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**SC SUPREME COURT**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Anderson County

R. Lawton McIntosh, Circuit Court Judge

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Opinion No. 2015-UP-557 (S.C. Ct. App. filed 12/16/15)

11-GS-04-1977 & 13-GS-04-569

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THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

PETITIONER

APPELLATE CASE NO. 2016-000309

---

**A P P E N D I X**

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

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

The State, Respondent,

v.

Andrew Antonio Clemons, Appellant.

Appellate Case No. 2013-001951

---

Appeal From Anderson County  
R. Lawton McIntosh, Circuit Court Judge

---

Unpublished Opinion No. 2015-UP-557  
Submitted October 1, 2015 – Filed December 16, 2015

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**AFFIRMED**

---

Chief Appellate Defender Robert Michael Dudek, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant  
Attorney General Christina Catoe Bigelow, and Assistant  
Attorney General Vann Henry Gunter, Jr., all of  
Columbia; and Solicitor Christina Theos Adams, of  
Anderson, for Respondent.

---

**PER CURIAM:** Affirmed pursuant to Rule 220(b), SCACR, and the following  
authorities: *State v. Cope*, 405 S.C. 317, 343, 748 S.E.2d 194, 208 (2013)

("Generally, the admission of expert testimony is a matter within the sound discretion of the trial court." (quoting *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991))); *id.* at 343-44, 748 S.E.2d at 208 ("Thus, we will not reverse the trial court's decision to admit or exclude expert testimony absent a prejudicial abuse of discretion."); *State v. Grubbs*, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion [when] the ruling is manifestly arbitrary, unreasonable, or unfair."); Rule 702, SCRE ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."); *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) ("All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration."); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (stating if the evidence is admissible under Rule 702, then the trial court should also analyze the evidence under Rule 403, SCRE); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ."); *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) ("A trial court has particularly wide discretion in ruling on Rule 403 objections."); *State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial [court's] decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (quoting *State v. Martucci*, 380 S.C. 232, 250, 669 S.E.2d 598, 607 (Ct. App. 2008))); *State v. Lyles*, 379 S.C. 328, 339, 665 S.E.2d 201, 207 (Ct. App. 2008) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.").

**AFFIRMED.**<sup>1</sup>

**SHORT, GEATHERS, and MCDONALD, JJ., concur.**

---

<sup>1</sup> We decide this case without oral argument pursuant to Rule 215, SCACR.



THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**COPY**  
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DEC 29 2015  
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2015-UP-557

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SC OFFICE OF  
APPELLATE DEFENSE

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Petitioner Andrew Clemons respectfully petitions this Court for rehearing because this Court may have overlooked the fact that the trial judge abused his discretion in not properly performing his "gatekeeping function" on expert testimony in this case. Dr. Sallie Carter opining that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts was speculative at best, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE.

The key issue in this case was *whether there was any penetration of the alleged victim which differentiated criminal sexual conduct with a minor in the first degree from a lewd act*. Defense counsel argued in closing that the critical element to CSC with a minor charge was penetration. He reminded the jury that the alleged victim had testified that there was no vaginal or anal penetration in this case. Defense counsel mocked the belated assertion that oral sex occurred, “and we’re just now hearing about oral sex six weeks before the trial [where it was not brought up during the forensic interview]” R. p. 211, ll. 2-9. Although the alleged victim denied making up the oral sex allegation for purposes of the trial, she had no explanation for her failure to reveal the alleged oral sex where she was previously repeatedly given the opportunity to add on other lewd or sexual acts to her allegations against appellant. R. p. 172, l. 6- 173, l. 21.

Even though the alleged victim specifically denied that any vaginal or anal penetration occurred, Dr. Sallie Carter was allowed to testify over objection, after watching the forensic interview of the alleged victim, that the alleged victim’s injuries were consistent with her being penetrated. Dr. Carter would interestingly cite to alleged pornography the alleged victim had watched as supporting her opinion that the alleged victim was penetrated despite her testimony to the contrary. R. p. 48, ll. 5-15; 117, l. 2 – 122, l. 16; 155, l. 12 – 159, l. 12; 165, l. 10 – 169, l. 12.

As this Court will recall, the testimony of Dr. Sallie Carter was proffered out of the presence of the jury. Dr. Carter was a physician at Anderson Oconee Pickens Child and Adolescent Mental Health Center. R. p. 88, ll. 1-19. Dr. Carter testified that “there were no abnormalities on the physical exam [of the alleged victim] except for the genital area where she had an absent posterior hymen.” R. p. 95, ll. 9-15. Dr. Carter said this was a significant finding. R. p. 96, ll. 3-10.

Out of the presence of the jury the judge questioned Dr. Carter about her proposed testimony regarding “some intrusion” causing the hymen not to be present. Dr. Carter said “that

would certainly be consistent with a penetrating type of injury.” R. 103, ll. 6-17. She said that other types of injuries could have caused the condition such as falling on a fence post or off a bicycle. However, Dr. Carter maintained that children the alleged victim’s age did not have the language skills to explain what probably happened during a lewd act. R. p. 102, l. 20 – 105, l. 19.

Defense counsel Thomason noted that there was no testimony about the injury being caused by some other mishap, and the alleged victim made it clear that the petitioner **“never penetrated her.”** She had testified that the petitioner had rubbed up against her with his penis but he had never penetrated her. R. p. 106, ll. 3-23. (emphasis added).

