present him.
22 THE CLERK: What says the Defendant?
23 MR. SCALZO: Please seat the juror.
24 THE CLERK: Please have a seat in the jury box.
25 Number 16, Nancy Bower.

1 (Nancy Bower, a white female, stood.)
2 THE CLERK: What says the State?
3 MS. SEAY: Please present her.
4 THE CLERK: What says the Defendant?
5 MR. SCALZO: Please excuse the juror.
6 THE CLERK: Thank you.
7 You are excused from this case.
8 Number 58, Luke Hanna.
9 (Luke Hanna, a white male, stood.)
10 THE CLERK: What says the State?
11 MS. SEAY: Please present him.
12 THE CLERK: What says the Defendant?
13 MR. SCALZO: Please seat the juror.
14 THE CLERK: Please have a seat in the jury box.
15 Number 134, Steven Stewart.
16 (Steven Stewart, a white male, stood.)
17 MS. SEAY: I'm sorry. Would you repeat that number?
18 THE CLERK: 134.
19 MS. SEAY: Thank you.
20 THE CLERK: What says the State?
21 MS. SEAY: Please present him.
22 THE CLERK: What says the Defendant?
23 MR. SCALZO: Please excuse the juror.
24 THE CLERK: Thank you.
25 You are excused from this case.

1 Number 57, William Griffith.
2 (William Griffith, a white male, stood.)
3 THE CLERK: What says the State?
4 MS. SEAY: Please present him.
5 THE CLERK: What says the Defendant?
6 MR. SCALZO: Please seat the juror.
7 THE CLERK: Please have a seat in the jury box.
8 Number 145, Derrick Vigil.
9 (Derrick Vigil, a white male, stood.)
10 THE CLERK: What says the State?
11 MS. SEAY: Please present him.
12 THE CLERK: What says the Defendant?
13 MR. SCALZO: Please seat the juror.
14 THE CLERK: Please have a seat in the jury box.
15 Number 97, Linda McBee.
16 (Linda McBee, a white female, stood.)
17 THE CLERK: What says the State?
18 MS. SEAY: Please present her.
19 THE CLERK: What says the Defendant?
20 MR. SCALZO: Please excuse the juror.
21 THE CLERK: Thank you.
22 You are excused from this case.
23 Number 105, Rita Oberle.
24 (Rita Oberle, a white female, stood.)
25 THE CLERK: What says the State?

1 MS. SEAY: Please present her.

2 THE CLERK: What says the Defendant?

3 MR. SCALZO: Please seat the juror.

4 THE CLERK: Please have a seat in the jury box.
5 Number 41, Andrea Faulkenberry.

6 (Andrea Faulkenberry, a white female, stood.)

7 THE CLERK: What says the State?

8 MS. SEAY: Please present her.

9 THE CLERK: What says the Defendant?

10 MR. SCALZO: Please seat the juror.

11 THE CLERK: Please have a seat in the jury box.
12 Number 140, Christopher Tolbert.

13 (Christopher Tolbert, a black male, stood.)

14 THE CLERK: What says the State?

15 MS. SEAY: Please present him.

16 THE CLERK: What says the Defendant?

17 MR. SCALZO: Please seat the juror.

18 THE CLERK: Please have a seat in the jury box.

19 THE COURT: Okay. We'll have one alternate.

20 the strikes are one each -- no, one and two. I'm
21 sorry.

22 THE CLERK: Number 156, Phillip Wolfe.

23 (Phillip Wolfe, a white male, stood.)

24 THE CLERK: What says the State?

25 MS. SEAY: Please present him.

1 THE CLERK: What says the Defendant?

2 MR. SCALZO: Please seat the juror.

3 THE CLERK: Please have a seat in the jury box.

4 THE COURT: All right. Any objections to the
5 selection process or composition of the jury from the
6 State?

7 MS. SEAY: No, sir.

8 THE COURT: From the Defense?

9 MR. SCALZO: Notwithstanding my prior request, Judge.

10 THE COURT: Are you --

11 MR. SCALZO: Regarding my voir dire.

12 THE COURT: Yes, sir.

13 And I'll make that a part of the record.

14 MR. SCALZO: Thank you, Judge.

15 THE COURT: I'll make it a Court's Exhibit.

16 The Court finds the selection process complied with
17 all statutory requirements and Constitutional mandates.

18 And, ladies and gentlemen, you've been selected to be
19 the jury in the case of the State v. Joseph Paugh. We're
20 going to begin the trial in just a few moments.

21 I'm just going to ask you to go back to the jury room
22 with Mr. Thompson. He'll show you the way. Don't talk
23 about the case. We'll attempt to start it in just a few
24 minutes.

25 Thank you very much.

1 (WHEREUPON, the jury was excused from open court at
2 approximately 10:48 a.m.)

3 THE COURT: All right. Those of you who were not
4 chosen, just call back tonight after 6:00, and they'll
5 give you further instructions.

6 And thank you for your cooperation and patience this
7 morning.

8 (WHEREUPON, the remaining jury panel members exited
9 the courtroom.)

10 THE COURT: Anything for the record before we get
11 started?

12 We're just going to take a quick break right now.

13 MS. SEAY: I was just going to ask for a quick break
14 so that we can get our witnesses down and everything.

15 THE COURT: Okay. We'll just break until 11:00.

16 MR. SCALZO: And, Judge, just so you know kind of
17 what's coming, I do have some motions on potential --

18 THE COURT: Before we get started?

19 MR. SCALZO: Yeah.

20 I just don't know what's going to be in front of the
21 jury as far as openings, or anything like that.

22 THE COURT: Okay. We'll come back at 11:00 and let
23 you argue those.

24 (WHEREUPON, Court's Exhibit No. 1 was marked for
25 identification and admitted into evidence.)

1 (WHEREUPON, a break was taken.)

2 THE COURT: Yes, sir, Mr. Scalzo.

3 MR. SCALZO: May it please the Court.

4 Your Honor, there are some issues, and I just want to
5 get clarification on the record. The State has indicated
6 that they were not going to introduce Lyle or 404(b) prior
7 bad act evidence. I want to be clear about what I
8 consider to be that kind of evidence.

9 THE COURT: Okay.

10 MR. SCALZO: There is references in the witness
11 statements and reports of domestic violence in the house.
12 I would consider that to be prior bad act evidence.

13 And there's, also, references in witness statements
14 and reports to the fact that the Defendant may have been
15 sexually abused by his father, as well as allegations that
16 he committed a sexual assault on another -- or other
17 people.

18 THE COURT: Okay.

19 MR. SCALZO: Those are the primary issues.

20 THE COURT: Okay. Ms. Seay.

21 MS. SEAY: Your Honor, I think the first issue that
22 he mentioned was the issue of domestic violence in the
23 home. Your Honor, I think that both the witnesses -- both
24 the victim, C [REDACTED] P [REDACTED], and her sister, K.P.,
25 and her mother, Angela Paugh, would all testify that there

1 was domestic violence in the home perpetrated by the
2 Defendant.

3 Now, I think it's part of the res gestae of the crime
4 of sexual abuse. Because I intend to present an expert
5 witness later in my case who would testify that the
6 presence of domestic violence in the home often reinforces
7 to a child sexual assault victim that the weaker parent is
8 unable to protect them. And that is one of the reasons
9 that children often delay in disclosing, as well as the
10 fact that children are often threatened not to disclose
11 abuse by the perpetrator, which is, in fact, the case
12 here. And that domestic violence, also, reinforces that
13 those threats could be very real, because the perpetrator
14 is willing to perpetrate violence on other people in the
15 home.

16 So I think the domestic violence issue is relevant in
17 a number of ways to the res gestae of the crime of the
18 sexual abuse that occurred.

19 THE COURT: All right. Well, that's two things,
20 though, isn't it? You're talking about res gestae and,
21 also, a motive for delayed disclosure?

22 MS. SEAY: Yes, sir.

23 THE COURT: So that's just --
24 What about that, Mr. Scalzo.

25 MR. SCALZO: Judge, one, you're going to hear an

1 objection from me with regard to that expert testimony, if
2 that's part of the topics that that expert is going to
3 talk about. But I'll put that aside for a second.

4 With regard to -- if you look at 404(b), the only
5 reason that that prior bad act would come in -- it's not
6 supposed to come in to show conformity therewith. That's,
7 essentially, what the Solicitor really just argued to you
8 is that the conduct, which is bad conduct in this case,
9 and, essentially, they're arguing that that makes it
10 consistent with the character that he's -- that the sexual
11 assault is acting in conformity with that bad character.

12 We don't have a situation where identity is at issue.
13 There isn't a claim of accident or mistake. Those are the
14 other exceptions to 404. The domestic violence isn't
15 relevant to the motive or intent for him to commit the
16 sexual assault. That's the primary decision that the jury
17 has got to make.

18 The issue isn't whether or not the child's disclosure
19 being later than immediate -- that's not an element of the
20 charge. I understand that that may be part of the State's
21 story that they're presenting to the jury. That isn't an
22 element of the crime that they've got to prove. And I
23 don't think a jury is really being asked to consider it as
24 conformity, him acting in conformity with that bad
25 behavior.

1 THE COURT: Okay. Well, y'all are going to have to
2 give me a little bit more specific indication of what the
3 testimony is going to be so I can work this out in my own
4 mind.

5 MS. SEAY: Your Honor, I believe the testimony would
6 be from Angela Paugh, the Defendant's ex-wife, that during
7 the marriage that he was physically abusive to her,
8 verbally, and mentally, and emotionally abusive to her.
9 And I believe that the testimony of K.P. , the
10 younger sister of the victim, would be that he was
11 verbally abusive towards her. And that the testimony from
12 the victim, C [REDACTED] P [REDACTED], would be that she observed this
13 domestic violence between her father -- the domestic
14 violence that her father perpetrated on her mother.

15 And I do think that goes to the issue of the delayed
16 disclosure and as part of what was going on in the home
17 during this time. I don't think it's something that can
18 just be separated out of what was going on in their lives
19 at that time.

20 THE COURT: Okay. I understand.

21 Well, I find that the evidence that Mr. Scalzo has
22 objected to is of minimal relevance to the alleged
23 offense. And any probative value it has is vastly
24 outweighed by the danger of unfair prejudice, or any other
25 concerns of Rule 403.

1 Now, I understand your argument about the delayed
2 disclosure and that that might be a rational for it. But,
3 at this point, I don't know what type of argument is going
4 to be made about that on either side as far as when the
5 disclosure was made as to when -- as opposed to when the
6 contact, initially, occurred. So it's possible, I
7 suppose, that the Defense could open the door to this type
8 of evidence under the theory that Ms. Seay has already set
9 forth.

10 But, before the State would seek to bring up this
11 type of evidence, they just need to notify the Court so we
12 can take it up outside of the jury's presence.

13 MS. SEAY: Yes, sir, Your Honor.

14 And I'll make sure that my witnesses -- if you'll
15 give me just a moment, I'll make sure my witnesses
16 understand your ruling. If you'll give me just a moment.

17 THE COURT: Okay. Sure.

18 (Pause.)

19 MS. SEAY: Okay. The next issue I believe was the
20 sexual abuse that the Defendant suffered, supposedly, at
21 the hands of his father.

22 Was that your next issue?

23 MR. SCALZO: Combined.

24 There was an allegation in -- I believe it's
25 C [REDACTED] either report or statement where she is

1 referencing that this happened to my client when he was
2 younger. And then there was, also, allegations by a
3 couple of witnesses that he has committed this kind of
4 offense against other family members, both related to
5 sexual abuse.

6 MS. SEAY: Okay. As to the first issue, Your Honor,
7 the sexual abuse of the Defendant. The victim has stated
8 in her statement and would testify that the Defendant told
9 her, The reason I'm doing these things to you is because
10 this is what my father did to me. You'll probably do it
11 to your own children, too.

12 I think that is relevant to this case, because it is
13 the Defendant telling the victim why he's doing what he's
14 doing to her. And I think that is an important part of
15 this case. And I don't think she should be prohibited
16 from testifying about that.

17 And as to him abusing any other family members, I
18 don't intend to get into that. And I've advised the
19 witnesses that they're not to comment on any allegations
20 about him abusing any other family members in a sexual
21 manner.

22 THE COURT: Okay. Mr. Scalzo.

23 MR. SCALZO: With regard to the abuse at the hands of
24 his father. One, again, it's prior bad act evidence in
25 the sense that the obvious underlying theme or argument to

1 the jury, the message they're trying to send to the jury
2 is someone who was victimized is now going to victimize
3 somebody else. There isn't any other evidence, other than
4 the witness saying that. Mr. Paugh has never alleged it
5 in a criminal matter. He's not going to get up on the
6 stand and allege it. It is simply that is what the
7 witness is going to say is a conversation that she claims
8 to have happened.

9 I don't see how the jury is not going to sort of play
10 armchair psychologist or psychiatrist and start trying to
11 get into the mind of the Defendant and then say, okay,
12 this isn't just here is my reason for doing this, not in
13 the sense that I'm doing this like I need money so I'm
14 going to go take that money. What it's really saying is
15 you have a character trait, that this happened to you,
16 therefore, in your character is to do this kind of thing.
17 And that's really what's trying to be -- that's what is
18 going to be placed in front of the jury. And I don't see
19 how they get around not applying that as character
20 evidence.

21 THE COURT: Okay. Well, this evidence of why he was
22 doing it, as alleged by the witness as to what Mr. Paugh
23 said, does not make the ultimate issue in this case, which
24 is whether he committed the crimes alleged in the
25 indictment, more or less probable to an extent such that

1 it's probative value would be more than the prejudice that
2 might ensue.

3 So I find a potential for unfair prejudice, again,
4 outweighs substantially any probative value that
5 evidence may have. So, under Rule 403, I would exclude
6 it.

7 Okay. Anything further?

8 MR. SCALZO: Judge, the only other issue that's
9 somewhat unresolved is that I don't know if the State
10 intends to attribute any statements that my client may or
11 may not have made to the State. I don't know if that's --
12 and do we need to have a Jackson v. Denno hearing.

13 THE COURT: Yes, ma'am.

14 MS. SEAY: Your Honor, the only thing I think
15 Mr. Scalzo could be referring to is Investigator Henderson
16 contacted the Defendant in Baltimore, Maryland, and asked
17 him if he would come and talk to her. And he stated that
18 he didn't have a way, or couldn't, or something like that.
19 And I didn't intend to get into that.

20 And when he was arrested and was brought here to
21 Greenville, Investigator Henderson went to interview him
22 and he invoked his right to counsel. And so we, of
23 course, would not get into that.

24 So I don't think there are any issues there.

25 MR. SCALZO: And I agree with that. And I just don't

1 know what's going to be used. There is -- and I realize
2 the person is not on the witness list, but I want to be
3 clear.

4 When he was interviewed in person and he said, I want
5 a lawyer, there was a woman from DSS who was present and
6 asked him some questions about paying child support. And
7 she does attribute a statement to him that is a little bit
8 negative. I don't know if the State intends to put
9 that in or not. I just want to be clear on the
10 record.

11 MS. SEAY: I was not planning to call the DSS worker
12 as a witness at this time.

13 THE COURT: Okay.

14 MR. SCALZO: Then that resolves that issue, Your
15 Honor.

16 MS. SEAY: I mean, I'm not saying that there may not
17 be something that would open the door to my calling her.
18 But, at this time, I am not planning to call her.

19 THE COURT: Okay. Well, I understand.
20 Anything further?

21 (There was no response.)

22 THE COURT: You can bring the jury in.

23 Thank you.

24 (WHEREUPON, the jury came into open court at
25 approximately 11:22 a.m.)

INTRODUCTORY REMARKS

THE COURT: Pay no attention to the man behind the curtain.

Ladies and gentlemen, I want to give you some preliminary remarks before we get started in this trial of the State v. Joseph Paugh.

The first thing I want to do is, again, thank you for your contribution to your community this week by being here for jury service. The right to a jury trial is a valuable and important right. And the right to have a trial before one's peers and public citizens is a right that was won by the founders of our country after a long and costly struggle.

The reason you were summoned to come down to the courthouse, as you probably know, on Monday morning is because you're either a registered driver, or a registered voter, or you have a highway department identification card. That's why you were sent a letter to come down here.

You may be curious as to why you were, actually, chosen to sit on this particular jury. And the reason you were chosen to be on this jury of the State v. Joseph Paugh is because both the State and Mr. Paugh believe you could be fair and impartial, and you could decide this case without any kind of bias or prejudice whatsoever, or

1 any preconceived notions about how it should come out. So
2 your task is to be fair and impartial in listening to the
3 evidence and, ultimately, reaching a verdict.

4 You've met the lawyers in the case. And I know some
5 of you were on the jury earlier this week, and you've
6 already met some of the participants. But let me now
7 introduce some of the other people in the courtroom and
8 kind of let you know who they are and what their jobs are.
9 And then I'm going to talk about your job.

10 The first person I want to introduce is Ms. Hollie
11 Jenkins. She's a court reporter. She takes down every
12 word that is said, because Circuit Court is a court of
13 record. And then to her right is Renee Kelley, who is
14 with the Clerk's Office. And, as you saw, she helps
15 conduct the jury selection and helps with keeping things
16 running efficiently. And then you've met the bailiffs,
17 Mr. Thompson and Mr. Anderson. They're here for your
18 assistance while you're serving on the jury. And then up
19 here on the bench with me is Graham Buckner, who's my law
20 clerk. He helps me with legal issues that arise during
21 the case. And you may see him going in and out of the
22 courtroom from time to time to help me with research on
23 issues that may arise in the case.

24 The people I've introduced to you, and, certainly,
25 the lawyers who you've already met, everyone has taken an

1 oath to do their job. And I, certainly, took an oath to
2 do mine. And you're going to take an oath as well.

3 So, at this time, I'm going to ask Ms. Kelley to
4 administer the oath. And listen to the words very
5 carefully because they've been around a long time and
6 they're very instructive.

7 So, yes, ma'am.

8 THE CLERK: Please stand and raise your right hand.

9 The correct response to the oath is, "I will."

10 (WHEREUPON, the jury was sworn at approximately
11 11:26 a.m.)

12 THE CLERK: Thank you.

13 You may be seated.

14 THE COURT: All right. Now, let me tell you a little
15 bit about my job, and then I'm going to talk about your
16 job in this process. My job is fairly simple when it's
17 compared to yours. I'm the judge of the law. And, under
18 our system of justice, that means that I have two main
19 tasks during this trial.

20 The first is to rule on the admissibility of
21 evidence. If someone objects during the course of this
22 trial to evidence -- and don't hold it against them if the
23 lawyers do object. They have an ethical duty to object
24 when they think evidence is improper. But if someone
25 objects, I'll have to rule on whether the objection is

1 proper. And, if I find that the evidence is improper and
2 you shouldn't consider it, I'm going to sustain the
3 objection to the evidence. If I find the evidence is
4 proper and you should consider it, then I'm going to
5 overrule the objection.

6 That is the first job I have, to rule on the
7 admissibility of objections to evidence. Usually, I can
8 do that right on the spot. Sometimes we have to have a
9 little conference up here at the bench. And other times
10 when things get a little protracted, we have to, actually,
11 ask you to go back to the jury room so we can hash it out
12 here in the courtroom.

13 My second job I have, as the judge of the law, is
14 that at the end of the case, I'm going to instruct you on
15 what the law is that you must apply to the facts of this
16 case.

17 Now, your job is to be a judge as well. And when it
18 comes to the facts of a case, your badge may as well say
19 judge, instead of juror. Because, under our Constitution
20 and system of justice, you, the jury, are the sole and
21 exclusive judge of the facts. I can't intrude on your
22 prerogative to determine what the facts are. And I'm not
23 going to comment on the facts during this trial, or
24 indicate in any way what I think any opinion I may have is
25 as to what the facts are, because that's your sole

1 prerogative to determine what the facts are. That's the
2 way our system is set up.

3 So you're the judge of the facts. And you must
4 determine what the facts are. And the reason we need a
5 jury is because there's a dispute about what the facts
6 are.

7 Now, how do you determine what the facts are? You do
8 that by weighing and evaluating the evidence. There are
9 only two things you can consider in determining what the
10 facts are, the first is witness testimony. And we
11 anticipate in this trial -- I know very little about this
12 because that's the way our system is set up, the Judge
13 doesn't know much beforehand, just as you don't. But I
14 anticipate we will have people who come in who are sworn
15 and sit in this chair right here to testify about things
16 they know about this case, or things that are relevant to
17 it. So that's the first source of evidence that you can
18 determine what the facts are from, witness testimony.

19 The second source is called an exhibit. And we may
20 have in this case -- I don't know if we will or not, but
21 we may have exhibits. Exhibits are simply physical,
22 tangible things. It might be a map, or a photograph, or
23 something of that nature. But you'll know it's an
24 exhibit. And you'll know it's evidence from what you can
25 determine what the facts are, because it will be back in

1 the jury room with you at the end of the case and have a
2 sticker on it that says exhibit number so and so.

3 Now, everything else is not evidence. What the
4 lawyers say, although it's very important and although you
5 should listen very keenly to what they say, because
6 they're trying to help you understand the evidence, bear
7 in mind that they're not witnesses. So what they say is
8 not evidence itself. So you can only determine the facts
9 from the evidence. And, again, that's sworn witness
10 testimony and exhibits.

11 Now, as the judge of the facts, you will have to
12 determine by necessity whether you believe the witnesses
13 or whether you believe the exhibits. And what I'm talking
14 about is the credibility of the evidence. So you'll have
15 to gauge the credibility of every witness who sits in this
16 witness chair and every exhibit that may be introduced.

17 Now, how do you do that? I'll give you some
18 guidelines. In the case of a witness who testifies, you
19 can consider whether they have some interest in the
20 outcome of this case, whether they're biased or prejudiced
21 towards a party or about some issue in the case, whether
22 they give evidence that is consistent or inconsistent with
23 other evidence in the case. In other words, how their
24 testimony stacks up against the other evidence in the
25 case. You may consider their demeanor on the stand. And

1 you can, certainly, consider and use whatever you use in
2 your day-to-day life to determine whether someone is
3 telling you the truth. Because your common sense did not
4 suddenly evaporate when you walked into the courthouse.

5 Now, bear in mind that, as I said, your job is much
6 more difficult than mine. And it's particularly hard in
7 being the judge of the facts, because if I make a mistake
8 on the law, it can easily be corrected on appeal. And you
9 may read in the paper from time to time about cases that
10 are reversed on appeal. And that means the Judge made a
11 mistake on the law, typically.

12 If you, the jury, make a mistake as to what the facts
13 are, the way our system of justice is designed, it can
14 almost never be corrected. So I know you'll do your job
15 earnestly. And I know you'll pay keen attention. I know
16 it's hard to sit there for long periods of time and
17 listen. But, remember, as we all know, it's right when we
18 let our minds drift that something important happens. So,
19 please, try to pay close attention during this trial. And
20 I know you won't decide the credibility of the evidence
21 arbitrarily, but you'll do it with a sound basis and using
22 your common sense and sound judgement.

23 Now, this is a criminal case. And there are certain
24 principles that apply to any criminal case that I need to
25 go over with you again. I've already told you about it a

1 little when we were about to start the jury selection.

2 But, in a criminal case, no matter what the charge
3 is, the person charged is always presumed innocent. A
4 person does not have to prove they're innocent or prove
5 they're not guilty. And by being indicted, bear in mind,
6 that the indictment is not evidence of anything. It's not
7 a witness. It's not an exhibit. The indictment is simply
8 a piece of paper. It's a ticket, so to speak, that lets
9 the State come into the courtroom and start a case against
10 a citizen and let the citizen know what he's charged with.

11 So Mr. Paugh has pled not guilty to the indictment.
12 And that puts the burden of proof on the State. And the
13 State can only obtain a conviction if the State convinces
14 all 12 of you that they have proven each element of the
15 crime beyond a reasonable doubt. Mr. Paugh is presumed
16 innocent. And he doesn't have any burden of proof
17 whatsoever. He doesn't have to offer any evidence or
18 explanation whatsoever. So those are some principles of
19 criminal trials. And I'll repeat those again at the end
20 and elaborate on them some more.

21 How many of y'all have sat on a jury before in a
22 criminal case, if you'll just raise your hand?

23 (WHEREUPON, several jurors indicated in the
24 affirmative.)

25 THE COURT: So those of you who have not, let me, in

1 hopes of demystifying the process even further, kind of
2 tell you the structure of a criminal trial and how it's
3 going to unfold.

4 In just a minute, you're going to hear the opening
5 statement by the Assistant Solicitor, Ms. Seay. And she
6 will give an opening statement, which is meant to be just
7 a road map or a guide of what the issues are going to be
8 and what the evidence is going to show, according to the
9 State. The State goes first, because the State has the
10 burden of proof.

11 Mr. Paugh, through his attorney, Mr. Scalzo, will
12 have the opportunity, but not the obligation, to give an
13 opening statement as well at that time. And then we'll
14 move into the presentation of the evidence. The State,
15 again, bearing the burden of proof, will go first. And
16 the Defense will have the opportunity to confront that
17 evidence. Once you've heard the State's evidence, the
18 Defense will have the opportunity, but, again, not the
19 obligation, to present any evidence he wishes to.
20 Because, remember, he doesn't have any burden of proof or
21 burden to do anything during this trial. And the State
22 can confront any evidence he wishes to present.

23 Then, after you've heard all the evidence, the
24 lawyers will give their closing arguments and they will
25 tell you what they think the evidence showed and what your

1 verdict should be. And then I'll give you the instruction
2 on the law. And then the case will be in your hands for a
3 decision and for a verdict.

4 Now, it's very important that until we reach that
5 point that you not talk about this case with anyone.
6 Don't talk about it amongst yourselves. Don't talk about
7 it with anyone. We spent a good deal of time this morning
8 trying to find a jury that could be fair and impartial and
9 have an open mind about this case, and we want to keep you
10 that way, so don't talk about the case.

11 The reason that is so important, I think, bears some
12 explanation. You may hear this morning or early this
13 afternoon from a witness. And if you start talking about
14 what that witnesses testimony consisted of, or what the
15 witness said, or didn't say, or should have said, you're
16 starting to draw conclusions about the case. And you may
17 very well hear from a witness later today or tomorrow who
18 says something completely opposite.

19 So don't talk about the case. Continue to keep an
20 open mind throughout it. And don't begin your
21 deliberations until I tell you that you can. And that
22 will be after you've heard all the evidence, after you've
23 heard the closing arguments, and after you've heard the
24 law that you must apply to the facts of the case. And
25 only then will you have the tools you need to do your job.

1 Now, ladies and gentlemen, we have fine attorneys
2 involved in this case. But, bear in mind, the attorneys
3 are advocates for their clients and they're going to
4 zealously represent their clients to the best of their
5 ability. You and I are not advocates or partisans for
6 either side. Our job is to be neutral and to be fair and
7 impartial. And your job is to determine the facts from
8 the evidence and determine whether the State has met its
9 burden of proof beyond a reasonable doubt.

10 Now, we're going to take a break about every hour and
11 a half, as I said. And if anyone needs a break before
12 that, just let me or one of the bailiffs know and we'll,
13 certainly, accommodate you. And the same goes for the
14 lawyers and anybody at their table. And if you can't hear
15 anything during the course of the trial or you can't see
16 anything, let us know, too. Because it's essential that
17 you see and hear all the evidence.

18 And I want to thank you again for your attention.

19 At this time, we'll have the opening statement.

20 So, yes, ma'am, Ms. Seay.

21 OPENING STATEMENTS

22 MS. SEAY: Thank you, Your Honor.

23 May it please the Court.

24 Ladies and gentlemen of the jury, I've already been
25 introduced to you, but I wanted to take the opportunity to

1 tell you again that my name is Bryna Seay. I'm employed
2 by the Solicitor's Office as an Assistant Solicitor. And
3 it is my job to assist in the prosecution of criminal
4 cases in Greenville County. It is my honor and my
5 privilege to represent the people of Greenville County in
6 this case.

7 And one of the people that is a citizen who is going
8 to be an important person for you to get to know in this
9 case is the victim in this case. Her name is C [REDACTED]
10 P [REDACTED]. And I'll tell you a little bit more about C [REDACTED]
11 in a few minutes.

12 The first thought that I want to give you is this,
13 children come into the world with the right to be loved
14 and nurtured, not to be abused, and, certainly, not to be
15 abused by their very own parent who's charged with raising
16 them in a loving and nurturing environment. Sexual
17 abuse -- and the testimony that you're going to hear about
18 the sexual abuse of C [REDACTED] P [REDACTED] is not a pleasant
19 subject. I'll go ahead and tell you that up front.

20 C [REDACTED], who's 16 now, is going to have to testify
21 and tell you about the details about what her father did
22 to torment her for six years of her life. Some of it may
23 be very unpleasant for you to hear. It may be disturbing.
24 But I ask that you listen to her very carefully to what
25 she has to say, because it's an important day for her.

1 This is her opportunity to tell you what happened to her.
2 She is an important part of this case.

3 She'll tell you that her father began abusing her
4 when she was around the age of five years old. And that
5 this went on until she was about 11 years old when he left
6 the home. She, finally, told this terrible secret that
7 she'd been keeping when she was 14. She's now 16 years
8 old. And, as I said, she'll testify. You'll get to know
9 her, and you'll hear the details of what happened.

10 Keep in mind that child abuse is a secret crime.
11 When I said she had a terrible secret, it was a secret
12 that only she shared with the perpetrator. Sexual abusers
13 don't go around committing their crimes in front of
14 witnesses, hey, look what I'm doing. Hey, look at this.
15 It's a very secret crime. They don't want anybody to find
16 out about it.

17 The State does have the burden of proof in this case,
18 as the Judge has already told you. We have the burden of
19 proving that this Defendant committed the offense of
20 criminal sexual conduct with a minor in the first degree
21 beyond a reasonable doubt. What does that mean? That
22 means that we must prove the elements of the crime beyond
23 a reasonable doubt. We'll talk more about reasonable
24 doubt at the conclusion of the case when we have an
25 opportunity to give you our closing remarks. But, for

1 now, I want to tell you what the elements of this crime
2 are, and what the State intends to prove.

3 Criminal sexual conduct with a minor in the first
4 degree has, basically, two elements. Number one, a sexual
5 battery occurred. And the Judge will give you the
6 specific definition of what a sexual battery is when he
7 gives you his charge on the law. As he explained to you,
8 that's part of his duty to give you the charge on the law.
9 So listen very carefully to that definition when the Judge
10 gives it to you.

11 But part of what he's going to tell you, I believe,
12 is that a sexual battery is any intrusion, however slight,
13 into the genital openings of another person's body. And
14 it, also, includes oral sex. The second element of this
15 crime is that the child was under the age of 11. And
16 we'll submit evidence to show that C [REDACTED] was under the
17 age of 11 when the majority of these acts took place.

18 Now, you may be thinking, what about motive? Doesn't
19 the State have to prove a motive? The State does not have
20 to prove motive in this case. The State cannot and will
21 not be able to explain to you why a grown man, the
22 biological father of a young lady, would find sexual
23 gratification by abusing her. We don't have to prove
24 that, and we won't be proving that.

25 As the Judge mentioned, your common sense did not

1 evaporate when you entered the courthouse doors. I want
2 to reiterate that point, that you need to use your common
3 sense, and you need to use the sense that you use in your
4 everyday lives in your business and your personal affairs
5 to evaluate what you hear, to evaluate the credibility or
6 the believability of the witnesses that you hear from.
7 Who has a motive in this case? Who might be bias? Who
8 has reason to say what they say? Use your common sense
9 when you're evaluating all of those things. That
10 will lead you to a just and truthful verdict in this
11 case.

12 And I submit to you that, at the conclusion of the
13 case, you're going to be firmly convinced of this
14 Defendant's guilt such that I'll be asking you to render a
15 verdict of guilty when I have an opportunity to speak with
16 you again.

17 Thank you for being here, for taking time from your
18 business and your personal affairs to be here. This is a
19 very important case both for C [REDACTED] P [REDACTED] and for Joseph
20 Paugh, the Defendant. And we appreciate the sacrifice
21 that you make to be here in order to serve as a juror in
22 this case.

23 Thank you.

24 THE COURT: Thank you, Ms. Seay.

25 Mr. Scalzo.

1 MR. SCALZO: Thank you, Your Honor.

2 Good morning.

3 Again, my name is Chris Scalzo. I'm a Public
4 Defender here in Greenville. And I'm privileged to
5 represent Joseph today in this trial.

6 I want to kind of step back for a second and give you
7 a little example and then tie that into what's going on in
8 this trial. I want to take you back to school, high
9 school. And you go to two classes, the first class is
10 shop. And, in your shop class, your teacher gives you a
11 pile of wood and says, Go build a desk. Okay. Your next
12 class is English. And what the teacher does in English
13 class is the teacher says, Here is the name of the
14 character, here is where the story takes place, and here's
15 the date when the story takes place. You're to write a
16 story using those three things. You can come up with
17 anything else you want, but you've got to use those three
18 things.

19 So you've got an English class and you've got shop.
20 And the question to you is, what is this trial more like,
21 shop class or English? It's more like shop. And here is
22 why. And it has a lot to do with what the Judge described
23 to you. The burden of proof is on the State. You've all
24 heard it your entire lives. We all hear it on TV all the
25 time. The State has got to prove beyond a reasonable

1 doubt that the person did what the State says they did,
2 the presumption of innocence.

3 Well, maybe at any other time in your life, you could
4 kind of say, okay, yeah, I understand that. Today, the
5 rubber hits the road. Today, you're going to be asked to,
6 actually, apply, that and to use that, and to make sure.
7 Because it's part of your oath that you apply it in
8 accordance with what the Judge tells you the law is. And
9 I think he's going to tell you, at the end of the trial,
10 that it's not a trick. It's not my trick. It's not
11 something I invented.

12 The State has told you, this is our burden. And
13 there's a reason for that. We value our freedom very
14 highly in this country. And, in order to protect it, what
15 we don't want to have happen is the State to just be able
16 to say, you did something, we're done. That's just not
17 how we, as Americans, think about criminal cases. The
18 State has got to bring evidence to you and provide it to
19 you.

20 Now, why is it more like shop than English class?
21 Well, in English class, the evidence you were given was
22 the name of the character, where the -- the date, where
23 does it take place. But you're filling in all the other
24 things. That's not evidence. That's three pieces of
25 evidence. But the story isn't written by those three

1 pieces of evidence. The story is written by a whole lot
2 of other things. It's more like shop. Because, in shop,
3 what you're given is a pile of wood, evidence, and then
4 some tools to work with to try to put together what it is
5 you're supposed to put together.

6 Now, if the shop teacher came in and said, Here is
7 your pile of wood, and you're in an empty room and you've
8 got no tools, it's not likely you're going to be able to
9 put together whatever it is you need to put together.
10 And, in a criminal trial, that's the burden of proof.
11 That's part of the burden of proof. That's why it's more
12 like shop class. It's that the State has got to be able
13 to, as part of evidence, not just simply a statement, not
14 just simply here is our allegation, the indictment that
15 the Judge was speaking of earlier when he said, This piece
16 of paper is not a piece of evidence, it's just the
17 allegation. And, as he told you, it's an allegation.
18 Well, there is more to providing evidence than the
19 allegation, more to it than just here is what we say took
20 place.

21 So I want you, as you're hearing the case and looking
22 at whatever it is that's going to be presented, to
23 remember that you're kind of in shop class. And there's a
24 danger in every criminal case, because they're all serious
25 because somebody's freedom is at stake. And there may be

1 victims in many criminal cases.

2 But there may be no more uncomfortable case to sit on
3 and to be presented with than this kind of case. There's
4 nothing that's going to make anybody in this room, Joseph
5 included, more uncomfortable than the kind of topic and
6 allegations that are going to be talked about and you're
7 going to hear in this case. But that just raises the duty
8 that you have and the stakes even higher about what is
9 going on and the ability for the State to take freedom.
10 Because that's what it's about. It not your job. You're
11 not the investigators.

12 You haven't been given an assignment in English class
13 to go out and try to fill in a gap, should it be there.
14 You're not trying to build that out of something that
15 you've not been presented with. It's shop class. The
16 State is your teacher. The State is the teacher who says,
17 Here is your wood, here are your nails, here are your
18 tools. If the State comes in and says, Here is your wood,
19 and doesn't give you nails, a room to work in, some
20 electricity, that's not proof beyond a reasonable doubt.
21 That's the concept. And that's what your job, your duty
22 is to do today. As you hear and as you sit there,
23 remember that.

24 Because the emotion, while important, if it's not the
25 same as a nail, if it's not the same as the tool, you

1 can't go to English class and then say, you know what,
2 because of the emotion, I'll -- here is the nail that they
3 didn't give me. Here is the tool that they didn't give
4 me. It's a very dangerous thing to allow that to happen.

5 You've been chosen because we think that you can live
6 up to your duty, that you can do this.

7 Thank you.

8 THE COURT: Thank you, Mr. Scalzo.

9 You may call your first witness.

10 MS. SEAY: Thank you, Your Honor.

11 The State calls C [REDACTED] P [REDACTED].

12 THE CLERK: Please raise your right hand and place
13 your left hand on the Bible.

14 WHEREUPON,

15 C [REDACTED] M [REDACTED] P [REDACTED],

16 after first having been duly sworn, testified as follows:

17 THE CLERK: Okay. You may have a seat.

18 DIRECT EXAMINATION

19 BY MS. SEAY:

20 Q C [REDACTED], would you, please, state your full name? I
21 want to make sure that the jurors way back here can hear
22 you okay.

23 A C [REDACTED] M [REDACTED] P [REDACTED].

24 Q Okay. Pull that microphone up or scoot up just a
25 little bit.

- 1 A (Witness complied.)
- 2 Q There you go.
- 3 Now, let's try that one more time.
- 4 A C [REDACTED] M [REDACTED] P [REDACTED].
- 5 Q That's better.
- 6 Okay. C [REDACTED], how old are you?
- 7 A 16.
- 8 Q What's your date of birth?
- 9 A November [REDACTED] [REDACTED].
- 10 Q Okay. And do you live here in Greenville?
- 11 A Yes, I do.
- 12 Q Have you always lived in Greenville?
- 13 A Yeah.
- 14 Q Okay. Do you go to school?
- 15 A Uh-huh.
- 16 Q Where do you go to school?
- 17 A Greenville High School.
- 18 Q What grade are you in this year?
- 19 A The eleventh.
- 20 Q What kind of classes are you in?
- 21 A I'm in mainly just regular classes, but I have
- 22 some -- like English. My English class is honors.
- 23 Q What kind of grades do you make?
- 24 A A's and B's, maybe one C.
- 25 Q Do you participate in any activities at school?

1 A I used to do cheerleading, but I quit cheerleading to
2 get a job. I'm thinking about doing softball.

3 Q Okay. What do you do in your spare time?

4 A I work, and just hang out at my house with my family
5 and friends.

6 Q Where do you work?

7 A I work at McDonald's.

8 Q Do you have any particular days that you work at
9 McDonald's?

10 A Saturday, Sunday, Monday, and Tuesdays.

11 Q Approximately how many hours a week do you work?

12 A About 27.

13 Q So 27 hours at work, plus school. You have kind of a
14 heavy load, don't you?

15 A Uh-huh.

16 Q C [REDACTED], who lives in your home right now?

17 A Me, and my mom -- me, and my mom, my sister, and my
18 mom's boyfriend or fiancé.

19 Q Okay. And what is your sister's name?

20 A K.P.

21 Q And what is your mother's name.

22 A Angela Paugh.

23 Q All right. And your mother's boyfriend or fiancé?

24 A Steven Cross.

25 Q How old is your sister, K.P.

- 1 A She's 13.
- 2 Q And what grade?
- 3 A The eighth.
- 4 Q Okay. Where do you, currently, reside?
- 5 A I'm sorry.
- 6 Q Where do you, currently, live?
- 7 A Oh, I live at [REDACTED] Orders Street.
- 8 Q How long have you lived at [REDACTED] Orders Street?
- 9 A Since sixth grade -- fifth grade, sixth grade --
- 10 fifth grade.
- 11 Q And, before you lived at [REDACTED] Orders Street, where did
- 12 you live?
- 13 A At [REDACTED] Conyers Street.
- 14 Q Okay. And do you know how long you lived at [REDACTED]
- 15 Conyers Street?
- 16 A From when I was a little kid until the time that I
- 17 moved in my new house.
- 18 Q Okay. So those are, primarily, the two places that
- 19 you have lived?
- 20 A Uh-huh.
- 21 Q All right. Is Joseph Paugh your father?
- 22 A Yes.
- 23 Q Are there some things that your father did to you
- 24 that you want to tell this jury about?
- 25 A Yes.

1 Q Let's start with the first thing that you can
2 remember that your father did to you. Can you tell us
3 about that?

4 A I was in -- I was five years old. And I was in the
5 bathroom. And he came in there buck naked and told me
6 that he was going to take a shower. And I had my towel
7 around me. And he took the towel and threw it on the
8 floor. And then he grabbed me and -- he grabbed me and
9 threw me on the floor. And then he tried to rape me. But
10 then I started screaming. And I guess that he got just
11 tired of -- and he couldn't -- I felt like he couldn't
12 like put it in me or something.

13 So I think that he just gave up. And then so he
14 threw the towel back at me and told me to go get dressed.
15 And I was crying and telling him that I felt like I had
16 got cut or something. It felt like I was cut down there.
17 And he told me to lay across the bed. And he took the
18 peroxide and poured it on my lower part. And he left the
19 peroxide on the floor. And he told me --

20 Q Let me interrupt you. How did that feel when he
21 poured the peroxide on there?

22 A It didn't feel good. It didn't feel any better than
23 it already felt.

24 Q Was this painful for you when your father did this to
25 you, when he tried to do what he did that you just

1 described?

2 A Yes.

3 Q All right. Go ahead with what you were saying.

4 A But he left the peroxide sitting on the floor. And
5 then he told me to tell my mom that -- because we had this
6 metal piece that was on the -- in our bathroom. And he
7 told me to tell her that I fell on that piece.

8 And so when she got home, she saw the peroxide that
9 was sitting beside my bed. And she asked him what
10 happened. And he said that I had fell on the metal piece
11 in the bathroom whenever I got out of the bath. And he
12 told her -- my mom said, Okay. Well, she grabbed me and
13 she looked at me. And then she didn't feel like it was
14 right.

15 So she took me across the street to my grandma's
16 house. And my grandma had a look at me. And she was
17 like, C [REDACTED], are you sure this is what happened?
18 Because he told me not to -- Joe told me not to tell.

19 So she asked me, she said, Are you sure this is what
20 happened? And I told my grandma, Yes, I'm sure that's
21 what happened. And I was only five. I was scared of him.
22 And so I didn't want to make him even more angry.

23 So I told my grandma, Yeah. And I told my mom, Yeah,
24 so my mom would believe me. And so that was the first
25 time that it ever happened.

1 MS. SEAY: Your Honor, may the witness have a tissue,
2 if she needs one?

3 THE COURT: Certainly.

4 MS. SEAY: Thank you.

5 BY MS. SEAY:

6 Q All right. Was -- so was that the beginning?

7 A Yes, ma'am.

8 Q All right. And what happened from there?

9 A It started happening more frequently when my mom was
10 at work.

11 Q Where did your mother work?

12 A Tanner's Big Orange.

13 Q Do you know what kind of hours she would work?

14 A She would work like morning time until like 7:00.
15 But she would get home about 7:30. And it would happen
16 then and when she went out with my grandma and her sisters
17 to play like bingo and stuff. It would happen whenever
18 she was not at home at all.

19 Q Okay. Would your sister be at home?

20 A Yes.

21 Q And what would she be doing during these times?

22 A I would always tell her to be quiet and put a movie
23 on.

24 Q Would she be in a different room?

25 A Yeah. She would be in my bedroom.

1 Q All right. You said this started happening more
2 frequently. Can you, please, describe what started
3 happening more frequently?