Dr. Carter maintained that 95% of sexual abuse exams were normal and since the alleged victim’s exam here was abnormal, that was significant, and she continued to question what occurred. R. p. 112, l. 2 – 113, l. 7. The judge then asked Dr. Carter to watch the forensic interview of the alleged victim. The judge observed that Dr. Carter’s testimony seemed to be **“like a bit of speculation.”** R. p. 113, l. 1 – 114, l. 8. (emphasis added).

After Dr. Carter viewed the forensic interview she stated it was very hard for a child to convey what really happened during a lewd situation. She cited the alleged victim watching pornographic films during whatever occurred as influencing her opinion about what may have happened. Dr. Carter testified that this case involved an adult taking **“sexual liberties with a child.** You have a child that’s really unable to articulate the full, the full --- unable to describe the extent of events.” R. p. 114, l. 24 – 117, l. 16.

Defense counsel Thomason again objected that the alleged victim specifically said she was not penetrated, and he argued that under Rule 403, SCRE whatever probative value this evidence had was outweighed by its unduly prejudicial effect. R. p. 117, l. 2 – 119, l. 18. The judge then

ruled that he was going to allow Dr. Carter to opine about penetration despite the testimony of the alleged victim to the contrary. R. p. 119, l. 21 – 122, l. 11.

Dr. Carter then testified in the presence of the jury that the posterior portion of the alleged victim's hymen was absent. That was the abnormal finding in the exam. R. p. 149, ll. 11-14.

Dr. Carter said after reviewing the pertinent items that it was her expert opinion that the injuries to the alleged victim were "consistent with a penetrating injury." R. p. 159, ll. 7-24. Dr. Carter also testified that she was concerned after watching the forensic interview because it appeared to her that the child had been "groomed" for sexual acts, and there was also pornography involved. She offered that children have to learn the language of "sexual activity." Dr. Carter said it would be difficult for the alleged victim to explain what really happened, and she again opined that the alleged victim's abnormality was "consistent with penetration." R. p. 160, l. 16 – 169, l. 12.

In making his directed verdict motion defense counsel Thomason continued to argue there was not a proper foundation for Dr. Carter's speculation that the alleged victim had been penetrated during a sex act, and that it invited a verdict on that basis. R. p. 181, l. 7 – 182, l. 19.

The solicitor argued to the jury that the alleged victim's testimony in a sexual assault case did not need to be corroborated. R. p. 194, l. 18 – 195, l. 6. The solicitor also argued that petitioner had put his penis against the alleged victim and "there could have been penetration, and again, the law reads, however slight. She may not know. It may not have hurt." R. p. 201, ll. 12-16.

Defense counsel Thomason noted to the jury the inconsistencies in the testimony that led to a reasonable doubt. He argued the alleged victim did not mention any oral sex on the video when it was fresher in her mind, and she then mentioned it only before the trial much later. R. p. 207, l. 16 – 208, l. 6.

Defense counsel urged the jury to focus on the fact that Dr. Carter's testimony was "a lot of speculation. We don't use speculation. We use facts." R. p. 208, ll. 2-6. Defense counsel argued that first-degree criminal sexual conduct "requires some form of penetration. That's the key to the whole thing is penetration." R. p. 211, ll. 2-5.

In its summary opinion, this Court noted the judge's gatekeeping function, and wrote that "a trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion [when] the ruling is manifestly arbitrary, unreasonable or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003). At a minimum the expert testimony in this case was unfair.

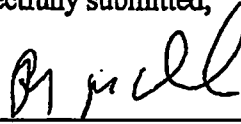
Defense counsel persuasively urged that where the alleged victim did not reference any allegation of oral sex earlier and that her later assertion of it was not credible. The judge even allowed the alleged victim to be recalled for re-cross examination where she still had no explanation for why her allegation of oral sex only made shortly before trial. The alleged victim acknowledged she was given every opportunity to tell the forensic interviewer that she had performed oral sex, and she did not. Although she naturally denied that she was lying about it at trial she had no explanation for this omission from her other detailed allegations. R. p. 172, l. 6 – 173, l. 21.

The testimony of Dr. Carter here was speculative as defense counsel correctly argued. Her opinions about pornography influencing why she thought the alleged victim had been penetrated seemed objectively unusual. (Defense counsel had tried to keep the jury from hearing any allegation regarding pornography but the judge ruled it could not be separated out from what allegedly occurred here). Dr. Carter was also clearly influenced by watching the alleged victim on the forensic interview tape. Her opinion that the alleged victim suffered penetration in this case – despite the alleged victim's direct denial of penetration – reveals its speculative nature.