4 A He would make me go in my mom and his bedroom. And
5 he would shut the door. And he would -- like my sister --
6 I would always tell my sister to put a movie on so she
7 wouldn't have to go through the same thing I was going
8 through.

9 Q So you tried to protect K.P. from anything
10 similar?

11 A Yeah.

12 Q Okay. And he would make you go into your parents
13 bedroom. And what would happen there?

14 A He would make me take my clothes off. And I would
15 always cry and tell him I didn't want to. And so I'd have
16 to like take them off one piece by another. And then he
17 would, usually, try to make me come on top of him, but I
18 would never want to. Because it always hurt. And I said,
19 Daddy, it's hurting. And he would always make me lay
20 beside him. And he would try to climb on top of me, and I
21 would scream.

22 Q What would he do when you would scream?

23 A He would, usually, give up. And then it got to the
24 point where after he gave up, he would start making me
25 suck his goober.

1 Q Okay. And how old were you when this started
2 happening?

3 A I don't know exactly what age I was. But it was
4 just -- the time from when I was five probably all the way
5 up. Because after it got to where he wasn't able to, I
6 guess, penetrate me, after it got to where he couldn't do
7 that, then he would make me suck it so that, I guess, he
8 would -- I don't know -- get the feeling or something.

9 Q What would happen when he would make you suck him?

10 A It, usually, started happening all the time. And it,
11 usually, would happen all the time. And I got to where
12 like when I would know that he was about to come. And so
13 whenever I would know that, because I would like let off
14 of his penis so it wouldn't get in my mouth. Because I
15 didn't like the taste.

16 Q Okay. Did your father ever threaten you in any way?

17 A Yeah.

18 Q Can you, please, describe those?

19 A He would threaten me and tell me that DSS was going
20 to come take me away from my grandma and my mom.

21 Q Did you believe him?

22 A Yeah. Because he knew that I loved my mom and my
23 grandma so much. And so whenever he would tell me that,
24 it would scare me. And I believed whatever he said.

25 Q Did he threaten you in any other way?

1 A Yeah. There was a few times whenever he would take
2 out his pocket knife that he would have. And he'd put it
3 up to my throat and tell me that if I would ever tell
4 anybody that he would kill me.

5 Q Did you believe him?

6 A Yeah.

7 Q Of those two threats, which scared you the most?

8 A Probably the taking me away from my grandma and my
9 mom.

10 Q Why is that?

11 A Because I felt like anything -- even if I would like
12 die, then it probably wouldn't hurt as much.

13 Q Hurt as much as what?

14 A As him hurting me.

15 Q So you thought that dying would be better than what
16 was happening to you?

17 A (Witness nodded.)

18 Q Did you ever think about telling somebody?

19 A Yeah, I did. But I was so scared that I couldn't do
20 it. Because he said that he would kill me.

21 Q Did he ever threaten you about if he went to jail
22 what would happen?

23 A He said that he would come back after me, that
24 whenever he got out, he would come and kill me. He would
25 come and kill me and my family.

1 Q Did you have any friends during this time?

2 A Yeah. I had my best friend, Shayley [phonetic], that
3 was -- she didn't live beside me at [REDACTED] Conyers Street.
4 But she lived on the next street over. And when we moved,
5 she was my next door neighbor.

6 Q Were you able to spend very much time with your
7 friends?

8 A No.

9 Q Why not?

10 A Because every day after school or whenever he would
11 come pick me up from my grandma's, my friend Shayley would
12 always ask if I could come over there and play. And he'd
13 say, No, she has cleaning, or, No, she needs to do this.
14 And he would just make up an excuse. And I never got to
15 spend very much time with her.

16 Q And so when he would keep you from going to spend
17 time with your friends, what would happen?

18 A He would either make me suck his penis, or he would
19 try to penetrate me again.

20 Q Was it painful when he tried to penetrate you?

21 A Yeah.

22 Q Did anything ever occur away from your house?

23 A Oh, there -- yeah. When my mom used to tell me to
24 like -- well, he would always like buy video games and
25 movies. And he would always want to take them back late

1 at night. And he would always tell my momma that I never
2 spent enough time with him.

3 And so my mom was like, Well, okay, go ride with him
4 to go take back the movies. But I think she was trying to
5 keep it to where it wasn't like starting an argument or
6 something.

7 And so whenever I would ride with him, he would take
8 me down into this thing that was really close by the house
9 and close by where Cherrydale was. And there was like a
10 bunch of like these buildings and stuff there. And he
11 would ride down through there. And he would make me get
12 in the back of his Explorer. And then he would make me
13 suck his penis there, too.

14 Q Did this happen one time, or more than one time?

15 A More than one time.

16 Q Did it happen frequently?

17 A Not all the time. It was just maybe once or twice a
18 month, maybe.

19 Q Okay. When he would take you off in the Explorer?

20 A Yeah. But this happened when I was about -- I mean,
21 I don't know the age. But it happened like after we moved
22 to Orders Street. And it was like when I was staying with
23 my friend like when I would go over to her house that
24 summer and stay with her a lot, he would make me ride with
25 him then.

1 Q Okay. And this is when you -- you lived at the same
2 place you live now?

3 A Uh-huh.

4 Q Did you have your own room?

5 A When I lived in [REDACTED] I didn't. Me and K.P. shared
6 a room. But then when I lived in [REDACTED] I got my own room.

7 Q Is there something significant that you recall that
8 happened in your room?

9 A Yeah. When he would come -- when my mom and all of
10 us would be asleep, he would come in there and he would
11 try to mess with me at night.

12 Q When you say that he would try to mess with you at
13 night, what, specifically, did he do?

14 A It's like I would be laying there. And he would like
15 start rubbing on my -- he would start rubbing on my leg.
16 And I would act like I was asleep, but I could feel it.

17 So I tried to stay asleep just to see if he would
18 stop and just go back to bed. And then he just kept on
19 going. And then I would like -- whenever he got probably
20 to where my calf is -- I mean where my upper leg is, I
21 would like jump and act like I just woke up. And then he
22 would just like put his mouth [sic] over me and tell me to
23 shut the "F" up.

24 Q He would put his --

25 A His hand over my mouth.

1 Q And what would he say to you?

2 A Shut the "F" up.

3 Q Okay. And what would he do to you after that?

4 A He would climb in the bed and make me suck on his
5 penis. And he would tell me always to be quiet, because
6 my momma was asleep.

7 Q Do you recall anything significant about a pair of
8 pajama's?

9 A There was a pair -- there was two pairs of pajama's
10 that I had got for my birthday. There was the pink ones
11 with the snow flakes and -- I mean the blue one with the
12 snow flakes, and then I had a pair of pink ones.

13 And I had my pair of blue like panties on. And he
14 had broke them. And whenever he broke them, I told him,
15 Daddy, you broke my pajamas. And he said, I don't care.
16 Shut the "F" up. Go back to bed. Because that was the
17 first time that he ever tried to do anything.

18 Q The first time he ever tried to do anything --

19 A At night.

20 Q At night?

21 A Yeah.

22 Q Okay. And this would be when your mother would be
23 asleep?

24 A Uh-huh.

25 Q And he, actually, ripped your panties?

1 A Uh-huh.

2 Q Do you recall anything about your father and having
3 to do with Vaseline?

4 A Yeah. He would -- whenever he would try to make me
5 climb on top of him, he would always tell me to go get the
6 Vaseline. And I would always start crying, because I knew
7 what he wanted me to do. And so he would make me rub the
8 Vaseline on him. And then he would make me try to climb
9 on top of him so -- he said that it would go in easier.

10 Q Did it?

11 A No.

12 Q Did it hurt you?

13 A Yeah.

14 Q Did he ever, actually, penetrate you?

15 A I don't -- I've been told that whenever I said that
16 it felt like a cut and I thought it was on the outside,
17 I've been told --

18 MR. SCALZO: Objection, Your Honor.

19 THE COURT: Sustained.

20 BY MS. SEAY:

21 Q Don't say what somebody else has told you.

22 A Okay.

23 Q Just say what you think.

24 A No, I didn't at first. But, yeah, I do.

25 Q You do think he penetrated you?

1 A Yes.

2 Q At some point, did you start your menstrual cycle?

3 A Yeah.

4 Q How old were you when that happened?

5 A I was about 10 years old.

6 Q All right. And tell us about that.

7 A Whenever I would start my period, I was -- I felt
8 like I was relieved. Because like he would never want me
9 to climb on top of him then, or try to penetrate me. So I
10 would -- all I would have to do is just suck on his
11 penis. And I would rather do that than him try to hurt me
12 again.

13 Q Okay. So any time that you had your period, he would
14 not try to penetrate you?

15 A Yeah.

16 Q Do you think about these things a lot, C [REDACTED]?

17 A Yeah. I try not to, but sometimes it just comes up.

18 Q Do you think about more and more things? Do you
19 remember more and more things that happened, as you think
20 about it?

21 A Yeah. Because I think it's like whenever he left and
22 those two years that I had just from him being gone and me
23 trying to act like a regular kid, it started to fade away.
24 But when I brought it back up, it started getting more
25 clear to me.

1 Q Okay. Well, let's talk about that, about when he
2 left and you, finally, brought it up. How old were you
3 when he left?

4 A I was 11.

5 Q Where did he go?

6 A Baltimore.

7 Q Okay. And did you hear from him after he went to
8 Baltimore?

9 A A few times. He would just call just to call. But
10 then there was one time whenever he called on my birthday
11 to wish me a happy birthday.

12 Q What birthday was it?

13 A I had just turned 14 -- yeah, I had just turned 14.

14 Q And he called you?

15 A Uh-huh.

16 Q What did he say?

17 A He told me happy birthday. And I had asked him if he
18 had -- about his other kid. And he -- because the family
19 from down there had told me that he was having another
20 kid. And so I had asked him about it. And he said, Yeah,
21 I'm having a little girl, but I'm not going to love her no
22 more than I love you. And the first thing that had popped
23 in my head was it's another little girl. And I started
24 thinking about K.P. and all those years, and about how
25 I would tell her to put a movie on and like just lay down

1 and try to go to sleep so she wouldn't have to go through
2 the same thing I went through.

3 And then so when he told me it was another little
4 girl, I knew that, you know, that's not my real sister,
5 but it's like my half-sister and how I wasn't going to be
6 able to protect her.

7 And so the next day, I -- me and my mom, we had went
8 to go shopping with my birthday money. And she had went
9 to the hospital. And I went to my grandma's house to stay
10 while she went there. And --

11 Q What's your grandma's name?

12 A Karen Davis.

13 Q Okay.

14 A And so I went there. And when I was sitting there,
15 she was like -- she -- her and my cousin, Chelsea, and my
16 papa was all in there watching the new Hairspray movie
17 with Zach Efron in it. And I was on her computer. And so
18 I told her to come into her bedroom because I needed to
19 talk to her. And she was like, Okay, Hold on a second. I
20 was like, Grandma, I kind of need you to come now. And
21 she was like, Okay, I'm coming.

22 So when she got into her bedroom, we were sitting on
23 her bed. And I told her, I was like, Grandma, Joe had
24 molested me. And she believed it right from the bat. And
25 she --

1 MR. SCALZO: Objection, Your Honor, as to what the
2 grandmother believed.

3 THE COURT: Sustained.

4 MR. SCALZO: I move to strike.

5 THE WITNESS: She had -- so she called my mom. And
6 my mom was like, Okay, well, I'm on my way home now. And
7 so my grandma was like, Well, you need to get home. And
8 then she hung up.

9 So my mom was thinking something was wrong with me --
10 with one of us that was there. And so my momma had called
11 back and she was like, What's wrong? And she was like,
12 You just need to get home. And she was like, Okay, I'm
13 coming.

14 So whenever she got there, my grandma -- I couldn't
15 tell my momma. And so my grandma had to tell my momma.

16 BY MS. SEAY:

17 Q You couldn't tell your mother about what had
18 happened?

19 A Yeah.

20 Q Why not?

21 A Because I knew it was going to hurt her, because I'm
22 her little girl.

23 Q So you had your grandma tell her what you had told
24 her?

25 A Yeah.

1 Q All right. And so your grandma is the first person
2 you told?

3 A Yeah.

4 Q Where is your grandma today?

5 A She's on bedrest, because she had a -- she went into
6 the hospital to get back surgery. But the back surgery
7 had went wrong and she couldn't breathe. And she had to
8 get a trach. So she's like -- she's on bedrest, because
9 she can't move.

10 Q Is she, essentially, bedridden and unable to get out
11 of her house?

12 A Yeah.

13 Q After you told your grandma and your grandma told
14 your mom, do you know whether your grandma called the
15 police?

16 A Yeah. My grandma had called the police. And they
17 told her that they couldn't do nothing about it tonight,
18 but we needed to call Lorraine Henderson in the morning.

19 Q Okay. And did you go see Investigator Lorraine
20 Henderson, who is seated right here, the next day?

21 A Yes.

22 Q Did you tell her what all had happened to you?

23 A I had told her most of it. But there was some of it
24 that I was starting to remember like later as the years
25 went by. But I told her a lot of it.

1 Q Okay. And she took a statement from you, and you
2 signed it?

3 A Uh-huh.

4 Q Okay. And how old were you at that time?

5 A I was 14.

6 Q Okay. Did you have to go get a medical exam?

7 A Uh-huh.

8 Q Did you have to tell the doctor who did the medical
9 exam about what your father had done to you?

10 A Yes.

11 Q Okay. How do you feel about the person you refer to
12 as "Joe," your father? How do you feel about him now?

13 A I don't have no respect for him. Because I don't
14 understand how a father could do that to their kid, or a
15 mother could do that to their kid. I don't understand it.
16 And I have no respect, because he didn't have respect for
17 me.

18 Q Are you still afraid of him?

19 A Yes. Because he did say that if he ever -- that he
20 would kill me.

21 Q And you believe that?

22 A Yes.

23 Q Are you scared about having to talk about this in
24 court today?

25 A Yes.

1 Q Have you been completely truthful in what you've told
2 the Court today?

3 A Yes.

4 Q C [REDACTED] did you ever blame yourself for what
5 happened?

6 A No. No, I didn't.

7 Q Did you feel embarrassed about what was going on with
8 you?

9 A A little bit.

10 Q Were you afraid to tell anybody?

11 A Yes.

12 Q Can you point out the person that you've been
13 referring to who did all this to you?

14 A (Witness complied.)

15 Q You're pointing to -- are you pointing to Joe Paugh?

16 A Yes.

17 MS. SEAY: All right. Please answer any questions
18 that his attorney may have for you.

19 THE WITNESS: Okay.

20 CROSS-EXAMINATION

21 BY MR. SCALZO:

22 Q What would you like me to call you, "C [REDACTED]" or
23 "Miss Paugh"?

24 A C [REDACTED].

25 Q Thank you.

1 C [REDACTED], let's start with when you were talking to
2 Ms. Seay about meeting with Lorraine Henderson the day
3 after you had -- you said you told your grandmother?

4 A Uh-huh.

5 Q Do you remember that?

6 A Uh-huh.

7 Q And you went down to the police station and talked to
8 Ms. Henderson?

9 A To the police station?

10 Q Or where did you go?

11 A It was to -- it was somewhere nearby Greenville
12 Hospital. I don't think it was at the police station.

13 Q Okay. But it wasn't at your house, you went to see
14 her?

15 A Yeah. I went to see her.

16 Q And when you were -- were you in a room with just
17 her, or who were you in the room with?

18 A I was with her and this other woman, I guess she was
19 from DSS.

20 Q All right. Now, you gave a statement to them. You
21 told them about what happened. Do you remember that?

22 A Uh-huh.

23 Q And did they type it out on a piece of paper for you?

24 A Uh-huh.

25 Q And --

1 MR. SCALZO: Judge, can I approach her?

2 THE COURT: Sure.

3 BY MR. SCALZO:

4 Q I'm going to show you these two pieces of paper.
5 Does that look like the statement that you remember
6 signing?

7 A Yes.

8 Q Okay. And the things that you talked about with
9 Ms. Henderson, she typed them down and put them on that
10 piece of paper; is that right?

11 A Uh-huh.

12 Q And the first thing, according to that statement --
13 and you tell me if this is right. But the first thing you
14 spoke about with Ms. Seay today, which was when you were
15 five years old and in the bathroom?

16 A Uh-huh.

17 Q Is that right?

18 A Uh-huh.

19 Q And when you spoke to her about that, that's -- would
20 you agree with me that's about the whole paragraph, that
21 first paragraph?

22 A Uh-huh.

23 Q The descriptions that you were giving to Ms. Seay
24 earlier just now when you were testifying about going into
25 the Explorer with your dad, having to go bring back the

1 movies, you didn't -- that wasn't in that statement;
2 correct?

3 A Huh-uh.

4 Q And let me check my notes real quick and make sure
5 I'm right.

6 Am I correct that in that statement, you did not talk
7 about the Vaseline?

8 A Yes.

9 Q I'm correct about that in that statement? And you
10 can refer to it, if you need to.

11 A Yeah. I think so.

12 Q You think so. You talked about it, or you think you
13 didn't talk about it?

14 A I don't think I talked about it.

15 Q Okay. Thank you.

16 And, obviously, since that time, you've talked about
17 it quite a bit with a lot of different people; right, what
18 you've just told the jury?

19 A Actually, I don't like discussing it, because -- with
20 my family and stuff, because it just feels like it's
21 awkward between us, if we talk about it.

22 Q But you have talked to your mom, and your sister, and
23 other people about it since that time?

24 A Yes.

25 Q Okay. And Ms. Seay asked you about this, and I'm not

1 sure it's very clear. So let's help the jury understand
2 this a little bit. Your dad lived with you until you were
3 how old?

4 A 11.

5 Q 11. Would that be 2005?

6 A Yes.

7 Q And he then left and moved to Baltimore?

8 A Uh-huh.

9 Q And it was just who in the house at that point, after
10 he left?

11 A Me, my mom, and my sister.

12 Q All right. And when he goes to Baltimore, does he
13 ever come back at any point?

14 A There was one time that he came back for -- I think I
15 was in the sixth grade. Yeah, I was in the sixth grade.
16 He came back because there was a court hearing about child
17 support.

18 Q Do you remember about how old you would have been?

19 A I would have probably still been 15. Because I think
20 it was the -- yeah, it would have been the -- around
21 August or sometime then.

22 Q All right. And this, obviously, was before the
23 birthday phone call that you talked about earlier?

24 A Yeah.

25 Q And that was in 2007, that phone call where he wished

1 you a happy birthday?

2 A Yes.

3 Q All right. You talked about several times with
4 Ms. Seay about being afraid of Joe?

5 A Uh-huh.

6 Q And is that -- are you saying that from the time of
7 this incident when you were five in the bathroom all the
8 way until now, has it always been that you were afraid?

9 A Yes.

10 Q Okay. And the incident you described to the jury
11 earlier, you were talking about the pajama's ripping?

12 A Uh-huh.

13 Q And I'm not sure I got it, but do you know how old
14 you were?

15 A I'm not sure.

16 Q All right. But you said that the pajama's had been
17 ripped?

18 A Uh-huh.

19 Q And I can show this to you again, if you need me to.
20 Do you remember if you described that in this statement
21 to Ms. Henderson --

22 A No, I didn't.

23 Q And that would have been in November of 2007, when
24 you gave that statement?

25 A Yes.

1 Q: Okay. You started off talking with Ms. Seay about
2 school. You go to high school now?

3 A: Uh-huh.

4 Q: And you said regular classes, except for English was
5 your honors class?

6 A: Uh-huh.

7 Q: And that you got A's and B's, and you said one C; is
8 that right?

9 A: Uh-huh.

10 Q: And that you've been working?

11 A: Uh-huh.

12 Q: And I'm going to assume you haven't been in any kind
13 of trouble with the law, or with your mom, or school, or
14 anything like that?

15 A: No.

16 Q: Okay. You learned, at some point, when Joe went
17 up -- your father went and moved to Baltimore. That was
18 in 2005. Do you remember when in 2005 that would have
19 been?

20 A: Huh-uh.

21 Q: Okay. But you know it was 2005 is what you're
22 saying?

23 A: Yeah. Because I know I was in fifth grade.

24 Q: You know you were in fifth grade. And when he went
25 to Baltimore, at some point, he has a girlfriend or --

1 A Yes.

2 Q And you found out about that?

3 A Yeah.

4 Q And then you said you found out about him having
5 another child?

6 A Yeah.

7 Q All right. And finding out about the child was the
8 same time -- that conversation was the first time you
9 found out about the child?

10 A Uh-huh.

11 Q I'm sorry. I'm just trying to make sure I ask you
12 everything you need to be asked. I'm sorry.

13 Do you remember -- you were talking about being five
14 and in the bathtub, and you got out. You were talking
15 about that time. And you were talking about peroxide and
16 having a cut?

17 A Uh-huh.

18 Q Do you remember where you got cut?

19 A From Joe.

20 Q I mean where on your body?

21 A Oh, on my bottom, my private part.

22 Q All right. Are you talking about your actual bottom
23 or your other private part?

24 A My vagina.

25 Q Okay. And that's your memory now, or did you always

1 remember that?

2 A Oh, I always remembered that. It was the first time.

3 Q All right. And you're saying you were how old?

4 A Five.

5 Q Five. Are you remembering that your mom worked at
6 Tanner's, or is that something that -- Tanner's Big
7 Orange, I think, is what you said, or is that something
8 that, after talking about it, you realized later on?

9 A No. I knew that my mom worked at Tanner's.

10 Q All right. That was your memory?

11 A Yes.

12 Q And her shift -- because you talked about when she
13 would come home. Is that something that you remembered
14 she came home late, or is that something where after
15 talking with people you found out?

16 A No. I knew that she came home around 7:30. Because
17 I would always wait for the clock to come. I would watch
18 the clock so I knew when my momma was coming home, so I
19 wouldn't be hurt by Joe.

20 Q Okay. And is that something you're saying you knew
21 when you were five, or is that something that you kind of
22 learned as you got a little bit older?

23 A That's something I learned whenever I got older.

24 Q All right. You met with a Dr. Henderson?

25 A Uh-huh.

1 Q And she's a medical doctor?

2 A Uh-huh.

3 Q You understood that was her job?

4 A (Witness nodded.)

5 Q You have to say "yes" or "no."

6 A Yes. I'm sorry.

7 Q She did a medical examination of you?

8 A Yes, sir.

9 Q And that would be in January of 2008. Does that
10 sound right?

11 A Yes, sir.

12 Q All right. And, in doing that examination, one of
13 the things she does is kind of gets a little bit of
14 history about any medical problems that you might have.
15 Do you remember her asking you about that kind of thing?

16 A Yes.

17 Q And she would, also, ask you if you had any other
18 kinds of like what we might call behavior problems, or
19 emotional problems, things like that. Did she ask you
20 about that?

21 A Yes.

22 Q To try to find out if you had any, or thought you had
23 any?

24 A Yes.

25 Q And you, in fact, told her you didn't have any

1 emotional or behavioral problems that you reported to her?

2 A I felt that I didn't.

3 Q Okay. And you, also, didn't report to her that you
4 had any physical problems, things that were hurting you or
5 physically bothering you?

6 A Yes.

7 MR. SCALZO: That's all I have, Judge, right now.

8 THE COURT: Redirect?

9 MS. SEAY: Just briefly.

10 REDIRECT EXAMINATION

11 BY MS. SEAY:

12 Q I want to clarify. Did you tell Dr. Henderson about
13 the sexual abuse as you've just described to the jury?

14 A Yes, I did.

15 MS. SEAY: That's all I have, Your Honor.

16 THE COURT: Any recross?

17 MR. SCALZO: I don't have any recross on that topic,
18 Judge.

19 THE COURT: All right. Thank you, ma'am.

20 You may step down.

21 MS. SEAY: Your Honor, may I step outside to see if
22 my next witness is here?

23 THE COURT: Well, I think we're going to go ahead and
24 just break for lunch.

25 Ladies and gentlemen, don't talk about the case. And

1 continue to keep an open mind. And we'll resume at 2:00.

2 Thank you.

3 (WHEREUPON, the jury was excused from open court at
4 approximately 12:38 p.m.)

5 THE COURT: See you at 2:00.

6 (WHEREUPON, a lunch break was taken.)

7 THE COURT: Anything before we bring the jury back
8 out?

9 MS. SEAY: No, sir.

10 We are ready to proceed.

11 THE COURT: Okay. Thank you.

12 (WHEREUPON, the jury came into open court at
13 approximately 2:04 p.m.)

14 THE COURT: Yes, ma'am. You may call your next
15 witness.

16 MS. SEAY: Thank you, Your Honor.

17 The State calls Dr. Nancy Henderson.

18 MR. SCALZO: Judge, may we approach for a second?

19 THE COURT: Sure.

20 (WHEREUPON, a bench conference was held.)

21 THE COURT: All right. Ladies and gentlemen, I'm
22 just going to ask you to go back to the jury room
23 momentarily while we take up one matter out here.

24 Don't talk about the case. And continue to keep an
25 open mind.

1 (WHEREUPON, the jury was excused from open court at
2 approximately 2:07 p.m.)

3 THE COURT: Yes, sir, Mr. Scalzo.

4 MR. SCALZO: Judge, I guess, essentially, I was
5 moving the Court for a hearing outside the presence of the
6 jury on whether or not the witness that's now being called
7 can be qualified as an expert. And, if so, I'm asking the
8 Court to make a determination that whatever opinions are
9 being offered are, actually, admissible opinions. And
10 that was what our sidebar was about. And that's my
11 request, Judge.

12 THE COURT: Okay. And what's the State's position?

13 MS. SEAY: Your Honor, the State's position is that
14 Dr. Henderson has been qualified as an expert on numerous
15 occasions. And her CV has been provided to Mr. Scalzo.
16 The medical exam of the child has been provided to
17 Mr. Scalzo.

18 She would simply be testifying that she performed
19 this examination, that it was a normal exam, but that that
20 does not rule in or out abuse, that it could be consistent
21 with the allegations in this case. That is my
22 understanding of what she would testify to.

23 And I don't understand why he would be entitled to a
24 hearing outside the presence of the jury of this entire
25 thing at all.

1 MR. SCALZO: Well, I think, one, if we take what the
2 Solicitor just presented as that's the expert opinion, I
3 have concerns that while it may be within her expertise
4 and purview, and assistance of the jury to say she
5 conducted a medical evaluation and did not find any
6 medical evidence to rule in -- or that was evidence of
7 sexual abuse. But to then take the next step and try to
8 offer an expert opinion to say we didn't find any
9 evidence, but let me tell you that that doesn't mean it
10 didn't happen.

11 How in the world can she make that kind of expert
12 opinion -- how can she offer that opinion?

13 One, I don't think the opinion moves the jury one way
14 or the other to help them understand whether it did or did
15 not happen. All it is is an expert trying to say that we
16 don't have any evidence, but it still could have happened.
17 I mean, that's, essentially, what the expert opinion is
18 that's being offered.

19 MS. SEAY: Well, Your Honor, I think he just doesn't
20 like the opinion that he thinks she's going to give. And
21 if she's qualified as an expert, she's qualified to give
22 an opinion based on her experience, and her education, and
23 her -- she's qualified to give an opinion on the issue.
24 And if she's qualified as an expert, she's entitled to do
25 that.

1 MR. SCALZO: But I think her opinion is -- again, her
2 opinion may have several levels. The level at which she
3 may describe, I conducted this examination and this is my
4 results. And she may be able to explain what that means
5 and what it is, and only an expert could do that. That's
6 one level.

7 But to go to the next level and to then say, I made
8 no finding as far as evidence of injury -- or injury
9 that's consistent with assault, to then go to the next
10 level to say that, now, I can offer you an opinion, jury,
11 as to why that might be, and that there still be a sexual
12 assault, all that does is invite the jury to speculate
13 that she's either right or wrong.

14 She's not offering them evidence that says, I'm
15 right, it did happen, even though there's no evidence of
16 it. She's simply trying to say -- I guess the way I was
17 thinking about it, Judge, is this way. What they're going
18 to do is they're going to offer her more as a fact witness
19 that says, I conducted these tests and here is kind of my
20 results. Now, in my expert opinion, it's inconclusive. I
21 don't find evidence that there was a sexual assault.

22 And what they really want to do is get her to almost
23 train the jurors to now be experts to evaluate how, even
24 though there isn't evidence of, there somehow is evidence
25 of it. I don't think that's the purpose of the expert.

1 If the expert can't tell you, here's my opinion. It
2 happened this way, and here's the evidence I'm relying
3 upon. All it's inviting the jury to do is speculate
4 without any real basis to do that. And they're not
5 experts. So if they're speculating, the expert is not
6 providing its service. All the expert is doing is
7 providing an argument for the jury on behalf of the State.

8 MS. SEAY: I completely disagree. And I think she
9 would be giving her opinions based on her experience and
10 the research that she's familiar with. And I think that
11 this is a jury consideration. It goes to the weight that
12 they want to give her testimony. It, certainly, doesn't
13 go to the admissibility of her opinion.

14 The jury can weigh how much they want to -- what
15 weight they want to give her testimony and her opinions.
16 But I think that she ought to be allowed to testify.

17 MR. SCALZO: Well, and I think this is kind of why I
18 asked for the hearing is to -- one, there aren't really
19 any specifics that are proffered for Your Honor to even
20 consider. We were kind of thinking this is what she'd
21 testify to. That's partly why I asked for the hearing.

22 The other reason I asked for the hearing is the case
23 I mentioned at sidebar, the Watson v. Ford case where -- I
24 mean, even in that case, they had an expert -- it wasn't
25 the issue that the expert was not qualified as an expert

1 in any field. It was that the expert should not have been
2 qualified and allowed to testify in the limited area that
3 that expert was allowed to testify in. What the Court, I
4 think, was saying there is the judge, actually, has to
5 make that decision before the jury hears it. Because if
6 it's inadmissible, then the jury should have never heard
7 it in the first place.

8 And I don't see how Your Honor can make that decision
9 at the same time that the jury is hearing it. And then
10 Your Honor might hear it and say, you know what, it is
11 inadmissible. And, I mean, I think that's ringing a bell
12 that you might not be able to unring. That's why I'm
13 asking for the hearing.

14 THE COURT: Well, if I understand you correctly,
15 Mr. Scalzo, your objection is not to Dr. Henderson's
16 qualifications or whether or not her testimony, which
17 would be scientific testimony, meets the requirements of
18 State v. Council and State v. Jones. But it is that you
19 are concerned that she may give an opinion that she's
20 reached by some type of negative inference or deductive
21 logic that would explain an inconclusive result, and the
22 reasons why it might be inconclusive.

23 And you object to that because you don't believe that
24 is within the purview of an expert who has been qualified
25 to testify to it; is that right?

1 MR. SCALZO: Yes, in general.

2 And I'm not aware of what they're going to offer as
3 to what evidence this witness would put forth to say that
4 it is justified. So I haven't heard it. I don't know
5 what it's going to be.

6 I agree with Your Honor that it's likely that she's
7 qualified as a medical doctor in this field to conduct the
8 actual medical examination. Whether or not she can then
9 go to that next step, I think as a first level is, is she
10 qualified to, actually, make the next step and testify to
11 that with the jury?

12 And the second step is -- if that's the case, is that
13 something that's even admissible for the jury to hear?

14 THE COURT: Well, why wouldn't it be?

15 If she's been qualified as an expert in her field,
16 isn't she automatically, therefore, entitled to give
17 opinions in that field?

18 MR. SCALZO: I think she might be entitled to give
19 opinions, for instance, in this -- if she found an injury,
20 she might be, because of her training, able to say, you
21 know what, this injury, in my opinion, is consistent with
22 this kind of impact or this kind of conduct.

23 Well, she's looking at evidence and she's evaluating
24 it based on her experience. There isn't any evidence that
25 she's going to offer. She's not going to say, I saw a

1 tear, or I saw this that she can then evaluate. What she
2 purely is doing is speculating. While she may have
3 experience, she's not making the speculation based on
4 evidence. She's making the speculation based on
5 speculation.

6 MS. SEAY: Your Honor, I --

7 MR. SCALZO: She's making it on the absence of
8 evidence.

9 MS. SEAY: Your Honor, I don't believe Dr. Henderson
10 is going to speculate to anything. I think she's going to
11 give her opinion based on her experience, her familiarity
12 with the research in the area, and her education.

13 And I think, like you said, that if she's qualified
14 as an expert, she's entitled to give opinions on the
15 ultimate issue in the case.

16 THE COURT: I think if your view or exception,
17 Mr. Scalzo, that an expert -- we wouldn't even need this
18 Rule 700 series. We would just have an expert like any
19 other fact witness who would come in and say, here are the
20 facts, here is the test, here is what the test said. And
21 that's as far as they could go. And that runs contrary to
22 the whole notion of experts being able to give opinions.
23 And why they're allowed to give opinions is to assist the
24 jury.

25 And the whole Watson v. Ford and all the cases that

1 have been generated by the so-called Daubert case have
2 driven it to a point now where it's a mini-trial over the
3 expert's qualifications over every word the experts says,
4 which I don't think is the intent of our Supreme Court.

5 So I would have to respectfully deny your motion.

6 MR. SCALZO: And, Judge, can I, just for the
7 record -- I'm not saying that -- I guess I would disagree
8 with -- I didn't intend for my argument to mean that the
9 700 series or the Rules of Evidence don't apply. What I'm
10 saying is I believe --

11 THE COURT: I know you didn't intend it. But I'm
12 just telling you what I concluded from it.

13 MR. SCALZO: Right.

14 And I guess my point is this, I think that because
15 Your Honor is the gate keeper of the evidence, the
16 admissibility of that evidence, one, right now, we don't
17 even have a proffer, other than this is what the Solicitor
18 is saying this witness will say. You have an expert
19 witness. I don't think that because the expert may be
20 limited to offer an opinion on -- as the Solicitor -- the
21 ultimate issue means that she is of no value to the jury.
22 She is a medical doctor. I'm not saying she can't offer
23 any medical opinions.

24 But I think her qualifications to offer an opinion
25 about whether or not, with the absence of evidence,

1 there's somehow an explanation, or she's capable of
2 offering an opinion that something did happen. If that's
3 the case, I think Your Honor has to hear that and figure
4 out, one, is the witness qualified to do that, and, two,
5 is that really something that a witness, even though
6 they're an expert, can, actually, do.

7 THE COURT: So if one perceives something and reaches
8 a conclusion, isn't that conclusion by necessity based on
9 what is there and, also, what is not there?

10 MR. SCALZO: I think it depends on the analysis that
11 that person is applying and whether or not -- because part
12 of the expert witnesses qualification is what analysis and
13 what training is she, actually, applying.

14 THE COURT: Okay.

15 MR. SCALZO: We don't know what she's going to say
16 she did to then get to the next level to say, after I did
17 this test what gets me to the next level to say, even in
18 the absence of evidence, I can say it's still possible for
19 it to have happened. I don't know what that evidence is
20 or what the procedure is.

21 THE COURT: But the point is, if she is -- and I have
22 no indication to the contrary and if the State does, they
23 can enlighten us and should enlighten us. But I am
24 presuming that she is going to testify and they're going
25 to lay a foundation for Dr. Henderson to be qualified as

1 an expert in pediatric medicine and --

2 What was the other category?

3 MS. SEAY: Sexual assault examinations.

4 THE COURT: Sexual assault examinations. And,
5 therefore, she is going to give her opinion based on
6 whatever she has observed and reviewed, and based on her
7 own expertise as to what within a reasonable degree of
8 medical certainty is her conclusion, and why it's her
9 conclusion. And that may include a conclusion that takes
10 into account things she didn't find or the reasons for why
11 she didn't find them.

12 And if those reasons, again, within her opinion are
13 reached using the same method and analysis that she has
14 been qualified in as an expert, how is that objectionable?

15 MR. SCALZO: Well, I think the first -- the threshold
16 issue is the level of her expertise doesn't go that far.
17 I mean, she hasn't described what that is. And she hasn't
18 described yet what the procedure or analysis she's going
19 to do that would then say, okay, now that I've looked at
20 this and applied these tests and here is the result, she
21 hasn't described to the Court yet what she -- what
22 scientific knowledge, what experience, what techniques,
23 are they accepted that she's then taking from that
24 evidence she's developed to then draw that next
25 conclusion, which is even though there's no evidence, my

1 opinion is it could still have happened. That's what I'm
2 saying.

3 THE COURT: What gives a defendant the right to have
4 that determined in-camera as kind of a preview to the real
5 testimony in front of the jury given the limited discovery
6 that, currently, exists under Rule 5?

7 Is there some authority that would give you the right
8 to have that determined in-camera?

9 MR. SCALZO: Well, I think when you look at,
10 essentially, a trial as a whole, the obvious risk that
11 stands out is the State is seeking to illicit testimony
12 that might be objectionable from -- one, you have an
13 efficiency issue. I'm raising it now so that we can go
14 through it.

15 What if Your Honor heard everything and determined
16 that she wasn't even qualified as an expert?

17 Then you would have had the jury listen to a whole
18 bunch of testimony about things that they might not should
19 have heard in the first place. And I guess what I'm
20 saying is it's one of those things you can't -- there's
21 aspects of it that you cannot unring that bell once they
22 hear about it.

23 And, certainly, we've done it before where the
24 witness testifies and you object as you go. But I don't
25 think -- I think when the Supreme Court is talking about a

1 trial judge as being the gate keepers and all that, I
2 think what they're encouraging in those cases is that the
3 Court hear that first. Because it is a special kind of
4 testimony.

5 It is not just a witness -- a fact witness who
6 observes something. There is an air of -- you know, a
7 high degree of reliability that jurors and people are
8 going to put into an expert. And that danger makes it
9 reasonable for the Defendant to request that the Court
10 make that determination before it's placed in front of the
11 jury.

12 THE COURT: All right. I'll tell you what I'll do,
13 under Rule 103 and 104, I'll allow the State to go ahead
14 and proffer the testimony.

15 Go ahead.

16 MS. SEAY: I would call Dr. Henderson to the stand.
17 (WHEREUPON, State's Exhibit No. 1 was marked for
18 identification only.)

19 THE CLERK: Please raise your right hand and place
20 your left hand on the Bible.

21 WHEREUPON,

22 NANCY HENDERSON, M.D.,
23 after first having been duly sworn, testified as follows:

24 THE CLERK: Thank you.

25 Please have a seat.

DIRECT EXAMINATION

1
2 BY MS. SEAY:

3 Q Dr. Henderson, where are you, currently, employed?

4 A Greenville Hospital System.

5 Q I want to show you State's Exhibit No. 1, which has
6 been marked for identification. Do you recognize this?

7 A Yes.

8 Q What is it?

9 A This is my CV.

10 Q Okay. And can you, please -- do you need this to
11 refresh your memory about anything?

12 A No.

13 Q Can you, please, tell us what your education is?

14 A I did my undergraduate work at Rutgers College of
15 Pharmacy and graduated in 1980, and got a BS in Pharmacy.
16 I then went to Bowman Gray School of Medicine in
17 Winston-Salem, North Carolina, and graduated in 1984 with
18 a medical degree. I then did my pediatric residency at
19 T.C. Thompson Children's Hospital in Chattanooga,
20 Tennessee, and remained there until 1991. And then I came
21 here to Greenville.

22 I am -- prior to that, I am board certified in
23 pediatrics. I came to South Carolina. I have my state
24 license in South Carolina for the practice of medicine. I
25 then, subsequently, got a sub-board in adolescent

1 medicine. And then recently, in 2009, they gave the first
2 examination for child abuse pediatrics as it's own
3 sub-specialty. And I was able to sit for that board, and
4 passed the exam in January of 2010. So I'm now a child
5 abuse pediatrician.

6 Q Okay. Thank you.

7 Do you have any faculty appointments?

8 A Yes. I am on the faculty -- the teaching faculty at
9 the hospital. I am head of the Division of Forensic
10 Medicine there in pediatrics. That involves seeing
11 inpatient consults when there are concerns about child
12 abuse, as well as evaluating children as outpatients at
13 two advocacy centers, both here in Greenville and in
14 Spartanburg.

15 I'm, also, involved with teaching the pediatric
16 residents and family practice residents in the area of
17 child abuse and neglect, as well as lecturing to the
18 medical students that rotate through pediatrics during
19 their third and fourth years at the hospital.

20 Q Do you hold membership or offices in any professional
21 or scientific societies?

22 A I am part of the sub-board in the area of child abuse
23 and neglect at the Academy of Pediatrics. I, also, am
24 part of the statewide network of all the medical
25 pediatricians that are doing child abuse here in South

1 Carolina. And I'm, also, on SCPSAC, which is -- and
2 ADSAP, which is a professional organization that evaluates
3 abused children.

4 Q Have you received any grants or awards?

5 A I have received some awards in -- from the Mary Black
6 Hospital, which helped to buy some equipment at the
7 Children's Advocacy Center. Also, recently, I guess two
8 years ago, I received an award from the hospital as
9 pediatrician of the year.

10 Q Okay. From the Greenville Hospital System?

11 A Yes, ma'am.

12 Q Okay. And I believe you've already told us about
13 your major teaching responsibilities; is that right?

14 A Yes, ma'am.

15 Q And what are your major clinical interests and
16 responsibilities at this time?

17 A Well, I am involved, as I mentioned, in the inpatient
18 consults when there's a concern about -- usually, severe
19 child abuse, a lot of physical abuse.

20 And then I am involved in seeing patients both at the
21 Children's Advocacy Center in Greenville and in
22 Spartanburg. I'm up there two days a week evaluating
23 children for -- doing the medical exams for evaluations of
24 possible abuse.

25 And I'm, also, over at Pendleton Place. And we do

1 all the inpatient physicals for the children that are
2 removed, as well as their general medical care. And I am
3 still involved one half-afternoon a week in the general
4 pediatric clinic working with the residents just in
5 general pediatrics.

6 Q Okay. And have you presented any lectures or other
7 presentations during the last three years?

8 A Yes. I am -- as of just recently, I lectured at
9 USC-Upstate in the area of child sexual abuse. And then
10 I, also, did a lecture at the beginning of October for
11 Spartanburg Regional in the area of -- we did, actually, a
12 mock trial preparation in that and we, also, did a
13 fatality review lecture.

14 Q Okay. And do you stay up-to-date with the literature
15 in your field?

16 A Well, to -- you know, to keep my regular general
17 pediatric board, you have to be re-certified every 10
18 years. And that involves not only a certain number of
19 continuing medical education credits, but, also, taking
20 a -- going to an off-site place to do an exam, as well as
21 for the area of child abuse. That was a five-hour
22 sit-down written exam that was done up in Chapel Hill.

23 Q All right. And do you know about how many sexual
24 assault examinations you have performed on children?

25 A I see anywhere from six to 15 a week, depending on

1 kind of what my duties are any particular week.

2 Q Okay. And you've been doing that for how many years?

3 A Well, it had started in 1992 with my initial work
4 with Greenville Hospital. But, certainly, the numbers
5 have increased more in the last five years.

6 Q Okay. It would be fair to say you've seen a great
7 number of children for sexual assault examinations?

8 A Yes, ma'am.

9 Q Okay. Have you previously been qualified as an
10 expert in the field of pediatrics and child sexual assault
11 examinations?

12 A Yes, I have.

13 Q Do you know in what courts, and approximately how
14 many times?

15 A Well, both in Family Court and in criminal court,
16 both here in Greenville, Spartanburg, Oconee County,
17 Anderson, and, also, up in Cherokee, and Union County. I
18 have testified because that's connected to the Spartanburg
19 Children's Advocacy Center. I don't have a specific
20 number of how many times. Probably in court, maybe two to
21 three times a month, but that is not an actual number.

22 MS. SEAY: Your Honor, I would offer her as an expert
23 in the field of pediatrics and child sexual assault
24 examinations.

25 THE COURT: Okay. Yes, sir, Mr. Scalzo.

1 MR. SCALZO: Well, Judge, can I voir dire her? Can I
2 ask her some questions?

3 THE COURT: Yes.

4 That's what I was asking you.

5 MR. SCALZO: Okay.

6 VOIR DIRE EXAMINATION

7 BY MR. SCALZO:

8 Q Doctor, help me to understand the difference between
9 doing a medical examination of somebody to determine do
10 they have some kind of injury or disease, or, you know, an
11 ailment in that sense, and then the next level of trying
12 to figure out -- let's give an example of you do find
13 something.

14 So you find a physical problem and then take it to
15 the next level of how do you then figure out what caused
16 that injury? Talk to me about what -- is there a process
17 that's used? Is it different for different injuries?

18 THE COURT: Well, are you voir diring her on her
19 qualifications?

20 MR. SCALZO: I am.

21 Because what I'm trying to understand, because it
22 wasn't really asked was, what is her qualification to then
23 offer the opinion -- and her opinion wasn't asked
24 either -- that based on not finding evidence of an injury,
25 how does she then make the next step? That's what I'm

1 trying to figure out.

2 THE COURT: I understand your question.

3 But I think, procedurally, she's been offered as an
4 expert. You have the right to voir dire her about her
5 qualifications. And then I have to determine whether
6 she's qualified. And then she'll be asked, I presume,
7 about any opinion she might have and what -- and then you
8 can cross-examine her.

9 MR. SCALZO: All right. I guess I -- let me ask it
10 this way.

11 BY MR. SCALZO:

12 Q Do you have to have different qualifications, other
13 than you get a medical license, which you have?

14 A Yes.

15 Q Is there a different set of qualifications to then
16 provide sort of forensic-type analysis of evidence?

17 A Well, I think a general medical doctor -- a general
18 family practice doctor can, certainly, offer a medical
19 opinion about forensics, depending on his or her
20 expertise, how many patients they see. My personal
21 expertise comes from my training and my experience.

22 Q All right.

23 A So the sub-board in the area of child abuse and
24 neglect is a very particular specialty. And so that kind
25 of allows me and has offered me the extra training hours

1 in that particular area.

2 Q All right. And what is the extra training or extra
3 knowledge and techniques that you've learned that would
4 allow you to take that next step? You find evidence and
5 then go to the next step of -- and I'm talking, obviously,
6 in the area of child sexual abuse offering an opinion or
7 an evaluation of how that could or could not have
8 happened?

9 MS. SEAY: Your Honor, I'm going to object. Because,
10 again, I don't think he's voir diring her on her
11 qualifications. I think he's trying to get to this issue
12 of her opinion that she hasn't yet offered.

13 MR. SCALZO: I'm trying to understand if she's
14 qualified to make that opinion. I'm anticipating that
15 that's the opinion she's going to be asked to offer.

16 THE COURT: Well, I mean, my understanding was that
17 we were going to have this out of the hearing of the jury
18 so you could hear what her opinion was. And then you
19 might have objections to her opinion, based on some
20 authority.

21 But I think, at this stage, she's either qualified or
22 not. And you can ask questions about her qualifications.
23 But you're asking her to give an opinion about her field
24 at the stage where your questions are, usually, limited to
25 whether she's qualified in that field.

1 I mean, I don't -- I understand where you're --

2 MR. SCALZO: Well, I asked her -- Judge, I asked her
3 to tell me the qualifications that she's saying she would
4 have that would give her the knowledge and experience to
5 be able to answer that second question, which is after
6 she's acquired medical evidence to then give the forensic
7 side of it. I asked what is the qualification.

8 I thought that focused my question on her
9 qualifications, as opposed to her opinion. That's why I
10 asked her that --

11 THE COURT: She hasn't given an opinion yet. So, I
12 mean, I don't understand.

13 MR. SCALZO: But she's being offered -- my
14 understanding of what she was offered as was an expert
15 who's going to offer an opinion about -- and, again, the
16 specifics of it have not been illicited from her by the
17 State. But we all know that the opinion she's being asked
18 to offer is based on a lack of physical evidence, an
19 opinion on how that could be, even though -- how the abuse
20 could have taken place, even though there's a lack of
21 physical evidence.

22 And what I'm asking her is, tell me the
23 qualifications that allow you to go to that next step.
24 That's all I asked her.

25 THE COURT: But I think we've got the cart before the

1 horse. And I don't know that. I mean, I don't know what
2 she's going to say. So -- and I'll give you the
3 opportunity to ask -- cross-examine her after she gives
4 her opinion. But I think, first, we have to have the
5 opinion.

6 MR. SCALZO: I guess I'm confused. Because she was
7 offered as an expert. I can't accept her as an expert
8 without having to question her about her qualifications as
9 an expert. And you're saying that she can't be -- offer
10 her opinion until she's qualified as an expert. That's
11 why I'm confused about the cart before the horse.

12 THE COURT: Well, she's being offered as an expert in
13 a field. And she's either qualified or not, as I've
14 already said.

15 So you would have to ask questions related to whether
16 or not she is qualified to give an opinion in her field.
17 I don't understand how the questions that you've proffered
18 further that. And I've heard your explanations. But you
19 seem to be anticipating what she's going to say and asking
20 her about that now.

21 So all I'm saying is the jury is not in here --

22 MR. SCALZO: I understand that, Judge.

23 THE COURT: -- so what's the point right now?

24 MR. SCALZO: My point is, what's the scope of her
25 qualification?

1 I mean, it may be one thing to be qualified as a
2 medical doctor in -- but that doesn't mean that you're now
3 an expert in every field of medicine, and that the full
4 scope of any field could be testified to. I'm trying to
5 understand what's --

6 THE COURT: Well, we've already heard what she's --
7 she's offered as an expert in pediatrics and sexual abuse
8 protocol --

9 Isn't that what --

10 MS. SEAY: Sexual assault examinations.

11 THE COURT: Sexual assault examinations. So --

12 MR. SCALZO: I understand that she's offered as that.
13 She said that that's the training she's received. But she
14 hasn't described that training. And she hasn't said how
15 that training has given her experience, and knowledge, and
16 scientific training that allows her to then make -- talk
17 about the area she's being, basically, asked to talk
18 about, which is that explanation that I anticipate she's
19 going to talk about.

20 THE COURT: Well, but if she's -- we don't know what
21 she's going to say. I mean, I just don't understand. You
22 could sit here for weeks and ask her questions about other
23 areas of medicine.

24 MR. SCALZO: I'm not asking her that. I don't want
25 to know about other areas.

1 THE COURT: I don't know. I'm not going to ask --
2 allow you to ask any more questions at this stage, unless
3 you've got questions directly related to her
4 qualifications.

5 MR. SCALZO: Well, I would just say that I think my
6 questions are to her qualifications. I understand the
7 Court's ruling that you don't think that. I think --

8 THE COURT: Okay. I understand you object to it.
9 Thank you.

10 Go ahead.

11 MS. SEAY: Okay. Procedurally, Your Honor, am I now
12 allowed to proceed assuming that she is qualified and ask
13 her --

14 THE COURT: She's qualified.

15 MS. SEAY: Okay. Thank you.

16 CONTINUED DIRECT EXAMINATION

17 BY MS. SEAY:

18 Q Dr. Henderson, did you have an opportunity to examine

19 C [REDACTED] P [REDACTED]?

20 A Yes, I did.

21 Q What was the date of the exam?

22 A January 14th, 2008.

23 Q What type of exam did you perform, and for what
24 purpose?

25 A I performed an examination for the possibility of

1 child sexual abuse.

2 Q How is that examination performed?

3 A The children are referred to the Children's Advocacy
4 Center for a medical evaluation. They come with a
5 particular caretaker, a legal guardian, for the
6 evaluation. They come back to the room with our
7 child-life specialist, who goes over exactly what's going
8 to take place on that particular day.

9 I then go back and talk to the parent and the child
10 to get a past medical history, and understand what's going
11 on. And then, in most cases, I talk with the child by
12 themselves to get an understanding of what's happened,
13 what their concerns are, any symptoms that they might be
14 having.

15 And then I do a complete head to toe physical
16 evaluation. Again, I offer for them to have somebody in
17 there with them, if they would like, or they can do it by
18 themselves.

19 So I do a complete head to toe evaluation, including
20 looking at the genital area with a piece of equipment
21 called the colposcope, which is a non-invasive machine
22 that allows for magnification of the genital area. It's
23 an excellent light source to look for any findings. Then
24 I decide if any specific testing needs to be done, based
25 on history and the medical exam. I then allow the child

1 to get dressed.

2 And I then do a follow-up as far as discuss any
3 findings, and make sure that they are -- have kind of the
4 next step in play, make sure that the child is safe where
5 they're at, and that they have the appropriate mental
6 health or forensic interview, depending on where they are
7 in any particular evaluation. And then I conclude the
8 exam.

9 Q And is that what you did, in this case, with C [REDACTED]

10 P [REDACTED]?

11 A Yes, I did.

12 Q What were your findings in C [REDACTED] P [REDACTED]'s
13 examination?

14 A Well, she had given me a very extensive history about
15 what had happened to her. And then, on her physical
16 examination, she was overweight. But there were no other
17 abnormal findings on her exam.

18 Q Okay. Can you discuss the part of the anatomy known
19 as the hymen, and explain some of its properties?

20 A Yes. The hymen is a type of tissue that partially
21 covers over the vaginal area. There are lots of different
22 kind of normal variations to what it might -- as far as
23 the shape of what it might look like. And it definitely
24 changes as the child goes through puberty.

25 So once there is estrogen around, that hymenal tissue

1 can, actually, stretch and becomes much more flexible.
2 And, on this particular exam, she has what's called a
3 crescent-shaped hymen, which is just kind of like a
4 crescent-shaped moon just going over the bottom half of
5 her vaginal opening.

6 Q Does the hymen normally allow for penetration?

7 A The hymen, in almost all the cases, does have an
8 opening, and as young girls start going through puberty to
9 allow for menses to happen. So, yes, it does have an
10 opening in the majority of the cases.

11 Q What are some common myths or misconceptions about
12 the hymen?

13 A Well, a lot of times, people feel like the hymen --
14 when there is sexual intercourse that the hymen can --
15 actually, has to tear to have some type of penetration.
16 And with -- even with penile penetration, a lot of times
17 teenagers can have very normal exams. Because that area
18 can stretch, instead of tear.

19 It, also, has an extremely excellent blood supply.
20 So that when there is minor trauma to that area, it can
21 heal very, very quickly, within hours to days.

22 Q Okay. Would you always expect to find evidence of
23 trauma following a sexual assault?

24 A No, you would not. The majority of the time that --
25 in the children that I see, they have normal exams. And

1 the medical literature states approximately 90 percent of
2 children have normal exams when they have had a history of
3 child sexual abuse. That often is related to a lot of
4 what happens to children as far as fondling, just being
5 touched in the genital area, oral sex, that often doesn't
6 leave any findings on the exam. Digital penetration as
7 well as even penile penetration, as I mentioned before,
8 often won't leave any findings on an examination.

9 And then children often delay in their disclosure.
10 And so, as I mentioned before, the healing process is
11 quite unique to that area. And so that when there is a
12 delay in hearing what has happened, things can heal up
13 very quickly if there had been trauma and then at the time
14 that they are coming for a medical exam.

15 Q Could a normal exam still be consistent with the
16 medical history of sexual assault in this case, in your
17 expert opinion, based on your experience and training?

18 A Yes, it could.

19 Q Can you explain that?

20 A Well, I feel that, as in most areas of medicine, the
21 whole process of this evaluation is looking at the
22 information, the history that the child provides, and the
23 examination is what we do in all areas of medicine by
24 taking a history and doing our physical exam.

25 So that the information that was provided in this

1 particular case and then the finding of a normal exam and
2 that I didn't see her right after the incidents had
3 occurred is, perhaps, one reason why she has a normal
4 exam. And then with the type of things that she shared
5 about what had happened, that, also, could be evidence as
6 to why her exam was normal at the time of my evaluation.

7 Q Okay. And can you state, specifically, what those
8 things are that you just referred to, the types of things
9 that would not necessarily leave evidence?

10 A Well, as I mentioned, fondling, being touched in the
11 genital area, digital penetration, oral sex. And a lot of
12 times, especially in younger children, they often will
13 describe the male genital area going into their genital
14 area. But it, also, is a difference of their
15 understanding of what their anatomy looks like.

16 So, a lot of times, the actual male genital area
17 doesn't, actually, go through the hymen into the vaginal
18 area, but just goes into the outer genital area, what is
19 referred to as the vulva area, and may cause irritation,
20 pain, sometimes burning when they go to the bathroom, but
21 doesn't, actually, leave any tears or scars even,
22 initially, on an examination.

23 Q Okay. What about attempted penile penetration?

24 A Well, again, for all the reasons -- you know, it's
25 hard to know exactly what "attempted" means. Is it

1 just -- you know, it's hard to know exactly, you know, how
2 far the male genital area goes in, or is that referring to
3 just that outer -- inside the labia, but into that kind of
4 vulva area.

5 I think a lot of -- that description of attempted
6 penetration refers to that kind of what we call vulva
7 intercourse, as I kind of explained what that was just a
8 minute ago.

9 MS. SEAY: Okay. Thank you, Dr. Henderson.

10 Please answer any questions Mr. Scalzo has.

11 THE COURT: Yes, sir, Mr. Scalzo.

12 MR. SCALZO: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. SCALZO:

15 Q When you were describing -- I think you used a
16 percentage, you said 90 percent when you were talking
17 about not expecting injury?

18 A Yes, sir.

19 Q You were getting the number from what?

20 A From --

21 Q Where?

22 A From the medical literature on child sexual abuse.

23 Q Okay. And I guess there's two parts of my question.
24 First, do you have tests, or do you conduct research in
25 that particular area to come up with your own percentage?

1 A No. I don't do research.

2 Q Okay. And then my second question is, in terms of
3 the research that was done, sort of your reviewing and
4 relying upon, I guess the obvious question to me is, how
5 do they know because all of this is, obviously, an
6 allegation versus what's happened?

7 How do they know, based on the child's description,
8 whether the child's description was accurate, inaccurate,
9 lie, not a lie when they're doing their research?

10 A Well, probably the best study -- and I, actually,
11 have a copy of it with me -- was done in 1994, which is
12 kind of the landmark study entitled "It's Normal to Be
13 Normal," which was in our peer review pediatric journal.
14 And they looked at about 270 children where there,
15 actually, had been a conviction of child sexual abuse.
16 And, in that case, 70 percent of the children had -- in
17 that case had normal or non-specific exams.

18 So there was a known conviction of sexual abuse from
19 the Court. And they went back and did a review of the
20 colposcopic pictures. And those pictures were viewed as
21 either normal or non-specific.

22 Q All right. And are those cases -- or do you know if
23 those cases that they're relying on are, I guess,
24 essentially, cases where one set of people said, I believe
25 you, maybe another set might say they didn't believe you,

1 but they're not cases of sort of forensically proving it?
2 Do you see my distinction?

3 A No, sir.

4 Q All right. For instance, if one person comes in and
5 says, it happened. The jury happens to believe that
6 person that something happened. That's one case. Okay.
7 Another case would be somebody says it happened and,
8 regardless, of what they say, from a physical standpoint,
9 DNA, fingerprints, whatever, you're able to establish that
10 it did happen. Those are two different types of cases.

11 I guess my question is, does that study distinguish
12 between those two different types of cases?

13 A No. Because they just reviewed the actual findings
14 on the medical exam, the colposcopic pictures. DNA is
15 extremely rare in child sexual abuse. Because a lot of
16 times, children -- DNA is only accurate, usually, in the
17 first 24 hours after the incident has occurred. And it's
18 extremely rare for a child to come forward within that
19 time period.

20 So finding DNA is something that is quite unusual in
21 the field of child sexual abuse. So it only is looking at
22 the colposcopic pictures and the jury finding in this
23 particular study.

24 Q And, because your opinion is based on an absence of
25 evidence, you're really just offering an explanation of

1 how -- why there might have had something happen, even
2 though there's no evidence of it. Is that a fair
3 description of your opinion?

4 A My opinion is based on the history that's provided by
5 the child, as well as her medical exam.

6 Q Now, when you say it's based on the history and the
7 medical exam, what in the history are you saying that
8 makes you say it could have happened, despite no physical
9 injury?

10 A All the information that she shared as far as what
11 happened to her.

12 Q Okay. So you're relying upon your assessment and
13 your believability of what she's telling you?

14 A No. I'm relying on the history that she provided to
15 me as a medical doctor.

16 Q Maybe I'm confused about what history you're
17 referring to. Are you referring to the -- as part of the
18 history what she claims the abuse was, or are you just
19 talking about medical history about what kinds of injuries
20 or disease she did or didn't have?

21 A It's like if a patient comes to me and they complain
22 about their head hurting. And they're complaining about
23 it throbbing, when it hurts, why it hurts, what made it
24 hurt. Those are very, very important pieces of
25 information as I go about doing my medical evaluation.

1 So I take that history. I do my medical exam. Often
2 with people that have headaches, they are going to have a
3 normal exam. But that history that they provided about
4 what happened, what caused it, what makes it better, what
5 makes it worse is really what I need to know to make my
6 medical diagnosis.

7 If I don't get that history and then I just don't
8 talk to them and do my medical exam, then I'm going to
9 come up with nothing. But, as a medical doctor, we are
10 trained, even at that very basic level, not a child sexual
11 abuse doctor, not a surgeon, but as a basic level of being
12 a medical doctor about taking a patient from -- taking a
13 history from a patient, and doing a medical exam. And
14 that is how we make our diagnosis.

15 We go through a differential diagnosis of what are
16 the possibilities that could come up with these findings,
17 but based on the history, the findings, looking at that
18 differential, and that's how we come to a conclusion about
19 it.

20 Q But, in this case, what, specifically, in the history
21 are you then saying, I'm relying on this specific thing to
22 then tell me it could have happened?

23 A Okay. I am relying on the history about the detail
24 about what she's able to share about what happened, her
25 concerns about why she had to come forward, about sharing

1 it, some of the symptoms that she described when it
2 happened, which are very specific symptoms that if it
3 didn't happen to you, it's not common knowledge that you
4 would even know that those things are associated with
5 that.

6 So it's looking at a statement, plus, especially with
7 children, they start bringing in some sensory information
8 about how it felt, what it made them do. That really
9 increases my index of concern and suspicion about the
10 credibility of the information that they're sharing to me.

11 Q And, obviously, correct me if I'm wrong. But what I
12 hear you telling me is that when you're referring to the
13 history, what you're referring to is her allegation and
14 her description about what she says happened to her. And
15 you're relying upon that or accepting that as an accurate
16 report?

17 A I am accepting it -- I take that information in just
18 like we do with every history that any patient provides
19 with -- to me, as a medical doctor. And I then look at
20 the exam, look at all the other things that are going
21 around, what's happening within the family. All those
22 things are very important to come up with a specific
23 diagnosis in this area.

24 Q My understanding is that psychiatry -- while you're a
25 medical doctor, psychiatry is a different set of training

1 than a physician, maybe training on top of being a
2 physician. Is that a fair --

3 A A psychiatrist is a physician.

4 Q Right. But they go -- in other words, you don't get
5 the same training as a psychiatrist. If you decide to be
6 a psychiatrist, you'll go on to different additional
7 training after medical school; right?

8 A Right. They do a psychiatry residency. I did a
9 pediatric residency.

10 Q Okay. And are you saying you have training in the
11 field of psychiatry or psychology that would help you then
12 understand when she's giving you this history that you
13 described -- because that sounds a lot more psychiatric or
14 psychological than it does physically medical history?

15 A What I am saying is that I am trained in the area of
16 child abuse and child sexual abuse. And the history is
17 very important that the child share it.

18 So the information she provides, plus, as I mentioned
19 before, the additional information as far as symptoms and
20 things like that that she is able to give during her
21 disclosure increases the validity to me about the
22 information that she has shared.

23 Q And, now, what I hear you saying is that naturally
24 your opinion is an opinion about the veracity or the
25 believability of what she's telling you?

1 A No. I'm not saying anything like that. I'm saying
2 she's sharing information.

3 Let's say we get back to the area about a headache.
4 Let's say a patient comes in and says, I have a headache.
5 But they can't tell you how it feels, when it happened,
6 you know, how it occurs, what makes it better, what makes
7 it worse. And all they can do is come in and say, I have
8 a headache. And you don't find anything on their exam.
9 And the headache is not bothering them at all. It's not
10 interrupting their day. They're able to go on. Well, at
11 the end of that, I'm going to say, you know, I know your
12 head hurts, but, you know, it doesn't seem to be
13 interfering with your daily life, you know. Let's try
14 this.

15 She, in her examination, is not just coming in and
16 saying, I was sexually abused. She is able to give quite
17 a bit of detail as far as what happened and, also, give a
18 lot of symptoms as far as what happened. And, as far as a
19 medical provider in this field, that is very important for
20 me to decide about what tests I need to do, and about
21 making a general conclusion about my evaluation.

22 Q All right. One thing I'm confused about is, you
23 said -- the "symptoms" is the word that you used. What
24 symptoms -- from your report, I can't tell what symptoms
25 you're referring to that she's reporting to you. So can

1 you tell me about that?

2 A Yes, sir, I can. Would you like me to read it,
3 specifically, to you?

4 Q Whatever is easiest for you to explain.

5 A Okay. It's on Page 7 of 12. It says, Clothes would
6 be off. She, also, reports there were many times he tried
7 to put his private part in hers, but she doesn't think it
8 happened. She does remember it hurting and having some
9 burning when she peed.

10 Q And you're looking at the section where it says,
11 Child Statement to Healthcare Provider? Is that where
12 you're reading from?

13 A Yes, sir.

14 Q And to use your example, because you said headache,
15 explain to me the difference between your example of the
16 headache and this case. And here is what I heard you say,
17 you said that the patient came to you and said they had a
18 headache. And you would get a history about them
19 describing the pain, I think is how you described it. Is
20 that accurate?

21 A That would be one of the questions.

22 Q There's symptoms that are telling you I've got this
23 headache and this is bothering me; right? And if you did
24 a physical examination of them and, as you said, it came
25 back normal, so you couldn't find physically something

1 that was causing their headache. Is that what you were
2 saying, essentially?

3 A Yes. Sometimes that happens, yes.

4 Q Okay. You might offer a treatment for the headache;
5 right?

6 A Yes.

7 Q But are you then saying that you can then tell the
8 patient or anybody else, I can tell you where that
9 headache came from?

10 A No. But I am saying that I'll make the diagnosis of
11 headache. And -- but I'm not saying -- and, in this case,
12 I'm not saying who caused the sexual abuse, but I can make
13 the diagnosis of sexual abuse.

14 Q But isn't that where it's sort of the headache
15 symptoms and the allegation of sexual abuse kind of
16 diverge?

17 As examples, the headache is, here is a pain. There
18 isn't a same kind of element of believability. You don't
19 have to believe that the headache came from a hit on the
20 head versus they didn't eat enough. They're just
21 describing pain, I have a headache. Whereas in a sexual
22 allegation, you, as a doctor, have to make an evaluation
23 whether or not, essentially, you're believing that that
24 action that she's describing took place?

25 A Well, I mean, going back to the headache, you know, I

1 may need to -- I mean, that may be part of the
2 differential diagnosis. If they come in for a headache, I
3 may need to -- you know, did they get hit?

4 A lot of times when kids come in with head problems,
5 or head trauma, or a headache, or like a seizure, for
6 example, those are the things that we need to think of.
7 Is there something else? Was there some trauma to it that
8 caused it to cause them to have all of these symptoms that
9 they're having? The same is true for this. I don't see
10 any difference.

11 Q One clarification. When she described to you and you
12 put in the history of the burning, I guess you said
13 burning when urinating?

14 A Yes.

15 Q Was that something she was describing as experiencing
16 at that point, or having had experienced it in the past?

17 A Experienced it when it happened.

18 Q Okay. And did you review any prior medical history
19 like from her pediatrician -- other pediatricians she
20 might have seen?

21 A Only the information that's provided by the mom.

22 Q So, in other words, what's contained in here when --
23 on that day and you're talking to the mom and to the
24 child, that's the limit of the history that you relied on?

25 A Right. I don't have any other medical history.

1 Q And are you saying that the description -- and,
2 please, tell me if there are other symptoms -- the
3 description of the symptom of this burning while
4 urinating, that description is what you're relying on to
5 say, even though there was not physical evidence and my
6 test is inconclusive, that doesn't rule out the
7 possibility that the allegation was accurate? Is that
8 what you're saying?

9 A That is one of the things that she said that added to
10 my conclusion. That's not the only thing.

11 Q Then what is the other thing -- or the other things?

12 A The other things are, again, the information that she
13 shared with me about what happened. And you'll have to
14 understand that, you know, none of this, as far as the
15 evaluation, coming in for a medical exam, sharing about a
16 sexual abuse incident, is at all pleasurable for anybody,
17 for a child, in particular.

18 And so there is nothing that happens that serves any
19 ulterior purpose, you know, that -- in my medical
20 evaluation that makes this a very -- I hope it's not a bad
21 experience. But it's, certainly, not a pleasant
22 experience.

23 And so that having a young child share very detailed
24 information about something that's happened to her, and
25 very clearly can say what has and what has not happened

1 and then, again, provide the symptoms and, clearly, say, I
2 think this happened, this didn't, give some symptoms about
3 what happened during the time of the abuse incident,
4 information as to why she was uncomfortable coming forward
5 about sharing sooner about the abuse --

6 Q Well, let me stop you there. How does the delay
7 in -- of disclosure, I guess is the term that's often
8 used -- what does that have to do with the medical
9 evaluation evidence of abuse or --

10 A Well, as I mentioned before, the delay of disclosure
11 is extremely important. Because if there had been -- if,
12 you know, a child gets -- you know, and it's often more
13 with adults, you know, when they get raped, they're picked
14 up, they go right to the ER, and those people where there
15 is no delay and they come right to a medical evaluation
16 sooner, the likelihood of finding things is about 30
17 percent, as opposed to children where, as I mentioned,
18 it's only about 10 percent.

19 Q No. I understand what you mean by it being important
20 information for you that there was a delay.

21 A Right.

22 Q But you seem to have been describing sort of the
23 nature, and the reasons, and what was, actually, going on
24 in context to the delay as, also, being relevant?

25 A Oh, I think it is relevant. Because I, as a

1 pediatrician, am, certainly, looking at the safety of a
2 child. A lot of times when they come into my examination,
3 a lot of times, the -- there's concerns that they still
4 have access to someone who has harmed them.

5 So, you know, when they come forward, why they come
6 forward at the time that they do is very relevant.
7 Because the safety of a child is an absolute part of my
8 evaluation as a general pediatrician. And, certainly, I
9 see more when I'm evaluating children for abuse and
10 neglect.

11 Q But is that part of your evaluation in terms of
12 looking out for the welfare of your patient and going
13 forward, or is that a necessary element to determining
14 whether or not, one, there's an injury, and, two, if
15 there's not an injury, could there have been a cause for
16 that? Those are different --

17 A I look at everything, the whole entire piece of that.
18 And it's not separated out. One question has to deal with
19 that, and one with that. My job is all of those things
20 that you just brought up.

21 Q So what you're saying is your job is to, also,
22 evaluate and document issues that might -- what we would
23 call in court credibility issues?

24 A No. It's to evaluate the safety of the child, and to
25 look for any medical conditions, and to make sure that the

1 entire situation is being evaluated in the most
2 appropriate way as possible.

3 Q And, in this case, what you -- in doing that, what
4 you did was you spoke to the mom and you spoke to the
5 child about it. In making the evaluation you just
6 described, those are the two people you spoke with?

7 A Yes.

8 Q And you are not saying that you looked into other --
9 any other, if there was, medical evidence or medical
10 history?

11 A There wasn't any other medical history to look into,
12 as far as I was told.

13 Q As far as you were told?

14 A Yes.

15 Q All right. But that means you did not consult with
16 any other physicians that would have seen her in the past?

17 A No.

18 Q Okay. What is it that you are doing or what are you
19 applying when you're making -- because you said that
20 overall evaluation, you're kind of taking everything in.
21 What, specifically, are you doing that anybody else
22 listening to that is not doing, or not able to do in
23 trying to figure out what happened?

24 A Well, anyone else -- I don't know who the anyone else
25 that you're, specifically, referring to --

1 Q I guess a non -- someone -- a non-expert with your
2 training is, I guess, my distinction.

3 A Well, I think what I am able to do is, one, look at
4 her medical history, look at the information that's
5 provided by the caretaker and the child, look at the
6 medical findings, look at the possibility of the
7 differential diagnosis, and then come to a conclusion.
8 And you have to understand that the medical evaluation is
9 just a part of the overall evaluation of children that are
10 abused.

11 So I come to my medical opinion about it. And then
12 they, also, are evaluated by, perhaps, a forensic
13 interview, perhaps, an interview by law enforcement,
14 perhaps, interview by DSS investigating the whole
15 situation. So all of those things are very important.
16 And the medical piece is an important part, but it's just
17 one part of this overall evaluation.

18 Q And you are not trained as a forensic interviewer --
19 you used the term "forensic interview." You are not
20 trained as -- in that field?

21 A No. I'm not a forensic interviewer.

22 Q And your understanding of a forensic interviewer is
23 the technique, or protocol, or use of a procedure to help
24 illicit facts from the child about what happened?

25 A That is what they do.

1 Q Okay. What you're saying is you're on the medical
2 side of trying to illicit, in essence, medical facts?

3 A Right. I am definitely trained in talking to
4 children. Because that's what I do all the time. And
5 then talking to parents about what is happening to their
6 children.

7 MR. SCALZO: I think that's it, Judge.

8 THE COURT: Okay. Any redirect?

9 MS. SEAY: No, sir.

10 THE COURT: And do you have a motion at this time?

11 MR. SCALZO: Yes, Judge.

12 What I would say is this, I do not disagree that
13 she's qualified as a medical doctor to perform a physical
14 examination of the child in some of the description that
15 she's given. My concern is that even if she -- even being
16 qualified, what she's described and she's doing -- I mean,
17 she -- in her words, she's taking the overall picture.
18 And what she's, essentially, doing is she is offering an
19 opinion that, at the end of the day, really is about the
20 credibility of what she was told happened.

21 Because she doesn't have physical evidence that she
22 could go to and say, here is the physical evidence that
23 I'm looking at to say something physical happened to the
24 child. What she's relying upon, in the absence of the
25 physical evidence, is a description by the child of what

1 she says happened to her. She has to go by the
2 credibility and believability of that to offer her
3 opinion.

4 So she's presuming the believability of it. I think
5 that's outside the realms of the expert opinion. She's
6 not -- the case law says you can't offer an expert opinion
7 about the believability of a witness. You can offer an
8 expert opinion about your evaluation, based on
9 professional observations and processional conclusions
10 from that. But once you get to a comment really that your
11 expert opinion is really based on the believability of
12 what the child is alleging, that is when I think you're
13 going beyond the scope of what is a permissible expert
14 opinion. And that's what I've been trying to describe to
15 the Court is sort of the difference.

16 She is a qualified expert, for instance, to say if
17 she saw a tear as the example I used, I don't doubt she's
18 qualified to explain how that tear might have happened,
19 what it would mean, how would it heal. Those are outside
20 the purview of a layperson to be able to explain that.
21 But what she's saying is -- what she's relying upon to
22 offer the opinion she's trying to offer here or being
23 asked to offer here is that she then has to rely upon
24 inherently her subjective opinion about whether she
25 believes the child or doesn't believe the child about the

1 basic allegation.

2 THE COURT: I understand your argument. And I may
3 have missed something. But I don't remember her
4 testifying during the direct examination that she was
5 making a diagnosis that abuse occurred, did she?

6 I thought she just made a statement that she saw no
7 signs of it, based on her physical exam. And there was
8 questions about how physical exams may not pick up all
9 cases of abuse. I don't recall a separate opinion being
10 made that abuse definitely occurred in this case.

11 Did I overlook something?

12 MS. SEAY: No. I don't think you did.

13 THE COURT: If she made that opinion, your argument
14 might have validity. Because it would, perhaps, fall back
15 on the essence of whether or not the patient or victim was
16 credible, whether the doctor believed it was credible,
17 because there would be no other basis for the opinion.
18 But she didn't do that.

19 MR. SCALZO: But I think -- I guess where I'm arguing
20 is on the overall reliability of that opinion.

21 THE COURT: But she didn't give that opinion.

22 MR. SCALZO: No.

23 I mean of the opinion you just described, which is
24 it's inconclusive is the diagnosis. And then the opinion
25 on top of that is to say even though the examination and

1 diagnosis that's inconclusive that -- the opinion the
2 expert has given is that that does not mean that sexual
3 abuse didn't happen. I mean, that's what she's saying to
4 the -- that's what they want her to say to the jury.

5 THE COURT: Right.

6 And when you asked her about that, she stated that
7 she based that on a peer review journal in the field in
8 which she is qualified as an expert, and that's something
9 she, typically, can rely on. So that's, specifically,
10 granted in the rules.

11 So in addition to it being probable and reliable on
12 its own -- and you explored that very thoroughly as to the
13 basis for that, articles, conclusions, and why that might
14 not be definitive and so forth. But that all goes to the
15 weight of the evidence, and not the admissibility of it.

16 But I don't understand how she could be prohibited
17 from that second part of her opinion when she's given the
18 reasons behind it, which meet with approval, specifically,
19 by our rules. Explain that to me.

20 MR. SCALZO: Well, I disagree with -- I think part of
21 the analysis that's required is reliability of what is,
22 ultimately, that conclusion. And the process that she
23 described in using to come to that second opinion --

24 THE COURT: Right.

25 MR. SCALZO: -- that we're talking about is that she

1 has to rely upon -- and which she's only relied upon is
2 what was described to her as having happened by the
3 victim. For instance, that's why I asked her about, is
4 there any other medical evidence, prior history that you
5 looked at? What else did you find out?

6 And she, basically, said the only thing she's relying
7 upon is what's described to her by the child as having
8 happened. That's what she's using to rely upon to make
9 her opinion. I'm saying it's reliability that -- you
10 know, can the Court rely upon the accuracy of that expert
11 opinion to allow it to go to the jury?

12 Because what's happened is she hasn't looked at the
13 medical history. She's not going to be able to talk to
14 the jury about what was there prior to what -- to her
15 evaluation on that date or what wasn't there. She is
16 limited to, at the end of the day, making a comment on the
17 believability of the victim.

18 THE COURT: Well, in the artificial world that you
19 just constructed, that would be true.

20 But what I heard her say as the basis of her opinion,
21 which I understand is limited to an inconclusive test and
22 the fact that an inconclusive test doesn't definitively
23 rule out abuse. And I'm paraphrasing. But I never heard
24 her say, until you began questioning her about it -- but I
25 never heard her say on direct examination that she was

1 saying that you could still have abuse, in her opinion,
2 even though the test was inconclusive and the physical
3 evidence was inconclusive, because this particular victim
4 was credible. I never heard her say that.

5 What I heard her say, initially, on
6 cross-examination, when you asked her about the basis for
7 her opinion. Was that the literature demonstrated that
8 based on case studies from a 1994 article -- I think she
9 mentioned something like 270 cases where there had been
10 convictions and the forensic evidence or physical evidence
11 had been inconclusive. That's what I understood her to
12 say was the basis.

13 And then you started talking to her about how, in
14 this particular case, wouldn't it be the basis for a
15 diagnosis of finding abuse that occurred wouldn't have to
16 be -- come back, ultimately, to whether or not you
17 believed the victim, and that would be the only way. And
18 then y'all got into a dialogue about the physician's
19 ability or the priority of a physician's reliance on
20 patient histories and believability and so forth.

21 But that wasn't anything that the State brought up.
22 And that wasn't anything that I heard her use to -- her
23 opinions on direct examination. So I don't understand how
24 it could be inadmissible.

25 MR. SCALZO: I think she was implying -- I was

1 flushing out what I thought was the implication from her,
2 which was she was relying -- I think the question I had
3 asked her when we were in this area was, What were you
4 relying upon from this individual to be able to offer the
5 opinion that, even though there was not -- that the
6 physical evidence was inconclusive, you -- she's offering
7 an opinion of that next step. I said, what were you
8 relying upon to be able to offer that next step? That's
9 when she was describing, well, the -- she said history.
10 And I had to flush out what she was, specifically,
11 referring to as far as history. And that's where we ended
12 up talking about the one example was the burning while
13 urinating.

14 But, ultimately, it got into sort of this circular
15 connection that I see, which is she still has to rely upon
16 only what the victim is telling her, as opposed to finding
17 evidence outside of what the victim is telling her.

18 THE COURT: Well, she's got two opinions. One is
19 specific, this case is inconclusive.

20 The second opinion is general, just because something
21 is inconclusive doesn't mean it rules out definitely that
22 abuse occurred. But what you're trying to say is that
23 both of those opinions are specific to this victim. And I
24 don't find that. So I have to deny your motion.

25 Anything further?

1 MR. SCALZO: The only thing I would ask Your Honor
2 is, in the way you described it, what I need to know is
3 the scope of what she's going to be able to testify to.
4 If she testifies to the way you just described, I
5 understand. But I would imagine that what the Solicitor
6 may ask her -- and I don't know, but may get into --

7 THE COURT: We just heard the questions and answers.
8 What else could it be?

9 MR. SCALZO: Well, one, I don't think that this
10 witness repeating what the victim told her about what,
11 specifically, happened -- in other words, in the report,
12 she is getting a medical history. And part of what she
13 says is the medical history is a description from the
14 victim of similar things to what she testified to today.

15 If the State is going to offer that, or the witness
16 is going to testify to that as part of the support for her
17 opinion, I don't think that's appropriate for the jury to
18 hear.

19 MS. SEAY: I think under Rule 803, Subsection 4,
20 Statements for purposes of medical diagnosis or treatment
21 that it would be pertinent.

22 THE COURT: Well, you're talking about Rule 801,
23 aren't you?

24 Is that your objection?

25 MR. SCALZO: One moment, Judge. I want to make sure

1 that I'm talking about the right --

2 THE COURT: You mean it has to be limited to time and
3 place.

4 Isn't that what you're talking about?

5 MR. SCALZO: Yes.

6 And I think that's kind of where I got to, you know,
7 it, ultimately, being a circular logic issue. I've been
8 through this before. I know where it's, ultimately, going
9 to go. Where it's, ultimately, going to go is she has an
10 opinion about why -- even though there's inconclusive
11 evidence, she could make the expert opinion that that
12 doesn't exclude it.

13 And then what she's going to do is say, well, the
14 basis for that is what I was told by the child during the
15 physical examination, which is hearsay and beyond what you
16 just described, which is time and place.

17 THE COURT: Well, you know --

18 MR. SCALZO: That, to me, completes the circle.

19 THE COURT: I don't -- what is the State's position
20 on that?

21 MS. SEAY: The State's position is that I would ask
22 her the questions that I just asked her in this proffer,
23 and that those would be appropriate questions, based on
24 her qualifications as an expert. And that she should be
25 allowed to testify. And that it is a jury issue as to the

1 weight that the jury wants to give her testimony. But
2 that it is, certainly, admissible testimony.

3 THE COURT: Okay. I understand, Mr. Scalzo, and I
4 applaud your creativity. Because I think what you're
5 trying to demonstrate is that even though Dr. Henderson
6 may be a medical doctor that, basically, what she is is a
7 forensic interviewer, and you want to bring in all the
8 forensic interviewing cases that talked about the issues
9 that crop up there. And that may be a valid point, as
10 I've already pointed out, if she were talking about the
11 credibility of the victim, and that she relied on the
12 victim's credibility and she believed the victim.

13 She didn't say that until you started asking her
14 questions about it. And, certainly, you can open the door
15 to that, if you want to. But for purposes of whether
16 she's qualified as an expert, it's simply not relevant
17 based on the proffer that we've now spent an hour and a
18 half on, and giving everyone the opportunity to put
19 whatever objections they have on the record.

20 The criteria I have to use is straightforward based
21 on State v. White, State v. Council, and State v. Jones,
22 and the Watson case. And I have to make three preliminary
23 findings under Rule 702. I, first, have to find that the
24 subject matter that Dr. Henderson is testifying about is
25 beyond the ordinary knowledge of the jury, thus, requiring

1 an expert to explain the matter to the jury. I,
2 certainly, find that physical examinations by physicians
3 for purposes of diagnosing sexual abuse are beyond the
4 ordinary knowledge of a juror.

5 The next thing I have to look at is whether the
6 expert has, indeed, acquired the requisite knowledge and
7 skill to qualify as an expert in a particular subject
8 matter. I find that it is beyond any reasonable objection
9 that Dr. Henderson is a qualified medical doctor, and has
10 acquired the knowledge and skill necessary to be a
11 pediatrician and an examiner of sexual abuse.

12 The last thing I have to do is evaluate what is the
13 substance of the testimony and determine whether it's
14 reliable. And I find that the substance of the testimony
15 is reliable. And I, certainly, would think that medical
16 conclusions by doctors using normal scientific methods by
17 pediatricians that graduated from prestigious medical
18 schools are reliable. If they're not, then we're all in
19 some kind of trouble, I would think.

20 So I find that she does qualify under the cases --
21 under State v. Council and State v. Jones. I find the
22 underlying science is reliable. She's, you know, talking
23 about scientific method and differential diagnosis.
24 Certainly, these are all sound, widely accepted and
25 reliable methods.

1 And I, first, find the probative value of it is not
2 outweighed by any prejudicial effect under Rule 403. And
3 so I find it's admissible, and she's qualified.

4 So, with that, we're going to take about a 10-minute
5 break. And we'll bring the jury back in.

6 All right. Thank you very much.

7 (WHEREUPON, a break was taken.)

8 THE COURT: Anything further before we get started?

9 MS. SEAY: Nothing from the State.

10 THE COURT: So let me just clarify. The testimony
11 from Dr. Henderson is going to be confined to the Rule 801
12 time and place; correct?

13 MS. SEAY: Yes, sir. I will do that, yes.

14 THE COURT: Okay. And you can go ahead and bring the
15 jury in.

16 (WHEREUPON, the jury came into open court at
17 approximately 3:41 p.m.)

18 THE COURT: All right. Ladies and gentlemen, I
19 apologize for the delay. We've been trying to work
20 something out related to the case that, hopefully, will
21 make things move more quickly. And I know it's
22 frustrating to sit back there without knowing what exactly
23 is going on. Somebody once compared jury service to being
24 in an airport waiting on an unscheduled flight to leave.
25 And I know that's probably how you feel right now.

1 So we apologize for that. But, believe me, it was
2 unavoidable. And we have been out here working the whole
3 time.

4 So with that, yes, ma'am. You may call your next
5 witness.

6 MS. SEAY: The State calls Dr. Nancy Henderson.

7 THE CLERK: Please raise your right hand and place
8 your left hand on the Bible.

9 WHEREUPON,

10 NANCY HENDERSON, M.D.,
11 after first having been duly sworn, testified as follows:

12 THE CLERK: Thank you.

13 DIRECT EXAMINATION

14 BY MS. SEAY:

15 Q Dr. Henderson, where are you, currently, employed?

16 A I'm employed with Greenville Hospital System.

17 Q Let me show what's been marked as State's Exhibit
18 No. 1 for identification, and ask if you recognize it?

19 A Yes. That's my CV.

20 Q Okay. I'd like to go through some specifics of your
21 CV. Can you, please, describe your education?

22 A Yes. I did my undergraduate education at Rutgers
23 College of Pharmacy in New Brunswick, New Jersey, and
24 graduated in 1980, with a BS in Pharmacy. I then went to
25 Bowman Gray School of Medicine in Winston-Salem, North

1 Carolina, and graduated with my medical degree in 1984.

2 And I then did my pediatric residency program training at

3 T.C. Thompson Children's Hospital, which is in

4 Chattanooga, Tennessee, and finished in 1987.

5 Q Okay. Do you have any specialties or board
6 certifications?

7 A Yes. I am board certified in pediatrics, and then
8 sub-boarded in adolescent medicine and in child abuse
9 pediatrics.