Expert opinions can be excluded when they are not helpful to the factfinder. Generally, an opinion is not helpful if it is speculative or conjectural. Collins, South Carolina Evidence §8.3 at pp. 220-221 (2000 ed.). To the extent Dr. Carter's testimony in this regard was relevant it nonetheless should have been excluded because of its speculative nature which made it unduly prejudicial under Rule 403, SCRE. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 191 (1991). Petitioner understands that "judicial restraint is desirable" when reviewing a Rule 403, SCRE ruling but this case reveals an abuse of discretion where Dr. Carter testified that she believed the alleged victim had been penetrated given the alleged victim's firsthand testimony of what actually occurred to the contrary. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). Not only may evidence that is speculative in nature be excluded, See State v. Compton, 366 S.C. 671, 681-682, 623 S.E. 2d 661, 666-667 (Ct. App. 2005), but, evidence such as that in this case, is also incompetent where it is confusing. It invited the jury to speculate that the alleged victim had been penetrated even though she had testified she had not. See State v. Saltz, 346 S.C. 114, 127-128, 551 S.E.2d 240, 247-248 (2001) (even if evidence of school attendance records was relevant, it was unfairly prejudicial, confused the issues and had a tendency to mislead the jury and invite speculation about the significance of the evidence). "The admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Fowler v. Nationwide Mutual Fire Ins. Co., Op. No. 5256, Shearouse's Adv. Sh. #31 at 87 (August 6, 2014). quoting Mali v. Odom, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988)). See, also, South Carolina State Highway Department v. Graydon, 246 S.C. 509, 144 S.E.2d 485 (1965),

Rehearing should be granted in this case: A verdict based on speculation the alleged victim may have been penetrated where she denied she was penetrated was unacceptable.

Respectfully submitted,



---

Robert M. Dudek  
Chief Appellate Defender

This 29<sup>th</sup> day of December, 2015.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

\_\_\_\_\_  
Appeal from Anderson County  
R. Lawton McIntosh, Circuit Court Judge  
\_\_\_\_\_

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**SC Court of Appeals**

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 29<sup>th</sup> day of December, 2015.



Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29<sup>th</sup> day  
of December, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.



# The South Carolina Court of Appeals

The State, Respondent,

v.

Andrew Antonio Clemons, Appellant.

Appellate Case No. 2013-001951

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## ORDER

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

Paul E. Short, Jr. J.

J. S. [Signature] J.

Stephanie L. McDonald J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire  
Robert Michael Dudek, Esquire  
Christina Theos Adams, Esquire  
Vann Henry Gunter, Jr., Esquire

**FILED**

January 21, 2016

**RECEIVED**

MAR 10 2016

**SC SUPREME COURT**

STATE OF SOUTH CAROLINA

In The Court of Appeals

---

APPEAL FROM ANDERSON COUNTY

R. Lawton McIntosh, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

---

RECORD ON APPEAL

---

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State of South Carolina

County of Anderson

In the Court of General Sessions

State,

Plaintiff,

-vs-

Andrew Antonio Clemons,

Defendant.

2011-GS-04-1977

2013-GS-04-569

May 13-15, 2013

Transcript of Record

BEFORE:

The Honorable R. Lawton McIntosh, Judge

APPEARANCES:

Kristin W. Reeves, Esquire  
 Lauren D. Price, Esquire  
 Assistant Solicitors for 10<sup>th</sup> Judicial Circuit  
 Attorneys for the State

Scott Thomason, Esquire  
 Attorney for the Defendant

Renee H. Tollison  
 Circuit Court Reporter

1 I assume we have a victims' advocate here today?

2 MR. THOMASON: Well, apparently, Ms. Johnson is  
3 going to be the first witness called, so I don't really  
4 ---

5 THE COURT: You don't have a problem with that?

6 MR. THOMASON: I don't really have a problem  
7 with that.

8 THE COURT: Okay. All right. Very good.  
9 Anything further from the State then before we go  
10 forward?

11 MS. REEVES: No, sir.

12 THE COURT: Mr. Thomason, from the Defense?

13 MR. THOMASON: Not at this time, Judge. As you  
14 know, once we get a little bit further into the thing, in  
15 the trial, as far as the medical and exhibits and things  
16 like that, we're going to have some things to talk about  
17 at that point.

18 THE COURT: All right. Well, you know, we met  
19 last Thursday about this video. Have y'all resolved the  
20 contents of the videos?

21 MS. REEVES: We have. The contents, yes.  
22 They're still being redacted as we speak, so we have not  
23 had official distribution of that yet.

24 THE COURT: And do you agree with that?

25 MR. THOMASON: I agree with that. What I don't

*State v. Andrew Antonio Clemons 2011-GS-04-1977, 2013-GS-04-569*  
*Pretrial Motions*

29

1 agree with is them being just -- the State saying, okay,  
2 now they're appropriately redacted, before I get an  
3 opportunity to look at them to make that determination.

4 THE COURT: Absolutely. He has a right to look  
5 at them before you put them up.

6 MS. REEVES: Absolutely.

7 THE COURT: It will just make life a lot easier  
8 for everybody. Okay. Anything else at this stage? I  
9 want to bring the jury in and let them go and just tell  
10 them, you know, some of my standard opening remarks. But  
11 anything I need to deal with before we do that?

12 MS. REEVES: Well, after they're gone, we'll  
13 address his absence, correct? And that ---

14 THE COURT: Well, we're going to address that  
15 when I give the opening charge to the jury. Right now  
16 I'm just going to tell them they can't speak about it  
17 with anybody. They can't talk about it amongst  
18 themselves. And if anybody tries to talk to them about  
19 it, they're to let me know.

20 MR. THOMASON: I guess to preserve the record I  
21 should renew my motion that I made at the pre-trial last  
22 Thursday, and that is a motion to elect between which of  
23 these charges the State wants to go forward with.

24 THE COURT: All right. I'm going to deny your  
25 motion. I looked at the statute again under the new

1 maybe at the end of the day for tomorrow.

2 THE COURT: Good. Sounds like a winner.

3 MS. REEVES: And I'll be right back.

4 (WHEREUPON, court stood at recess for a short  
5 break.)

6 THE COURT: All right. Ms. Reeves, are you  
7 ready to proceed for the State?

8 MS. REEVES: Yes, sir.

9 THE COURT: Mr. Thomason, are you ready?

10 MR. THOMASON: Yes, sir.

11 (WHEREUPON, the jury entered the open court at  
12 approximately 1:59 p.m.)

13 THE COURT: Ms. Reeves?

14 MS. REEVES: Thank you, Judge. May it please  
15 the Court?

16 THE COURT: Yes, ma'am.

17 OPENING STATEMENT

18 BY MS. REEVES:

19 Molesting a child. That's what the Defendant,  
20 Andrew Clemons, is charged with, and that's what this  
21 case is about. That child was eight-year-old MINOR

And the Defendant in this case was her  
23 stepfather. She was eight when her stepfather decided to  
24 touch her sexually. She is now ten, and she's going to  
25 take the witness stand and tell you how he touched her



*State v. Andrew Antonio Clemons 2011-GS-04-1977, 2013-GS-04-569*  
*Opening Statement by Ms. Reeves*

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1 and with what part of his body and what he made her touch  
2 his body with on her body.

3 This happened on more than one occasion. And  
4 afterwards she's going to tell you how the Defendant had  
5 her pray with him.

6 You are also going to hear from her sister who's now  
7 nine years old who, when she came into the house on one  
8 occasion, she saw her sister coming out of the bedroom,  
9 out of her father's bedroom and her mother's bedroom.  
10 And she only had a shirt on. And the Defendant was  
11 behind her, was behind the victim.

12 Along with the victim, MINOR and her sister,  
13 T'Aja, you're going to hear from several other witnesses.  
14 You're going to hear from their mother. You're going to  
15 hear from a forensic interviewer who conducted an  
16 interview of the girls in her forensic capacity or in her  
17 professional capacity. And you're also going to hear  
18 from the doctor who examined the victim MINOR

19 To convict the Defendant, I must prove to you, as  
20 you heard from the Judge, beyond a reasonable doubt. And  
21 I must prove to you that the Defendant committed two  
22 acts, two charges. The first is criminal sexual conduct  
23 with a minor in the first degree, and the second is lewd  
24 act upon a child. I must prove to you that these  
25 incidents occurred between December 1st of 2009 and

1 August 31st of 2010. I don't have to prove that these  
2 acts occurred on a specific day or date during that time  
3 frame. And I'm allowed to do that because children are  
4 developmentally a little bit different from us, and they  
5 can't generally remember the date or the time that  
6 something happened. So I can prove to you that these  
7 incidents occurred between certain dates.

8 I do, however, have to prove the evidence or the  
9 elements of the crimes to you. The first is criminal  
10 sexual conduct with a minor in the first degree. The  
11 Judge is going to instruct you exactly what that charge  
12 reads at the end of this trial. But I want you to keep  
13 in mind as you hear the evidence that that charge  
14 basically means that the Defendant committed sexual acts  
15 on a child under eleven years old. And those sexual acts  
16 included a penetration, however slight, of any part of  
17 the body.

18 Now, different examples, of course, are sexual  
19 intercourse. But those are also attempted or anal --  
20 excuse me -- anal intercourse or fellatio or cunnilingus.  
21 Another charge is lewd act on a child. And that  
22 basically means sexual touching, like rubbing or  
23 masturbating.

24 Now, I know that the frank discussion of body parts  
25 and sexual acts can make everyone feel uncomfortable,

*State v. Andrew Antonio Clemons 2011-GS-04-1977, 2013-GS-04-569*  
*Opening Statement by Mr. Thomason*

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1 especially as they relate to children. But  
2 unfortunately, they are crimes, and they are committed.  
3 And that is what the Defendant in this case is charged  
4 with committing.

5 So at the end of this case, after you've heard all  
6 of the evidence, I will ask that you find the Defendant  
7 guilty of criminal sexual conduct with a minor in the  
8 first degree and lewd act. Thank you.

9 THE COURT: Mr. Thomason, does the Defense wish  
10 to have an opening statement?

11 MR. THOMASON: May it please the Court, Your  
12 Honor.

13 THE COURT: Yes, sir.

14 MR. THOMASON: Good afternoon. And y'all can  
15 say good afternoon.

16 THE JURORS: Good afternoon.

17 OPENING STATEMENT

18 BY MR. THOMASON:

19 You know, my name is Scott Thomason. I've worked  
20 with the Public Defender's office here in Anderson. That  
21 means that I defend those who can't otherwise afford to  
22 defend themselves. A lot more folks out there than you  
23 would think. I like to say we don't just defend poor  
24 folk; we defend po' folk.

25 It also occurs to me that during this whole jury

*Opening Statement by Mr. Thomason*

1 selection process, I mean, we basically herd you guys in  
2 here like cattle. Like you come stand up there, like  
3 we're bidding on you like a prize bull or something like  
4 that, and ask you all kinds of personal questions.

5 So, as I said, my name's Scott Thomason. I was born  
6 and raised here all my life. My daddy's Glenn and my  
7 sister's Nancy Jo. I go to First Baptist Church, and  
8 I've got a black lab named Beaufort. And that's about  
9 all you need to know about me.