10 Q And how long have you been certified in child abuse
11 pediatrics?

12 A Just since this previous January.

13 Q Okay. How long has that board certification existed?

14 A This is the first time that this has been offered as
15 a sub-board under the area of pediatrics. So the first
16 examination was given in November, and the results were
17 provided in January.

18 Q So you sat for the very first examination of that new
19 sub-specialty?

20 A Yes, ma'am.

21 Q What are the qualifications to sit for that board?

22 A Well, either you had to be -- part of your previous
23 training for five years, 50 percent of the training had to
24 be in the area of child abuse and neglect. And then you
25 had to take this examination, which was a five-hour

1 examination that was -- it was offered all over the
2 country. But I took the examination in Chapel Hill.

3 Q Okay. Do you know how many participants were board
4 certified as a result of that examination?

5 A I believe there's 240 pediatricians that were
6 sub-boarded in this area for this first examination.

7 Q And that would be within the United States?

8 A Yes, ma'am.

9 Q Okay. Do you have any faculty appointments?

10 A Yes. I'm on the faculty at Greenville Hospital
11 System. I'm chairman of the Division of Forensic
12 Pediatrics, often known as child abuse and neglect. And
13 I'm involved with teaching the pediatric and family
14 practice residents in the areas of child abuse and
15 neglect, as well as the medical students from Columbia
16 Medical School that rotate during their third and fourth
17 year at Greenville Hospital.

18 Q Okay. Do you have memberships or offices? Do you
19 hold offices in any medical professional society -- excuse
20 me. I think I best just start that question over.

21 Do you have membership in or hold any offices in any
22 professional or scientific societies?

23 A Well, I am on the section at the academy of
24 pediatrics in adolescent medicine, and then the section on
25 child abuse and neglect. I am, also, part of ADSAP and

1 SCPSAC, which is kind of our statewide organization. It's
2 an organization involving professionals involved in the
3 area of child abuse and neglect.

4 And I'm, also -- there's approximately nine
5 physicians and nurse practitioners in our state that
6 gather three times a year to evaluate our medical
7 protocols. And I am part of that team.

8 Q Have you received any grants or awards?

9 A I have received some grants in the past. I was the
10 recipient of a \$25,000 grant for Mary Black Hospital that
11 allowed for the purchase of a colposcope that I use in the
12 examinations up in Spartanburg.

13 We, also, received a grant here in Greenville from a
14 woman's organization, also, for the purpose of a
15 colposcope at the Children's Advocacy Center. And I,
16 also, was awarded pediatrician of the year not last year,
17 but the year prior to that from Greenville Hospital
18 System.

19 Q So, in 2008, you were pediatrician of the year?

20 A Yes, ma'am.

21 Q Okay. And I believe you described your major
22 teaching responsibilities, currently, already; is that
23 correct?

24 A Yes.

25 Q Okay. And what are your major clinical interests and

1 responsibilities at this time?

2 A Okay. I am involved in inpatient consults. So when
3 there is a child that is admitted to the hospital where
4 there is a concern about child abuse and neglect, they may
5 consult our division for help in evaluating the case.

6 I, also, see children both at the Children's Advocacy
7 Center here in Greenville, as well as the one up in
8 Spartanburg. I'm up there two days a week evaluating
9 children for the possibility of child sexual abuse, and
10 physical abuse, and neglect.

11 And I'm, also, involved at Pendleton Place, which is
12 the children's shelter. And I do the medical exams there
13 for the children that are emergency removed. And I, also,
14 do their ongoing general pediatric care while they're
15 there at the center. And I, also, do general pediatrics
16 on Thursday afternoons in the general pediatric clinic. I
17 work with the residents -- again, family practice
18 residents and pediatric residents in their training as
19 they're seeing general pediatric problems.

20 Q Have you presented any lectures or presentations
21 during the last three years?

22 A Yes. I -- as part of my responsibilities, I did give
23 lectures to the pediatric residents in the area of child
24 abuse and neglect, as well as the medical students as
25 they're doing their rotations in pediatrics, which is

1 primarily part of their third-year rotation.

2 I, also -- recently, I've been involved in lectures.
3 Both were up in Spartanburg. One was at USC-Upstate. It
4 was an undergraduate course in the area of child
5 maltreatment. And I did a lecture at the beginning of
6 October in the area of child sexual abuse. And then I,
7 also, did a lecture for Spartanburg Regional Medical
8 Center in the area of child fatalities and, also, in being
9 a witness at a trial. That was, also, another -- one of
10 the other lectures that I was involved with up there.

11 Q Have you been previously qualified as an expert in
12 the field of child sexual assault examinations and
13 pediatrics?

14 A Yes, I have.

15 Q Have you testified in court previously?

16 A Yes, I have.

17 Q Okay. Do you know on how many occasions you've been
18 previously qualified as an expert in the field that I've
19 just described?

20 A I'm often called to court approximately maybe two to
21 three times a month. I haven't kept a specific number.
22 But I am qualified in those areas when I do either go into
23 Family Court or criminal court.

24 Q Okay. And can you, please, briefly tell us which
25 courts you've testified in?

1 A Do you want jurisdictions?

2 Q Yes. I'm sorry.

3 A I -- because of the involvement with the Children's
4 Advocacy Center up in Spartanburg, we often are seeing
5 children not only from Spartanburg County, but, also, from
6 Cherokee County and Union. So I have been in those
7 courtrooms. And then, here in Greenville, we're often
8 seeing children not just from Greenville County, but,
9 also, from Anderson and in Laurens. So I have been
10 involved in those court areas as well.

11 MS. SEAY: Your Honor, at this time, I would offer
12 Dr. Nancy Henderson as an expert in the field of
13 pediatrics and child sexual assault examinations.

14 THE COURT: Any voir dire?

15 MR. SCALZO: No additional voir dire. But subject to
16 my prior motions with the Court.

17 THE COURT: Yes, sir.

18 Okay. I find she's qualified.

19 Ladies and gentlemen, typically, witnesses can only
20 give testimony about things they've observed or otherwise
21 perceived through their senses. Expert witnesses, unlike
22 other witnesses, are allowed to give their opinions.

23 And so if a person has been qualified by reason of
24 their education, training, or experience as an expert in
25 their field, they're allowed to give opinions from the

1 facts, unlike other witnesses. But the credibility of all
2 the witnesses, including expert witnesses, is something
3 that you alone judge.

4 So with that, you may continue.

5 MS. SEAY: Your Honor, at this time, I would move
6 State's Exhibit No. 1 into evidence.

7 MR. SCALZO: Without further objection.

8 THE COURT: Okay. It's in evidence.

9 (WHEREUPON, State's Exhibit No. 1 was admitted into
10 evidence.)

11 BY MS. SEAY:

12 Q Dr. Henderson, did you have an opportunity to examine
13 C [REDACTED] P [REDACTED]?

14 A Yes, I did.

15 Q What was the date of that exam?

16 A January 14th, 2008.

17 Q And how old was she at that time?

18 A She was 14.

19 Q What type of exam did you perform and for what
20 purpose?

21 A She was referred to the Greenville Children's
22 Advocacy Center for a medical evaluation for the
23 possibility of sexual abuse.

24 Q How is the examination performed?

25 A The examination involves the child coming to the

1 center with their legal guardian. And then they go back
2 to the medical exam room with the child-life specialist,
3 who goes over what's going to happen to the child that day
4 so they feel more comfortable with the process.

5 And then I go in and talk with whoever is with the
6 child and the child as far as gathering past medical
7 history. And then I talk with the child by themselves to
8 get an understanding of what has happened and any problems
9 that they may be having.

10 And then I do a complete head to toe medical
11 evaluation, which includes looking at the genital area
12 with a piece of equipment called a colposcope that just is
13 not anything that touches the child. It's not at all
14 invasive, but it allows for magnification of the genital
15 area. And it has a really good light source for me to get
16 a -- the best evaluation as possible, and decide what
17 medical tests need to be done based on all that
18 information.

19 I do that and then allow the child to get dressed.
20 And I then talk to the child, usually, by herself, first,
21 to give her some follow-up, and then bring -- again, if
22 it's the parent back into the room and make sure that we
23 have kind of a process of where things are going to go
24 from this point on.

25 Q Okay. And is that what you did in this case?

1 A Yes, I did.

2 Q What were your findings during C [REDACTED]'s exam?

3 A I did find -- during the exam, she had shared
4 information. During my medical history, she did have
5 obesity on her exam. She was greater than the 97
6 percentile for her weight and height. And the rest of her
7 medical evaluation was normal.

8 Q Okay. Would you always expect to find evidence of
9 trauma following a sexual assault?

10 A No, I would not.

11 Q Can you describe the hymen, that particular part of
12 the anatomy?

13 A Yes. The hymen is just the medical name given to the
14 partial covering over the vaginal opening. There's lots
15 of different types of normal shapes that it is. But
16 that's what the hymen is.

17 Q Does it normally have an opening or allow for
18 penetration?

19 A It normally, the majority of the time, does have an
20 opening. And the main purpose of the opening is to allow
21 secretions -- bodily secretions to move out.

22 Q Okay. What are some common myths or misconceptions
23 about the hymen?

24 A Well, I think one of them is what you mentioned that
25 it is a complete covering over the vaginal area. And, as

1 I just mentioned, that is not true. Some people feel like
2 there could be an absence of a hymen so that people are
3 born without a hymen. And that is a very, very rare
4 finding and, usually, only found when there is other
5 severe genetic abnormalities. So the majority of the
6 time, finding a hymen is a very, very normal finding.

7 The other thing that's often a misconception is that
8 during penetration that the hymen has to tear or -- to
9 tear or disappear from that process. And that, also, is
10 not true, especially during adolescence. Once a child
11 starts going through puberty, the estrogen that's in the
12 body, which is, actually, the first part of puberty, that
13 hymen becomes much thicker and can stretch, and often will
14 not tear.

15 Q Did you obtain a medical history from C [REDACTED]?

16 A Yes, I did.

17 Q Is that necessary for your diagnosis and treatment?

18 A Yes. As with any other medical evaluation, obtaining
19 a history from a patient is very important.

20 Q Did she indicate to you that she had been sexually
21 assaulted?

22 A Yes, she did.

23 Q Did she indicate to you when that had taken place?

24 A Yes, she did.

25 Q Could C [REDACTED]'s normal exam still be consistent with

1 the medical history of sexual assault in her case?

2 A Yes, it could.

3 Q Can you explain that?

4 A Yes. In my experience, as well as in the medical
5 literature, the majority of time children will have normal
6 exams when they're evaluated for child sexual abuse. And
7 there's a lot of reasons to help understand that. One is
8 that children don't often come forward right away when
9 there has been an incident. They often will wait days,
10 weeks, even years before they come forward. And that
11 genital area has an extremely good blood supply. So that
12 area, if there had been a tear, can heal quite well.

13 Another reason is that a lot of the ways that
14 children are sexually abused may not cause injury even if
15 I saw them right from the get-go. So a lot of times
16 children can just be touched in the genital area. There
17 can be just a finger inserted, it can be oral, things,
18 again, that, again, wouldn't leave any findings on the
19 examination. And a lot of times when children, in my
20 experience, have talked about a history of penetration,
21 they don't really quite understand what their anatomy
22 looks like. So it's often that the male genital area has
23 come into kind of the outer part of the female genital
24 area and may cause problems there, but not, actually,
25 cause any tears or scarring that you might see on the

1 examination.

2 And the last reason being for the one I had already
3 talked about that once you've gone through puberty and
4 there is that estrogen around there, there can be
5 penetration and, again, not any findings on the medical
6 exam. Because that hymenal tissue can just stretch,
7 instead of it being, you know, an actual tear to that
8 area.

9 MS. SEAY: Thank you, Dr. Henderson.

10 Please answer any questions Mr. Scalzo has.

11 THE WITNESS: Yes, ma'am.

12 THE COURT: Yes, sir. Cross-examination.

13 MR. SCALZO: Thank you, Judge.

14 CROSS-EXAMINATION

15 BY MR. SCALZO:

16 Q I guess I'll start out, I'm glad to find the other
17 scarlet knight, a Rutgers University graduate in South
18 Carolina. I'm, also, a graduate of that university.

19 You went to medical school, though, in -- where was
20 it? North Carolina?

21 A Yes.

22 Q All right. And then the -- I guess where I'm really
23 getting into is when do you get into this particular area
24 of the forensic evaluation and the child abuse?

25 A Well, child abuse probably is not -- maybe just as a

1 couple of lectures during medical school. But, certainly,
 2 it is a very important part of the pediatric residency.
 3 So, for me, at T.C. Thompson Children's Hospital where I
 4 did my three-year residency was probably where I spent a
 5 good portion of time in the area of child abuse.
 6 Q All right. And so it starts there?
 7 A Primarily.
 8 Q And you've been continuing since that time?
 9 A Yes, sir.
 10 Q All right. Now, let me get to your report so I'll be
 11 accurate about my questions. One of the things that you
 12 talked about doing, when the Solicitor asked you, was
 13 taking a history?
 14 A Yes.
 15 Q And I guess that's like any doctor taking a history.
 16 When you go to your doctor, they're going to get a little
 17 bit of history about you and what's been going on?
 18 A Yes.
 19 Q And you did that in this case?
 20 A Yes, sir.
 21 Q And you got what your report refers to as the
 22 pertinent past medical history where it seems to be you're
 23 asking about burns, fractures, head injuries, things of
 24 that nature. Do you see that?
 25 A Are you referring to --

1 Q Page 5.

2 A Page 5. That part of the history is primarily taken
3 from the caretaker that accompanies them.

4 Q So, in this case, that would have been the mom?

5 A Yes.

6 Q Is it Angela Paugh?

7 A Yes.

8 Q And there was no report of a "yes" in that category.
9 She did not have any pregnancy sutures, ingestion of
10 things like poison, things like that. It looks like
11 you're asking about a lot of -- a variety of potential
12 problems in that section?

13 A On that particular page, she did not share anything.

14 Q Okay. And you then have on Page 6, there's a section
15 that says, "Review of Systems and It's Behavioral." It
16 says "ROS." What does "ROS" stand for?

17 A Review of systems.

18 Q Okay. And, in that section, you're getting a
19 history -- sort of a behavioral history. Isn't that what
20 that is?

21 A Yes.

22 Q And that's of the child?

23 A Yes.

24 Q And is that from mom or from the child?

25 A Both. They're both there together at that time.

1 Q All right. And, in this section, there was no report
2 of having difficulty sleeping, for instance?

3 A That's correct.

4 Q And being fearful -- fearful of being left alone is
5 another category that there wasn't any report of?

6 A That's true.

7 Q Okay. And in that entire section what you're,
8 essentially, asking for is any reports of, I guess,
9 negative behavior. Is that a fair way to describe it?

10 A I would describe it as any concerning behavior.

11 Q Okay. And, in that specific area, there wasn't a
12 response that there was concerns, as you've described, or
13 other negative reports?

14 A No. Everything was doing okay.

15 Q Okay. And, in fact, in -- one of your handwritten
16 notes says, Doing great in school?

17 A Yes.

18 Q Because that's another area that you inquire about?

19 A That's correct.

20 Q All right. You were asked by the Solicitor about the
21 hymen and some myths about the hymen. So I'd like to talk
22 to you a little bit about your testimony there.

23 A Okay.

24 Q You described -- you said one of the myths was that
25 the hymen is a complete covering?

1 A No. I said it's not a complete covering.

2 Q Right. What I meant is that people think it's always
3 a complete covering. Is that what you meant?

4 A Some people do think that, yes.

5 Q Okay. Now, are you saying it's never a complete
6 covering, or that just sometimes it is and sometimes it
7 isn't?

8 A It's rarely a complete covering. Because those
9 children that have that often will -- you will see that in
10 the newborn period. Because they will have blood and
11 secretions that will fill up behind that area. And so, on
12 their examination, during diaper change, that gets noticed
13 and they have to have surgery to have that opened up.

14 Q Okay. And then you, also, described that there is an
15 opening. I guess the Solicitor had asked you is there an
16 opening in the hymen normally?

17 A In the -- the hymen is just a partial covering. So
18 there is an opening into the vagina is the question -- is
19 how I answered.

20 Q And that's what you were talking about?

21 A Yes.

22 Q When you were asked about there being an opening, the
23 opening you're talking about was the opening of the
24 vagina?

25 A Opening into the vagina --

1 Q Into the vagina?

2 A -- yes.

3 Q And one of the things that you -- in your medical
4 examination and physical examination with regard to the
5 hymen is you're, actually, using an instrument to look?

6 A Yes.

7 Q And what did you call it?

8 A A colposcope.

9 Q A colposcope. And one of the things that you might
10 be looking for would be a tear in the hymen?

11 A Yes.

12 Q Or other -- what you would view as abnormalities to
13 the hymen?

14 A Yes.

15 Q Okay. And, in this case, you did not find any tears
16 or scars is what you have on Page 9 of your report; is
17 that correct?

18 A That's correct.

19 Q And let's talk about tears for a minute. The tear
20 can result from the penis rubbing -- bumping into the
21 hymen, or can that cause a tear?

22 A Not bumping into, but going across.

23 Q Across. Okay.

24 A Yes, sir.

25 Q So breaching that space?

1 A Right.

2 Q Okay. Is it, also, possible that a finger could
3 cause maybe not a complete breach, but a tear?

4 A It's possible.

5 Q All right. And if a tear had -- takes place and it's
6 not a complete breach, we're just talking about a slight
7 tear that's not a complete breach. Okay. Over time, can
8 that heal?

9 A Breach is really not a medical term.

10 Q Okay.

11 A So I'm not exactly sure what you're talking about
12 when you use that word.

13 Q All right. You can have a situation where the hymen
14 is completely broken away from wherever it's attached; is
15 that right?

16 A That often will happen maybe during multiple
17 childbirths. As a the baby comes out, it kind of wears
18 away. But, usually, when there is a penis that goes
19 across the hymen, having the hymenal tissue just be
20 completely broken away is -- would be very uncommon.

21 Q All right. Then what about a situation where the
22 hymen receives a partial tear?

23 A Okay.

24 Q And for whatever reason, over time, it can repair
25 itself?

1 A Yes, sir.

2 Q And, as a doctor looking at it, might you see a scar?

3 A You might see a scar, or it might look totally
4 normal.

5 Q Okay. But most of us have experience with seeing
6 scars on the outside of our body. But is it true that you
7 can have a scar on the inside of your body in that
8 particular area?

9 A Yes.

10 Q And is it similar to what you would see as a scar on
11 the outside as far as what happens?

12 A Yeah, typical.

13 Q Skin sort of growing over it?

14 A Healing.. It's a healing process, yes.

15 Q And you might see a bump or some other shape; is that
16 right?

17 A Perhaps.

18 Q Okay. So when you were making a note saying you
19 didn't see any scarring, isn't it true that you looked for
20 that?

21 A Yes.

22 Q Because that would be an indicator that something had
23 touched or been in contact with the hymen?

24 A Well, I wouldn't expect it to just touch. Because
25 touching wouldn't cause any -- but it would be something

1 that would cause significant trauma to that area.

2 Q Okay. Something with enough force to cause a tear
3 that would then heal over?

4 A Yes.

5 Q You, also, talked about penetration. And you were
6 talking about how -- I guess it was based on literature
7 that you read, or it may be personal experience with your
8 own patients. But you were talking about how children
9 will sometimes describe the penetration. And it sounded
10 like what you were saying was they didn't know how to be
11 accurate about it; is that right?

12 A Yes. They don't really know their anatomy. In fact,
13 we've done studies looking at adults and they don't really
14 know their anatomy about where, you know, they go to --
15 they void from and where the genital opening is. And so
16 when we ask them about, you know, what is -- what do they
17 call their private area, they just have one name. And
18 it's one name for the entire area.

19 Q And my question is, when there's a description of
20 penetration, it sounded to me like what you were saying
21 was that that is not sort of a one size fits all
22 explanation, it's always this much or this little. That's
23 what I heard you say, but I may be wrong.

24 A I'm not so sure I understand what you're saying.

25 Q When -- the Solicitor asked you -- you were talking

1 to her about the topic of penetration.

2 A Yes.

3 Q And with -- and I think in this sub-area, you were
4 talking about the penis penetrating the vagina?

5 A Yes.

6 Q And what I thought I heard you say was that children
7 sometimes don't know enough about their own anatomy to
8 give an accurate description about how much penetration
9 there was?

10 A Yes. That is very true that they can say it goes
11 inside their private area, but they -- and it does, it
12 goes between their legs into their genital area. And so
13 they will say that there has been -- and they often don't
14 even use the word "penetration."

15 Q Right.

16 A That's often an adult term. But that the pee-pee
17 went inside their private area. And so often it's adults
18 trying to seek whether it went in through the hymen into
19 the vagina. But their description is just "inside."

20 Q All right. And one of the things you mentioned was
21 that over time -- and this was when you were talking
22 about -- you said estrogen makes the hymen stretch. Is
23 that -- that was accurate. I wrote that down.

24 A Yes, sir.

25 Q And it sounded like what you were describing was

1 that, for instance, a small child, a seven- or
2 eight-year-old child, a female, their hymen would be
3 different in terms of elasticity than a child who had
4 gotten into puberty?

5 A A seven-year-old, yes. An eight-year-old, it's hard
6 to tell. Because a lot of times eight-year-olds are
7 really starting to go through puberty now, especially
8 having that estrogen effect. But, yes, there is a very
9 big difference between the pre-pubertal hymen and an
10 adolescent hymen.

11 Q And would it be fair to say, based on what you
12 described, that since the oncoming of more estrogen in the
13 body makes the hymen more elastic, going backwards, when
14 there's a lack of that level of estrogen in the body, the
15 hymen isn't as elastic as it is in puberty?

16 A That is a true statement.

17 Q Okay. And if the child is trying to describe to you
18 penetration -- because you said before that penetration
19 is, usually, the word an adult uses, not the child. They
20 don't, usually, use that particular word; right?

21 A Yes.

22 Q And are you -- or do you, when you're conducting your
23 examination, have some method for helping you figure
24 out -- while they may not realize what degree of
25 penetration there was, do you make an effort to try to

1 figure that out?

2 A Well, I think that history is important, because that
3 helps me understand what I may or may not see on my
4 findings on my examination. And then, you know, I do my
5 examination as described, and pretty much the examination
6 is pretty consistent no matter what the child says. The
7 testing may be different. But the way I look at it, the
8 way I approach it is really -- doesn't alter just based on
9 that history itself.

10 Q Okay. So is the answer, yes, that you, actually, try
11 to inquire with the child in some way to figure out how
12 far that was, or how slight it was, or are you able to do
13 that at all?

14 A All you can do is gather the information and hear how
15 they have to describe it.

16 Q Okay.

17 A But if they don't have the knowledge or words to
18 describe it, then I would absolutely not further delve
19 into that, if they're not sharing that information with
20 me.

21 Q Okay. And when you did this examination, in this
22 case, you said already that you spoke with mom; right?

23 A Yes.

24 Q And you spoke with C [REDACTED]?

25 A Yes.

1 Q And those were the two people that were there that
2 day for that evaluation?

3 A Yes.

4 Q Was there anybody else there that day that you talked
5 to?

6 A Not in the evaluation room.

7 Q Okay. And did you -- or I should say you did not
8 refer to any prior medical records or history of [REDACTED]
9 in this evaluation?

10 A I didn't refer to any other prior medical records.
11 But I did the history as provided by the mother and child.

12 Q Right.. And what I'm asking is aside from those two
13 history reports?

14 A Right. I did not have any other medical records.

15 Q So, for instance, talking to a pediatrician of hers
16 that had seen her over a course of time or any specific
17 time, that's not something you did; correct?

18 A I did not have any contact with her pediatrician.

19 Q Okay. And, in this case, your finding was that you
20 did not observe any physical medical evidence of
21 abuse. That was one part of your finding; isn't that
22 right?

23 A She did not have any abnormalities on her medical
24 exam.

25 MR. SCALZO: That's all I have for right now, Judge.

1 THE COURT: Redirect?

2 MS. SEAY: Just briefly.

3 REDIRECT EXAMINATION

4 BY MS. SEAY:

5 Q Despite the fact that she did not have any
6 abnormalities on her medical exam, could that still be
7 consistent with the history that she gave you of her
8 sexual assault?

9 A Yes, it could.

10 MS. SEAY: Thank you.

11 RE CROSS-EXAMINATION

12 BY MR. SCALZO:

13 Q It could as a possibility is what you're saying;
14 right? She asked you was it possible for that to be the
15 case.

16 A Was it possible for her -- I'm not -- could you
17 rephrase your question? I want to make sure I answer it
18 appropriately.

19 Q Yes. She asked you -- there wasn't medical evidence,
20 physical medical evidence showing that -- there were no
21 abnormalities is what you said; correct?

22 A Correct.

23 Q And what the Solicitor just asked you was, even
24 though that was the case, it's possible, essentially, that
25 sexual abuse could have taken place is what you were just

1 asked?

2 A Right.

3 Q And you said, Yes?

4 A Right.

5 Q You're saying you base that on it's a possibility.
6 But, again, you're not directing her to the abnormalities
7 that we talked about, a tear, a scar, a thing of that
8 nature. That's what you meant by abnormality, didn't you?

9 A Right. There was not a tear or scar in her exam.

10 Q Okay. And because you did not find a -- I guess
11 physical evidence that it did not happen, you're leaving
12 open the possibility that it could have happened?

13 A Based on all the information that I had and her
14 having a normal exam, I did feel like it could have
15 happened.

16 MR. SCALZO: That's all I have, Judge.

17 THE COURT: Okay. Thank you, Dr. Henderson.

18 MS. SEAY: May Dr. Henderson be excused at this time?

19 THE COURT: Any objection?

20 MR. SCALZO: No, Your Honor.

21 THE COURT: Yes, ma'am. Thank you for being here.
22 You may call your next witness.

23 MS. SEAY: The State calls Angela Paugh.

24 THE CLERK: Please raise your right hand and place
25 your left hand on the Bible.

1 WHEREUPON,

2 ANGELA MICHELLE PAUGH,
3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 Have a seat.

6 DIRECT EXAMINATION

7 BY MS. SEAY:

8 Q Ms. Paugh, please, state your full name so I can make
9 sure everybody back here can hear you.

10 A Angela Michelle Paugh.

11 Q Okay. Ms. Paugh, how are you related to Joe Paugh?

12 A I am his ex-wife.

13 Q Okay. When were you married to him?

14 A We got married in September of '93.

15 Q Okay. And when was C [REDACTED] born?

16 A She was born in November of '93.

17 Q And when was K.P. born?

18 A December 8th, 1996.

19 Q All right. And are those your only two children with
20 Joseph Paugh?

21 A Yes, ma'am.

22 Q Have you always lived in Greenville?

23 A Yes, I have.

24 Q Is it accurate -- you were here when your daughter,
25 C [REDACTED], testified. Is it accurate that she has lived in

1 primarily two locations here in Greenville?

2 A Yes, ma'am, pretty much. We lived in an apartment
3 complex right before she turned one. And from right
4 before her first birthday, we lived at just those two
5 places.

6 Q Okay. What were those addresses again?

7 A [REDACTED] Conyers Street, and, now, we're living at [REDACTED]
8 Orders Street.

9 Q Okay. When did you move to [REDACTED] Orders Street?

10 A When -- it was 2004 when C [REDACTED] -- about 2004.

11 Q Okay.

12 A When she was about 10.

13 Q All right. Where are you, currently, employed?

14 A I'm employed at Oakmont East Nursing Center.

15 Q Okay. What is your position there?

16 A CNA?

17 Q And "CNA" stands for?

18 A Certified nursing assistant.

19 Q Okay. And were you previously employed at Tanner's
20 Big Orange?

21 A Yes, ma'am, for 12 years.

22 Q Okay. What years were those?

23 A Right before C [REDACTED] turned one until right after me
24 and him split up in 2005.

25 Q Okay. Do you know what your normal schedule at

1 Tanner's Big Orange was during that time?

2 A I was the assistant manager at Tanner's. And I went
3 in about 10:00, and got off about 6:30. After we closed
4 about 6:30, I had to do all the manager stuff. I left
5 about 7:00, got home about 7:30, somewhere around there.

6 Q Okay. Who would care for your children while you
7 worked?

8 A My mother and father would care for them, get them
9 from school, depending on if Joe got off work before me if
10 he got them. If he got off work before I did, he'd pick
11 them up from my mom's house, go home with them until I got
12 home.

13 Q Okay. So were there occasions when you got home from
14 work when he was there with the children alone?

15 A Many of them, many of them.

16 Q Okay. Let me direct your attention to November of
17 2007. Did you learn that C [REDACTED] had been sexually
18 assaulted? Just answer "yes" or "no."

19 A Yes.

20 Q Okay. Did she tell you when this had taken place?

21 A She did.

22 Q And did she tell you where it had taken place?

23 A She did.

24 Q What was her demeanor like when she was telling you
25 these things?

1 A She -- to begin with, she couldn't even tell me. She
2 looked at her grandma and said, Grandma, you tell her.
3 And she walked out of the room crying. Then, when she
4 came back in, she couldn't even look at me and tell me.
5 And she only told certain things, what she wanted to let
6 out at the time.

7 The next morning, I didn't want to ask her too much.
8 The next morning, before we went to Lorraine, she told
9 some more things. I just let her let out what she wanted
10 to let out in the order she wanted to let it out. I
11 didn't want to just hound her about what happened, when it
12 happened, how it happened.

13 So I just let her just take her own course for what
14 she wanted to let me know.

15 Q Did you have any idea that this was going on?

16 A No, ma'am. No, ma'am.

17 Q Let me direct your attention to when C [REDACTED] was
18 approximately five years old. Do you recall an incident
19 that concerned you at that time?

20 A I do. When I come home from work -- I was the type
21 of mother that told her kids to put everything where it
22 goes, clean up behind yourself. And there was a bottle of
23 peroxide beside her bed. And things like that I kept up,
24 you know, just not in kid's reach.

25 So I asked what that bottle of peroxide was in the

1 floor beside her bed for. And Joe came in her bedroom.
2 And there was a metal stripping between the linoleum from
3 the bathroom to the carpet. And he tried to say that she
4 slipped on the linoleum coming out of the bathroom and cut
5 herself on that metal piece.

6 And so I took C [REDACTED] right then, put her on her bed.
7 And I asked, Is that what happened? She said, Yeah. And
8 I pulled her pants down to look at her bottom. And I just
9 seen it was red, like rashy red. And I said, C [REDACTED], are
10 you sure? I didn't see where there was a cut or anything
11 like that. It was just red. She said, Yeah, momma,
12 that's what happened.

13 So, right then, I pulled her pants up. My mom lives
14 across the street two doors over. And I took her over to
15 her house. And I said, Momma, I come home -- it just
16 didn't seem normal to me for a dad to be putting peroxide
17 on a little girl's bottom anyway. That's a mother's place
18 if she got hurt down there.

19 So that was my instinct, to take my child to my mom.
20 And my momma asked her, C [REDACTED], is that what happened?
21 And she -- me, my mom, and her were the only ones in her
22 bedroom. C [REDACTED] swore to us that was what happened. So
23 with my daughter telling me, Yeah, that's what happened,
24 and with him telling me, Yeah, that's what happened, I had
25 no other choice but to believe it.

1 Q Okay. And you are -- are you divorced now from
2 Joseph Paugh?

3 A Yes, ma'am.

4 Q Did you file for divorce?

5 A Yes, I did.

6 Q And when were you divorced?

7 A We separated in 2005. I filed for divorce. And our
8 divorce was final in 2006.

9 Q Okay. When you separated, who went where?

10 A When we separated, he took off and he went to
11 Baltimore.

12 Q Okay. Does he have family there?

13 A He does.

14 Q Okay. And, as a result of the report of the sexual
15 abuse of C [REDACTED], did DSS become involved with you, and do
16 certain things with you, and visit with you, and require
17 certain things of you?

18 A Yes, ma'am, they did.

19 Q Okay. And is that still ongoing?

20 A Yes, ma'am.

21 MS. SEAY: Those are all the questions I have.

22 Please answer any questions Mr. Scalzo might have for
23 you.

24 THE COURT: Yes, sir. Cross-examination.

25 MR. SCALZO: Thank you, Your Honor.

CROSS-EXAMINATION

1
2 BY MR. SCALZO:

3 Q Ms. Paugh, you just testified that with regard -- I'm
4 talking about the peroxide incident that you were just
5 asked about. You said that you did not observe a cut?

6 A That's what I said.

7 Q Okay. And you described it as, I guess, concerning
8 you enough that you needed to go across the street to
9 talk -- to show your mom. Is that a --

10 A Yes, sir.

11 Q -- fair way of describing it?

12 A Yes, sir.

13 Q All right. And you're saying she was five. Do you
14 remember when this was in the year?

15 A No. I don't remember what month of the year it was.
16 I know she was five.

17 Q All right. And it's not the case that Joe had asked
18 your mom, actually, to come over to what would have been
19 you all's house at the time?

20 A I'm sorry. I don't understand what you're asking me.

21 Q Is it not the case that Joe had earlier asked your
22 mom to come over and take a look at C [REDACTED] ?

23 A I don't know what he asked my mom. I can't tell you
24 if he asked my mom that while I'm at work. And my mom
25 didn't know anything about it.

1 Q All right. That's not your understanding. You
2 didn't -- your mom wasn't there when you got there is what
3 you're saying?

4 A My mom was at her house across the street two doors
5 down.

6 Q And she lived just two doors away?

7 A Yeah.

8 Q And you didn't get off early. You got off at you
9 regular time, is that what you're saying, from Tanner's
10 Big Orange?

11 A Yes, sir.

12 Q That day?

13 A Yes, sir.

14 Q All right. Now, you said -- it's been testified to
15 that Joe and you had separated in 2005?

16 A That's right.

17 Q And, in fact, I think we know the date. Was it May
18 18th, 2005? Is that --

19 A I'm not sure exactly what date it was.

20 Q Was it May?

21 A I'm not sure.

22 Q You're not sure?

23 A I'm not going to tell you, yeah, when I'm not sure.
24 Sorry.

25 Q Okay. That's quite all right. If you don't know,

1 you don't know. But you did separate, and he went to
2 Baltimore?

3 A Yes, sir.

4 Q Okay. And was there either belief or concern --
5 whether it's true or not we'll talk about it in a second.
6 But did Joe believe that you had been unfaithful?

7 A I don't know if he believed that or not.

8 Q You're saying --

9 A I don't know what he believed. I had been --

10 MS. SEAY: Your Honor, I'm going to object as to --

11 THE WITNESS: Thank you.

12 MS. SEAY: -- knowing what he might believe.

13 THE COURT: Sustained.

14 BY MR. SCALZO:

15 Q Is it your understanding as far as one of the --
16 there may have been other problems, but one of the
17 problems that might have led to separating was that he
18 believed you had been unfaithful?

19 A I don't know what he believed, like I said. I was --
20 I cannot bring up why I left him or -- because of abuse
21 towards me.

22 Q Okay.

23 A So if you want me to tell you what he believes, I'm
24 going to tell you what I know.

25 Q All right.

1 A And that's because he domestically, violently abused
2 me is why I split up with him.

3 Q Here is my question. Is it true then that, at the
4 time, either right before or around the time that you
5 separated that you were dating somebody else or involved
6 with somebody else?

7 A No, sir.

8 Q And is it true that, at some point in time, that
9 before the separation, I'm talking about in 2005, that you
10 had, actually, left for a couple of days with the
11 children?

12 A No, sir.

13 Q No?

14 A No.

15 Q And was there ever a point in time where you decided
16 you weren't going to stay in the same bedroom with him,
17 and kind of took one of the children's bedrooms and had
18 them stay together in one room?

19 A Yes, sir.

20 Q Okay. When was that?

21 A That was about a month and a half before he left.

22 Q All right. There -- at some point, you said you
23 filed for divorce, and that was 2006 when it was
24 finalized?

25 A Yes, sir.

1 Q And, as far as child support went, was that something
2 that was part of the divorce in 2006?

3 A Yes, sir.

4 Q Where he was ordered to pay?

5 A Yes, sir.

6 Q And there was a period of time where he did not pay;
7 is that right?

8 A Yes, sir.

9 Q And there was a period of time in 2006, where he had
10 to come back, there was a court hearing, wasn't there,
11 about child support?

12 A Yes, sir.

13 Q And he had come back and, actually, provided payment?

14 A Partial payment.

15 Q Partial payment. But he had brought some money with
16 him?

17 A Yes, sir.

18 Q And he was back here for a couple of days, and then
19 he went back up to Baltimore?

20 A Yes.

21 Q And you all saw him when he came back at that time?

22 A Yes, sir.

23 Q Did you all spend time -- did the girls spend time
24 seeing him at that time?

25 A At that time, yes, they did.

1 Q Okay. In over the -- this time period since
2 separating, have there been -- there have been times where
3 child support has been an issue, that he either hadn't
4 paid or hadn't paid what he was supposed to pay?

5 A Just one time he's come to a court hearing. Since --
6 any other time, I don't never talk to him on the telephone
7 or anything. I get my child support -- if I get it, I get
8 it. If I don't, I don't. I support my kids.

9 Q All right. But it sounds like you're telling me --
10 and tell me if I'm right -- that there were periods of
11 time where you're saying he didn't pay when he was
12 supposed to pay?

13 A True.

14 Q Okay.

15 A A lot of times.

16 Q All right. I'm now -- I'm going to talk about before
17 November of 2007, when you had the conversation with
18 C [REDACTED] and she said that this had happened to her. I'm
19 talking about before that time. Okay.

20 A Okay.

21 Q Were there ever arguments or disagreements, whatever
22 you want to say, about Joe wanting to see the girls and
23 you not wanting him to see them?

24 A I'm not sure if I can talk about this in court. I
25 don't know if I'm allowed to say what I want to say.

1 Q Well, I guess it's either a "yes" or "no" answer as
2 to whether or not -- I'm not asking you why. I just want
3 to know, is it --

4 A Yes, there was.

5 Q Okay. That's all I wanted to know.

6 Now, in 2007, it's your understanding that -- or
7 maybe you were there. Did Joe call either your house
8 or wherever C [REDACTED] was and talk to her on her
9 birthday?

10 A Yes.

11 Q Okay. Were you present when the call came, or did
12 you find out about that later on?

13 A I was present.

14 Q All right. And, at that time, when C [REDACTED] got off
15 the phone, she did not discuss any of the allegations with
16 you at that point?

17 A No, sir.

18 Q All right. The girls have a pediatrician or a
19 doctor?

20 A They do.

21 Q And have they had one over the course of their life?

22 A They have.

23 Q Okay. And were you the one that normally would take
24 them to the doctor on regular visits, and things like
25 that?

1 A Yes.

2 Q And you've done that?

3 A Yes, sir.

4 Q Okay. And they've been to the doctor more than one
5 or a few times over the course of their life like
6 checkups, or things of that nature?

7 A A lot of times.

8 Q Okay. And up until the time that you were told by
9 C [REDACTED] about her allegations of the abuse, I think you
10 testified that you didn't have any idea about that?

11 A No, sir, I didn't.

12 MR. SCALZO: One second, Judge.

13 THE COURT: Okay. Yes, sir.

14 (Pause.)

15 MR. SCALZO: That's all I have right now, Judge.

16 MS. SEAY: I have nothing further for Ms. Paugh right
17 now.

18 THE COURT: Thank you, ma'am.

19 You can step down.

20 THE WITNESS: Thank you.

21 THE COURT: You may call your next witness.

22 MS. SEAY: The State calls Investigator Lorraine
23 Henderson.

24 THE CLERK: Please raise your right hand and place
25 your left hand on the Bible.

1 WHEREUPON,

2 LORRAINE HENDERSON,
3 after first having been duly sworn, testified as follows:

4 THE CLERK: Thank you.

5 Please have a seat.

6 DIRECT EXAMINATION

7 BY MS. SEAY:

8 Q Investigator Henderson, where are you employed?

9 A Greenville County Sheriff's Office.

10 Q How long have you been employed there?

11 A 32 years.

12 Q 32 years?

13 A Yes, ma'am.

14 Q Okay. Can you speak up just a little bit so we can
15 hear you back here?

16 What is your current position?

17 A I work in the sex crimes division.

18 Q How long have you worked in the sex crimes division?

19 A A little over 24 years. I went in June of '86.

20 Q And what are your duties as a sex crimes
21 investigator?

22 A We only investigate anything that has to do with any
23 kind of sex crimes, whether it's adults or children. We
24 interview children, work up cases, sign warrants.

25 Q Okay. What is your education and training to perform

1 your duty?

2 A Well, I've had numerous schools in sex crimes. I've
3 had a couple forensic interviewing schools. I have an
4 Associate's Degree in Criminal Justice. I have a BS in
5 Sociology with an emphasis in criminal justice. I have a
6 Masters in Mental Health Counseling. And I still have
7 continuing education that I still have to have.

8 Q Okay. So you said you entered the sex crimes
9 division in 1986; is that right?

10 A That's right.

11 Q Can you estimate, since 1986, the approximate number
12 of children that you may have interviewed?

13 A I would say it's in excess of 2,000. We average
14 about 10, 11 cases a month.

15 Q Okay. In excess of 2,000?

16 A Yes, ma'am.

17 Q Did you receive a report involving C [REDACTED] P [REDACTED]?

18 A Yes, ma'am, I did.

19 Q On what date did you receive that report?

20 A 11-27-07.

21 Q Who was the complainant in the case, or the person
22 who made the report?

23 A Ms. Karen Davis.

24 Q Do you know who that is?

25 A It's the victim's grandmother, C [REDACTED] P [REDACTED]'s

1 grandmother.

2 Q And, as a result of receiving this report, did you
3 interview C [REDACTED] P [REDACTED]?

4 A I did.

5 Q What was her demeanor when you met with her?

6 A She was -- she looked at the floor a lot. She was
7 kind of quiet, soft spoken to me.

8 Q Did you take a written statement from her?

9 A Yes, ma'am, I did.

10 Q How did you go about preparing this written
11 statement?

12 A When I start, I, usually, inform them about telling
13 the truth, that we tell the truth in here, that I was
14 going to be taking down the words she says, everything she
15 says that I -- when she's talking to me, I put it in her
16 words, and I type it as she goes along and tells me.
17 After we finish, she reads it. If there's anything on
18 there that she needs to change, or whatever, or she says,
19 I've got her name or anything wrong, I go back and I
20 change it right then. And she re-reads it. And she signs
21 it.

22 I call her mother back there so she can sign it -- so
23 she can watch her sign it. And I, also, have a notary
24 back there, usually, when her mother gets back there.

25 Q All right. Did -- just answer this "yes" or "no."

1 Did C [REDACTED] P [REDACTED] report to you that she had been sexually
2 assaulted?

3 A Yes, ma'am.

4 Q Did she tell you when it had happened?

5 A Yes, ma'am.

6 Q Did she tell you where it had happened?

7 A Yes, ma'am.

8 Q Were the locations that she gave you within
9 Greenville County?

10 A They were.

11 Q Did you interview C [REDACTED]'s mother?

12 A I did.

13 Q Did you refer C [REDACTED] for a medical exam in this
14 case?

15 A Yes, ma'am.

16 Q And did you, eventually, sign a warrant for Joseph
17 Paugh in this case?

18 A Yes, ma'am, I did.

19 Q On what date did you sign a warrant?

20 A 3-3-2008.

21 Q And do you know the date that the warrant was,
22 eventually, served on the Defendant?

23 A It was served around 8-13-09, I think.

24 Q Do you know where it was served?

25 A In Baltimore.

1 Q Baltimore?

2 A Yes.

3 MS. SEAY: Okay. Thank you.

4 Please answer any questions Mr. Scalzo has.

5 THE COURT: Cross-examination.

6 MR. SCALZO: Thank you, Judge.

7 CROSS-EXAMINATION

8 BY MR. SCALZO:

9 Q Investigator Henderson, you talked about some
10 training that you've done over the years that you've been
11 involved in the sex crimes unit. You mentioned forensic
12 interviewing schools?