10 This is just -- you know, when you read the charges  
11 off on a case like this, everybody just kind of, ugh.  
12 But you know, you have to look at it and use the same  
13 approach intellectually as if it were a larceny or a DUI  
14 or a spitting on the sidewalk. These charges are way,  
15 way more serious than those. But in your mind, when  
16 you're determining what the facts are, you should not  
17 allow yourself to be prejudiced because of the simple  
18 nature of the charges. In other words, just because the  
19 charges are heinous, it does not reflect on the  
20 Defendant's innocence or guilt.

21 Now, you're probably all sitting there wondering,  
22 where's the Defendant. Well, the answer to that question  
23 truthfully -- and I'm just going to tell you -- I don't  
24 know. And you should not concern yourself with that.  
25 The Defendant has the right not to testify. And the

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1 Judge will tell you that that is the right that every  
2 American citizen has, and it is a right that you all  
3 have. It's a right everybody has. And the fact that  
4 somebody does not testify in their own behalf cannot be  
5 used against them. It's human nature to think otherwise,  
6 but you're just -- I'm sorry. You're just going to have  
7 to suspend human nature for a little bit because you just  
8 cannot hold that fact against him. The fact that he's  
9 not here, you can't hold that against him. Because even  
10 if he was, he wouldn't have had to testify anyway. So  
11 just put those things out of your head and we'll move on.

12 Now, you know, I'm not going -- I'm not a mind  
13 reader, and I can't tell you who all's going to testify  
14 and who's not. But I anticipate there to be a couple of  
15 children testifying in this case. And ladies and  
16 gentlemen, I just want to tell you right now that that is  
17 the absolute hardest part of my job is having to cross-  
18 examine a child. I mean, I'm a human being. And I don't  
19 like having to do it, but it has to be done. It's the  
20 way the American justice system works, and it's my job.  
21 And I take my job very seriously.

22 I will only get to speak directly to you twice  
23 during this trial, and this is one of them. So I really,  
24 really hope y'all pay attention. And I really appreciate  
25 the fact that y'all came up here today and volunteered

1 your -- well, you didn't volunteer really. But you  
2 fulfilled your civic duty and came up here today and were  
3 willing to serve on this jury, and I do want to show my  
4 appreciation for that. And I will try to not run off at  
5 the mouth any more than necessary. I'm usually a man of  
6 very few words.

7 But I do again -- because it's that's important. I  
8 do again want to remind you that the fact that Mr.  
9 Clemons, the Defendant, whether he's here or whether he  
10 testifies, that cannot hold any sway in your decision-  
11 making on the facts. The facts are going to come from  
12 the witness stand and through the evidence and exhibits  
13 presented.

14 Now, you will be chosen to weigh those facts. And  
15 the Judge will talk to you more at the end of the trial  
16 about how you weigh them. And I expect at some point  
17 during the trial I may have to stand up and say,  
18 objection, or Ms. Reeves may have to stand up and say,  
19 objection. And we'll have to ask you to leave the room  
20 for a minute. It's not because we're trying to hide  
21 something from you. It's just because the only way you  
22 can have a fair trial is for only admissible evidence to  
23 come in.

24 There's two kinds of evidence. Some's admissible  
25 and some's not admissible. And sometimes the parties or

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1 the prosecuting attorney and I will disagree as to what  
2 those are. So if there is an objection and y'all have to  
3 go out, please just don't think we're trying to hide  
4 anything. It's not that at all. It's just the way it  
5 works.

6 And the Judge is right. This is not Law and Order.  
7 This is not -- you know, it's just going to be kind of  
8 long and slow. But hopefully we'll move through it as  
9 quickly as possible and cause everybody as little pain as  
10 possible.

11 So thank you very much for listening to me. And I  
12 will be talking with you again one more time. And  
13 unfortunately, the next time I talk to you, I'm going to  
14 have a lot more to say. So thanks.

15 THE COURT: Would you call your first witness,  
16 please, ma'am?

17 MS. REEVES: Yes, sir. The State calls Telfia  
18 Johnson.

19 **TELFIA JOHNSON,**

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MS. REEVES:

23 Q. Ms. Johnson, where did you graduate from high  
24 school?

25 A. From T.L. Hanna in 2002.

1 Q. And did you go on to college?

2 A. Yes. I went to Tri-County Technical College with a  
3 degree in Licensed Practical Nursing December 2011.

4 Q. And do you work now?

5 A. Yes.

6 Q. Where?

7 A. I work for Greenville Health Systems. I work at the  
8 medical center in Powdersville in the urology and surgery  
9 department.

10 Q. And you said for the Greenville Hospital System in  
11 Powdersville. But what did you say, urology and what  
12 else?

13 A. I work for the Greenville Hospital System, but it's  
14 their office -- they have a medical center in  
15 Powdersville. And I work in the urology and surgery  
16 department.

17 Q. And how long have you worked there?

18 A. I've worked there since January of this year.

19 Q. And do you work anywhere else?

20 A. Yes. I work at Diamond Health and Rehab in  
21 Simpsonville.

22 Q. And is that full-time?

23 A. It's as needed.

24 Q. And how long have you worked there?

25 A. Since January of 2012. And before then, I worked --



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- 1 I was going to school, so I was working at Wendy's.
- 2 Q. Are you married?
- 3 A. Yes, to Byron Johnson.
- 4 Q. And when did you get married?
- 5 A. November 2012.
- 6 Q. Do you have any children?
- 7 A. Yes. I have four.
- 8 Q. And what are their names and ages?
- 9 A. MINOR she's ten; T'Aja J. , she's  
10 nine; [REDACTED], he's six; and [REDACTED] (phonic)  
11 [REDACTED], he's five.
- 12 Q. And who is MINOR father?
- 13 A. Jonathan White.
- 14 Q. And when is her birthday?
- 15 A. Her birthday's [REDACTED] [REDACTED].
- 16 Q. And is Mr. White part of her life?
- 17 A. Yes. He sees her when he wants.
- 18 Q. Who is the father of your other three children?
- 19 A. Andrew Moochie Clemons.
- 20 Q. When did you start seeing the Defendant? And I'm  
21 sorry you said, Andrew who Clemons?
- 22 A. Moochie.
- 23 Q. And is that a nickname of his?
- 24 A. Uh-huh (affirmative). We call him Moochie.
- 25 Q. So when did you start seeing Moochie?

1 A. Well, I've know him since I was like fifteen. But

2 we didn't actually start dating until I was nineteen.

3 And that was in November of 2002 after MINOR was born.

4 And I had T'Aja -- I got pregnant with T'Aja January of

5 2003, and I had her in October of 2003.

6 Q. And is the Defendant your age?

7 A. No. He's four -- when I first met him he was four

8 years older than me.

9 Q. And did you ever live with him?

10 A. Yes. We lived together on-and-off.

11 Q. What was the most recent time that he started living

12 with you?

13 A. December 2009, mid-December.

14 Q. And where was that?

15 A. [REDACTED].

16 Q. And is that in Anderson County?

17 A. Yes, ma'am.

18 Q. Okay. And in mid-December, you said, of 2009 is

19 when he came to live with you again?

20 A. Yes.

21 Q. And how old was MINOR at that time?

22 A. She was seven then.

23 Q. In December of 2009, were you in school?

24 A. Yes, ma'am. I was going to Tri-County Tech during

25 that time, but I was also working too.

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1 Q. And where were you working then?

2 A. I was working at Magnolia's full-time rotating  
3 between first and second, and then I was also working  
4 part-time for Interim. But I only worked at Magnolia's  
5 for a little bit because they don't work around my school  
6 schedule, so I had to go full-time at Interim.

7 Q. What kind of work did you do at Magnolia's?

8 A. Med tech and care giver.

9 Q. And how about at Interim Health Care?

10 A. Did home health care.

11 Q. Where did your children go during the day while you  
12 were at work back in, let's say, December 2009?

13 A. Well, the girls were in school, and the boys went to  
14 daycare.

15 Q. When did you normally get home?

16 A. It'd be after five.

17 Q. What did the girls do after school?

18 A. They rode the bus home from school, and Moochie  
19 would be there with them until I got home with the boys.

20 Q. And so you picked -- you said you came home with the  
21 boys; is that right?

22 A. When I would get off of work, I would go by the  
23 daycare and pick them up, and then we would go home.

24 Q. Was the Defendant working in December of 2009?

25 A. No, ma'am.

1 Q. And in 2010?

2 A. He wasn't working at all.

3 Q. How long did you live with the Defendant at [REDACTED]

4 [REDACTED]?

5 A. We lived together through mid-August of 2010. And I  
6 kicked him out when all this ---

7 Q. Can you describe the house for me on [REDACTED],  
8 what the bedroom situation was like?

9 A. Yes, ma'am. Me and Moochie shared a room, the boys  
10 shared a room and MINOR and T'Aja shared a room.

11 Q. And can you describe the furniture in the girls  
12 room?

13 A. They had bunk beds.

14 Q. And how about the furniture in the living room?

15 A. We had a long couch, included the sofa, a love seat  
16 short couch and a TV, coffee table and end tables.

17 Q. You mentioned a TV. Did you have any other devices  
18 that you could watch movies on or anything?

19 A. Uh-huh (affirmative). We just had a little portable  
20 DVD player.

21 Q. Do you still have that portable DVD player?

22 A. No. When I kicked him out with his stuff, I gave  
23 all his stuff to Camilia White.

24 Q. Without saying what anyone else said, when did you  
25 become aware that something had happened to MINOR

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1 A. Well, in January of 2011, I heard the girls in their  
2 room arguing. I was in the kitchen cooking. And they  
3 ran in there, and T'Aja said that she wanted ---

4 Q. Wait. Let me stop you right there. Don't say what  
5 anybody else said. But again, can you describe -- there  
6 was an incident that you became aware?

7 A. Yes. They were arguing, and she wanted to tell me  
8 something about what she seen between MINOR and her  
9 father.

10 Q. How did you feel after you heard what she said?

11 A. A cold feeling ran through me because I just felt  
12 like it wasn't good, what she was about to say.

13 Q. And what, if anything, did you do next?

14 A. I told T'Aja to leave out of the kitchen so I could  
15 talk with MINOR alone.

16 Q. And again, without saying what MINOR told you,  
17 did you have a conversation with her about what T'Aja was  
18 talking about?

19 A. Yeah. But she kept going around in circles, and she  
20 really wouldn't come out and tell me. And while she was  
21 trying to tell me, T'Aja kept coming in, trying to butt-  
22 in and basically try to say, you know, that that's not  
23 basically what was said. She was trying to correct  
24 Jonashja.