13 A Yes, sir.

14 Q You said you went to those?

15 A Yes, sir.

16 Q And are you certified or licensed to do forensic
17 interviews?

18 A I completed the school, yes, sir. I did the ones
19 that I completed in the school.

20 Q Okay. And is that in South Carolina or...

21 A Yes, sir, it was.

22 Q And when was that?

23 A I don't know -- I can't remember when the first one
24 was. It was prior to 2005. And, if I'm not mistaken, it
25 was in Charleston. And the next one was in Columbia. And

1 that was like right in '08, or '07.

2 Q Okay. And one thing I forget. You were asked about
3 the interview between you and C [REDACTED]?

4 A Yes, sir.

5 Q And I know it was recorded because -- by you writing
6 or typing the statement. But it was not recorded by
7 videotape, or audio tape, or anything like that; is that
8 correct?

9 A Mine was not, no, sir.

10 Q And it was done where?

11 A It was, actually, at 301 University Ridge in my
12 office, Suite 5200.

13 Q Okay. And you did -- is it fair to say you did not
14 utilize any of the training or the proceedings of a
15 forensic interview when you did this interview?

16 A Because of her age, once we get over the truth and
17 telling the truth, You tell me what happened.

18 Q Okay. But -- so the answer to my question is, no,
19 you did not conduct a forensic interview, I guess, is
20 what --

21 A No, sir, I didn't.

22 Q Okay. And let's describe what a forensic interview
23 is so we can kind of let the jury in on what that is.

24 A forensic interview is an interview where the
25 interviewer is trying to find out the facts about what the

1 child is, actually, alleging; is that right?

2 A Yes, sir.

3 Q And it's not the same as the medical exam that we
4 heard about from Dr. Henderson?

5 A No, sir.

6 Q Okay. And there is a certain protocol to follow when
7 you're doing a forensic interview; is that correct?

8 A Yes, there is. Like I said, I went to the classes
9 and things. But when they're young, I mean, like maybe
10 single digit-age children, I send them for a forensic
11 interview to the people that does them every day, also.

12 Q Okay.

13 A But I do my own interview in the beginning.

14 Q Okay. Got you. So what you're telling us is, in
15 this case or cases similar in terms of age, you don't
16 conduct the forensic interview. You'll ask somebody else
17 to do the forensic interview?

18 A I will get another person to do it, yes.

19 Q Okay. Even though you understand what it is and, as
20 you said, you were trained in doing it; is that right?

21 A Yes, sir.

22 Q Okay. Again, so we can kind of clue the jury in on a
23 little bit about what this, actually, is. As I said,
24 there's a protocol or a method that you're trained to use
25 in conducting a forensic interview; is that right?

1 A Yes.

2 Q And it's an actual course that takes how many hours?

3 A Are you talking about the interview itself or --

4 Q No. I mean the training.

5 A The last one I went to was a week long and eight
6 hours a day.

7 Q And it's not just lecture; right?

8 A No, sir. It's testing and it's performing.

9 Q And part of the protocols or what you're supposed to
10 do if you're doing the forensic interview, what the goal
11 is that the interviewer is trying to facilitate is the
12 child giving their own words and not influencing the child
13 to say certain things that the interviewer might want them
14 to say; right?

15 A Yes.

16 Q That's the goal of the forensic interview?

17 A Yes.

18 Q And what you learned in your training and all that is
19 it's because children can be impressionable or susceptible
20 to being led to say things, and things like that?

21 A Yes, sir.

22 Q And that, over the years, experts have developed this
23 protocol and what you should do when you're doing a
24 forensic interview?

25 A Yes, sir.

1 Q And you've used them or have, like you described,
2 sent children to have these done before in other cases?

3 A Yes, sir, I have.

4 Q Okay. And I'm assuming that's a part of an
5 investigator's tool in the investigation of the case?

6 A Yes, sir.

7 Q All right. And what the forensic interviewer does
8 is, because you know about having been trained in it, they
9 do things like trying to build a rapport with the child;
10 is that right?

11 A Yes, sir.

12 Q And putting a child in a setting with -- to help
13 facilitate hearing, and getting the child to tell them
14 what, in their words, happened?

15 A Yes, sir.

16 Q But it's forensic in the sense that it's trying to
17 get to certain facts without influencing the child?

18 A Yes, sir.

19 Q All right. Is it part of the protocol that those
20 interviews with be recorded in some way, if it's a
21 forensic interview I'm talking about?

22 A Okay. Yes. When they are -- like I said, we're
23 talking about single-digit children, usually. And you
24 send them over to the advocacy center and they're recorded
25 there.

1 Q Okay. And you said this several times, are you
2 telling me that sort of the rule of thumb that you use
3 that if it's a child that's in the double digits, you'll
4 send them over to somebody -- a forensic interviewer that
5 does it more often than you do?

6 A No, sir. I do my -- if they're of the age and
7 they're understanding what's going on, really they can
8 tell you what happened without you keep saying what
9 happened next, or did you -- such and such or -- and they
10 can tell their own story.

11 Q Right.

12 A I take that interview. I put it on paper. I let
13 them read it. And, you know, I explain it to them. If
14 they're not -- they cannot read or comprehend, then
15 they're sent over there. But, as far as a child of this
16 age, I do it.

17 Q I thought you said earlier that when they were in the
18 double digits or a little bit earlier, you'll send them to
19 someone who does forensic interviewing more -- on an
20 every-day basis. Was I wrong about that?

21 A Yes, sir. That's more single-age children. Usually,
22 because I don't -- some -- I might do some -- it just
23 depends on what their mentality is in learning and their
24 ability to speak with you. But, other than that, if they
25 are 10 or above, I can do it.

1 Q All right. And that's your -- you've come up with
2 that as your -- the way you operate for yourself?

3 A Yes, sir, that I can talk with them.

4 Q That you would talk with a double digit, but send to
5 another person for the single digit, if they didn't really
6 understand?

7 A Well, I talk to them all.

8 Q Right.

9 A I try to make that first initial meeting myself. But
10 I, also, send the single digit over to the advocacy
11 center. Some of them are exceptionally smart for their
12 age and they can tell you without...

13 Q All right. And, as you said, what you conducted was
14 not a forensic interview of C [REDACTED]; is that correct?

15 A That is correct.

16 Q And you did not refer her for a forensic interview,
17 although you did refer her for the medical interview?

18 A That is correct.

19 Q And when a forensic interview is conducted, and as
20 you described, part of the protocol you agreed was it be
21 videotaped and recorded in that kind of matter; right?

22 A Yes.

23 Q And then it can be observed as sort of interaction
24 between the interviewer, as well as the child; is that
25 right?

1 A Ask me that again.

2 Q Okay. We agreed that part of the protocol for a
3 forensic interview was that it be recorded in some way,
4 audio, video, usually, it's video; isn't that right?

5 A Yes, sir.

6 Q And, in doing that, that allows you to view the video
7 and see the interviewer and the child interacting?

8 A Yes.

9 Q Okay. And, as I said, one of the major goals of the
10 forensic interview is to follow the protocol so that there
11 isn't an influence by the interviewer onto the child?

12 A Yes.

13 Q In your interview of -- or if you were conducting a
14 forensic interview and the child came with a guardian or a
15 parent, the interview would not be done in the presence of
16 that guardian or parent, it would be done in the -- just
17 with the interviewer and the child; is that right?

18 A That is how I do most of mine. Some -- you know,
19 trying to talk to a two-year-old, sometimes they will not
20 come with you alone.

21 Q Right. Well, what I'm talking about is a forensic --
22 not necessarily your interview --

23 A Okay.

24 Q -- but a forensic interview and your understanding of
25 the protocols and what happens.

1 A Usually, it's alone with the interviewer.

2 Q And your interview of C [REDACTED], there was another
3 person in the room besides the two of you, or no?

4 A Yes.

5 Q Who was that?

6 A Because of circumstances, I had to notify DSS. And
7 it was Brenda --

8 Q It was a DSS caseworker or employee?

9 A Yes. I can't pronounce the last name.

10 MR. SCALZO: That's all I have right now, Judge.

11 THE COURT: Any redirect?

12 MS. SEAY: Just briefly, Your Honor.

13 REDIRECT EXAMINATION

14 BY MS. SEAY:

15 Q Investigator Henderson, was it your goal to try to
16 get the facts from C [REDACTED] about what had happened to her?

17 A Yes, ma'am.

18 Q And was she able to communicate with you?

19 A Yes.

20 Q Did she have any problem telling you what happened?

21 A No, ma'am.

22 Q Did you do anything to suggest to her what she should
23 say to you?

24 A No, ma'am.

25 Q Okay. Was she able to, basically, give you her --

1 what she had to say in a narrative-type form?

2 A She was.

3 MS. SEAY: Thank you.

4 That's all I have.

5 MR. SCALZO: Quick recross, Judge.

6 THE COURT: Sure.

7 RECROSS-EXAMINATION

8 BY MR. SCALZO:

9 Q The Solicitor just asked you about your goal was to
10 find out the facts about what happened?

11 A Yes, sir.

12 Q She was making an allegation to you; correct?

13 A Yes.

14 Q For instance, it wasn't something you had personal
15 knowledge of --

16 A I did not.

17 Q You were just listening to what she was telling you?

18 A I was.

19 Q And since this was not a forensic interview, I'm
20 going to assume -- I mean, it was an interview, so you
21 didn't just say, Go. You had some questions, I'm sure,
22 back and forth with her, didn't you?

23 A Yes.

24 Q All right. And was it a situation where you asked
25 her a question, she answered your question, and you wrote

1 it down?

2 A No. She was telling me things that happened, you
3 know. I tell her, you start -- it's just like you're
4 writing it in a diary. I want to know in chronological
5 order what happened; how old you were, everything -- you
6 know, where you were going to school, who was your
7 teacher, whatever you remember of that.

8 Q All right.

9 A And then I take it down just like she says it. If
10 it's out of order, it's down on that paper out of order.

11 Q Okay. And so really almost like what you're trying
12 to do is take a transcript of her -- what she's telling to
13 you?

14 A I am typing just what she says.

15 Q All right. And you're going to ask her a question if
16 you might not really understand what she meant so you can
17 get it right?

18 A Sometimes I have to do that.

19 Q But, basically, what you're doing is you're writing
20 down what she's saying?

21 A Yes, sir.

22 MR. SCALZO: That's all I have, Judge.

23 THE COURT: All right. May I see the lawyers just
24 quickly, please?

25 (WHEREUPON, a bench conference was held.)

1 THE COURT: All right. Ladies and gentlemen, we're
2 just going to go ahead and break for the evening. We'll
3 just resume tomorrow morning at 9:00. Just be back in the
4 jury room at 9:00. And we'll try to resume the case at
5 that time.

6 Thank you for your patience and cooperation.

7 Don't talk about the case with anyone. Don't do any
8 kind of outside research. And don't get on the Internet
9 and look around. As I told you today, you have to confine
10 your decision to the evidence. And I know you'll abide by
11 your oath in that regard.

12 So have a good evening. And we'll see you in the
13 morning at 9:00.

14 (WHEREUPON, the jury was excused from open court at
15 approximately 5:01 p.m.)

16 THE COURT: Okay. Anything for the record before we
17 adjourn for the evening?

18 MS. SEAY: Nothing from the State.

19 MR. SCALZO: No, sir.

20 THE COURT: Okay. We'll see you in the morning.

21 Thank you.

22 (WHEREUPON, the proceedings were concluded at
23 approximately 5:02 p.m., to be reconvened on
24 Thursday, October 14, 2010.)
25

THURSDAY, OCTOBER 14, 2010

THE COURT: Okay. Good morning.

We were just informed that there was a juror that was late who just arrived. I saw him walking through the hall.

Are there any motions before -- or matters before we get started?

MS. SEAY: No, sir.

Just that I have sort of re-strategized. And I have decided to rest.

THE COURT: Okay. Mr. Paugh, I'm going to ask you some questions about your right to testify or not testify, sir.

If you would, I'm just going to have you sworn in.

THE CLERK: Please raise your right hand.

WHEREUPON,

JOSEPH PAUGH,

after first having been duly sworn, testified as follows:

THE CLERK: Thank you.

THE COURT: All right, sir. I'm just going to ask you some questions. And if you don't understand any of my questions, or if I'm just not making sense to you, or if you want me to repeat something, please, let me know.

Okay, sir?

DEFENDANT PAUGH: (Defendant Paugh nodded.)

1 THE COURT: You have to say "yes" or "no," so we'll
2 have it for the record.

3 DEFENDANT PAUGH: Yes.

4 THE COURT: All right. Do you understand that we've
5 reached the point in the trial where the State is about to
6 rest? And that means you have the opportunity to present
7 any evidence you may wish to. And that includes your own
8 testimony.

9 The first thing I want to make sure you understand
10 is, if you do present evidence, you will then give up the
11 right you have to have Mr. Scalzo make the last closing
12 argument in front of the jury, to have the last word, so
13 to speak. If you did not present evidence, then
14 Mr. Scalzo would have the right to make that final closing
15 argument.

16 Do you understand that, sir?

17 DEFENDANT PAUGH: Yes.

18 THE COURT: Okay. And do you understand further that
19 if you testify, you get to tell your side of the story.
20 And you, also, would be subject to being cross-examined,
21 just as Mr. Scalzo has cross-examined the State's
22 witnesses. If you take the stand, you would be subject to
23 being cross-examined by the Solicitor as to anything that
24 might bear on your credibility, and as to anything that
25 might be relevant to this case.

1 Is there any kind of prior record the State would
2 seek to use to impeach him with?

3 MS. SEAY: No, sir.

4 THE COURT: If you did not testify, of course, you
5 would not subject yourself to cross-examination, and you,
6 also, certainly, have the right, which is guaranteed by
7 both the South Carolina and Federal Constitutions to
8 remain silent. If you chose to claim the right to remain
9 silent, I would tell the jury that they could not hold
10 that against you in any way, or even discuss it in the
11 jury room, or take it into account whatsoever.

12 Now, do you understand that, sir?

13 DEFENDANT PAUGH: Yes.

14 THE COURT: Now, the right to testify or not testify
15 is a personal right. And the right to remain silent is,
16 of course, a personal right. That means it's your right,
17 not anybody elses.

18 Have you had enough time to think about whether you
19 wish to testify or not?

20 DEFENDANT PAUGH: Yes.

21 THE COURT: And do you feel like you understand all
22 the consequences of testifying or not testifying?

23 DEFENDANT PAUGH: Yes.

24 THE COURT: Do you have any questions of me about any
25 of those matters, sir?

1 DEFENDANT PAUGH: No.

2 THE COURT: Have you decided if you do want to
3 testify or -- have you made a choice?

4 DEFENDANT PAUGH: Yes.

5 THE COURT: And what are you going to do?

6 DEFENDANT PAUGH: I'm going to testify.

7 THE COURT: Okay. Is there anything else before we
8 bring the jury in?

9 MS. SEAY: No, sir.

10 THE COURT: Okay. You can bring the jury in.

11 (WHEREUPON, the jury came into open court at
12 approximately 9:25 p.m.)

13 THE COURT: Ladies and gentlemen, good morning.

14 At this time -- when we left yesterday afternoon, the
15 State had called a witness and concluded that witness.

16 At this time, ma'am, you may call your next witness.

17 MS. SEAY: Your Honor, at this time, the State rests.

18 THE COURT: All right. And let me just see the
19 lawyers up here real quick.

20 (WHEREUPON, a bench conference was held.)

21 THE COURT: All right. I note, for the record, that
22 there will be a motion argued at a later date, but it's
23 been made.

24 At this time, ladies and gentlemen, as I said, the
25 Defense, Mr. Paugh, has the opportunity, but not the

1 obligation, to present any evidence he wishes to.

2 So, yes, sir, Mr. Scalzo.

3 MR. SCALZO: Thank you, Your Honor.

4 The Defense calls Joe Paugh to the stand.

5 THE CLERK: Please raise your right hand and place
6 your left hand on the Bible.

7 WHEREUPON,

8 JOSEPH PAUGH,
9 after first having been duly sworn, testified as follows:

10 THE CLERK: Please have a seat.

11 DIRECT EXAMINATION

12 BY MR. SCALZO:

13 Q Joe, can you tell the jury how old you are?

14 A 36.

15 Q And where are you from?

16 A Baltimore, Maryland.

17 Q Is that where you were born?

18 A Born and raised.

19 Q And do you have family there?

20 A Yes.

21 Q Who lives there?

22 A My mom, and my dad, and the rest of my family.

23 Q Okay. And what is the highest grade you finished in
24 school?

25 A Eighth grade.

1 Q Do you have a GED?

2 A No, sir.

3 Q Besides C [REDACTED] and K.P. who we've heard about
4 during the trial, do you have other children?

5 A Yes, I have two.

6 Q And how old are they?

7 A Karena, she's two and a half. And Faith, she's one
8 and a half.

9 Q All right. And who is their mother?

10 A Wendy Cizewski [phonetic].

11 Q And do they live with Wendy?

12 A Yes, they do.

13 Q And where do they live?

14 A They are now residing at [REDACTED] Cornwell Road in
15 Dundalk, Maryland.

16 Q Have they moved since you've last been there?

17 A Yes.

18 Q Okay. And when have you last been there in Baltimore
19 with them?

20 A About -- almost 15 months ago.

21 Q Do you have siblings?

22 A Yes.

23 Q Brother? Sisters?

24 A Yeah.

25 Q Both?

1 A Yeah.

2 Q And how many?

3 A I have one sister, and I have four brothers.

4 Q All right. And do you have any half-brothers or
5 half-sisters?

6 A Yeah. Two of my brothers -- well, three of my
7 brothers are half, and my sister is half.

8 Q You said your mom lives in Baltimore. Is she still
9 alive?

10 A Yes.

11 Q And your father as well?

12 A Yes.

13 Q They are not married to each other right now?

14 A No. They're separated.

15 Q What kind of work have you done?

16 A I've done roofing for the last 22 years. But when I
17 went back to Baltimore, I had to resort to a temp
18 service -- multiple temp services, because I couldn't find
19 a job.

20 Q All right. And what kind of work did you do with
21 these temp services?

22 A They sent me on forklift jobs, factory jobs. I've
23 worked in candy factories. And then, every now and then,
24 I would be taken off the list, not being able to work.

25 Q And is it consistent every day, or is it periods?

1 A It's like you might -- if you're on the roster, you
2 might get to work maybe a day or two here and there.

3 Q Do you understand what you're charged with today?

4 A Yes, I do.

5 Q And can you explain, in your own words, to the jury
6 what you're charged with, what you understand it to be?

7 A It's called criminal sexual conduct with a minor.
8 And I'm being accused of messing with my daughter.

9 Q Did you sexually assault your daughter, C [REDACTED]?

10 A No, I did not.

11 Q And we're going to talk a little bit more,
12 specifically, about those allegations in a little bit.
13 But let's get a little bit more background.

14 Okay. When did you meet Angie -- or Angela Paugh?

15 A In 1992, the summer of 1992 in June.

16 Q And how old were you?

17 A I was 18.

18 Q And how old was she?

19 A She was 15 at the time.

20 Q And did you meet in Greenville?

21 A Yes, we did.

22 Q What brought you from Baltimore, where you grew up,
23 to Greenville?

24 A My dad was living here and he had an accident. And
25 my mom asked me if I would like to come to South Carolina

1 to help out with my dad until he got back on his feet.

2 Q All right. And when were you married, you and Angie?

3 A We was -- 1993, September 25th.

4 Q And, after you and Angie were married, where was the
5 first place you lived here in Greenville?

6 A K.P. Smythe Street.

7 Q And how long were you there?

8 A We was there for about a year, a year and a half.

9 Q And then where did you move to?

10 A Then we moved to Orders Street directly across from

11 [REDACTED] I don't remember the address. It was an apartment
12 complex.

13 Q All right. And then was there any other apartments
14 or places that you lived?

15 A Yeah. We moved from the apartments around the corner
16 on K.P. Conyers Street. And then, from there, we moved to
17 K.P. Orders Street.

18 Q You and Angie were divorced in 2006; is that right?

19 A Yes.

20 Q And is it true that you moved out in 2005?

21 A Yes.

22 Q Where did you go,

23 A I went to Baltimore.

24 Q And did you stay there for a long period of time?

25 A I was there until the day that I got arrested.

1 Q Well, was there a point in time where you came back
2 for a visit?

3 A Yes.

4 Q To Greenville, I mean.

5 A Yeah, in 2006, March 26th of 2006.

6 Q All right. I'm going to talk about that visit in a
7 little bit.

8 First, I want to talk to you about, did you and Angie
9 argue a lot when you were married?

10 A Yes. Yes, we did.

11 Q And do you think all that arguing was her fault?

12 A No. It was a little bit of both.

13 Q Do you think you made mistakes in that relationship
14 as a husband?

15 A Oh, yes.

16 Q Angie testified yesterday about you beating her, I
17 think that was the word that she used. Was there -- were
18 there times where in arguments there -- it was physical?

19 A Yeah. A little bit from both of us.

20 Q And, one, do you think it was appropriate for you to
21 be physical with her? Was that right for you to do that?

22 A No. That was the wrong thing to do.

23 Q Let's talk about child support. At some point, were
24 you ever ordered by a court to pay child support?

25 A Yeah. When I come to Baltimore -- I mean, excuse me.

1 When I come from Baltimore to South Carolina in 2006, in
2 March, I come to take care of that. I was subpoenaed to
3 court the first time. But Angie said she told the Court
4 that I wasn't able to come.

5 So the second time, they said I had to be there, so I
6 come. I come through the night to -- because I was
7 wanting to come see my kids anyway.

8 Q Is that the March date you were talking about a few
9 minutes ago?

10 A Yes.

11 Q Okay. Before we talk more about that visit, tell me
12 this. How much were you ordered to pay?

13 A \$88.77 a week.

14 Q A week. And have there been times where you did not
15 pay the child support?

16 A Yes, sir.

17 Q Have there been times where you couldn't afford to
18 pay it?

19 A Yes, sir.

20 Q Have there been times where you could afford to pay
21 it, but did not pay?

22 A Yes, sir.

23 Q All right. Let's talk about those times where you
24 could afford, but didn't. Why didn't you pay those times?

25 A I was being selfish, because I was angry with my

1 ex-wife.

2 Q What were you angry about?

3 A I was angry because she wasn't allowing me to talk to
4 my kids on the phone. She wasn't allowing me to see my
5 kids. I asked for visitation two weeks out of the
6 summertime. The kids were with her all year around. And,
7 when I asked, she told me that there was already plans.
8 And she wouldn't allow them to come.

9 Q And let's make sure we get the years when this is
10 taking place. Is this in 2005? 2006? 2007? When?

11 A 2006.

12 Q Okay. And do you think that was the right way to
13 handle it by not paying the child support?

14 A No, I don't.

15 Q Okay. Let me ask you some specific -- we're going to
16 talk about the allegations against you in a little bit
17 more specific way.

18 Have you ever tried to have sex with your daughter,

19 C [REDACTED]?

20 A No.

21 Q Have you ever made her give you oral sex?

22 A No.

23 Q Have you threatened to kill her?

24 A No.

25 Q Have you threatened to have her taken away from her

1 mother?

2 A No, I haven't.

3 Q C [REDACTED] and Angie both testified about an incident
4 when C [REDACTED] was in the bathroom and she was about five
5 years old. Do you remember that testimony?

6 A Yes, I do.

7 Q All right. That's -- I want to talk to you about
8 that. One, do you remember the incident they were
9 referring to?

10 A Yes, I do.

11 Q Tell the jury what you remember happening in that
12 bathroom.

13 A That morning, my wife went to work at 10:00. Her
14 last request to me that morning was, Can you go ahead and
15 take care of the kids? Because, that evening, she had
16 something planned. We went out to eat dinner that
17 evening. And she asked me to make sure the kids got their
18 baths. K.P. [REDACTED] was an infant at this time. And, C [REDACTED]
19 I ran the water for her, and put a towel down. And Angie
20 said that C [REDACTED] could wash herself.

21 So I ran the water. And I allowed her to wash
22 herself. She got out of the tub. When she stepped off
23 the towel, she went into a split like that. We just had
24 repairs done in our house. Our landlord, Roger Sexton,
25 had forgot the piece of metal on the carpet. And he had

1 to come back and put it.

2 But, when this happened, I told the landlord, I said,
3 My little girl done fell. When she went into a split, she
4 hurt herself down there.

5 Q Now, you said "down there," tell us where she got
6 hurt.

7 A At her private area.

8 Q And was it a cut? A bruise? What was it?

9 A It was like -- more like a scratch.

10 Q A scratch. Okay. And what did you -- when she got
11 hurt, this scratch, what did you do?

12 A Instead of -- in the environment that I grew up in --
13 all right. My mom and everybody always took care of the
14 females. And so, therefore, I immediately called my
15 mother-in-law. I called my mother-in-law. She come over
16 to the house.

17 Q Where did your mother-in-law live at that time?

18 A She lived at [REDACTED] Conyers Street.

19 Q How close was that to the house you were in?

20 A We was across the street, probably two houses down
21 across the street.

22 Q All right. And what did your mother-in-law do? What
23 did you see her do?

24 A My mother-in-law told C [REDACTED] to lay down on her bed.
25 And she looked at her private area. She asked C [REDACTED],

1 What has happened? And C [REDACTED] told her she done a split
2 right when she stepped off the towel. She said, Daddy
3 said momma said go ahead and take a bath. All right. And
4 I told her what Angie told me that morning.

5 And so she told me to go get some peroxide and a rag,
6 or some gauze, or something. And I said, Okay. So I took
7 them to her. All right. Shortly after she took care of
8 the problem -- all right -- then we got on the phone with
9 Angie.

10 Q Angie was not at home at this time?

11 A No. She was at work.

12 Q What time of the day was this?

13 A This was roughly between the hours of, I would have
14 to say, 10:00 to maybe 12:00.

15 Q At night or in the morning?

16 A Yeah. It wasn't long after she had left the house.
17 All right. But it was like about lunchtime, somewhere
18 around lunchtime.

19 Q And when -- what time -- or when does Angie come
20 home?

21 A She got off that evening roughly -- the store closes
22 about 6:30, 6:45, something like that. And she would have
23 to do her manager job, and do all the tills and all that
24 stuff. And she probably wouldn't get home until almost
25 8:00.

1 Q And did she come home at a normal hour that night?

2 A No, she did not.

3 Q What time did she come home?

4 A She come home at her regular time, because her mother
5 told her that C [REDACTED] was okay.

6 Q All right. Do you have any medical problems?

7 A Yes, I do.

8 Q Describe them for the jury.

9 A I'm diabetic. I've got high blood pressure. I've
10 got high cholesterol. I'm losing my eyesight in my right
11 eye. And I have a hernia.

12 Q And how long have you had this hernia?

13 A Since I was 15 years old.

14 Q And describe it for the jury. Where is it and --

15 A It's at my private area.

16 Q What part of your private area?

17 A Next to my genitals, in fact, hooked to my genitals.

18 Q And how big is it?

19 A About as big as my fist.

20 Q And when you are naked, is it noticeable?

21 A Very noticeable.

22 Q You mentioned coming to visit Greenville in March of
23 2006?

24 A Yes, sir.

25 Q All right. Tell the jury again why you came.

1 A I come to take care of my child support. And I came
2 to visit my children.

3 Q And, when you came, I think you had already testified
4 you paid some child support?

5 A Yes. I brung [sic] a money order of \$520. My mother
6 gave me the letter that they sent to me late. At this
7 present time, I wasn't paying. All right. But I did have
8 a job. All right. Like I said earlier, I was being
9 selfish in -- because I was angry with Angie.

10 Q Well, did you come by yourself or did anybody come
11 with you?

12 A No. My mother and my brother come with me.

13 Q And after you went to court or did whatever you have
14 to do with the child support, did you see Angie on that
15 visit?

16 A Yes, I did.

17 Q And did you see the children on that visit?

18 A Yes, I did.

19 MR. SCALZO: I would like to have these marked.

20 (WHEREUPON, Defendant's Exhibit Nos. 1, 2, 3, 4, and
21 5 were marked for identification only.)

22 BY MR. SCALZO:

23 Q Joe, I'm going to show you what's been marked for
24 identification as Defendant's Exhibit Nos. 1 through 5.
25 Tell me what Defendant's Exhibit No. 1 is.

1 A Pictures --

2 Q You can pick it up.

3 A Pictures of me and my two kids.

4 Q And does that picture -- when was that picture taken?

5 A In March of 2006.

6 Q During the visit we were just talking about?

7 A Yes.

8 Q Does that picture accurately represent -- depict or
9 show how y'all looked that day?

10 A Exactly.

11 Q Can you look at the other pictures? Are they, also,
12 pictures of this same time?

13 A Yes, they are.

14 Q Look at all of them.

15 A (Witness complied.)

16 Q All right. Do all of those pictures, Defendant's
17 Exhibit Nos. 1 through 5, accurately represent what
18 y'all looked like in March of 2006 when those were
19 taken?

20 A Yes, they do.

21 MR. SCALZO: Judge, at this time, we'd offer these
22 into evidence.

23 THE COURT: Any objection?

24 MS. SEAY: No objection.

25 THE COURT: Okay. They're in evidence.

1 (WHEREUPON, Defendant's Exhibit Nos. 1, 2, 3, 4, and
2 5 were admitted into evidence.)

3 MR. SCALZO: Permission to publish them to the jury.

4 THE COURT: Yes, sir.

5 MR. SCALZO: That's all I have right now, Judge.

6 THE COURT: Cross-examination.

7 CROSS-EXAMINATION

8 BY MS. SEAY:

9 Q How do you look at yourself in the mirror every day
10 after what you did to your daughter?

11 MR. SCALZO: Objection, Your Honor.

12 THE COURT: Sustained.

13 MS. SEAY: I withdraw the question.

14 And I have no further questions.

15 MR. SCALZO: I don't have any redirect, Judge.

16 THE COURT: All right. You can step down, sir.

17 Thank you.

18 MR. SCALZO: I don't have any other witnesses or
19 evidence, Judge. We would rest.

20 THE COURT: Okay. Does the State have any reply?

21 MS. SEAY: No reply from the State.

22 THE COURT: Ladies and gentlemen, you've heard all
23 the evidence you're going to hear in the case. And I have
24 some procedural matters I have to take up with the lawyers
25 at this time.

1 So I'm just going to ask you to go back to the jury
2 room. Don't talk about the case. And continue to keep an
3 open mind. And then we'll have the closing arguments and
4 I'll give you the instruction on the law. And then you'll
5 begin your deliberations after that.

6 So thank you very much.

7 UNIDENTIFIED JUROR: Your Honor, could we take these
8 photographs with us? Because everybody hasn't looked at
9 them.

10 THE COURT: Okay. You can't take them back there
11 right now, sir.

12 UNIDENTIFIED JUROR: Okay.

13 THE COURT: But when -- if y'all want to stay in here
14 and look at them right now, you can. But they'll be back
15 in the jury room with you during your deliberations.
16 They're in evidence.

17 UNIDENTIFIED JUROR: Okay.

18 THE COURT: And I would ask that y'all select someone
19 to be the Foreperson while you're back there. And just
20 let the bailiff know who that is.

21 Thank you.

22 (WHEREUPON, the jury was excused from open court at
23 approximately 9:49 a.m.)

24 THE COURT: Mr. Scalzo, you had moved for a directed
25 verdict at the close of the State's case when we were

1 having the sidebar. And just due to the procedural
2 position we were in as far as the jury already being back
3 in the courtroom and there had already been some delay
4 with one of the jurors being late, we agreed to defer the
5 argument on that motion until this point. Both sides
6 consented to that.

7 So I appreciate everyone being agreeable in that
8 regard. And it, certainly, doesn't prejudice anyone.

9 Yes, sir. You may make your argument now.

10 MOTIONS

11 MR. SCALZO: Thank you, Your Honor.

12 That's correct as far as our consent to do that,
13 Judge.

14 Judge, I would make a motion for a directed verdict.
15 And I would, obviously, renew my prior motions I've made
16 up until this point.

17 THE COURT: Okay. Well, thank you, sir.

18 The evidence, and I'm just looking at it in the light
19 most favorable to the State. And I'm just looking at the
20 State's case in chief. I find that there is sufficient
21 evidence as to each element of the crime for the case to
22 go forward to the jury under the standards set forth in
23 Rule 19.

24 So I respectfully deny your motion.

25 Is there any specific charges either side wishes to

1 make?

2 I've got the State's request for charge on no
3 requirement of corroboration.

4 Is there any other request that either side wishes to
5 make at this time?

6 MS. SEAY: I don't have anything further.

7 Will you be granting that request?

8 THE COURT: What is the Defense's position on that?

9 MR. SCALZO: I would object to it because, one, I
10 think the cases that have reviewed it have really put it
11 in the light that there's great concern that by -- in
12 essence, by making it, you're over-emphasizing it. I'm
13 assuming that Your Honor is going to charge what is
14 normally charged about testimony and being able to believe
15 part or all. And I think that's an appropriate charge.
16 But the no corroboration, particularly, in this kind of
17 case, I don't think is going to be appropriate.

18 So I would object to it.

19 THE COURT: Any other requests?

20 MR. SCALZO: I don't have any additional requests of
21 my own.

22 MS. SEAY: Your Honor, I would direct the Court's
23 attention to State v. Rayfield where, A jury instruction
24 that the testimony of victims need not be corroborated was
25 not reversible error, where the Court, also, instructs the

1 jury that they're the finders -- the sole finders of fact
2 and discretion to determine the credibility of the
3 witnesses instructed that the law did not permit the Court
4 to have an opinion about the case and correctly charged
5 the State's burden of proof.

6 That's a South Carolina Court of Appeals case from
7 2004. And that is good statutory law. The -- I attached
8 the statute that applies, and it is the law in this state.

9 THE COURT: I tend to agree with Justice Pleicones
10 view on this, which he elaborated on in a dissent in a
11 case where -- and I don't believe -- it may have been
12 Rayfield when it got to the Supreme Court. But the Court
13 has never said we have to charge it. The cases have gone
14 up on whether it's reversible error to charge it. And
15 they have held, as you state, it's not. But I think
16 Justice Pleicones thorough and incisive analysis is well
17 taken on that, which it does highlight the issues and
18 almost amounts to a charge on the facts. So I'm not going
19 to do -- I'm not going to charge it.

20 I've got the charge on first degree, if you want to
21 come look at it. It's just -- it's straightforward.

22 (Pause.)

23 MS. SEAY: Your Honor, this, actually, should be
24 16-3-655.

25 THE COURT: Okay.

1 MS. SEAY: This is the one for adults, 16-3-652.

2 THE COURT: Okay.

3 MS. SEAY: It should be with a minor. I have a copy,
4 if you need it.

5 MR. SCALZO: Judge, I've got Judge Anderson's book
6 with the charge in it.

7 (Pause.)

8 MS. SEAY: Your Honor, do you mind going over briefly
9 your charge on reasonable doubt, so I'll know how to
10 address that in my closing?

11 THE COURT: Sure. I'll let you look at it right
12 here.

13 MS. SEAY: Okay.

14 THE COURT: You can probably look at it quicker than
15 I can tell you.

16 MS. SEAY: All right.

17 THE COURT: And we've now got the correct charge.

18 MS. SEAY: Okay. Thank you.

19 MR. SCALZO: I don't have any -- I read that, Judge.

20 MS. SEAY: Do you want to see this?

21 MR. SCALZO: Yes.

22 MS. SEAY: Thank you, Judge.

23 THE COURT: Thank you.

24 Anything else before we bring the jury back in?

25 Do y'all want to take about five minutes just to --

1 MR. SCALZO: Yes.

2 And, Judge, other than your normal charges, are there
3 any other additional charges that you're -- I'm assuming
4 you have an expert witness charge?

5 THE COURT: Yes, sir.

6 I'm just going to tell them that expert witnesses --
7 I mean, I've already told them, basically, you know --

8 MR. SCALZO: Right.

9 THE COURT: -- who experts are and how their
10 testimony is to be viewed.

11 MR. SCALZO: Are any other specific -- are there any
12 other special charges that we didn't talk about already?

13 THE COURT: Well, let's see. Bear with me one second
14 so I don't get out of order here.

15 MR. SCALZO: Sure.

16 (Pause.)

17 THE COURT: No, sir.

18 I don't think there's anything other than just, you
19 know, the jury's role as the judge of the facts, what
20 evidence is, burden of proof, direct and circumstantial
21 evidence, credibility, expert testimony, indictment is not
22 evidence, presumption of innocence, reasonable doubt,
23 intent, and the elements of first degree criminal sexual
24 conduct with a minor. And then there's just some general
25 instructions on deliberations that I normally give.

1 MR. SCALZO: Thank you, Judge.

2 THE COURT: Okay. Well, let's take about a
3 five-minute break.

4 Ms. Seay, would you do me one favor and look at this
5 verdict form and make sure it's okay, and share it with
6 Mr. Scalzo.

7 MS. SEAY: Yes, sir.

8 (WHEREUPON, a break was taken.)

9 THE COURT: Okay. Anything before the jury comes
10 in?

11 MS. SEAY: No, sir.

12 THE COURT: All right. Bring the jury in.

13 (WHEREUPON, the jury came into open court at
14 approximately 10:15 a.m.)

15 THE COURT: All right. Mr. Tolbert, you've been
16 selected Foreperson. You'll be the liaison between the
17 Court and the jury. If any question arises, I can only
18 communicate with you by way of a note, a written note or
19 out here on the record. And, of course, the note becomes
20 part of the record. But, hopefully, you won't have any
21 need to communicate with me. But if you do, that's the
22 method we have to use. And, of course, you'll preside
23 over the deliberations.

24 With that, we'll have the closing arguments.

25 And, yes, sir, Mr. Scalzo.

CLOSING ARGUMENTS

MR. SCALZO: Thank you, Your Honor.

May it please the Court.

Good morning.

I'll let you all look at that while I start talking.

I'm going to start where I left off in my opening statement talking about the classroom and the English class and the shop class. And there were other examples that you could come up with, and I could come up with. But the point that I was trying to make is -- and I guess I thought of another analogy to throw at you.

In a way, you're like inspectors, you know. If you have your house built, you're having someone work on your house. You have an inspector to come out to check the work as it's progressing and when it's done to make sure that it's done to code, done the right way. The inspector doesn't do the work. The inspector -- if the inspector comes out and says, these 2 X 4's are too close or too far away. The inspector doesn't go in and take the 2 X 4's out and do it right. That's the job of the contractor, the guy doing the work.

Well, in that analogy, the Prosecutor, the Government, is the contractor. You're the inspector. And that's what's going on. And there's a reason for that. And it goes back to what I said yesterday in my opening

1 statement. The law is that the State has to put together
2 a case and bring it to you. And before the Government can
3 take somebody's freedom from them, that product has to
4 prove the case beyond a reasonable doubt.

5 It's not a situation like I described with the
6 English class. It's not I'll give this fact and this fact
7 and allow you, the jury, to kind of develop the story.
8 The story needs to be laid out in a way that you can say,
9 okay, I understand this. This is what this says. I
10 understand this is what this says. And I think the case
11 that the Government has presented to you is missing some
12 tools, missing some pieces. And I'm going to get into the
13 details of what I think is missing.

14 But before I do that, you took an oath, an oath to
15 apply the law. And what the law is in a criminal case is
16 that a person is presumed innocent. You can't walk in --
17 it's a violation of your oath to come in, sit down, and
18 assume Joe is guilty. It doesn't work that way. We have
19 the luxury of doing -- I have the luxury of doing that.
20 People in the audience have the luxury of making all the
21 assumptions in the world they want to. This is why your
22 job, as the Judge described it, is the hardest one.

23 Because the most natural -- we're so comfortable in
24 our everyday lives and not being where you are, not having
25 that responsibility that you have to do that, to sit --

1 you know, you're watching TV and the news comes on, and
2 you see a little blurb, man charged with this, woman
3 charged with that. We all do it. You can sit there and
4 assume that the person did it all you want. You don't
5 have a duty sitting on your couch. You have a duty, and
6 it's the hard part.

7 What you're going to hear the Judge describe when
8 he's describing reasonable doubt, what the law is on
9 reasonable doubt, what the law is on presumption of
10 innocence -- there's going to be a lot of words. Lawyers
11 tend to use a lot of words when one word really will do.
12 And I think if one word really summed up what was going on
13 with reasonable doubt and your duty with presumption of
14 innocence, it's being sure. Certainly, you're going to
15 hear in the charge, you know, nothing -- it doesn't have
16 to be absolute certainty. That's fair. But there's a
17 level of certainty, a level of I'm sure.

18 Firmly convinced, I think, is one of the phrases that
19 you're going to hear, you know, not causing you to
20 hesitate to act. That's the kind of thing, when you have
21 a reasonable doubt, you're not -- I'm not sure I can go
22 there, something is holding me back. That is what the
23 Government's product has to answer for you. It has to do
24 that. And either they have to lay it out, or they have to
25 provide you with a tool that answers that question.

1 So let's talk about what I think has been missing as
2 far as tools, and follow that analogy. What -- and this
3 is a temptation that's related to what I was just talking
4 about. And it's a temptation that we all have because
5 we're human. There is a strong temptation to assume that
6 C [REDACTED] was absolutely right. It's a strong temptation to
7 accept the emotional description, the emotional experience
8 of sitting in here and hearing it.

9 You have been selected because, out of everybody in
10 relation to this case, you're 12 people who don't know
11 either side, 12 people who have said they can be
12 impartial, and have taken an oath to be impartial whose
13 job it is to apply reason to the evidence that's going to
14 be presented and are the least likely to be taken in an
15 inappropriate way by the emotion of it. It's not to say
16 that emotion is not important. And it's not to say that
17 emotion might not be valid. But emotion is not always --
18 and you can't always say emotion here equals evidence on
19 the other side.

20 And the reason you can't do that and this case
21 highlights it is because you are not psychiatrists, and
22 psychologists, and other professionals who are able to
23 understand the mind, you know. You're not interviewing.
24 You didn't even get to ask a question.

25 You're not doing the professional work that that kind

1 of person would do to be able to get into somebody's brain
2 and emotions, and understand what I see, is that really
3 what they're telling me it is, whether they realize it,
4 whether they're hiding it, whether they are just not
5 capable of describing it, whatever the reason is. The
6 problem is you don't know. You sitting there don't know.
7 And the job of the Government is to answer all the
8 reasonable doubts and leave you with the really only one
9 reasonable conclusion.

10 What did you hear? You heard from a medical doctor,
11 Dr. Henderson. And you heard her say, I performed a
12 medical examination. Well, the medical examination is
13 exactly what she said, it's, in essence, a physical
14 examination, primarily, but asks about history. We talked
15 about history. We talked about the physical examination.
16 And her physical examination was she looked at C [REDACTED] and
17 tried to determine, is there any physical evidence,
18 medical evidence, that would tell me, yes, she was
19 sexually abused from the age of five to the age of 11 I
20 found and I can point to this. She said she couldn't.

21 One of the things she and I talked about for a little
22 while was the hymen and the tearing. Was there a scar?
23 Was there not a scar? Obviously, there could be other
24 injuries. She didn't find them. The fact that she said
25 that doesn't rule it out. That's possible. Okay. That's

1 one small aspect of a much larger picture. Just
2 because -- you know, you want to build just about
3 anything. Usually, you need more than one tool. So if
4 that's one of the tools, that doesn't mean it's the only
5 tool. There are other tools in the tool box.