25 Q. Did this help MINOR

- 1 A. No.
- 2 Q. In what way?
- 3 A. She still wasn't telling me anything much of nothing
- 4 at all.
- 5 Q. How old were MINOR and T'Aja?
- 6 A. At that time?
- 7 Q. Yes.
- 8 A. Seven and eight.
- 9 Q. And you were referring -- do MINOR and T'Aja have
- 10 nicknames?
- 11 A. Yes.
- 12 Q. They're shortened names. What are they?
- 13 A. T'Aja is 'Aja, and MINOR is MINOR
- 14 Q. Did you bring this up again with MINOR ?
- 15 A. When I picked her up from school the next day, I
- 16 tried to ask her about it again. And she told me --
- 17 well, we talked about it inside of the car and then at
- 18 home.
- 19 Q. And without saying what she said, did she give you
- 20 at that time some more details?
- 21 A. She gave me enough details to know that I needed to
- 22 try to get her checked out, but she didn't really go deep
- 23 into it.
- 24 Q. What, if anything, did you do after you spoke with
- 25 her?

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- 1 A. I called her father, and we scheduled her an  
2 appointment at Dr. Syad.
- 3 Q. Do you remember when that appointment was?
- 4 A. It was January the 28th, 2011.
- 5 Q. And who is Dr. Syad?
- 6 A. That's their pediatrician.
- 7 Q. Did you go to that appointment?
- 8 A. Yes, ma'am.
- 9 Q. And who was with you?
- 10 A. Me and MINOR father and MINOR
- 11 Q. What did you want Dr. Syad to do?
- 12 A. Just to make sure that she was okay.
- 13 Q. What kind of an exam did -- were you present for the  
14 exam?
- 15 A. Yes. Me and John both were in the room.
- 16 Q. And what kind of exam did Dr. Syad perform?
- 17 A. Just a basic visual exam. She didn't use any  
18 equipment.
- 19 Q. And what was your understanding of her exam?
- 20 A. She told me that she couldn't rule in or out  
21 anything, but that she did not think that there was any  
22 penetration because she was still crescent-moon shaped.
- 23 Q. And what, if anything, did the doctor recommend you  
24 do after that with MINOR
- 25 A. She gave me two numbers to contact a counselor.

1 Q. Did you follow up with that?

2 A. Yes. I called one of them, and they were no longer  
3 accepting Medicaid. And then the other one, mental  
4 health, referred me to Mr. McClellan at school. And he  
5 doesn't always work on site. He rotates between the two  
6 schools. I left numerous messages for him, but he would  
7 never call back. And when I finally got in contact with  
8 him, he explained to me that he wouldn't be beneficial  
9 for MINOR because he worked more with behavior issues.

10 Q. And at some point, did DSS become involved in this?

11 A. Yes. Not too long after I had talked to Mr.  
12 McClellan, they had put a note on my door -- it was like  
13 a card -- telling me to contact -- that was on a Friday.  
14 It was like February the 18th.

15 Q. And do you know how DSS got to be involved?

16 A. Uh-huh (affirmative). Me and a friend of mine -- I  
17 believe that she called them. We had a falling out when  
18 she had called them.

19 Q. You said that the Defendant had moved out in mid-  
20 August of 2010; is that right?

21 A. Uh-huh (affirmative).

22 Q. And had he had any contact with MINOR or any of  
23 you after that?

24 A. Not after that point.

25 Q. And when DSS was involved, did you cooperate with



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1   them?

2   A.    Yes.

3   Q.    And once they got involved, was MINOR    referred  
4   anywhere?

5   A.    To Foothills Alliances to do a forensic interview,  
6   and then she was able to start counseling.

7   Q.    Did you -- were you able to watch that interview?

8   A.    No.

9   Q.    And at some point later, did you have a conversation  
10   with her, a more in-depth conversation with MINOR  
11   about what happened to her?

12   A.    Well, I never really bring it up to her. But she  
13   would -- if she talk about it, I would listen, you know.  
14   But I never brought it up to her.

15   Q.    And again, without saying all of what she may have  
16   told you, did she tell you when something had happened to  
17   her?

18   A.    Around her birthday that summer when she was turning  
19   eight.

20   Q.    And did she happen to tell you where something had  
21   happened to her?

22   A.    In the living room twice on both the long couch and  
23   the short couch and in my bedroom.

24   Q.    And that was at what house?

25   A.    [REDACTED] [REDACTED].

1 Q. After MINOR told you this information, how did  
2 that make you feel?

3 A. I had a lot of -- a lot of mixed emotions about it.  
4 I was angry with him because I, you know, would leave her  
5 there for him to watch them while I work and go to  
6 school. And then I was angry with myself because I felt  
7 like, you know, I was not there to protect her. And now  
8 there's nothing that I could do about it. And I felt  
9 like I put my school and work in front of them and wasn't  
10 really paying attention to what was going on at home. I  
11 felt guilty.

12 Q. At eight years old, had you had a conversation with  
13 MINOR about her body?

14 A. No. I would just tell her, you know, not to let  
15 anybody touch her chest or her butt, but nothing like  
16 that.