6 One of the things that Dr. Henderson described was
7 the reporting of the history. And I asked her about,
8 basically, what would be physical history? Did you have
9 any -- did she report any diseases? Did she report any,
10 you know, sicknesses, things like that? And I, also,
11 asked her about behavior. What you have not heard either
12 from Dr. Henderson, from the other witnesses, or some
13 other professional, some other interviewer, was C [REDACTED]
14 has trouble sleeping. C [REDACTED] is scared all the time.
15 She's acting up in school. She is mad all the time.
16 She -- I'm not saying that all those things have to be
17 present. What I'm saying is you didn't hear even one
18 description of that. What you heard was a well-adjusted
19 girl who gets good grades. But the allegation is from the
20 age of five to 11, she was being sexually abused in a
21 horrible way.

22 And the question is not, is it possible that she
23 wasn't abused, but is it reasonable? It's reasonable to
24 say that is not -- that if you have a child who's been
25 abused from the age of five to the age of 11, for you to

1 not hear about something in their life where that bubbles
2 up, particularly, with -- remember, what you have is you
3 have a delay, according to the allegation, in reporting of
4 what happened.

5 It's not a situation where at five, she says that
6 this happened to me. It gets addressed. And then you
7 might expect somebody as they grow, okay, maybe they've
8 been able to deal with it. What you have is 14-year-old
9 looking backwards saying, I remember this when it,
10 obviously, had never been dealt with until 14. But, yet,
11 psychologically, behaviorally, whatever else you want to
12 say, it did not pop up. And my suggestion to you is
13 that's reasonable to conclude that it might not be what
14 she's saying it is. It's reasonable.

15 When you put that into the larger picture of what was
16 going on overall, it becomes reasonable that you have a
17 family that's admittedly -- Joe admitted it, Ms. Paugh
18 talked about it, they argued, you know. Nobody was here
19 to say this was a perfect family. Joe wasn't up here to
20 say this was perfect, nothing ever went wrong. There were
21 problems. It was, you know, bumpy. He did some things
22 that he said he shouldn't have done in terms of the
23 relationship, arguing, being physical.

24 He leaves in 2005. They're divorced. He's living in
25 another state. There are a lot of things going on here.

1 This is not mom and dad married, everything is rocking
2 along, and nobody has any problems, and then all the
3 sudden, this comes out. There's something there.

4 And my suggestion to you is go back to the tool box
5 issue. What tool have you been given so that you can
6 decide that you can check off that this never came from
7 displaced anger or a belief that dad did this because he
8 doesn't love me? We don't know the answer to those
9 questions. We, also, don't have anybody that's tried to
10 find out. That's not your role. It's not your role to
11 figure out whether or not that's where it comes from.
12 That's the Prosecutor's job.

13 The Prosecutor is saying, believe this witness,
14 believe this girl. But that's the temptation I was
15 talking about. The temptation is to just assume that she
16 told the truth, but not challenge whether or not that's
17 accurate, truthful, or some other combination of the two.
18 That's the job of the Government to come in and give you
19 the tools and the materials to be able to sort that out.
20 When it doesn't do that or it can't do that is the reason
21 that you're going to be told that the law is proof beyond
22 a reasonable doubt.

23 Because to come into court and simply say, somebody
24 did something to me, you have to assume that it's true.
25 How is that ever going to -- that's not reasonable.

1 That's not how we approach our lives or -- it's not the
2 Government we want. That's why we have the Constitution
3 written the way it is. Because we don't want the
4 Government to be able to do that. We don't want the
5 Government to be able to just simply say, I wrote it down,
6 here is the piece of paper, don't ask any questions.

7 Now, it happens to be that this kind of case is --
8 you know, if it was a case about mowing the lawn or, you
9 know, building a table, or something that we all do in our
10 everyday life and kind of have an understanding of, that
11 might be one thing to expect you to be able to understand
12 that. But what we're talking about is, you know,
13 behavioral, psychology, what's going on in the emotions,
14 and the brain, and heart of people. You don't have the
15 tools to figure that out. There are professionals who do
16 that.

17 I talked to Investigator Henderson about a forensic
18 interviewer, someone trained many hours of training to
19 talk to a child, use a special method and a protocol on
20 how to try to uncover what is this child really saying.
21 That's the evidence that you bring and say, here, I'm
22 eliminating -- the Prosecutor, I'm going to eliminate any
23 reasonable doubt you have. One, I'm going to answer how
24 it's not this kind of anger or this kind of an incident.
25 I'm going to answer how it's not this and how it's not

1 that. And the only thing that's left on the bottom of
2 that list is what the claim is. You don't have that.
3 That's not something that has been presented to you. This
4 case hasn't been presented in that way.

5 A couple of things about what was described to you,
6 the allegation. C [REDACTED] -- and when she testified and in
7 her statement to Investigator Henderson always starts with
8 being five. But her allegation isn't only that she was
9 five. Her allegation is that she was from five to 11. It
10 ended when I was 11. She's saying that she remembers or
11 she's willing to come -- not that she remembers, she's
12 always remembered, but that she was willing to disclose it
13 at 14. Five is the most recent memory when you're 14.
14 What about 11? Remember when she described it, she said,
15 Joe took me in the Explorer. And I asked her about how
16 that wasn't in her original statement. Being taken in the
17 Explorer was when she was older. What's in her statement
18 is when she's five.

19 Now, like I said before, taking it in isolation of
20 one thing? No, taking it as a whole. I think that begins
21 to say, wait a minute, there are other possibilities here,
22 other reasonable possibilities here.

23 The other thing is as a five-year-old -- think about
24 a five-year-old. It struck me as not making a whole lot
25 of sense if you're trying to get a five-year-old to do

1 something to, one, attack them. If you're trying to get
2 them to do something and you don't want to get caught to
3 attack them and then threaten them, there are two problems
4 with that for a five-year-old or a young child at that
5 age. One, they're not old enough. They don't understand
6 death and being killed the way that an older child or an
7 adult understands that. They're just as likely to go,
8 mommy, mommy, he said he was going to kill me, or even
9 joke about it. Because they don't get subtleties the way
10 older children get it, the way adults get it. They don't
11 get that. They're more literal.

12 Plus, you're attacking the child, the child is not
13 going to cooperate. Where is the need to do that? It
14 doesn't make sense to start that way. If that was what
15 the goal was, it would be trying to convince the child to
16 do something, being sneaky with the child, and trying to
17 convince the child this is what we should do, not forcing
18 the child to do that. Because every time there's a force,
19 what you're increasing is the risk that the child is going
20 to turn around and run out of the room, and tell somebody.
21 And, again, we're talking about it starting when -- very
22 young. I understand the argument that, well, he
23 threatened to kill her and threatened her. That may make
24 more sense at 11. It makes less sense at five or six,
25 because the understanding of the child changes.

1 Again, that highlights the professional tools that
2 are missing. Simply because while we know that we have an
3 experience with five-year-olds or six-year-olds in terms
4 of we have a general idea that they don't get those
5 subtleties, we don't have any specific information to
6 refute or to even inquire as to what really was going on.
7 Were you mad? Were you not mad? Is this about dad? Is
8 this identifying more with mom? Is it -- or is it none of
9 those things.

10 What you're asked to do -- I won't say it that way.
11 What you're being tempted to do -- maybe not necessarily
12 purposely tempted, but just the way it's laid out. The
13 temptation is you have to assume the truth is what she
14 says, as opposed to the building blocks and you then get,
15 okay, here is the evidence that the final conclusion is
16 she must be telling the truth, or she must be accurate.
17 It's a cart before the horse sort of idea. That's not how
18 a criminal trial -- the rules don't -- that's not the
19 rules of a criminal trial.

20 Joe got on the stand. He didn't have to. He had a
21 right to remain silent. But he got on the stand and he
22 answered my questions. And he talked about things. And
23 he didn't get up there and say that these are all evil
24 people and they just want to get me. He said, Look, you
25 know, I'm not perfect. I'm not claiming to be perfect. I

1 didn't act the right way all the time, you know. He
2 didn't call them crazy. He just simply said, I didn't do
3 it. And here is a little bit more about me, I have
4 brothers and sisters. I have a family. He didn't get
5 asked a question. It was, How do you look at yourself,
6 which was objected to by me, and sustained by the Judge.

7 Well, he talked about a lot of things. And one of
8 the things that he talked about was his hernia. That's a
9 significant thing. He described it to you, you know. One
10 incident one time at five, you might not have noticed
11 that. But think back to the descriptions that you were
12 given as to what the assault was, what the abuse was. And
13 his hernia has got to be in there. How is it avoided? It
14 was never mentioned never by anyone, except for Joe.

15 Before I get to my last issue, I want to talk about
16 something before I forget it. I, obviously, am saying to
17 you that there were missing tools and that the primary
18 missing tool I'm saying is, where is the professional
19 training and evaluation to make sure that this isn't
20 really about sort of the dead-beat dad, or the dad that
21 left, or the dad that didn't really treat me and my mom
22 the right way? How do we uncover whether or not that was
23 going on versus what she is alleging that went on? We
24 don't have the tool to really resolve that. And the
25 family dynamics of divorce and sort of dysfunction are

1 very reasonable and real considerations.

2 Now, what I would expect the Prosecutor to say is,
3 you know, Investigator Henderson interviewed her. She had
4 been interviewed. But I think I would ask you to remember
5 that the description of the interview is not a counseling
6 session. It's not really applying what trained kind of
7 counselors and professionals do to try to help somebody,
8 usually, uncover what they may not be ready to talk about,
9 what they don't want to talk about, you know. That's
10 not -- you don't just get up in front of people that you
11 don't know and just start telling why you may really not
12 be accurate, or you might not be telling the truth. You
13 don't -- that doesn't just miraculously happen in a
14 courtroom.

15 I've been doing this a while. And Perry Mason has
16 not come through that door and just asked a question and
17 the witness just completely turns. Why? Because our
18 brains and our emotions are complicated. They're way too
19 complicated to just sort out in a room, you know, with a
20 bunch of people that you don't really know, and without
21 the training to be able to do that.

22 The last thing I'll leave you with is this, it's what
23 I left with, it's these picture. When I was talking to
24 Joe, the last thing I did was get him to identify these
25 pictures. And we put them in evidence. Look at the

1 pictures. The date is on the back. Joe testified to
2 them, March of 2006.

3 And let's put it into the context of what's going on.
4 He's left in 2005, gone to Baltimore. The divorce comes
5 through. He's supposed to be paying child support. He's
6 not very good at it all the time. It ends up that he's
7 got to come to Greenville to deal with the Court because
8 he hasn't paid. He comes. Maybe he brought all of it,
9 maybe he just brought enough to get the Court off his
10 back, but he came to make some kind of payment. And while
11 he's here, he visits. And those pictures are taken.

12 Now, it was not described to you that this was a -- I
13 don't know what the right word is -- suppressed or
14 repressed memory that all the sudden came, you know. I
15 blocked it out of my mind for all these years and all the
16 sudden, it popped out because something happened. What is
17 described to you -- I believe the word was torment, that
18 it was a torment that had gone on for a period of time,
19 that it was always sort of present. There was always fear
20 there. That was what was described.

21 But I'm asking you to look at the pictures. And when
22 you look at the pictures, sort of ask yourself, what do I
23 see? Do I see fear and the torment or not? And I'm not
24 saying, look, if the fear and torment were there, it
25 doesn't mean that they wouldn't take a picture -- she

1 wouldn't take a picture. But it would be quite subdued, I
2 would think, or a little bit reluctant, you know.

3 If there was fear, you don't want to get caught, you
4 don't want to get in trouble, you know. It's our secret.
5 And, you know, dad is kind of looking at you, and remember
6 you're supposed to keep our secret. You're a little
7 withdrawn. You're a little pulled away. But that's not
8 what you have in these pictures. And we don't have an
9 explanation for why it would be that way or not that way.
10 I think that's all very reasonable questions and doubts as
11 to whether or not overall the answer is dysfunctional
12 family, divorce, all things that lead to anger,
13 difficulties, trying to sort out the relationships between
14 all the people involved. That can, certainly, lead to a
15 story that isn't true.

16 We're not saying men from Mars came down. That would
17 be saying, oh, it's possible. It's possible some aliens
18 from a different planet came. We're not saying that.
19 What we're saying is given what we know about human
20 beings, given what we know about family dynamics, what is
21 reasonable? And has the State answered how it is not
22 those other reasonable explanations for what has gone on?

23 Thank you.

24 THE COURT: Thank you, Mr. Scalzo.

25 Yes, ma'am. Ms. Seay.

1 MS. SEAY: Thank you, Your Honor.

2 May it please the Court.

3 Mr. Foreman, ladies and gentlemen of the jury, thank
4 you for your attention to this case.

5 I know that you've paid close attention to all that
6 you've heard, to all the witnesses who've testified. And
7 you've been chosen because we believed that you were
8 fair-minded, that you would listen to, with an open mind,
9 what I told you, at the beginning, would be disturbing and
10 unpleasant to hear.

11 You are asked in your everyday life to make important
12 decisions. Today is no different. You're going to be
13 asked to make an important decision today about the guilt
14 or innocence of Joseph Paugh. The State's burden in this
15 case was to bring you evidence, to prove to you beyond a
16 reasonable doubt that he committed the offense of criminal
17 sexual conduct with a minor in the first degree. Let's
18 talk about that.

19 I told you that there were two elements. The first
20 element being sexual battery, any intrusion, however
21 slight, into the anal or oral -- anal or genital openings
22 of another person's body. The second element, that the
23 child was under 11 when the acts took place.

24 Now, I did a little timeline that I want to put up
25 here and show you. It's a little difficult to see. But

1 C [REDACTED] testified she was born on November 25th of 1993,
2 and that these acts began when she was five years old, and
3 went on until she was 11 years old. And you'll note that
4 I made a notation that at 10, she began menstruating. And
5 I want to come back to that in a little while. And that
6 is the time frame of the indictment, November 25th, 1998,
7 through November of 2004. That is the time frame of the
8 indictment. So she would have been under 11 during this
9 time period.

10 Now, you heard from C [REDACTED] P [REDACTED], who is now 16
11 years old. She's seated here on the front row. Despite
12 what she went through for six years of her life, she
13 somehow managed to hold it together. The Defense wants
14 you to believe that any child that something like this is
15 happening to must fall apart in some way. They must have
16 some problem. They must have difficulty sleeping or, they
17 must have emotional problems. They must have anger or
18 acting out. C [REDACTED] didn't have those things.

19 C [REDACTED] is an amazing child. You heard her testify.
20 You got to observe her demeanor. You got to get to know
21 her. You got to find out about her. She's an eleventh
22 grade student at Greenville High School who makes A's and
23 B's, and maybe a C. But she's always been a good student.
24 Maybe that was her outlet. Maybe that was her good time
25 when she wasn't in her living hell. When she was at

1 school, she was away from her father.

2 She manages to hold down a job at McDonald's for 27
3 hours a week, and carry good grades. And she even told
4 you when she went to the doctor for an exam when she was
5 14, the doctor asked her, Do you have -- you know, Do you
6 think you have any problems? She said, No, I don't think
7 I've got any problems. But here is what happened to me.
8 She told the doctor.

9 She told you in great detail what happened to her
10 beginning when she was five years old. And I think that
11 that is significant in many ways. She was asked, What is
12 the first time you remember your father doing something
13 like this to you? She remembers the incident when she was
14 five years old in the bathroom. She described it in great
15 detail. She said her father came in buck naked, that he
16 got on the floor, and he tried to rape her is what she
17 said.

18 And, in fact, he injured her in some way. And he
19 then proceeded to pour peroxide on her injury and tell her
20 mother that she fell on a piece of metal. And that has
21 been corroborated by Ms. Paugh, who, also, told you that
22 that was the story that was given, that that happened.
23 And, today, the Defendant took the stand and corroborated
24 what C [REDACTED] told you that at five years old, there was
25 this incident in the bathroom where she supposedly hurt

1 herself on this piece of metal.

2 Now, he wants to change it around a little bit and
3 tell you that the grandmother came over, at that time, and
4 poured peroxide on her. But that's not the way C [REDACTED]
5 and her mother told you that happened. He poured peroxide
6 on it. And he told her not to tell. And she was
7 sufficiently afraid not to tell that when her grandmother
8 and her mother asked her, C [REDACTED], is this how it
9 happened? She said, Yes, that's how it happened.

10 Little did she know -- she was only five. Little did
11 she know that that was simply the beginning of what was to
12 come for her. Why did he decide to start this at five
13 years old? I don't know. The State can't explain that to
14 you. Again, the State doesn't have to prove to you and
15 can't prove to you why a grown man, a father, would
16 sexually abuse his own daughter in such a despicable way.
17 That's not part of what we have to prove.

18 But she testified and she told you in great detail
19 that this became frequent, that he would attempt to
20 penetrate her, that he would make her put Vaseline on him,
21 and he would say, This is going to make this easier. Do
22 you want to do it the hard way, or the easy way? This is
23 going to make it easier. And she would beg him, Daddy,
24 don't do this, this hurts me. Don't do this, please. She
25 would dread those times. She would watch the clock

1 waiting until her mother got off work. She knew that when
2 7:30 came that she would be safe from her father's
3 advances.

4 Does this all sound like something that she just made
5 up, that she decided to come and tell a courtroom full of
6 strangers and various other people sitting in here that
7 she doesn't even know and the -- in front of the man who
8 did it to her? I say that she's a lot braver and more
9 courageous than a lot of adults would be if something
10 similar had happened to them. And we don't ask -- you
11 know, we haven't asked any adults to come in here and say,
12 oh, well, tell us about your last sexual experience in
13 great detail. But we've asked a 16-year-old girl in the
14 middle of her high school years to come in here and tell
15 us all those details.

16 She told you that he made her perform oral sex on him
17 numerous times, that there were specific times that she
18 would be forced to go with him to return movies, that her
19 mother would say, C [REDACTED] go on and ride with your daddy.
20 Her mother having no idea what was going on. C [REDACTED]
21 would dread in her heart, oh, please, don't make me go.
22 She would have to go with her dad knowing that he was
23 going to pull over behind a building somewhere and park,
24 and make her get in the back, and make her perform oral
25 sex on him. And she told you that as she got older, she

1 learned to realize when he was about to ejaculate so that
2 she wouldn't have to taste it. Does that sound like
3 something that didn't happen, or does that sound like a
4 child who's telling you the truth?

5 I submit to you that C [REDACTED] gave you compelling
6 details about what happened to her. And the fact that the
7 first time that it happened when she was five years old
8 has been corroborated by two other witnesses, including
9 the Defendant, gives it even more of a ring of truth,
10 ladies and gentlemen. C [REDACTED] has been consistent.

11 And do you know what was so moving, I submit to you,
12 is she kept the secret. She kept it. And she kept a
13 facade that everything was okay. Because she was trying
14 to protect her sister, K.P. She told you that. She
15 didn't want the same thing to happen to K.P. So she
16 would go and put a movie in. Her daddy would make her go
17 put a movie in for K.P. to occupy K.P. who is much
18 younger, while he performed despicable acts on her in his
19 bedroom. And she was so afraid that he was going to do
20 something to her younger sister. She wanted to protect
21 her.

22 When she -- when her father, finally, left -- and,
23 obviously, you heard from Ms. Paugh and you heard from the
24 Defendant. There was, obviously, domestic violence in the
25 home. He tried to soft-pedal it today and say, well, it

1 was a little bit of both of us and, yeah, I shouldn't
2 have -- probably shouldn't have done that, and that was
3 wrong, and, yeah. Well, what do you think this said to
4 C [REDACTED]? He threatened her. He threatened her life. And
5 then she sees him in an abusive situation with her mother.
6 What does this do but re-enforce to her that he's willing
7 to go through with the violence that he's threatened her
8 with, and that her mother can't protect her.

9 And she told you she didn't want to tell her mother
10 because she didn't want to hurt her mother. C [REDACTED]
11 thought about everybody but herself in this. What you
12 heard was from an unselfish young lady who, when she was
13 14 years old, found out when her father called her on her
14 birthday and told her he was having a child, and it was a
15 girl. And, now, we find out today when he testified, he
16 has two girls in Baltimore. That is what was so moving, I
17 submit to you, that C [REDACTED] said, I felt that I had to
18 tell because there's another girl out there that I can't
19 protect unless maybe I tell. And that is when she came
20 forward the very next day on 11-27 of '07. She turned 14
21 on 11-25-07. She told the next day, the 26th. And they
22 made the report and said, Come on in tomorrow and meet
23 with the investigator.

24 So on 11-27-07, they went in and they made that
25 report. And she was interviewed by Investigator

1 Henderson. And she told Investigator Henderson what she
2 was able to tell her. And Investigator Henderson, who's
3 trained in forensic interviewing, told you, I didn't need
4 to do anything special for C [REDACTED]. C [REDACTED] was able to
5 communicate with me. And she was able to tell me what had
6 happened to her. And I just typed out what she told me.

7 And she started with the time that she was five, the
8 first time she remembered. And she went up until the time
9 that she was 11. And she told about what had happened.
10 And she was consistent then and she's consistent now.
11 And, yes, she's remembered additional things. She'll
12 probably continue to remember additional things as she
13 grows older. And, I submit, she may need professional
14 help as time goes on. She very well may need it. And I
15 hope that she will get it, if she needs it.

16 But she does not have any motive to have told you
17 what she did or to have come forward when she did, other
18 than what she has explained to you on the stand. Where is
19 her motive? He's brought up -- the Defense has brought
20 up, oh, there's divorce and there's anger. You didn't
21 hear about any of that. She didn't express any anger. I
22 asked her how she felt about her father. And she said, I
23 ain't got no respect for him. Well, you can't blame her
24 for that.

25 She has no motive whatsoever, except that she was

1 trying to be self-less and protect another child coming
2 into the world from the living hell and the torment that
3 she had been through. She has no motive, other than it's
4 the truth. She told it then and she told it now.

5 Joseph Paugh was not going to come in here today and
6 take the stand and say to you, yes, I did these despicable
7 things to my daughter. That only happens on TV. That's
8 not going to happen here. He didn't tell you anything.
9 He told you, yeah, I've got another family in Baltimore.
10 Yeah, I lived at these addresses where the family says
11 they lived. Again, that's corroboration of what C [REDACTED]
12 and her mother have already told you. Yes, I kept the
13 children while my wife worked at Tanner's Big Orange.
14 Yes, she got off at the time that C [REDACTED] said she did.
15 She'd get home about 7:30 or 8:00. He corroborated
16 everything C [REDACTED] said, except for the horrible acts that
17 he committed, which he's not going to admit to you.

18 Child molesters are cowards. And they do their
19 despicable acts in secret. And then because they're such
20 cowards, they threaten their victims with things they know
21 that children will believe, things like, if you tell, DSS
22 will come and take you away from your momma and your
23 grandmother.

24 And you heard C [REDACTED] say up on this stand, My mother
25 and my grandmother are my whole world. He knew that that

1 was what would scare me to death. And he held a pocket
2 knife to her throat on one -- more than one occasion and
3 said, I will kill you if you tell. This is a child we're
4 talking about, ladies and gentlemen. Children who are
5 taught and brought up to respect authority, to obey
6 adults. She took those threats seriously. Any of us
7 would be like, he's not going to do anything. He's not
8 going to do that. She's a child. She took it seriously.
9 She believed it. And then there was the domestic violence
10 to re-enforce it. And so she didn't tell. She kept it
11 all inside and managed this facade of, I'm an okay kid
12 somehow or another.

13 These pictures were on a visit, his father [sic] and
14 his brother were with him. He wasn't spending any private
15 time with her. She wasn't afraid to have her picture
16 taken with him. Again, facade, smile for the camera. I'm
17 here with my sister getting my picture made with my dad
18 who's come for this visit, but thank God he's not going to
19 stay. Thank God he's gone. I can be a kid again. He's
20 going. This is just a short visit for a child support
21 hearing, and he's going back to Baltimore. This doesn't
22 mean anything.

23 You heard from Dr. Henderson. Here is her resume.
24 It's in evidence. She's a very experienced doctor in
25 sexual assault examinations. She told you that, in the

1 majority of cases, children do not have any kind of
2 evidence of trauma from sexual assaults, that it's the way
3 that child molesters operate.

4 They use things like oral sex, which are not going to
5 leave trauma. They use things like partial penetration,
6 which the children think is penetration but really isn't
7 penetration. She described it as more penetration of the
8 vulva region, rather than actual penetration into the
9 vagina, which might leave some kind of evidence. They're
10 not going to do that. And C [REDACTED] described that to you,
11 that he would attempt to penetrate her, but never really
12 did, but that he would put his penis in her private area.
13 Well, that's an intrusion, however slight. And that oral
14 sex is a sexual battery, too. So that element is
15 satisfied. And the element of age is satisfied, ladies
16 and gentlemen.

17 And I submit to you that what she said about the fact
18 that when she started her period at age 10, he stopped
19 messing with her. She would be relieved when she would
20 have her period, because he would not mess with her or try
21 to penetrate her. He would only make her do oral sex.
22 That would be so relieving to her because he wouldn't try
23 to hurt her.

24 Well, low and behold, shortly thereafter, guess what
25 Joseph Paugh does? He leaves and goes to Baltimore. He's

1 done with her. He's done with her because, now, she's
2 getting older and she's started her period. There's a
3 chance that he can get her pregnant if he keeps up his
4 act. And he knows that. And there's, also, a chance that
5 as she gets older, she's going to tell it. So he leaves.
6 And he goes to Baltimore, and he starts a new family.

7 Reasonable doubt is not anything magical. The
8 Defense likes to bring it up a lot because they want you
9 to think about it a lot. They want you to find something
10 to hang your hat on to say, well, that's reasonable doubt
11 so I can't possibly find this Defendant guilty.

12 Reasonable doubt simply means that you are -- that
13 you have a doubt to which you can attach a reason. You
14 must be firmly convinced of the Defendant's guilt is what
15 the Judge is going to charge you. You must be firmly
16 convinced. After you heard C [REDACTED]'s testimony, ask
17 yourselves, was I firmly convinced that this child has
18 been truthful?

19 And I digress a little bit. I want to go back.
20 Dr. Henderson told you that her exam was normal, that that
21 was the case for most children in cases of ongoing abuse,
22 especially where the child has delayed in disclosing the
23 abuse. There may have been some evidence. There may have
24 been some tear or some scar at some point in time. But
25 the area we're talking about has good blood flow and heals

1 very quickly and easily. So C [REDACTED] may have had
2 evidence, at some point, that if she had had a specialized
3 sexual assault exam somebody may have found. We don't
4 know. But that's not how it happened. That's just not
5 how it happened. Because she didn't tell because she was
6 trying to protect her sister, and she was scared to death.

7 And she told you yesterday on the stand -- and how
8 brave did she have to be to tell you in front of the man
9 who did it to her, I'm still scared of him. Because he
10 told me that if he goes to jail, he will come and get me
11 one day. And I'm still scared.

12 Ladies and gentlemen, reasonable doubt doesn't mean
13 that you can't have a doubt or any doubt. Because if that
14 were the case, no one would ever be convicted in a court
15 of law in any court anywhere in the United States. But
16 your doubt has to be reasonable. And I submit to you that
17 the evidence that the State has submitted should leave you
18 firmly convinced of this Defendant's guilt, and that this
19 child deserves justice. She deserves justice from this
20 Court for the living hell that this man put her through
21 for six years. And I ask that you give it to her.

22 Thank you.

23 CHARGE ON THE LAW

24 THE COURT: Thank you, Ms. Seay.

25 Ladies and gentlemen, it's now my duty to instruct

1 you on the law that applies to this case. And it's your
2 duty to find the facts from the evidence in this case.
3 And, to those facts, you must apply the law as I give it
4 to you. And you should not be concerned with what the law
5 should be, but what the law is. And that means you must
6 not be influenced by any personal likes or dislikes, or
7 opinions, or prejudices, or undue sympathy. And that
8 means you must decide the case solely on the evidence
9 before you and according to the law. As you recall, you
10 took an oath to do just that yesterday when we began this
11 trial.

12 In following my instructions, you must follow all of
13 them and not single out some more than others, because
14 they're all equally important. And you must not read into
15 these instructions or into anything I may have said or
16 done during this trial as any indication as to what I
17 think the facts are, or what I think your verdict should
18 be. Because, as I told you at the outset, you are the
19 sole judge of the facts. And I'm not going to intrude on
20 your prerogative to determine the facts just as I know you
21 would not interfere with my prerogative to tell you what
22 the law is.

23 Now, under our Constitution, you and you alone are
24 the judges of what the facts are. You decide what the
25 facts are by evaluating and weighing the evidence you've

1 heard during the course of this trial. This is a mental
2 process. It's not a physical process whereby you weigh
3 things such as like weighing things on a scale. It's a
4 mental process. And you weigh and evaluate the evidence
5 by simply using your good common sense and your sound
6 judgment.

7 Now, I told you, also, that you must determine the
8 facts solely from the evidence. And I told you that
9 evidence consists of two sources, the first is witness
10 testimony, and the second is exhibits. Everything else is
11 not evidence.

12 And I told you that the fact that the lawyers make
13 their arguments does not turn them into witnesses. So
14 what they said is not evidence in itself. And while their
15 statements are important, they are not evidence. So while
16 you should pay close attention to what the lawyers say,
17 because they're trying to help you understand the
18 evidence, if your memory of the evidence is different than
19 the lawyers statements as to what the evidence showed,
20 your memory would control.

21 Now, I, also, told you that you would have to
22 determine the credibility of all the evidence. And I gave
23 you some guidelines for how to do that. And I'm not going
24 to repeat those, because I know you heard me the first
25 time.

1 But I will tell you this, you may consider and
2 believe everything a witness says, or you may believe
3 nothing a witness says. You may believe part of a
4 witnesses testimony and disbelieve other parts. You may
5 believe one witness over several, or several over one.
6 But you must decide the matter of credibility on a
7 rational basis and not arbitrarily.

8 I told you that person's described as experts may
9 give their opinions on matters in their field and may,
10 also, state their reasons for the opinion. And that makes
11 them different from ordinary lay witnesses. But expert
12 opinion testimony should be judged just as any other
13 testimony. You may accept it or reject it. You may give
14 it as much weight as you think it deserves considering the
15 witnesses education, experience, the reasons given for the
16 opinion, and all the other evidence in the case.

17 Now, there are two types of evidence that are,
18 generally, presented during a trial. And what I'm talking
19 about now is direct evidence and circumstantial evidence.
20 Direct evidence is the testimony of a person who claims to
21 have actual and direct knowledge of a fact, such as an
22 eyewitness. It is evidence that immediately establishes a
23 fact. Circumstantial evidence is indirect evidence. Or
24 put another way, circumstantial evidence is proof of a
25 chain of facts and circumstances from which you could find

1 that another fact exists, even though it has not been
2 proven to you directly.

3 The law makes no distinction between the weight or
4 value to be given to either direct or circumstantial
5 evidence. You may consider both kinds of evidence. There
6 is not a greater degree of certainty required of
7 circumstantial evidence. And you must consider all the
8 evidence you've heard in this case in the light of
9 reasoned common sense and experience. And after weighing
10 it and making your credibility determinations, if you are
11 not convinced of the guilt of Mr. Paugh beyond a
12 reasonable doubt, you must find him not guilty.

13 Now, ladies and gentlemen, as I told you before
14 several times, the mere fact that someone has been charged
15 in an indictment does not mean anything for purposes of
16 your deliberations. The fact that someone was arrested,
17 charged, and indicted is not evidence and cannot be
18 considered by you as evidence of guilt. Nor does it
19 create any presumption, or inference, or even a suspicion
20 of guilt.

21 The indictment is simply the formal written
22 instrument which contains the charges made against
23 Mr. Paugh, and informs him of what he is charged with.
24 It's the formal document by which the case is brought to
25 court and the trial can begin.

1 Mr. Paugh has pled not guilty to the indictment, and
2 that puts the burden of proof on the State to prove him
3 guilty beyond a reasonable doubt. A person charged with
4 committing a crime is never required to prove his own
5 innocence, or to prove himself not guilty, or offer any
6 evidence or explanation whatsoever. It is a fundamental
7 rule of our law that no matter what the charge may be, the
8 person who is charged will always be presumed to be
9 innocent of the crime, unless and until guilt has been
10 proven by evidence that satisfies you of guilt beyond a
11 reasonable doubt.

12 Now, this presumption of innocence is not a legal
13 technicality. It is an important substantial right. And
14 it is one of the cornerstones of our criminal justice
15 system. The presumption of innocence does not end when
16 you begin your deliberations, but it accompanies the
17 Defendant throughout the trial until you reach a verdict
18 of guilt based on evidence satisfying you of that guilt
19 beyond a reasonable doubt. The presumption of innocence
20 has been likened to a robe of righteousness that is placed
21 around the shoulders of a defendant, and remains with him
22 until it has been stripped by evidence satisfying you of
23 guilt beyond a reasonable doubt.

24 Now, what is a reasonable doubt under the law? A
25 reasonable doubt is the kind of doubt that would cause a

1 reasonable, sincere, honest, and conscientious person to
2 hesitate to act in an important matter in their own
3 affairs. Proof beyond a reasonable doubt is proof that
4 leaves you firmly convinced of the Defendant's guilt.

5 There are very few things, as we all know, in this
6 world that we can know with absolute certainty. And, in
7 criminal cases, the law does not require proof that
8 overcomes every possible doubt. If, based on your view of
9 the evidence, you are firmly convinced that Mr. Paugh is
10 guilty of the crime charged, you must find him guilty. On
11 the other hand, if you think there is a real possibility
12 that he is not guilty, you must give him the benefit of
13 the doubt and find him not guilty.

14 A reasonable doubt may arise from the evidence, or
15 from a lack of evidence. And a defendant, in a criminal
16 case, is entitled to every reasonable doubt that may
17 arise. And what that means is simply this, if upon any
18 issue of fact that is essential to a conviction and a
19 verdict of guilt you have a reasonable doubt as to how
20 that issue should be resolved, it is your duty to resolve
21 that doubt in favor of Mr. Paugh.

22 In order to establish criminal liability, criminal
23 intent is required to be proven beyond a reasonable doubt.
24 Criminal intent is always a matter that must be determined
25 by the jury from the circumstances. There's no way to

1 prove intent to a mathematical certainty. We can't
2 dissect someone's brain and determine what they had in
3 mind at a certain point in time.

4 So the law says that criminal intent may be inferred
5 from the circumstances. It is not necessary to establish
6 intent by direct and positive evidence, but it may be
7 established by inference, and the same way as any other
8 fact by taking into consideration the acts of the parties
9 and all the facts and circumstances. Criminal intent is a
10 mental state of a conscious wrongdoing. And it is up to
11 you to determine what the Defendant intended to do, based
12 on the circumstances shown to have existed.

13 Now, ladies and gentlemen, the charge in this case is
14 criminal sexual conduct with a minor in the first degree.
15 And I want to go over with you the elements of that crime.
16 Under our South Carolina Code Section 16-3-655(a), it
17 states that a person is guilty of criminal sexual conduct
18 with a minor in the first degree if the actor engages in
19 sexual battery with the victim, who is less than 11 years
20 of age.

21 So in order to convict Mr. Paugh of this crime that
22 he's been charged with, the State must, first, prove
23 beyond a reasonable doubt that Mr. Paugh engaged in a
24 sexual battery with the victim. A sexual battery is
25 defined as sexual intercourse, cunnilingus, fellatio, anal

1 intercourse, or any intrusion, however slight, of any part
2 of a person's body, or of any object into the genital or
3 anal openings of another person's body, except when the
4 intrusion is accomplished for medically recognized
5 treatment for diagnostic purposes.

6 Second, the State must prove beyond a reasonable
7 doubt that the victim was less than 11 years old at the
8 time of the sexual battery. Consent, willingness,
9 indifference, or ignorance on the part of the minor, if
10 any, as to what was taking place does not in any way
11 effect the charge of criminal sexual conduct with a minor.
12 Because an unmarried woman under the age of 14 cannot
13 legally consent to sexual intercourse.

14 Now, that covers the substantive law in this case. I
15 want to talk to you just for a minute about your
16 deliberations. You don't serve as jurors to be partisans
17 or advocates for either side. You were chosen because
18 both sides believed you could be fair and impartial, and
19 decide this case solely on the evidence without bias or
20 prejudice. And that means you use your experiences in
21 life, and your good common sense, and your sound judgment,
22 and you bring those things to bear on the evidence you've
23 heard during this trial. And, once you do that, you'll be
24 able to determine the facts of the case. And, once you've
25 decided the facts, you take and apply the law I've just

1 given to you to those facts. And once you've done that,
2 you'll be able to reach a verdict.

3 Deliberation, if you went and looked it up in the
4 dictionary is defined as a careful consideration, a
5 weighing up with a view to a decision. And I've already
6 talked to you about this idea of weighing and evaluating
7 the evidence, which is your task.

8 Now, the genius of our jury system is that it brings
9 together 12 different people from different backgrounds,
10 and different perspectives, and points of view, and allows
11 them to consider the evidence, and talk about it, and,
12 ultimately, reach a verdict. And we call them
13 deliberations for a reason. You are to consider the
14 evidence, in this case, carefully, and deliberately, and
15 discuss it in a calm, thorough, and courteous manner.

16 But, remember, you're not partisans or advocates for
17 either the State or Mr. Paugh. You are judges, judges of
18 the facts. And your sole interest is to find the facts
19 from the evidence, and determine whether the State has met
20 its burden of proof. So listen to the views of all your
21 fellow jurors, and consider other's points and points of
22 view, and talk through and discuss the evidence. And,
23 remember, if you're doing something deliberately, you're
24 not in a big hurry. And you should not be in a hurry
25 here, because this case is very important to both sides.

1 And this is their only day in court.

2 So your verdict must be unanimous, Mr. Foreman. And
3 I've set forth a verdict form, which I've shown to both
4 sides. And I'll show to you too, sir. It's very
5 straightforward. It just asks as to the charge whether
6 you find the Defendant guilty or not guilty. Don't attach
7 any significance as to which option I put first. I just
8 have to put one first. And that, certainly, doesn't mean
9 anything. And you're only authorized to sign that, sir,
10 when the verdict is unanimous.

11 The record is closed. There's not going to be any
12 more witnesses or exhibits. So if there's something that
13 was referred to in the trial that you don't have back
14 there with you, I can't give it to you, because the record
15 is closed.

16 Now, don't start talking about the case until you get
17 the exhibits. That will be your signal that you can start
18 deliberating.

19 And I want to thank you for your attention throughout
20 the trial and your patience with us. And I'll just ask
21 you to go back to the jury room. And we'll get the
22 exhibits right back to you in just a few minutes.

23 And, Mr. Wolfe, if you'll just stay behind, I'll talk
24 to you separately.

25 Thank you.

1 (WHEREUPON, the jury was excused from open court at
2 approximately 11:28 p.m.)

3 THE COURT: Sir, thank you for your service.

4 The law doesn't allow you to go back in the jury
5 room. But I do want to thank you for being here the past
6 two days. You do have a three-year exemption now from
7 jury duty in Circuit Court.

8 And if you need anything for work or for whatever
9 reason to show where you've been, Ms. Kelley will provide
10 that for you. There will not be any more cases this week,
11 so you're free to go, if you wish, at this time.

12 Thank you very much.

13 JUROR #156, PHILLIP WOLFE: Thank you.

14 (WHEREUPON, Juror #156, Phillip Wolfe, exited the
15 courtroom.)

16 THE COURT: Are there any objections to the charge
17 from the State?

18 MS. SEAY: No, sir.

19 THE COURT: From the Defense?

20 MR. SCALZO: No.

21 THE COURT: We'll be at ease pending a verdict.

22 (WHEREUPON, the proceedings were recessed at
23 approximately 11:30 a.m.)

24 QUESTIONS FROM THE JURY

25 THE COURT: Okay. We have a note from the jury,

1 which I'll make part of the record. There are two
2 questions, the first question is, "Can we review
3 Investigator Henderson's report?"

4 The second question is, "Are any reports available
5 from the victim's grandmother?"

6 So I'll be glad to entertain any suggestions as to
7 how y'all wish for me to respond. My inclination would be
8 just to tell them, as I already have, that the record is
9 closed. And they have all the exhibits that have been
10 admitted into evidence.

11 MS. SEAY: That would be what I would assume you
12 would tell them.

13 MR. SCALZO: I don't think you can tell them anything
14 else, Judge.

15 THE COURT: Okay. I can, also, ask them if they want
16 us to order lunch. I don't know what they're thinking
17 about.

18 MR. SCALZO: I don't have any objections to you
19 asking them about ordering lunch, Judge.

20 THE COURT: Okay. We'll just make this a Court's
21 Exhibit. And I'll let y'all look at it before I send it
22 back there.

23 MS. SEAY: Okay.

24 MR. SCALZO: Sounds good, Judge.

25 THE COURT: All right.

1 THE BAILIFF: Do you want me to get it right back, or
2 tell them to keep it with the exhibits?

3 THE COURT: Well, just give it to them. And I expect
4 they'll write back pretty quickly about the lunch.

5 (WHEREUPON, there was a brief recess.)

6 THE COURT: Okay. So they do want lunch. So we'll
7 just get them the menus.

8 We'll be at ease until we hear something else.

9 Thank you.

10 (WHEREUPON, Court's Exhibit No. 2 was marked for
11 identification and admitted into evidence.)

12 (WHEREUPON, the proceedings were recessed at
13 approximately 12:11 p.m.)

14 THE COURT: I understand we have a verdict.

15 Is there any matter before we bring the jury back in?

16 MS. SEAY: Nothing from the State.

17 MR. SCALZO: No, sir.

18 THE COURT: Okay. Well, it was a very well tried
19 case on both sides.

20 Bring the jury in.

21 (WHEREUPON, the jury came into open court at
22 approximately 2:50 p.m.)

23 THE COURT: All right. Mr. Foreman, has the jury
24 reached a unanimous verdict?

25 JUROR #40, CHRISTOPHER TOLBERT: Yes.

1 THE COURT: If you would, hand it to the bailiff and
2 we'll receive it and publish it.

3 All right. Yes, ma'am.

4 VERDICT

5 THE CLERK: As to the State v. Joseph Paugh,
6 2009-GS-23-8144, as to the charge of criminal sexual
7 conduct with a minor first degree, we, the jury, unanimous
8 find the Defendant, Joseph Paugh, guilty.

9 THE COURT: Okay. Any matters or motions before the
10 jury is discharged from the State?

11 MS. SEAY: Nothing from the State.

12 THE COURT: From the Defense?

13 MR. SCALZO: I would just renew my prior motions.

14 THE COURT: All right, sir. Do you want to have the
15 jury polled?

16 MR. SCALZO: Yes, Your Honor.

17 THE COURT: All right.

18 THE CLERK: Ladies and gentlemen, the verdict that I
19 have just published was the verdict you reached in the
20 jury room, I ask you, was it your verdict then and is it
21 your verdict now?

22 As I call your name, please, answer "yes" or "no."

23 Christopher Tolbert?

24 JUROR #40, CHRISTOPHER TOLBERT: Yes.

25 THE CLERK: Xiomara Lopez?

1 JUROR #86, XIOMARA LOPEZ: Yes.
2 THE COURT: Hoyt Knox?
3 JUROR #82, HOYT KNOX: Yes.
4 THE COURT: Jose Febres?
5 JUROR #42, JOSE FEBRES: Yes.
6 THE CLERK: Jessica Shead?
7 JUROR #120, JESSICA SHEAD: Yes.
8 THE CLERK: Kevin Robinson?
9 JUROR #120, KEVIN ROBINSON: Yes.
10 THE CLERK: Michael Pakkala?
11 JUROR #107, MICHAEL PAKKALA: Yes.
12 THE CLERK: Luke Hanna?
13 JUROR #58, LUKE HANNA: Yes.
14 THE CLERK: William Griffith?
15 JUROR #57, WILLIAM GRIFFITH: Yes.
16 THE CLERK: Derrick Vigil?
17 JUROR #145, DERRICK VIGIL: Yes
18 THE CLERK: Rita Oberle?
19 JUROR #105, RITA OBERLE: Yes.
20 THE CLERK: Andrea Faulkenberry?
21 JUROR #41, ANDREA FAULKENBERRY: Yes.
22 THE COURT: All right. Thank you.
23 MR. SCALZO: Thank you, Your Honor.
24 THE COURT: Ladies and gentlemen, thank you for your
25 service.