17 Q. Nothing about what, specific?

18 A. Yeah, nothing that specific.

19 Q. Did you ever have a conversation with the Defendant  
20 concerning what had happened to MINOR

21 A. Uh-huh (affirmative).

22 Q. And what did he say?

23 A. He just said that it did not happen all the way like  
24 what she said, and he had wanted to talk with her, but I  
25 wouldn't let him speak with her. And he told me to just

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*Telfia Johnson - Cross-examination by Mr. Thomason*

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1 ask them what they used to pray about.

2 Q. Nothing further right now, Ms. Johnson.

3 THE COURT: Cross-examination?

4 MR. THOMASON: May it please the Court.

5 CROSS-EXAMINATION

6 BY MR. THOMASON:

7 Q. Ms. Johnson, just to clarify -- do you need a  
8 minute, or are you okay?

9 A. I'm fine.

10 Q. All right. Just to clarify the behavior alleged  
11 that my client, Andrew Clemons, committed -- and I'm  
12 going to call him Andrew, okay? I just frankly ...

13 THE COURT: Can the jury hear?

14 MR. THOMASON: Can y'all hear me? I'm sorry.

15 THE COURT: I think you need to come up a  
16 little bit.

17 MR. THOMASON: I'm usually accused of being too  
18 loud.

19 Q. The alleged behavior or the events that are in  
20 question that Mr. Clemons is being charged with were  
21 supposed to have been taken place between December 9th  
22 and August 10th -- I'm sorry. August 9th '09 -- December  
23 9th, '09 and August 10 of '10?

24 A. Yes, sir.

25 Q. And you alleged that you only found out about it in

1 January of '11?

2 A. Yes, sir.

3 Q. And you also, I believe, said that your youngest  
4 daughter was the one that brought this to your attention,  
5 not ---

6 A. It was T'Aja, his daughter, that brought it to my  
7 attention.

8 Q. And through -- again, not saying what anybody else  
9 told you. But did you discover what age MINOR was when  
10 this happened to her?

11 A. Did I discover it when she told me about it?

12 Q. Yes.

13 A. Yes.

14 Q. And what ---

15 A. It was around -- she was turning -- her birthday is  
16 June the 12th, 2002, and it was around that time when she  
17 was turning eight years old, that summer.

18 Q. Okay. So did you come to find out that this alleged  
19 conduct occurred when she was eight years old?

20 A. Uh-huh (affirmative). When she was turning eight  
21 around the time of her birthday.

22 Q. Okay. So really then you can -- and she turns --  
23 her birthday is June the ---

24 A. 12th.

25 Q. --- 12th?

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1 A. 2002.

2 Q. Okay. So now we're really only talking about from  
3 June of 2010 to August of 2010, if she was turning eight  
4 years old, because that's when she would have been  
5 turning eight years old?

6 A. Uh-huh (affirmative).

7 Q. Okay. So December 9th, 2009, would have been  
8 approximately six months before she turned eight years  
9 old, correct?

10 A. Yes. But he was in the home with her at the time.

11 Q. I understand. You -- how best to characterize this.  
12 You and Mr. Clemons did not always have the most -- you  
13 guys had a fairly rocky relationship. Would that be fair  
14 to say?

15 A. Correct.

16 Q. And from time to time, you would get mad at him or  
17 he would get mad at you, and y'all would split up and get  
18 back and split up and get back and that sort of thing?

19 A. Yes, sir.

20 Q. When you found out -- and when you -- again, not  
21 saying what anybody told you. But upon when you -- at  
22 the end of the conversation when you had been told what  
23 you had been told by T'Aja or MINOR and so forth and  
24 so on, did you realize that that behavior or those  
25 allegations being made were criminal?

- 1 A. Was it criminal?
- 2 Q. Yes.
- 3 A. Yes.
- 4 Q. Did you know they were crimes?
- 5 A. Yes.
- 6 Q. But you did not report them to the police?
- 7 A. I took her to the doctor, and I was looking for Dr.
- 8 Syad -- you know, at that moment at that time I really
- 9 didn't know what to do, and that's why I took her to the
- 10 doctor. And when I took her to Dr. Syad, I basically was
- 11 looking for her for guidance. And she gave me those two
- 12 numbers. And based on what she said, I took the
- 13 information and did what she told me to do.
- 14 Q. And Dr. Syad said that there was no penetration,
- 15 didn't she?
- 16 A. She said that she couldn't rule it in or out, but
- 17 she did not think that there was any penetration because
- 18 she was still crescent-moon shaped.
- 19 Q. All right.
- 20 A. But she did give the number for counseling and the
- 21 two numbers to contact to get MINOR some counseling.
- 22 Q. Okay. Well, when in fact did law enforcement get
- 23 involved?
- 24 A. After -- whenever I went and spoke with the lady
- 25 that Monday at DSS, then she contacted the law

1 enforcement.

2 Q. So you mentioned that one of your emotions that you  
3 felt after having those conversations was anger.

4 A. Uh-huh (affirmative).

5 Q. And yet you did not pick up the phone and call 9-1-1  
6 and report a crime?

7 A. No, I did not report a crime, but I did take her to  
8 the doctor. And I was using -- based on what Dr. Syad  
9 said -- and I expected -- I thought she was telling me  
10 basically what to do. You know, she told me to call the  
11 counselor, and that's what I did. And I felt also if we  
12 were in there and it felt like it need -- you know, if  
13 anything went wrong that she would have told me, you  
14 know, well, you need to