1 This concludes your jury service this week. We don't
2 have any more cases on the docket. And you have a
3 three-year exemption now from Circuit Court jury duty.

4 Ms. Kelley will be glad to provide you with any type
5 of verification you might need for your employer or
6 anything else. And you have our compliments of the
7 courtroom staff up here for being up here all week and
8 your cooperation and patience.

9 So thank you very much.

10 And you're excused.

11 (WHEREUPON, the jury exited the courtroom at
12 approximately 2:53 p.m.)

13 MR. SCALZO: Judge, can I talk to him for two or
14 three minutes before sentencing --

15 THE COURT: Just one second.

16 THE BAILIFF: Judge, they want to know if they can
17 come back around for the sentencing?

18 THE COURT: Yes, absolutely.

19 If you would, just tell them they can come around.

20 Yes, sir, Mr. Scalzo.

21 MR. SCALZO: Can I just talk to him for a couple of
22 minutes before we do the sentencing?

23 THE COURT: Sure.

24 Do you have any motions or anything you want to make
25 at this stage?

MOTIONS

1
2 MR. SCALZO: I would make a motion for a new trial,
3 and, as I said, request the Court -- I would renew all my
4 prior motions.

5 THE COURT: Well, I'll have to respectfully deny
6 that.

7 Thank you very much.

8 Yes, sir. We'll give you a few minutes to consult.

9 MR. SCALZO: Thank you.

10 (WHEREUPON, a break was taken.)

11 THE COURT: All right. Yes, ma'am Ms. Seay.

12 MS. SEAY: May it please the Court.

13 Your Honor, you heard the testimony in this case.
14 And the victim, C [REDACTED] P [REDACTED], does not wish to address
15 the Court, but she has asked me to ask you to impose the
16 maximum sentence that is allowed by law, that she feels
17 that is appropriate. So I am conveying that to you.

18 This is under the zero to 30 statute because it
19 happened prior to July 1st, 2006, when we went to the
20 mandatory 25. So it is under the zero to 30-year statute.

21 He does not have any prior record.

22 THE COURT: All right. Thank you.

23 Mr. Scalzo.

24 MR. SCALZO: May it please the Court.

25 Your Honor, you heard a lot from Joe because he

1 testified. What I would, I guess, say to the Court is,
2 one, it is under the zero to 30. However, it is still an
3 85-percent sentence. Whatever you give him, he will serve
4 85 percent of that and, obviously, come out under
5 community supervision and be subject to going back to
6 prison should he violate that. He, certainly, will have
7 sexual registry -- Sex Offender Registry. It may be an
8 open question on GPS monitoring. But, nonetheless,
9 that's, certainly, another collateral issue that would be
10 out there.

11 I would remind Your Honor, as was just said, he does
12 not have a prior record. And I guess, essentially, he
13 would return to Baltimore, at some point, where the
14 remainder of his family is. But that's all I have, Judge.

15 And I've spoken with Joe after the verdict, I do not
16 believe he has anything to add. But he would, certainly,
17 answer any specific questions, should Your Honor have any.

18 THE COURT: Anything you want to say, sir?

19 DEFENDANT PAUGH: No, sir.

20 SENTENCING

21 THE COURT: Well, the Court is not to comment on the
22 verdict. That's not my place.

23 But I do wish to commend, again, both sides for their
24 excellent representation. Both the Solicitor and
25 Mr. Scalzo did an excellent job in presenting the case and

1 the Defense. And so I commend you for that.

2 And the maximum sentence is 30 years. And I find
3 that this warrants the maximum sentence. He's to be
4 placed on the Sex Offender Registry upon release.

5 Thank you very much.

6 *****END OF TRANSCRIPT OF RECORD*****
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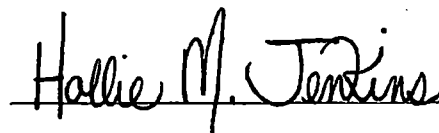
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, 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 the
proceedings had and the evidence introduced in the trial
of the captioned case, relative to appeal, in the Court of
General Sessions for Greenville County, South Carolina, on
the 13th and 14th days of October, 2010.

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

March 28, 2011



Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH PAUGH,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion in allowing an expert witness to improperly vouch for a minor's veracity in a sexual abuse case against Appellant when no physical evidence was presented by the State and the minor's credibility was the critical determination of the case?

STATEMENT OF THE CASE

On June 22, 2010, Joseph Paugh was indicted by the Greenville County Grand Jury for criminal sexual conduct with a minor in the first degree. R. 128.

On October 13, 2010, Paugh proceeded to trial before the Honorable D. Garrison Hill and a jury, where he was represented by Christopher Scalzo. R. 1. The State was represented by assistant solicitor Bryna Seay. R. 1.

On October 14, 2010, the jury found Paugh guilty of criminal sexual conduct with a minor in the first degree. R. 126, ll. 5-8. Judge Hill sentenced Paugh to thirty years imprisonment and ordered that Paugh be placed on the Sex Offender Registry upon release. R. 127, ll. 2-4.

This appeal follows.

STATEMENT OF FACTS

Background

Joseph Paugh's daughter ("Minor Child") was sixteen-years-old at the time of trial, belatedly maintained that her father had sexually abused her (attempted penetration and oral sex) on several occasions when she was younger. R. 3, ll. 5-9; 6, l. 4 – 19; 9, l. 14 – 17, l. 1. Minor Child claimed that the sexual abuse began when she was five-years-old and stopped when she was eleven-years-old because her father moved to Baltimore, Maryland, after her parents' divorce was finalized. R. 10, ll. 3-5; 18, ll. 1-6; 124, ll. 1-11

Minor Child testified that when she turned fourteen, her father called to wish her a happy birthday and told her that "he was having another kid." R. 18, ll. 7-20. Minor Child also testified that her father told her: "I'm having a little girl, but I'm not going to love her no more than I love you." R. 18, ll. 21-22. Minor Child claimed that this statement immediately made her think about how she would not be able "to protect her" half-sister. R. 18, l. 22 – 19, l. 6.

When asked whether her father ever penetrated her, Minor Child stated, "I don't – I've been told that whenever I said that it felt like a cut and I thought it was on the outside, I've been told." R. 16, ll. 14-17. At this time, the trial judge sustained defense counsel's objection to Minor Child's testimony. R. 16, ll. 18-19. The Solicitor subsequently instructed Minor Child to "[j]ust say what you think," and Minor Child stated, "No, I didn't at first. But yeah, I do." R. 16, ll. 23-24.

Minor Child maintained that the next day she was staying at her grandmother's home and that she told her grandmother that "Joe had molested me." R. 19, ll. 23-24. Minor Child also claimed that her grandmother "believed [her] right from the bat." R. 19, l.

24. Defense counsel objected to Minor Child's speculation as to what her grandmother believed, and the trial judge sustained the objection. R. 20, ll. 1-3. Although defense counsel moved to strike the improper comment, the trial judge never ruled on defense counsel's motion. R. 20, l. 4.

Minor Child testified that her grandmother was the first person she had ever told this information and that her grandmother subsequently notified the police. R. 21, ll. 1-18. Minor Child maintained that she was afraid of her father because she claimed he threatened her; if she told anyone about the alleged sexual abuse, he would have DSS take her away from her mother and grandmother, and that he would kill her. R. 10, l. 16 – 11, l. 25; 22, ll. 18-22.

Dr. Nancy Henderson

Before Dr. Nancy Henderson testified, defense counsel requested a bench conference. R. 34, ll. 18-20. Defense counsel argued that the State was presenting Dr. Henderson as an expert "to almost train the jurors to now be experts to evaluate how, even though there isn't evidence of [sexual abuse], there somehow is evidence of [sexual abuse;] I don't think that's the purpose of [an] expert [witness]." R. 46, ll. 22-25. Defense counsel also argued, "what if your Honor heard everything and determined that she wasn't even qualified as an expert?" R. 45, ll. 15-16. Consequently, the trial judge allowed the State to proffer Dr. Henderson's testimony. R. 46, l. 12 – 80, l. 9.

In Camera

Dr. Henderson testified as to her education and experience: She is licensed to practice medicine in the State of South Carolina and has been sub-board certified in child

abuse pediatrics for almost ten months. R. 47, l. 3 – 51, l. 8. Dr. Henderson also testified that she has been certified numerous times as an expert in court. R 51, ll. 13-21.

The State then offered Dr. Henderson as an expert in the field of pediatrics and child sexual assault examinations, and the trial judge found that Dr. Henderson was qualified as an expert in child sexual assault examinations. R. 51, ll. 22-24; 58, l. 14.

Dr. Henderson then testified that she examined Minor Child for the possibility of child sexual abuse. R. 58, l. 18 – 59, l. 1. Dr. Henderson maintained that Minor Child gave a “very extensive history about what happened to her” during the examination. R 60, ll. 14-15. Despite Minor Child’s allegation of abuse, Dr. Henderson testified that she found no abnormal findings (no physical evidence) on Minor Child’s child abuse examination. R. 60, ll. 16-17.

Defense counsel argued that Dr. Henderson’s testimony will not only consist of her failure to find physical evidence during the examination, but in her opinion, she believed that Minor Child was sexually abused since normal examinations are not necessarily indicative of whether sexual abuse occurred. R. 80, l. 11 – 82, l. 1. In response, the trial judge stated, “If [Dr. Henderson] made that opinion, your argument might have validity . . . But she didn’t do that.” R. 82, ll. 13-18.

In other words, defense counsel argued that the sole purpose of Dr. Henderson’s testimony was to bolster Minor Child’s credibility by implying that she believed Minor Child was sexually abused despite no physical evidence was found during the exam. Accordingly, defense counsel further argued to the trial judge that Dr. Henderson’s testimony must be “limited” in scope to prevent her from “making a comment on the believability of the victim.” R. 84, ll. 15-17. The trial judge replied, “Well, in the artificial

world that you just constructed, that would be true," and subsequently denied defense counsel's motion to limit the scope of Dr. Henderson's testimony:

Well, [Dr. Henderson's] got two opinions. One is specific, this case is inconclusive. The second is general, just because something is inconclusive doesn't mean it rules out definitely that abuse occurred. But what you're trying to say is that both of those opinions are specific to this victim. And I don't find that. So I have to deny your motion.

R. 84, ll. 18-19; 86, ll. 18-24.

Again, defense Counsel reiterated his concern to the trial judge that Dr. Henderson's testimony must be limited to time and place pursuant to Rule 801, SCRE. R. 87, l. 1 – 88, l. 18. In response, the trial judge stated, "I applaud your creativity;" however, Dr. Henderson did not address the credibility of Minor Child until defense counsel "started asking her questions about it . . . And, certainly, you can open the door to that. . . ." R. 89, ll. 3-20.

The trial judge found that the three preliminary rulings pursuant to Rule 702, SCRE, were met, and that Dr. Henderson was qualified as an expert. R. 89, l. 20 – 91, l. 3. The trial judge then asked the assistant solicitor, "So let me clarify . . . The testimony from Dr. Henderson is going to be confined to the Rule 801 time and place, correct?" R. 91, ll. 10-12. The assistant solicitor replied, "Yes, sir . . . I will do that, yes." R. 91, l. 13.

The trial judge then requested that the jury return to the courtroom. R. 61, ll. 14-15.

In the Presence of the Jury

On direct-examination and with no break in the testimony, Dr. Henderson testified that she obtained Minor Child's "medical history" and that Minor Child had indicated to her during the medical examination that she had been sexually assaulted. R. 102, ll. 15-22. Dr. Henderson also testified that Minor Child's medical evaluation was normal, but that Minor

Child's normal exam still could be consistent with the medical history of sexual assault in her case because "[i]n my experience, as well as in the medical literature, the majority of time children will have normal exams when they're evaluated for child sexual abuse." R. 101, ll. 6-7; 102, l. 25 – 103, l. 6.

On cross-examination, Dr. Henderson testified that in obtaining Minor Child's "medical history," she did not refer to any of Minor Child's prior medical records or contact Minor Child's pediatrician; instead, Dr. Henderson relied solely on what Minor Child had told her and the physical examination, which was normal (no physical evidence present). R. 116, ll. 7-18.

On redirect examination, the solicitor asked Dr. Henderson, "Despite the fact that [Minor Child] did not have any abnormalities on her medical exam, *could that still be consistent with the history that [Minor Child.] gave you of her sexual assault?*" R. 117, ll. 5-8. Dr. Henderson replied, "*Yes, it could.*" R. 117, l. 9. (emphasis added).

On recross examination, defense counsel asked Dr. Henderson, "And because you did not find . . . physical evidence that it did not happen, you're leaving open the possibility that it could have happened?" R. 118, ll. 10-12. Dr. Henderson replied, "*Based on all the information that I had and her having a normal exam, I did feel like it could have happened.*" R. 118, ll. 13-15. (emphasis added).

Cross Examination of Joseph Paugh

On cross-examination of the defendant, the first words spoken by the solicitor were "*How do you look at yourself in the mirror every day after what you did to your daughter.*" R. 125, ll. 9-10. (emphasis added). After the trial judge sustained defense counsel's contemporaneous objection, the solicitor stated, "I withdraw the question . . . And

I have no further questions.” R. 125, ll. 13-14. Defense counsel then replied, “I don’t have any redirect, Judge.” R. 125, l. 15.

ARGUMENT

The trial court abused its discretion in allowing an expert witness to improperly vouch for a minor's veracity in a sexual abuse case against Appellant because no physical evidence was presented by the State and the minor's credibility was the critical determination of the case.

The South Carolina Supreme Court has held that it is improper for an expert to comment on the veracity of a child's accusations of sexual abuse. *State v. Jennings*, 394 S.C. 473, 716 S.E.2d 91 (2011); *See State v. Dawkins*, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); *see also State v. Dempsey*, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child); *but see State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009) (finding that it was unnecessary for the trial court to qualify the interviewer as an expert, but that the interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no other indication concerning the victim's veracity).

In this case, the trial judge erred by not limiting the scope of Dr. Henderson's expert testimony because her opinion testimony improperly vouched for Minor Child's credibility. *Id.*; R. 46, ll. 22-25; 80, l. 11 – 90, l. 25; 118, ll. 13-15. There is no other way to interpret Dr. Henderson's improper opinion testimony: "***Based on all the information that I had . . . I did feel like it could have happened;***" other than to mean that Dr. Henderson believed Minor Child was being truthful during her examination about her father sexually abusing her. *Id.*; R. 118, ll. 13-15. (emphasis added).

Furthermore, similar to *Jennings*, 394 S.C. 473, 716 S.E.2d 91, there was no physical evidence presented to prove Paugh sexually assaulted his daughter, and the only evidence presented by the State was Minor Child's account of what occurred and other hearsay evidence.¹ R. 2, l. 18 – 33, l. 15; 60, ll. 12-17; 101, ll. 2-7; 116, ll. 18-24; 117, ll. 19-22. Thus, the trial judge's decision not to limit the scope of Dr. Henderson's improper opinion testimony was not harmless error because Minor Child's credibility was the critical determination of this case. *Id.*; See *State v. Ellis*, 245 S.C. 175, 178, 547 S.E.2d 490, 492 (2001) (noting that "[a]n officer's improper opinion which goes to the heart of the case is not harmless."); R. 80, l. – 86, l. 24.

Although the assistant solicitor's sole question to Paugh on cross-examination is not an issue before this Court, it is clear that the assistant solicitor's improper question was an unfair trial tactic that was deliberately calculated to prejudice Paugh by denying him of his due process right to a fair trial, particularly when no physical evidence was presented by the State and the credibility of the minor was the critical determination of this sexual abuse case.²

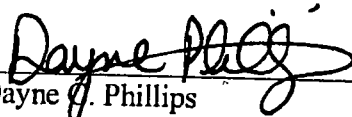
¹ Minor Child improperly stated that her grandmother "believed" her, but is unable to testify because she is "bedridden" due to a recent back surgery. R. 19, l. 23 – 21, l. 12.

² See *State v. McGill*, 191 S.C. 1, 3 S.E.2d 257, 261 (1939) (finding that a Solicitor "is a quasi judicial officer, and. . . that a solicitor must not, because of the high position he holds; say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law."); see also *State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) (finding that "[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated."); *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1999) (finding that prosecutorial misconduct usually involves a prosecutor's improper effort to collect evidence or unfair trial tactics); *State v. Quattlebaum*, 338 S.C. 441, 449, 527 S.E.2d 105, 109 (2000) (finding that deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice).

CONCLUSION

For the foregoing reasons, Paugh respectfully requests that this Court reverse his convictions and remand this case to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,


Dayne C. Phillips
Appellate Defender

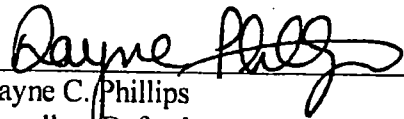
ATTORNEY FOR APPELLANT

This 21st day of June, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 21st, 2012


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

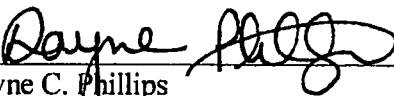
V.

JOSEPH PAUGH,

APPELLANT

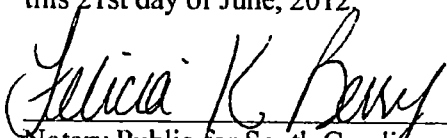
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of June, 2012.


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of June, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

The State,

Respondent,

v.

Joseph Paugh,

Appellant.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in allowing the expert's testimony.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court did not err in allowing the expert's testimony.

Appellant contends the trial court erred in allowing the testimony of the State's expert in pediatrics and child sexual assault examination. The expert properly testified and her testimony did not constitute impermissible bolstering or vouching. Further, the issue is not preserved for review on appeal and was of Appellant's own making.

The State sought to put forth the testimony of Dr. Henderson, the chairman of the Division of Forensic Pediatrics with the Greenville Hospital System. Prior to presenting her testimony to the jury, Appellant asked the court to require her to testify *in camera* regarding her qualifications and her subsequent testimony. She did and the court found her qualified in pediatrics and child sexual abuse examinations. Further, she testified while the physical exam of the victim was normal, a normal exam could still be consistent with the history of sexual assault presented by the victim. (T.116; R. 63). Dr. Henderson never indicated she believed the victim's story; instead, she stated a normal exam did not rule out the possibility of a sexual assault.

After conducting *in camera* cross-examination in which he unsuccessfully sought numerous times to get Dr. Henderson to say she believed the child, Appellant's counsel asked to limit her testimony. (T.118-133; R. 65-80). He argued the only reason behind the testimony was to bolster and vouch for the child's accusation. He sought a limitation to prevent Dr. Henderson from "making a comment on the believability of the victim." (T.137; R. 84).

The court found Dr. Henderson never indicated she believed the child's statement or made any comments regarding the child's credibility. He noted the issue may arise in the "artificial world" Appellant's counsel constructed but did not arise in the actual testimony by the expert. The court found she made a simple two part finding: 1) a specific finding that the test in this case was normal or inconclusive regarding sexual assault, and 2) just because something is inconclusive doesn't mean it rules out definitely that the abuse occurred. (T.139; R. 86). The trial court also explained that Appellant's attorney's motion may have validity regarding restricting her testimony if she had indicated in any way she believed the victim. The court noted: "She didn't say that until you started asking her questions about it. And, certainly, you can open the door to that, if you want to." (T. 142; R. 89). The trial court's finding in no way prevented Appellant from objecting to any testimony he believed improper.

In front of the jury, Dr. Henderson explained she was board certified in pediatrics and sub-board certified in adolescent medicine and child abuse pediatrics. She indicated over the previous five years, fifty percent of her training has been in the area of child abuse and neglect. (T.146; R. 93). She then testified to her extensive experience, and indicated she testifies as an expert in either family or criminal court two or three times a month. (T.147-150; R. 94-97). The court qualified her as an expert in pediatrics and child sexual assault examination. This qualification has not been challenged on appeal.

Dr. Henderson testified she conducted a physical examination of the child victim. She indicated the exam was normal, and she does not expect to always find evidence of trauma following a sexual assault. (T.152-154; R. 99-101). She then explained why there could be limited trauma due to the nature of the hymen and the penetration. (T.154-

155; R. 101-102). She also explained she took a medical history from the child victim which included the victim's statement she had been sexually assaulted. She then explained the normal exam could still be consistent with the medical history. She testified that many times children would have normal exams because they wait to come forward, the genital area heals quickly, and the type of abuse may not lead to any trauma or other observations on an exam. (T.156-157; R. 103-104). Appellant never objected during any of this testimony.

On cross-examination, Appellant further explored Dr. Henderson's findings. Dr. Henderson admitted she did not review any other medical records for the child, but did obtain a history from the child and mother. (T.168-169; R. 115-116). Dr. Henderson iterated there were no abnormalities on her medical exam. (T.169; R. 116).

On redirect, the State asked: Despite the fact that she did not have any abnormalities on her medical exam, could that still be consistent with the history that she gave you of her sexual assault?" Dr. Henderson replied, "Yes, it could." (T.170; R. 117). This testimony does not indicate she believed the child or the child was telling the truth. It simply indicates a normal examination does not rule out sexual assault in a child. Importantly, there was no objection raised to this testimony by Appellant.

On recross, Appellant's attorney confirmed Dr. Henderson indicated there were no abnormalities. Then, he confirmed Dr. Henderson indicated it was possible the sexual abuse could have taken place even with a normal examination. (T.170-171; R. 117-118). Appellant's counsel finally asked: "And because you did not find a - - I guess physical evidence that it did not happen, you're leaving open the possibility that it could have happened?" Dr. Henderson responded: "Based on all the information that I had and her

having a normal exam, I did feel like it could have happened.” (T.171; R. 118). This testimony was elicited by Appellant and, again, no objection was made at the time Dr. Henderson made the statement.

Appellant has failed to preserve any issue for review on appeal. While he sought to make a preliminary limitation on the testimony by Dr. Henderson, the court found no part of her testimony vouched for the child or indicated she believed the child. The court found the limitation not necessary, but instead indicated if the testimony had vouched for the child or indicated the child was telling the truth then in that “artificial world” there could be error. Even if the court had limited Dr. Henderson by instructing her not to indicate she believed the child—which he in effect did by indicating that could be error—it would still be incumbent on Appellant to object when improper testimony was admitted before the jury. Appellant never objected to any testimony by Dr. Henderson in front of the jury. As a result, the issue is not preserved for review on appeal. See State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) (“A contemporaneous objection is required to properly preserve an error for appellate review.”).

Additionally, the only testimony Appellant raises as an example of vouching or commenting on the child’s veracity was the testimony he elicited on recross. He does not object, even on appeal, to any of the testimony elicited by the State during its examination of Dr. Henderson. At trial, Appellant elicited the only alleged error in testimony, and as a result, he cannot now raise that issue on appeal. See State v. O’Neal, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) (“An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector. Under this well known rule, the appellants are in no position to complain of the court’s

ruling.”); see also, State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984) (finding a party cannot complain of an error which his own conduct has induced.)

On the merits, the issue also fails. “For an expert to comment on the veracity of a child's accusations of sexual abuse is improper.” State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011). See also, State v. Dawkins, 297 S.C. 386, 393–94, 377 S.E.2d 298, 302 (1989) (finding therapist indicating he believed victim's allegations were genuine was improper); State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000) (finding therapist's testimony children were being truthful in ninety-five percent of instances in which sexual abuse was alleged was improper vouching for child).

The testimony by Dr. Henderson did not indicate she believed the child or vouched for the child. The testimony simply indicated even with a normal examination it was possible the sexual abuse described by the child could have occurred. Dr. Henderson never testified it did occur, or she believed it occurred, or that the child was telling the truth. Her testimony solely indicated it was possible to have occurred and for the child to still have a normal medical examination.

As a result, even if Appellant had properly objected to the testimony preserving the issue, and even if the only testimony complained of on appeal had not been elicited by Appellant's own counsel, the testimony would still be properly admissible.¹

¹ Finally, the State addresses the highly inappropriate commentary by Appellant in both his statement of facts and argument of the issue on appeal. While the entirety of Appellant's appeal focuses on the alleged improper testimony by the State's medical expert, he brings in superfluous and entirely irrelevant testimony at the end of his statement of facts and argument on appeal. In doing so, Appellant's counsel readily admits the cross-examination of the Appellant “is not an issue before this Court,” but still finds it necessary to make allegations regarding prosecutorial misconduct and the denial of a fair trial. It should be noted, Appellant objected to the statement by the solicitor and the trial court sustained the objection. The solicitor withdrew the question and no further motion was made by Appellant's counsel even though appellate counsel now maintains the comment was deliberately calculated to prejudice Appellant, and denied him his due process right to a fair trial. (T.220; R. 125). The commentary, innuendo, and frivolous accusations have no basis being presented in a brief regarding a completely unrelated issue.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 7, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

The State,

Respondent,

v.

Joseph Paugh,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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ATTORNEYS FOR RESPONDENT

June 7, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

The State,

Respondent,

v.

Joseph Paugh,

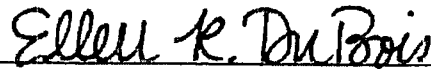
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Dayne C. Phillips, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 11th day of June, 2012.



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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH PAUGH,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The issue before the Court is preserved for review on appeal.

The South Carolina Supreme Court has held that, although a ruling from a motion *in limine* is generally not a final determination, “where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection.” *State v. Forrester*, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001) (noting “[b]ecause no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling”) (quoting *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995)).

Furthermore, this Court has acknowledged “the rule that an unpreserved issue will not be considered on appeal does have its exceptions.” *State v. Passmore*, 363 S.C. 568, 584-585, 611 S.E.2d 273, 282 (Ct. App. 2005). One exception is “the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused.” *Id.*; *See State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding “[a]s to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile.”); *see also State v. Higgenbottom*, 344 S.C. 11, 542 S.E.2d 718 (2001) (employing futility doctrine). Additionally, Rule 18(a), SCRCrimP, states, “[c]ounsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced.”

In this case, this issue before the Court is preserved for review on appeal for two reasons. First, “there was no basis for the trial court to change its ruling” since the trial

judge overruled defense counsel's objections "immediately prior to the introduction of the evidence in question" ROA 46, ll. 22-25; 80, l. 11 – 91, l. 13; *Cf. State v. Forrester*, 343 S.C. at 642-43, 541 S.E.2d at 840 (quoting *State v. Mueller*, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410).

Second, the issue is also preserved for review on appeal pursuant to the doctrine of futility and Rule 18(a), SCRCrimP. This is because defense counsel raised multiple objections to Dr. Henderson testifying as to whether she believed the minor child was sexually abused, and the trial judge acknowledged and overruled those objections. ROA 46, ll. 22-25; 80, l. 11 – 90, l. 25. Therefore, defense counsel's objections are "pristinely preserved." *State v. Covet*, 368 S.C. 188, 202, 628 S.E.2d 482, 490 (Ct. App. 2006).

II. The solicitor's first and only question on cross-examination of Appellant is related to the issue of improperly bolstering the minor child's credibility and relevant to establish additional prejudice to Appellant.

On page 7, footnote 1, of Respondent's brief, the State maintained that Appellant presented "highly inappropriate commentary . . . in both his statement of facts and argument of the issue on appeal."¹ Specifically, the State claimed that Appellant's "allegations regarding prosecutorial misconduct and the denial of a fair trial" were "superfluous and entirely irrelevant" and "have no basis being presented in a brief regarding a completely unrelated issue."

In this case, although the solicitor's improper question on cross-examination of Appellant is not the primary issue before the Court, it is related to the issue of improperly bolstering the minor child's credibility and is relevant to establish additional prejudice against Appellant. As to vouching for the minor child's credibility, the solicitor's *first and*

¹ From Appellant's Brief - Statement of Facts, page 9:

On cross-examination of the defendant, the first words spoken by the solicitor were "*How do you look at yourself in the mirror every day after what you did to your daughter.*" ROA 125, ll. 9-10. (emphasis added). After the trial judge sustained defense counsel's contemporaneous objection, the solicitor stated, "I withdraw the question . . . And I have no further questions." ROA 125, ll. 13-14. Defense counsel then replied, "I don't have any redirect, Judge. ROA 125, l. 15.

From Appellant's Brief - Argument, page 11:

Although the assistant solicitor's sole question to Paugh on cross-examination is not an issue before this Court, it is clear that the assistant solicitor's improper question was an unfair trial tactic that was deliberately calculated to prejudice Paugh by denying him of his due process right to a fair trial, particularly when no physical evidence was presented by the State and the credibility of the minor was the critical determination of this sexual abuse case. (footnote omitted).

only question on cross-examination of Appellant implied that the solicitor believed the minor child's testimony and that Appellant is guilty of sexually abusing his daughter.² ROA 125, ll. 9-10. *See State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805, *cert. denied*, 534 U.S. 977, 122 S.Ct. 404 (2001) (noting "a solicitor: cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness.... Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony....") (citations omitted).

Furthermore, the solicitor's improper question on cross-examination of Appellant is relevant to establish additional prejudice against Appellant because the trial hinged on the credibility of both the minor child and Appellant, and no physical evidence was presented by the State. *See State v. McGill*, 191 S.C. 1, 3 S.E.2d 257, 261 (1939) (finding that a Solicitor "is a quasi judicial officer, and . . . that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law"). This illustrates a pattern of improper questions by the solicitor, which prejudiced Appellant's ability to receive a fair trial. *See generally State v. Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956) (finding a prosecuting attorney has a duty to treat the defendant in an impartial manner); *see also State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1999) (finding that prosecutorial misconduct usually involves a prosecutor's improper

² "How do you look at yourself in the mirror every day after what you did to your daughter." (emphasis added). ROA 125, ll. 9-10.

effort to collect evidence or unfair trial tactics).

The South Carolina Supreme Court noted in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31, n. 18 (2011):

We will not tolerate witness intimidation from anyone, including the Solicitor's office. Furthermore, we are deeply concerned that the Solicitor's behavior represents a pattern of misconduct that continues to undermine our state's system of justice. Specifically, *this Court is concerned with the "win at all costs" attitude that appears to permeate the Solicitor's office*. Because the plea judge determined that the Solicitor's conduct was not intentional, we reluctantly defer to that factual finding. However, we note that in the future such misconduct may result in disciplinary proceedings.

(emphasis added). Because the solicitor's *highly inappropriate* question on cross-examination was her *first and only* question to Appellant, common sense provides that the solicitor deliberately calculated to prejudice Appellant by using an unfair trial tactic. See *State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) (noting that "[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated"); see also *State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) (finding "[p]rosecutors are ministers of justice and not merely advocates . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. . . . We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice").

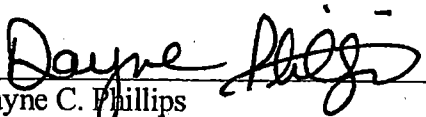
Accordingly, even if this Court does not find that Dr. Henderson's improper vouching for the minor child's veracity requires reversal, the totality of the prejudice against Appellant amounts to a denial of a fair trial. See *State v. Dawkins*, 297 S.C. 386, 377

S.E.2d 298 (1989) ("We caution prosecutors throughout this state to be mindful of the words of Mr. Justice Sutherland: 'The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. *He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*' ") (quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) (emphasis added)).

CONCLUSION

For the foregoing reasons, Appellant Joseph Paugh respectfully requests that this Court reverse his convictions and remand this case to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT.

This 21st day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH PAUGH,

APPELLANT

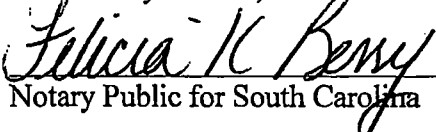
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon William Blitch, Jr, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 21st day of June, 2012.


Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 21st day of June, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: June 21, 2020.

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

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

The State, Respondent,

v.

Joseph Paugh, Appellant.

Appellate Case No. 2010-175787

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2012-UP-659
Submitted October 1, 2012 – Filed December 19, 2012

AFFIRMED

Appellate Defender Dayne C. Phillips, of Columbia, for
Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, Assistant Deputy
Attorney General William M. Blich, Jr., all of Columbia;
and Solicitor W. Walter Wilkins, III, of Greenville, for
Respondent.

PER CURIAM: Joseph Paugh appeals his conviction of first-degree criminal sexual conduct with a minor, contending the trial court erred by not limiting the scope of the State's expert testimony because her testimony improperly vouched for the minor's credibility. We affirm¹ pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Jennings*, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." (citation and internal quotation marks omitted)); *In re Manigo*, 389 S.C. 96, 106, 697 S.E.2d 629, 634 (Ct. App. 2010) ("[An expert witness] may base his or her opinion on information, whether or not admissible, . . . if the information is of the type reasonably relied upon in the field to make opinions."); *State v. Douglas*, 380 S.C. 499, 503-04, 671 S.E.2d 606, 609 (2009) (stating the interviewer did not vouch for the victim's veracity where she never stated she believed the victim and gave no indication concerning the victim's veracity); *State v. O'Neal*, 210 S.C. 305, 312, 42 S.E.2d 523, 526 (1947) ("An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector."); *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (stating a party cannot complain of an error which his own conduct has induced).

AFFIRMED.

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

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

**RECEIVED**

JAN 14 2013

ATTORNEY GENERAL

The South Carolina Court of Appeals

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CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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January 11, 2013

The Honorable Paul B. Wickensimer
Courthouse
305 E North St
Greenville SC 29601-2121

REMITTITUR

Re: The State v. Paugh, Joseph
Lower Court Case No. 2009GS2308144
Appellate Case No. 2010-175787

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: William M. Blitch, Jr.
Dayne C. Phillips

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)JOSEPH PAUGH # 343216)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2013-CP-23-

06/53

APPLICATION FOR

POST-CONVICTION RELIEF

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. TICKENBARGER
2013 JUN 3 PM 2 41INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LEE CORRECTIONAL INST. 990 Wiscoky Highway, Bishopville S.C. 29
2. Name and location of Court which imposed sentence GREENVILLE SESSION COURT
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-23-8144 Criminal Sexual conduct with minor
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) OCTOBER 13 and 14, 2010 30 yrs
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Jury Trial
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES S.C. Court of Appeal
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeal
- ii. "
- iii. "
- (b) the result in each such Court to which you appealed:
- i. Unpublished opinion No. 2012-UP-659
- ii. "
- iii. "
- (c) the date of each such result:
- i. Submitted Oct 01, 2012
- ii. Filed December 19, 2012
- iii. "
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Affirmed
- ii. "
- iii. "
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) SEEK REVERSAL OF OFFENSE
- (b) "
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (i) INEFFECTIVE ASSISTANCE OF COUNSEL 2254 (c)(2), (C)(3) PARAGRAPH (2)
- (b) DIRECTED APPEAL, DUE PROCESS VIOLATION
- (c) MALICIOUS PROSECUTION, PROSECUTORIAL MISCONDUCT

11. State concisely and in the same order the facts which support each of the grounds set out

- in (10): STRICKLAND vs. WASHINGTON 446 U.S. 168, 104 S.Ct. 295 (1982)
- (a) U.S. vs. CROWE, 446 U.S. 168 (1984) SEE ATTACH SHEET
- (b) EVITT vs. LOBEY, 105 S.Ct. 830 (1983)
- (c) GRIFFIN vs. ILLINOIS, 357 U.S. 12, 100 L.Ed. 2d 191, 76 S.Ct. 585 (1964)
STATE vs. PAULING, — S.Ct. —, — S.Ct. 22 —, (2003)

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. NONE

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. NONE

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. NONE

ii. _____

iii. _____

- iv. _____
- (d) the date of each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Post Conviction Relief

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

- (a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. Christopher D. Scatzo
- ii. Wayne C. Phillips
- iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Trial
- ii. Directed Appeal
- iii. _____

19. State clearly the relief you seek in filing this application:

Reversal and Vacated

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I, _____, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

* Joseph E. Parry

SWORN to and subscribed before me this 8
day of April, 2013.

Maurice W. Mills (L.S.)
Notary Public

My Commission Expires: 3/8/2020

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

I, Joseph Paragh, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Joseph Paragh
Applicant

SWORN or affirmed to and subscribed before me this

16 day of Oct., 2013.

Delma Series
Notary Public

My Commission Expires: 11-4-2015

STATEMENT OF ISSUE ON Appeal

Did the Trial Court abuse its discretion in allowing an expert witness to improperly vouch for a minor's veracity in a sexual abuse case against Appellant when no physical evidence was presented by the State and the minor's credibility was the critical determination of the case. SEE STATE VS. BROWN, op. No. 2003-UP-274 (S.C. Ct. App. File April 15, 2003. (EXCEPT THREE COUNT OF FIRST DEGREE CSC REVERSED)

STATEMENT OF THE CASE

On June 22, 2010, Joseph Paugh was indicted by the Greenville County Grand Jury for criminal sexual conduct with a minor in the first degree. R. There is no element in body of Indictment nor do it meet the S.C. Code 17-19-10, 17-19-20, 17-19-30, 17-19-92

On Oct 13, 2010, Paugh proceeded to trial before the Honorable D. Garrison Hill and Jury, where he was represented by Christopher Scalzo, Tr. 1. The State was represented by Assistant Solicitor Bryan Sney, Tr. 1.

On Oct 14, 2010, the Jury found Paugh guilty of criminal sexual conduct with a minor in the first degree. Tr. 270, 115-3. Judge Hill sentenced Paugh to thirty years imprisonment and ordered that Paugh be placed on the Sex Offender Registry upon release. STATE VS. Paugh — S.C. —, (2003) vacated CSC Charge. S.C. Court. Supreme, J. E.C. BURNETT, III

Tr. 275, 11.2-4
This Appeal follows.

FIRST ISSUE'S

Appellant argued that the S. Court of Appeal violated his constitutional right of the S.C. Const. Article I, Section 14 and Fed. Cons 6th Amendment, as the Court of Appeal submitted this unpublished

Opinion Case No. 2012-UP-059, CREATING A DUE PROCESS VIOLATION³²⁹ -
CITING Griffin vs. Illinois, 351 U.S. 12, 100 L. Ed. 2d 841, 76 S. Ct. 585
(1956) STATING EVERY DEFENDANT OR APPELLANT HAS A RIGHT TO A EFFECT
IVE DIRECTED APPEAL... CITING Evitts vs. Lucey, 105 S. Ct. 830 (1983)
APPELLATE COUNSEL WAS INEFFECTIVE WHEN HE/SHE FAILED TO FILE A
SANCTION AND PETITION TO THE S.C. COURT OF APPEAL AS THIS COURT
DEPRIVE COUNSEL AND APPELLANT TO PRESENT ORAL ARGUMENT ON
THE MERIT OF THIS CASE.

ISSUE'S TWO

Appellant argued that the STATE has present PROSECUTORIAL
MISCONDUCT AND MALICIOUS PROSECUTION AS THE RECORD PRESENT
TO EVIDENCE THAT THE STATE TRIED APPELLANT ON A THEORY BEFORE
A JURY... WHEN STATE EXPERT WITNESS MORELY FORSAKE HER OWN
PERSONAL OPINION THAT THIS ACTED TOOK PLACE AS THE STATE FAILED
TO PRESENT EVIDENCE TO JURY BEYOND A REASONABLE DOUBT... AS WELL
THE JURY'S ALSO ACTED ON THEIR OWN PERSONAL OPINION... BEING THAT
A MINOR (CHILD) INVOLVED THE STATE SOLE CASE SURROUNDING EVERY
ONE MIX EMOTION WHICH CLOUDED THEIR JUDGMENT.

ISSUE'S THREE

Appellant argued that his counsel failed to INVESTIGATE OR SOUGHT
IT'S OWN EXPERT WITNESS TO TESTIFY ON HIS CLIENT BEHALF... BUT COUNSEL
~~WAS~~ ALSO ALLOW HIMSELF TO BECOME MIX EMOTIONS... HAD COUNSEL CALL
WITNESSES FOR HIS CLIENT AND SOUGHT TESTIMONY FROM THESE DEFENSE WIT
NESSES MEANING FAMILY'S, FRIEND, SCHOOL TEACHER, PREACHER, AND ETC.
SEE. U.S. vs. Cronic

ISSUE'S FOUR

Well [DR. HENDERSON] GOT TWO OPINIONS. ONE IS SPECIFIC, THIS

CASE IS INCONCLUSIVE. THE SECOND IS GENERAL, JUST BECAUSE
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SOMETHING IS INCONCLUSIVE DOESN'T MEAN IT RULES OUT DEFINITELY
THAT ABUSE OCCURRED. BUT WHAT YOU'RE TRYING TO SAY IS THAT
BOTH OF THOSE OPINIONS ARE SPECIFIC TO THIS VICTIM. APPELLANT
ARGUED THAT THIS TESTIMONY HAS PREJUDICE HIM AT EVERY STAGE
OF BEING FALSELY ACCUSED AS THE STATE MERELY PRESENT PREJUDICED
EVIDENCE TO OBTAIN A CONVICTION AND KNOW IN HIS/HER
CAREER.

ISSUE'S FIVE

ON DIRECT - EXAMINATION AND WITH NO BREAK IN THE TESTIMONY,
DR. HENDERSON TESTIFIED THAT SHE OBTAINED C.P.'S "MEDICAL
HISTORY" AND THAT C.P. HAD INDICATED TO HER DURING THE
MEDICAL EXAMINATION (HEARSAY) THAT SHE HAD BEEN SEXUALLY
ASSAULTED. Tr. 155, 11 15-22. DR. HENDERSON ALSO TESTIFIED THAT
C.P.'S MEDICAL EVALUATION WAS NORMAL, BUT THAT C.P.'S NORMAL
EXAM STILL COULD BE CONSISTENT WITH THE MEDICAL HISTORY OF
SEXUAL ASSAULT IN HER CASE BECAUSE [IN MY EXPERIENCE, AS
WELL AS IN THE MEDICAL LITERATURE, THE MAJORITY OF TIME CHILD
REN WILL HAVE NORMAL EXAMS WHEN THEY'RE SO EVALUATED OF PHYSICAL
EVIDENCE FOR CHILD SEXUAL ABUSE." Tr. 154, 11 67, 155, 1, 25
- 156, 1.6

ISSUE'S SIX

CROSS EXAMINATION OF JOSEPH PAUGH.

ON CROSS - EXAMINATION OF THE DEFENDANT, THE FIRST WORDS
SPOKEN BY THE SOLICITOR WERE... HOW DO YOU LOOK AT YOUR
SELF IN THE MIRROR EVERY DAY AFTER WHAT YOU DID TO
YOUR DAUGHTER." Tr. 220 11. 9-10 (EMPHASIS ADDED). AFTER
THE TRIAL JUDGE SUSTAINED DEFENSE COUNSEL'S CONTEMPORARY
OBJECTION, THE SOLICITOR STATED, I WITHDRAW THE QUESTION... AND I HAVE NO FURTHER QUESTIONS. Tr. 220, 11 13-14.

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DEFENSE COUNSEL THEN REPLIED, I DON'T HAVE ANY REDIRECT
JUDGE.

1. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTION TO THE SOLICITOR GENERAL'S IMPROPER COMMENT TO TAIN THE JURY'S THOUGHT AND SEAL A WRONGFUL CONVICTION

2. COUNSEL WAS INEFFECTIVE FOR NOT REQUESTING A MISTRIAL ON THIS PROSECUTORIAL MISCONDUCT WAS DISPLAYED BEFORE A JURY'S WHO LACK AND UNDERSTAND THE CONCEPTS OF OUR JUDICIAL SYSTEM

3. COUNSEL WAS INEFFECTIVE FOR NOT POINTING OUT THAT THE STATE HAS VIOLATE THE S.C.R.E. RULE 403. SEE: STATE VS. COLLINS, No. 4941 S.C. COURT OF APPEAL. SEE STATE VS. ADAMS, 354 S.C. 36 378, 580 S.E.2d 785 (Ct. App. 2003). A TRIAL JUDGE'S DECISION REGARDING THE COMPARATIVE PROBATIVE VALUE AND PREJUDICIAL EFFECT OF EVIDENCE SHOULD BE REVERSED ONLY IN EXCEPTIONAL CIRCUMSTANCES. WE ARE OBLIGATED TO GIVE GREAT DEFERENCE TO THE TRIAL COURT'S JUDGMENT [REGARDING RULE 403] (WHICH CITATION OMITTED).

PROBATIVE VALUE

RULE 403 PROVIDE THAT [A]LTHOUGH RELEVANT EVIDENCE MAY BE EXCLUDED IF ITS PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHT BY THE DANGER OF UNFAIR PREJUDICE. PROBATIVE MEANS [T]ENDING TO PROVE OR DISPROVE. BLACK LAW DICTIONARY 1323 (9TH ED. 2009). PROBATIVE VALUE IS THE MEASURE OF THE IMPORTANCE OF THAT TENDENCY TO THE OUTCOME OF A CASE. IT IS THE WEIGHT THAT A PIECE OF RELEVANT EVIDENCE WILL CARRY IN HELPING THE TRIER OF FACT DECIDE THE ISSUES. 390 S.C. AT 623, 703 S.E.2d AT 328 (EMPHASIS ADDED). THE EVALUATION OF PROBATIVE VALUE CANNOT BE MADE IN THE

Abstract, but should be made in the practical context of the issue at stake in the trial of each case. ~~SEE~~ SEE: STATE VS. HYLES, 374 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008) When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will turn on the facts of each case. SEE: STATE VS. GILLIAN, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)

EXPERT WITNESS

Under Rule 702 S.C.R.E. a witness may be qualified as an expert if the Judge find that his/her expertise will assist the trier of fact, the expert possesses the requisite knowledge, skill, experience, training, or education and the expert's testimony is reliable. SEE: Rule 702 S.C.R.E. IN STATE VS. WHITE, 382 S.C. 265, 676 S.E.2d 684 (2009) the Supreme Court noted that the trial court has a gate keeping function in assuring the reliability of expert testimony - whether scientific or non-scientific. SEE: STATE VS. HADDIS 391 S.C. 508, 706 S.E.2d 40 (Ct. App. 2011). This Court rejected the argument that a forensic toxicologist had insufficient training or expertise to allow him to give his opinion regarding the effects of drugs and alcohol on the body.

Opinion and Expert Testimony

Rule 702 S.C.R.E. Rule of Evidence / 703

The reliability factor for admission of scientific evidence, take into consideration; (1) the publication and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedure, STATE VS. JONES, 343 S.C. 562, 541 S.E.2d 813 REHEARING DENIED, STATE VS. WHITE, 372 S.C. 364 642 S.E.2d 607 REHEARING DENIED, CERTIORARI GRANTED.

15.6
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IN RE ROBERT R., 340 S.C. 242, 531 S.E.2d 301 (S.C. App. 2000)
REHEARING DENIED STATE VS. COUNCIL, 120 S.Ct. 585, 528 U.S. 1050
145 L.Ed.2d 489 grant of post conviction relief, REVERSE IN
PART, 380 S.C. 159, 670 S.E.2d 356, 129 S.Ct. 2770, 174 L.Ed.
2d 284, CRIMINAL LAW KEY 469.1 CRIMINAL LAW KEY 478 (1) CRIMINAL
LAW KEY 488. Scientific evidence is admissible if the trial
judge determined (1) the evidence will assist the trier of
fact; (2) the expert witness is qualified; (3) the underlying
science is reliable, and (4) the probative value of the evidence
outweighs its prejudicial effect. STATE VS. JONES, 343 S.C.
562, 541 S.E.2d 813 REHEARING DENIED, APPEAL AFTER NEW TRIAL
681 S.E.2d 580 CRIMINAL LAW KEY 469

TO WARRANT REVERSAL BASED ON THE ADMISSION OR EXCLUSION OF
EVIDENCE, THE COMPLAINING PARTY MUST PROVE BOTH THE ERROR
OF THE RULING AND THE RESULTING PREJUDICE. TO SHOW PREJUDICE
THERE MUST BE A REASONABLE PROBABILITY THAT THE JURY'S VERDICT
WAS INFLUENCED BY THE CHALLENGED EVIDENCE OR LACK THEREOF. SEE
STATE VS. WHITE, 372 S.C. 364, 642 S.E.2d 607 (S.C. App. 2007) REHEAR-
ING DENIED, CERTIORARI GRANTED, AFFIRMED BUT CRITICIZED. 382
S.C. 265, 676 S.E.2d 684 CRIMINAL LAW KEY 1169.1 (1) CRIM. LAW KEY
1170. (1)

28 U.S.C.A. 2253 (c) A PRISONER SATISFIES THIS STANDARD
BY DEMONSTRATING THAT REASONABLE JURISTS WOULD FIND THIS
COURT'S ASSESSMENT OF HIS CONSTITUTIONAL CLAIMS IS DEBATABLE
OR WRONG AND THAT ANY DISPOSITIVE PROCEDURAL RULING BY
THE DISTRICT COURT IS LIKEWISE DEBATABLE. SEE: MILLER ET AL VS.
COCKWELL, 537 U.S. 322, 336 (2003) SEE: SHOCK VS. MCCARTHER, 529
U.S. 473, 484 (2000) SEE ROSE VS. LEE, 252 F.3d 676, 683 (4th
Cir. 2001) IN THIS CASE THE LEGAL STANDARD FOR THE ISSUANCE
OF A CERTIFICATE OF APPEALABILITY HAS BEEN MET AS DIS

CASE 3:13-10004 ABOVE, IT IS AN OPEN QUESTION OF LAW IN THIS CIRCUIT AS TO WHETHER THE ENTIRE PRE-TRIAL PERIOD, WITHOUT ANY FORMAL COURT APPEARANCE, IS A CRITICAL STAGE FOR PURPOSE OF ANALYZING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM UNDER UNITED STATES VS. CRONIC, 466 U.S. 648 (1984). IT IS ALSO AN OPEN QUESTION AS TO WHETHER THE FAILURE OF COUNSEL TO CONSULT WITH PETITIONER THROUGHOUT THE ENTIRE PRE-TRIAL PERIOD JUSTIFIES A DEMONSTRATED BY THE SIXTH CIRCUIT COURT OF APPEAL'S HELD. IN MITCHELL VS. MASON, 325 F.3D 732 (6TH CIR. 2003) REASONABLE JURIST HAVE FOUND THE PRE-TRIAL STAGE WITHOUT FORMAL COURT APPEARANCE TO BE A CRITICAL STAGE AND THAT ABSENCE OF COUNSEL THROUGHOUT THE ENTIRE PRE TRIAL PERIOD JUSTIFIES A FINDING OF PER-SE PREJUDICE UNDER CRONIC. THE COURT FINDS THAT PETITIONER HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL CLAIMS TO BE DEBATABLE OR WRONG. THEREFORE, A CERTIFICATE OF APPEALABILITY IS GRANTED AS TO PETITIONER CLAIM THAT HE WAS DENIED COUNSEL AT A CRITICAL STAGE OF THE PROCEEDING AND THEREFORE IS ENTITLED TO PER-SE FINDING OF PREJUDICE UNDER CRONIC.

APPELLANT COUNTERED HIS CONSTITUTIONAL OF S.C. AND FED CONST. S.C. CONST. ART. I, SECTION 3, 4, 9, 10, 11, 12, 14, 15 AND 24 (ART. V, SECTION 22, ART. 12, SECTION 2 AND 9) SAME AS FED. CONST. 5th, 6th, 14th AMENDMENT

DATE: _____, 2013

Bishopville, S.C.

X
Joseph Daugh # 343216
Unit: KEE.
LEE CORRECTIONAL INST.
990 Wisnoky Highway
Bishopville, S.C. 29610

1. S.C. CONST. ARTICLE 1, SECTION 3, 4, 9, 10, 11, 12, 14, 15,
AND 24 (ARTICLE 5 SECTION 22, ARTICLE 12, SECTION 2 & 9)

2. S.C. CONST. ART. 1 SECTION 3 / SAME / Fed. CONST. 14th AMEND
DUE PROCESS & EQUAL PROTECTION

3. S.C. CONST. ART. 1 SECTION 10 / SAME / Fed. CONST. 4th AMEND
THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSON, HOUSES
PAPER, AND EFFECTS AGAINST UNREASONABLE SEARCH & SEIZURES AND
UNREASONABLE INVASION OF PRIVACY SHALL NOT BE VIOLATED, AND
NO WARRANTS SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED
BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE
PLACE TO BE SEARCHED THE PERSON OR THING TO BE SEIZED, AND
THE INFORMATION TO BE OBTAINED

S.C. CONST. ART. 1 SECTION 12 / SAME / Fed. CONST. 5th AMEND
NO PERSON SHALL BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE
PUT IN JEOPARDY OF LIFE, OR, LIBERTY, NOR SHALL ANY PERSON BE
COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST
HIMSELF.

S.C. CONST. ART. 1 SECTION 14 (SAME) Fed. CONST. 6th AMEND
THE RIGHT TO AN EFFECTED REPRESENTATION OF HIS TRIAL, APPELLATE
COUNSEL, PER COUNSEL

Griffin vs. Illinois, 351 U.S. 12, 100 L. Ed. 2d 891, 76 S. Ct.
585 (1956) DIRECTED APPEAL

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The Applicant argued that his Appellate Counsel violate his S.C. CONST. ARTICLE 1, SECTION 3 and Fed. CONST. 14th Amendment as Appellate failed to file an SANCTION AND PETITION on the ERROR of law, CITING EVITTs VS. LUCEY, 105 S.Ct. 830 (1985) 6th Amendment INELIG. of ASS. of Counsel

The Applicant argued that his Appellate Counsel allow the S.C. COURT of Appeal to present ORAL ARGUMENT on the MERIT of his CASE. 28 U.S.C.A. 2253 (c) A PRISONER SATISFIES this STANDARD by DEMONSTRATING that REASONABLE JURISTS would find this COURT'S ASSESSMENT of his CONSTITUTIONAL claims is DEBATABLE OR WRONG AND that any DISPOSITION PROCEDURAL RULE by the DISTRICT COURT is likewise DEBATABLE, see MILLER-EL. VS. COCKRELL, 537 U.S. 322, 336 (2003) see SLACK VS. Mc DANIEL, 529 U.S. 473, 484 (2000) see: ROSE VS. LEE, 252 F.3d 676, 683 (4th Cir. 2001). In this CASE, the LEGAL STANDARD for the ISSUANCE of CERTIFICATE of APPEALABILITY has BEEN MET. As discussed ABOVE, it is AN OPEN QUESTION of LAW in this CIRCUIT as to whether the ENTIRE PRE-TRIAL PERIOD. Without any formal COURT appearance, is a CRITICAL STAGE for PURPOSE of ANALYZING AN INEFFECTIVE ASS. of Counsel UNDER U.S. VS. CRONIC, 466 U.S. 648 (1984). It is also AN OPEN QUESTION as to whether the FAILURE of counsel to consult with PETITIONER throughout the ENTIRE PRE-TRIAL PERIOD justifies a finding of PER-SE PREJUDICE under CRONIC. Further, as demonstrated by the Sixth Circuit COURT of Appeal's holding in MITCHELL VS. MASON, 325 F.3d 732 (6th Cir. 2003), REASONABLE JURISTS have found the PRE-TRIAL STAGE without formal COURT appearance to be a CRITICAL STAGE and that absence of counsel throughout the ENTIRE PRE-TRIAL PERIOD justifies a finding of PER-SE PREJUDICE under CRONIC.

The Court finds that Petitioner has made a substantial³³⁷ showing of the denial of a constitutional claim to be debatable or wrong. Therefore, a certificate of appealability is granted as to Petitioner claim that he was denied counsel at a critical stage of the proceeding and therefore is entitled to a per-se finding of prejudice under Cronic. see Power vs. Alabama,

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

C.A. No. 2013-CP-23-6153

Joseph Paugh,
S.C.D.C. No. 343216,

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed November 13, 2013, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the June 2010 term of General Sessions for first-degree criminal sexual conduct with a minor (2009-GS-23-8144). Christopher D. Scalzo, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On October 14, 2010, the Honorable D. Garrison Hill sentenced the Applicant to thirty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Paugh, Op. No. 2012-UP-659 (S.C. Ct. App. filed December 19, 2012). The Remittitur was sent on January 11, 2013.

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

II.

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

1. Ineffective assistance of trial counsel:
 - a. Failed to investigate.
 - b. Failed to seek an expert witness.
 - c. Failed to object to the solicitor's improper comment.
 - d. Failed to request a mistrial after the solicitor's comment.
 - e. Failed to argue "the State has violate the S.C.R.E. Rule 403."
2. Ineffective assistance of appellate counsel:
 - a. Failed to "file an sanction and petition" to the South Carolina Court of Appeals.
3. Due process violation:
 - a. South Carolina Court of Appeals violated the Applicant's constitutional rights in issuing an unpublished opinion without oral argument.
4. Malicious prosecution. Prosecutorial misconduct.
 - a. The State's expert witness "merely forsake her own personal opinion that this acted took place."
 - b. The State presented fabricated evidence.

III.

The Respondent asserts the Applicant's allegation that his trial and appellate attorneys were ineffective is without merit. The Respondent asserts the Applicant's attorneys rendered effective assistance well within the standard of "reasonableness within professional norms."

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v.

Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegations of ineffective assistance of counsel probably raise questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305

S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent submits the allegation of malicious or vindictive prosecution must be dismissed. To establish vindictive prosecution a defendant must prove "that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus." United States v. Wilson, 262 F.3d 305, 314 (4th Cir. 2001). To establish genuine animus, the defendant may prove actual vindictiveness through direct evidence or raise a presumption of vindictiveness when the prosecutor's actions "pose a realistic likelihood of 'vindictiveness.'" Blackledge v. Perry, 417 U.S. 21, 27, 94 S. Ct. 2098 (1974). The Applicant has failed to meet his burden of proof regarding this issue.

V.

The Respondent denies each allegation not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held solely on the issues of ineffective assistance of counsel and that counsel be appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: Att. R. W. F.
Attorneys for Respondent

May 28, 2014

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

2013-CP-23-6153

JOSEPH PAUGH, 343216)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

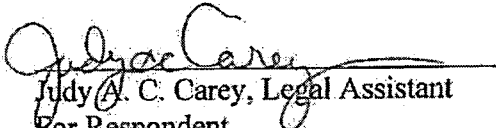
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Joseph Paugh, 343216
 Lee Correctional Institution
 990 Wisacky Highway
 Bishopville SC 29010

DATED this 28th day of May, 2014.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	) COURT OF COMMON PLEAS
	)
COUNTY OF GREENVILLE	) Case No(s) : 2013CP2306153
	)
Joseph Paugh,	)
	)
Applicant,	)
	)
-VS-	) TRANSCRIPT OF RECORD
	)
State of South Carolina,	)
	)
Respondent.	)

October 22, 2014
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

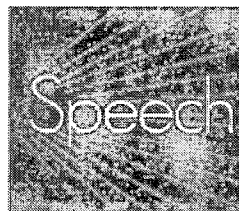
A P P E A R A N C E S:

KAREN RATIGAN, Esquire
Attorney for the State

BRIAN JOHNSON, Esquire
Attorney for the Applicant

Teresa B. Johnson
Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

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I N D E XDIRECT CROSS REDIRECT RECROSS

Joseph Paugh

by Mr. Johnson 5

Chris Scalzo

by Ms. Ratigan 11

Certificate of Reporter 19

EXHIBITS PAGENO.DESCRIPTIONID EV

APPLICANT EXHIBITS

(No exhibits offered.)

RESPONDENT EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

Remarks

P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 22nd day of October, 2014 at approximately 2:09 p.m.)

THE COURT: All right. Yes, ma'am.

MS. RATIGAN: May it please the court.

This is the case of Joseph Paugh versus the State of South Carolina. The docket number is 2013-CP-23-6153. Mr. Paugh is indicted for First Degree Criminal Sexual Conduct with a Minor. He was represented on that charge by Mr. Scalzo.

The case was brought to trial before Judge Hill in October 2010 at which point Mr. Paugh was found guilty. On October 14th of 2010, Judge Hill sentenced him to 30 years. He did file an appeal. The Court of Appeals affirmed his conviction and sentence in December 2012. The state is ready to proceed.

THE COURT: All right. Mr. Johnson?

MR. JOHNSON: Thank you, Your Honor. I do think I can narrow the issues really this time. First of all, my client thinks that counsel was ineffective because he should have requested a mistrial after an inappropriate remark by the solicitor. He also thought that he should have

1 argued that they could not pinpoint where the
2 incident or the alleged incident happened. He
3 thought he should have objected to a juror
4 whose information was not included in the juror
5 information packet. He thought he should have
6 advised him to testify on the basis of how he
7 wasn't the father. I think that pretty much
8 limits the extent of the testimony my client
9 will give.

10 **THE COURT:** Okay. Are you ready to
11 proceed?

12 **MR. JOHNSON:** Yes, ma'am. I am going to
13 call Joseph Paugh to the stand.

14 **THE CLERK:** Mr. Paugh, would you please
15 place your left hand on the Bible and raise
16 your right hand?

17 **JOSEPH PAUGH**
18 having first been duly sworn, testifies as follows:

19 **THE CLERK:** Thank you. Please state your
20 full name for the record.

21 **THE WITNESS:** Joseph Paugh.

22 **THE CLERK:** Thank you. You may be seated.

23 **DIRECT EXAMINATION**

24 **BY MR. JOHNSON:**

25 **Q** Joseph, for the record, can you read and

1 write well? Is that a limitation that you have?

2 A No, I have learned a little bit since I
3 have been down. But no, I can't read that well.

4 Q Can't read that well. So the basis of your
5 testimony would be to the extent of what you
6 understood, the materials that you read and to the
7 extent that we went over it, is that correct?

8 A Yes, sir. Yes, sir.

9 Q Now, do you know why you are here today?

10 A Yes, sir.

11 Q And this is regarding your application for
12 post-conviction relief.

13 A Yes, sir.

14 Q And are you alleging that your trial
15 counsel was ineffective?

16 A Yes, sir.

17 Q And are you also alleging that the
18 ineffectiveness prejudiced you?

19 A Yes, sir.

20 Q Who was your trial counsel?

21 A Christopher Scalzo.

22 Q This wasn't a guilty plea. This was indeed
23 a trial, correct?

24 A No. Uh, sir?

25 Q It wasn't a guilty plea. It was indeed a

1 trial, correct?

2 A There was a trial.

3 Q I went over a list of issues before the
4 judge. I'm going to ask you about them. Okay?
5 First, with regards to an inappropriate comment by
6 the solicitor, do you recall that?

7 A Yes.

8 Q Do you recall what she said? I know what
9 is in the transcript. But do you recall what she
10 said?

11 A She said how can you look at yourself in
12 the mirror the way you treat your daughter.

13 Q Did your counsel object?

14 A I remember him saying something, but I
15 don't remember an objection, nah.

16 Q Do you recall that he asked for a curative
17 instruction or a mistrial?

18 A I think he did. The judge said that he
19 would come back to that.

20 Q Did y'all come back to that?

21 A I don't recall that.

22 Q Now, you also, another thing I enumerated
23 is you stated he should have argued and he should
24 have pinpoint -- argued that they could not pinpoint
25 when the incident happened, is that correct?

1 **A** That's right.

2 **Q** What is the basis for your suggesting an
3 argument there?

4 **A** Well, they are wrapping the case all the
5 way around from '98 all the way to 2004.

6 **Q** You are saying that they are alleging --

7 **A** 25th of November. 25th of November is my
8 daughter's birthday. Okay. They are wrapping it
9 like it happened from her first birthday to the end
10 and so forth all in the middle. All right. These
11 facts never took place. All right. These are all
12 lies. I have never done this to my daughter. If
13 anything, I care about my daughter very much and I
14 wish her well. All right.

15 **Q** Let me ask you a question, Joseph. I'm
16 sorry. I know you want to state what you need to
17 say. But you are saying the time period is from '98
18 to 2004, is that correct?

19 **A** Yes, sir.

20 **Q** You are stating there was not an argument
21 made as to the dubiousness or how questionable that
22 time period is.

23 **A** Right.

24 **Q** Okay. Now, I also listed something in
25 regard to a juror. Do you recall the situation with

1 the juror?

2 **A** Yeah. The court swore the juror in. She
3 did not have her proper paperwork nor did my lawyer
4 have it on his document saying that she has been
5 sworn in. They had to swear her in verbally instead
6 of on paper like all the rest of the jurors did.

7 **Q** And you believe -- she was selected for the
8 jury, correct?

9 **A** Sir?

10 **Q** She was indeed selected to your jury?

11 **A** Yes, she was.

12 **Q** And you believe that the lack of
13 information may have prejudiced you?

14 **A** Yes.

15 **Q** Because you did not know enough about that
16 juror?

17 **A** That's correct.

18 **Q** Now you also gave testimony, is that
19 correct?

20 **A** Yes, I did.

21 **Q** Is there some testimony that you were
22 advised not to give that you would've preferred to
23 give?

24 **A** I would have liked to have gave the jury my
25 opinion of how I was a father to my daughter, how I

1 was, how I was -- I tried to provide, I treated her
2 well and all of that. It was just a number of things
3 I was being accused of and was being said of that
4 never took place. I would have liked to speak more
5 on that. I was never given that opportunity.

6 Q Is there anything specifically that you
7 would like to say to the court now considering you
8 have to show prejudice on the issue?

9 A Yeah, I would like to have a new trial or
10 have -- or have my sentence reversed. One of the
11 two.

12 Q Were you aware of any witnesses that
13 counsel may have interviewed on your behalf?

14 A Yeah. I was aware that Crystal and Angela
15 was going to be there. I was aware that Caitlin was
16 going to be there. I was not aware that anything to
17 do with Karen or with, uh, (Inaudible.)

18 Q So you are stating that these are witnesses
19 that testified that you weren't aware was going to be
20 present?

21 A (Shakes head.)

22 Q You have to speak.

23 A No, sir. No, sir.

24 Q And you believe that -- have you ever
25 discussed these witnesses with your attorney?

1 **A** The only witness that I discussed was
2 Crystal.

3 **Q** Do you believe that the lack of the
4 discussion may have hurt your case with regards to
5 preparation?

6 **A** Yeah. Yeah.

7 **Q** All right. Mr. Paugh, please answer any
8 questions the Attorney General has.

9 **A** Okay.

10 **MS. RATIGAN:** I don't have any cross-
11 examination.

12 **THE COURT:** All right, sir. You can step
13 down.

14 **MR. JOHNSON:** Your Honor, that is the
15 applicant's case.

16 **THE COURT:** All right. Yes, ma'am.

17 **MS. RATIGAN:** The State would call Mr.
18 Scalzo.

19 **CHRIS SCALZO**
20 having first been duly sworn, testifies as follows:

21 **THE CLERK:** Thank you. Please state your
22 full name for the record.

23 **THE WITNESS:** Chris Scalzo.

24 **THE CLERK:** Thank you.

25 **DIRECT EXAMINATION**

1 BY MS. RATIGAN:

2 Q Mr. Scalzo, do you recall representing Mr.
3 Paugh on this charge?

4 A I do.

5 Q And did you meet with him prior to the
6 trial?

7 A Yes.

8 Q Did you review the discovery materials with
9 him?

10 A I did.

11 Q Did he tell you kind of his version of
12 events, his side of the story?

13 A Yes, sir. Yes, ma'am.

14 Q Was there any physical evidence against
15 your client in this case?

16 A Not that I recall, no.

17 Q Would it be fair to say it was just a he
18 said, she said swearing match?

19 A Yeah, it was an allegation of abuse that
20 had taken place many -- I want to say 10 or 11 or so
21 years prior to when we were having the trial.

22 Q And were you aware that the State was
23 alleging a time frame between 1998 and 2004?

24 A Yeah, it would have been in the indictment
25 and I believe it was in the police reports.

1 Q Did you ever contact the assistant
2 solicitor in an attempt to get her to narrow down the
3 time frame?

4 A I don't -- I don't have a specific
5 recollection of doing that. It would have been my
6 standard practice to do that. It is my standard
7 practice in Criminal Sexual Conduct with a Minor
8 cases, where they allege windows of time as the term
9 they use, to try to get them to be more specific
10 about the time frame so that we could more thoroughly
11 investigate it.

12 Q Okay.

13 A And it's standard practice for them to just
14 maintain the window of time that they give.

15 Q Did you explain to Mr. Paugh that this was
16 a standard, large window time frame in this kind of
17 case?

18 A I don't have a specific recollection of
19 that conversation. That probably would have been what
20 I would have said if he was asking me about it or I
21 was explaining to him what it meant by the time frame
22 that they had given.

23 Q About the juror, the transcript on page 15
24 reflects that when Juror 86 was presented, you stated
25 you didn't have any information about her in your

1 packet. Do you recall that?

2 **A** I don't recall it as a specific memory but
3 in looking at the trial transcript, you are correct
4 that that's what took place in the trial transcript.

5 **Q** Okay. And the transcript reflects that the
6 judge kind of orally went through the questions with
7 her. Is that fair to say?

8 **A** Yes.

9 **Q** At the conclusion of which, she was
10 selected to be on the jury.

11 **A** That's right.

12 **Q** Did you have any concerns in asking her to
13 be seated on the jury after going through all those
14 questions?

15 **A** Apparently not. I don't have a specific
16 memory of what was going on with that juror and why I
17 did or didn't select her. What I have on my trial
18 notes, and I have a section on here where I wrote
19 down her -- essentially the biographically
20 information that she gave when the judge was asking
21 her the questions. Then I have my jury selection
22 sheet that I create myself while I'm doing juror
23 selection. And I write down the juror number, then I
24 write down any remarks, which are my own comments.
25 Then I will write who struck the juror, who didn't,

1 that kind of thing.

2 When it comes to her, my notes says
3 skeptical of government. Her husband was deported. I
4 don't have a specific memory but that seems to be
5 telling me that what I was thinking was she may not
6 trust the investigators in the case and that was sort
7 of my rationale for taking her or really not striking
8 her. She was the third juror put out there. I would
9 have had several jurors to go through to maintain
10 strikes for. That seems to have been my rationale.

11 **Q** Prior to the trial, did you discuss with
12 Mr. Paugh whether or not he would testify?

13 **A** I'm sure that we did. I do remember talking
14 an awful lot about him, his personal life, his living
15 in Baltimore, those kinds of things. It's obviously
16 standard for me to talk to him about the fact that he
17 will have to talk to the judge at some point in the
18 trial about whether or not he wants to testify and
19 what are the ramifications for that and those sort of
20 things. So I don't have a specific memory. I don't
21 have a specific note about the actual conversation
22 but my practice in looking at everything that took
23 place in the transcript, it appears we had some
24 conversation about that.

25 **Q** Do you recall discussing with Mr. Paugh

1 that if he were to testify, he should avoid
2 discussing basically how he was a father to the
3 victim?

4 **A** No, I don't have a specific memory of it. I
5 was trying to see if I actually could get out of my
6 head a specific conversation that we would have had.
7 So I can't answer that from specific memory. I heard
8 what he testified to. I don't have a specific memory.
9 The only thing I could think of is this just may not
10 have been relevant and easily shut down by the judge.
11 That may have been the reason but I don't know for
12 sure.

13 **Q** And do you recall when the Solicitor asked
14 one question on the cross of your client?

15 **A** Yeah, I remember that very well.

16 **Q** The transcript reflects that you did
17 object.

18 **A** Yes, I did.

19 **Q** And she withdrew the question?

20 **A** Yes.

21 **Q** At that point, why did you not take a
22 further step? What was your kind of rationale behind
23 not asking for mistrial, asking she be struck or
24 whatnot?

25 **A** I didn't ask for it to be struck because

1 she withdrew the question. That was essentially the
2 same thing in my mind. We were before the jury when
3 that all took place. Even with the objection and the
4 withdrawal of the question, the jury never went out.
5 So in my mind, I was in front of the jury. I don't
6 think I asked for a mistrial. I don't know why. I
7 think I felt like it was resolved by her withdrawing
8 the question. And she also sat down. That was the
9 only. It's was obvious that was the only question she
10 was going to ask. I just said, well, I'll leave it at
11 that.

12 **MS. RATIGAN:** That's all I have, Your
13 Honor.

14 **THE COURT:** Mr. Johnson?

15 **MR. JOHNSON:** Your Honor, I don't have any
16 cross-examination questions.

17 **THE COURT:** All right. Sir, you can step
18 down.

19 **THE WITNESS:** Thank you.

20 **THE COURT:** Anything else from the State?

21 **MS. RATIGAN:** The State would rest and ask
22 that Mr. Scalzo be released.

23 **THE COURT:** All right. Any objection to
24 that?

25 **MR. JOHNSON:** No objection to that.

1 **THE COURT:** All right. Thank you, Mr.
2 Scalzo for being here.

3 Mr. Johnson?

4 **MR. JOHNSON:** Your Honor, we have no
5 further evidence to present at this time.

6 **THE COURT:** All right. Mr. Paugh, I need
7 to read the transcript of the entire trial, not
8 just the portions that were referenced. I want
9 to read the whole thing and I want to look at a
10 few other things. I'll be issuing a decision
11 shortly, but I want to take this matter under
12 advisement. All right?

13 **MR. PAUGH:** All right.

14 **THE COURT:** Thank you. Good luck to you.

15
16 **(WHEREUPON, the proceedings conclude at**
17 **approximately 2:27 p.m.)**

18

19

20

21

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25

CERTIFICATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, 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 Court of Common Pleas for Greenville, South Carolina, on this 26th day of April, 2015.

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

Teresa B. Johnson

Official Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No. 2013-CP-23-6153
	)	
Joseph Paugh, S.C.D.C. No. 343216,	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
v.	)	
	)	
State of South Carolina,	)	
Respondent.	)	

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. MICHELSMEIER
2014 DEC 19 PM 4:38

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 19, 2013. The Respondent made its return on May 28, 2014. A hearing into the matter was held on October 22, 2014 before Judge Letitia H. Verdin at the Greenville County Courthouse. The Applicant was present and represented by Brian P. Johnson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Christopher D. Scalzo, Esquire. The Court had before it the trial transcript; the Greenville County Clerk of Court records, including the arrest warrant, indictment and sentencing sheet; the Applicant's South Carolina Department of Corrections Records; the PCR Application, and the Return.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant in its June 2010 term for criminal sexual conduct with a minor in the first degree (2009-GS-23-8144).



After the State called the case to trial, the Applicant was found guilty. On October 14, 2010, the Honorable D. Garrison Hill sentenced the Applicant to thirty years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Dayne C. Phillips, Esquire, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Paugh, Op. No. 2012-UP-659 (S.C. Ct. App. Dec. 19, 2012). The Remittitur was sent on January 11, 2013.

ALLEGATIONS

The Applicant argues that he is entitled to post-conviction relief because he received ineffective assistance of trial counsel; received ineffective assistance of appellate counsel; and experienced a violation of the Due Process Clause. The Applicant's ineffective assistance claim was the only argument presented at the PCR hearing.

Regarding the claim for ineffective assistance of trial counsel, the Applicant asserts:

- a. Counsel failed to investigate to pinpoint the date(s) of the alleged incident(s);
- b. Counsel failed to seek an expert witness;
- c. Counsel failed to object to the Assistant Solicitor's improper comment and failed to request a mistrial thereafter;
- d. Counsel failed to argue that the State violated Rule 403 of the South Carolina Rules of Evidence;
- e. Counsel failed to object to or strike a juror who was seated, where the juror's information was not properly included in the juror information packet; and
- f. Counsel failed to advise the Applicant to testify in his own defense.

Regarding the claim for ineffective assistance of appellate counsel, the Applicant asserts that counsel failed to properly file his appeal with the South Carolina Court of Appeals. Regarding the Due Process violation, the Applicant argues that the South Carolina Court of Appeals violated his constitutional rights by issuing an unpublished opinion without oral argument.



FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2013).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 686 (1984); Porter v. State, 368 S.C. 378, 629 S.E.2d 353, 356 (2006). Regarding the first prong, the Applicant must in essence show that counsel's advice was not “within the range of competence demanded of attorneys in criminal cases.” Hill v. Lockhart, 474 U.S. 52, 56 (1985). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). A reasonable probability is “a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 686).



Furthermore, the decisions and advice of trial counsel should be assessed for reasonableness under all the circumstances, with heavy deference given to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). A criminal defense attorney has a duty to conduct a reasonable investigation so that he may discover all reasonably available mitigation evidence, as well as any reasonably available evidence tending to rebut evidence produced by the state. McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 361 (2008). There is a strong presumption that adequate assistance of counsel was rendered, and that reasonable care was exercised—particularly in the arena of professional judgments. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007).

a. Trial counsel's failure to investigate the date(s) of the incident(s).

The Applicant asserts that trial counsel was ineffective because he did not pinpoint the date(s) of the alleged incident(s) of abuse. This particular argument was raised at the PCR hearing, while the application for relief merely raises a claim of failure to investigate.

The Applicant testified at the PCR hearing that the incidents giving rise to the charge allegedly occurred over a span of six years, from 1998 to 2004. He argues that this broad range of time prevented him from preparing a proper defense and consequently deprived him of the effective assistance of counsel.

The Applicant's trial counsel testified that the range of years was included in the original indictment that was presented to the Grand Jury. He further testified that, while he did not specifically recall this case, it is his standard practice to narrow the timeframe of the alleged incident(s) through communication with the Solicitor's Office, as well as witnesses.

This Court finds that the Applicant has failed to meet his burden of proving counsel was ineffective for failing to narrow down this timeframe. The evidence presented at the PCR

4

hearing demonstrates that trial counsel conducted a reasonable investigation into the facts of the Applicant's case, as required by McKnight v. State, 378 S.C. at 46, 661 S.E.2d at 361. There was further no evidence that the result of the case would have been different had a different course of action been taken. This Court finds that trial counsel's investigation of the case and preparation for trial were reasonably effective under the prevailing professional norms of the legal community. Furthermore, the Applicant demonstrated no prejudice as a result of the date range use at trial.

b. Trial counsel's failure to seek an expert witness.

The Applicant argues that trial counsel was ineffective because he failed to seek and present an expert witness on the Applicant's behalf. No testimony or other evidence was presented on this subject at the PCR hearing. The Applicant further has not demonstrated that, had an expert been called, the outcome of his trial would have been different. Therefore, this Court finds that the Applicant has not met his burden of proving that counsel was ineffective in this manner.

c. Trial counsel's failure to object to the Assistant Solicitor's improper comment and failed to request a mistrial thereafter.

The Applicant asserts that trial counsel was ineffective because he failed to object and request a mistrial after the Assistant Solicitor asked the Applicant, "How do you look at yourself in the mirror, every day after what you did to your daughter?" (Trial Tr. 220.)

The Applicant testified that he believed this comment to be highly inflammatory and prejudicial. He argues that trial counsel's failure to object to this comment, to ask for a curative instruction to the jury, or to move for a mistrial constitutes ineffective assistance of counsel.

The Applicant's trial counsel testified that he recalled the comment and objected to it as soon as it was made. (See Trial Tr. 220.) Upon his objection the Assistant Solicitor withdrew the



question and sat down. (Id.) Based on the Assistant Solicitor's actions, trial counsel did not in his judgment believe any further action was required.

This Court finds that in this instance it is appropriate to defer to trial counsel's professional judgment under Simpson v. Moore, 367 S.C. at 587, 627 S.E.2d at 706. As discussed in Simpson, an attorney's decisions relating trial strategy are entitled to a high level of deference by reviewing courts. Furthermore, as noted in Ard v. Catoe, there is a strong presumption that reasonably effective assistance was given, particularly where a professional judgment is under scrutiny. 372 S.C. at 331, 642 S.E.2s at 597. This Court finds that the Applicant has not overcome this presumption here. Trial counsel's decision not to draw further attention to the Assistant Solicitor's comment is, as a matter of trial strategy, reasonably effective. Therefore, the Applicant is not entitled to post-conviction relief on this basis.

d. Trial counsel's failure to argue that the State violated Rule 403 of the South Carolina Rules of Evidence.

The Applicant has not offered any evidence or argument on this subject. Therefore, this Court finds that the Applicant has not met his burden of proving either prong of Strickland's ineffective assistance standard in this respect.

e. Trial counsel's failure to object to the seating of a juror.

The Applicant claims that trial counsel was ineffective because he permitted a juror to be seated without knowing sufficient information about her.

Criminal defendants have a constitutional right to a fair and impartial jury. U.S. Const. amends. VI and XIV; S.C. Const. art I, § 14; State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). While the Sixth and Fourteenth Amendments provide a defendant with the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury. State v. Stanko, 376 S.C. 571, 576, 658 S.E.2d 94, 97 (2008).



The trial judge has a duty to ensure that a jury of fair, impartial, and unbiased jurors is impaneled. S.C. Code Ann. §§ 14-7-1010 –1020 (2014); State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998). In order to identify any potential sources of bias, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party—a process commonly known as *voir dire*. State v. Woode, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001). A trial judge acts with discretion when he evaluates a prospective juror's competence. State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996). The trial judge's determination of the ability of a prospective juror to be neutral will not be disturbed on appeal in the absence of manifest error. DeLee v Knight, 266 S.C. 103, 111–12, 221 S.E.2d 822, 847 (1975).

The scope of *voir dire* and the manner in which it is conducted are within the sound discretion of the trial court. Stanko, 376 S.C. at 575, 658 S.E.2d at 96. Where the parties wish to ask potential qualified jurors about their specific views of a topic, they may do so only with the express permission of the trial court. Cf. id. “The Constitution, after all, does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury.” Id. at 576, 658 S.E.2d at 97. To overturn a conviction due to a *voir dire* error, the Applicant must show that the court's failure to ask or allow a certain examination rendered the defendant's trial fundamentally unfair. State v. Wise, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004).

The Applicant testified at the PCR hearing that he did not know anything about a Juror 86, who was seated for his trial, because this juror had not properly turned in her juror information sheet prior to *voir dire*. The Applicant's trial counsel confirmed that there was no information in the jury packet concerning Juror 86, and the Court rectified this problem by conducting an oral examination of her in the courtroom. (See Trial Tr. 15.) At the conclusion of this examination, the Court determined that Juror 86 was qualified to serve. (Id.)



The Applicant's trial counsel further testified, based on the information revealed during this oral examination, that he did not believe it prudent to exercise a peremptory strike for Juror 86. Trial counsel stated that Juror 86 was the third juror presented, and he believed that he needed to save his strikes for future and more compelling *voir dire* issues. Such a strategic decision is entitled to deference by this Court in accordance with Simpson v. Moore, 367 S.C. at 587, 627 S.E.2d at 706.

To the extent that the Applicant contends that he is entitled to PCR as a result of the trial court's oral examination of Juror 86, this Court finds that such relief is not merited. The trial court's oral examination of Juror 86, conducted on the record and in the presence of the Applicant, satisfies the constitutional requirements to ensure a fair and impartial trial by an unbiased jury. To the extent that the Applicant asserts that he is entitled to PCR because of trial counsel's failure to exercise a peremptory strike, this Court further finds that trial counsel's decision was within his discretion. Trial counsel's strategic decision does not demonstrate ineffective assistance of counsel such that it entitles the Applicant to post-conviction relief.

f. Trial counsel's failure to advise the Applicant to testify.

A criminal defendant has a fundamental right to testify in his own defense, just as he has a right to remain silent. Rock v. Arkansas, 483 U.S. 44, 53 (1987). However, the right to present testimony is not without limitation. State v. Rivera, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013) (citing Rock v. Arkansas, 483 U.S. at 55). The right may be limited to accommodate other legitimate interests in the criminal trial process. Id.

A criminal defendant also has the right to put in evidence of his good character, either by taking the stand or presenting character witnesses. State v. Lyles, 210 S.C. 87, 91, 41 S.E.2d 625, 627 (1947). However, such evidence opens the door for the State to provide other evidence of



the criminal defendant's character only for those traits focused on by the accused. State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990). Additionally, a criminal defendant is only permitted to provide evidence of "pertinent" character traits—those involved with the offenses charged. State v. Mizell, 332 S.C. 273, 277, 504 S.E.2d 338, 340 (Ct. App. 1998).

The Applicant claims that he told his attorney that he wished to testify at trial, and that he wished to be prepared for this testimony by his attorney. The Applicant asserted at his PCR hearing that he wanted to testify about his skill and competency as a father, but that trial counsel advised him against it and did not afford him an opportunity to discuss the subject at trial.

The Applicant's trial counsel testified that he recalled some discussion about the Applicant testifying, but believed that the suggested subject might lead to objections based on relevancy and would not help to assert a viable defense. The trial transcript reveals that the Applicant did testify in his own defense at trial. (Trial Tr. 206–20.) This testimony primarily focused on providing the Applicant's version of events as well as general background for the jury's consideration. The Applicant did not testify on the subject of his capabilities as a father.

This Court finds that the Applicant's right to testify was respected, and a substantial amount of time during the trial was dedicated to this testimony. Before testifying, the trial court asked the Applicant several questions to make sure he understood the rights and considerations involved in his decision. (Trial Tr. 202–05.) The question of the scope of the Applicant's testimony was never raised during his trial. Additionally, the subjects of testimony that the Applicant raised during his PCR hearing appear to amount to character evidence about a non-pertinent trait. Such evidence would likely have been found to be inadmissible under Rule 401 of the South Carolina Rules of Evidence. Therefore, this Court finds that the Applicant has not shown that trial counsel's assistance in this matter was ineffective.



g. Appellate counsel's failure to file a necessary petition with the South Carolina Court of Appeals.

This issue was not raised at the Applicant's PCR hearing. Furthermore, the Applicant has provided no indication of what particular petition or challenge should have been raised. In light of the absence of any evidence, this Court finds that the Applicant has not met his burden of proving that appellate counsel was ineffective.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test—that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed wither errors or omissions in his representation of the Applicant. This Court also finds that the Applicant has failed to prove the second prong of Strickland—that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

Based on all the foregoing, this Court finds that the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by Counsel's representation.



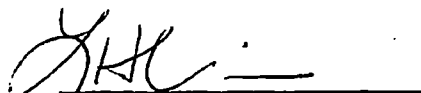
Furthermore, this Court finds no evidence of prosecutorial misconduct. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 8 day of ^{Dec.}~~November~~, 2014.



Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit



WITNESSES

Lorraine Henderson

SH

Greenville County Sheriffs Office

8/12/2009

ARREST WARRANT NUMBER

1474995

ACTION OF GRAND JURY

TRUE BILL

mm Swerette
FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Guilty

Chantal J.
Foreperson of Petit Jury

10/14/2010
Date:

DOCKET NO. 2009-GS-23-

BSD

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

June

TERM 2009¹⁰

THE STATE

vs.

JOSEPH PAUGH

Indictment for

0385

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

VIOLATION § 16-03-0655(A)(1)

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

At a Court of General Sessions, convened on

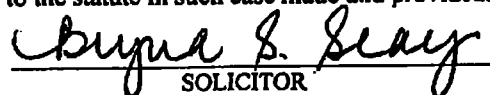
JUN 22 2010

the Grand Jurors of Greenville

County present upon their oath:

That JOSEPH PAUGH did in Greenville County, between the 25th day of November, 1998 through November, 2004, commit a sexual battery on C.P., who was less than eleven years of age. This is in violation of §16-3-655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR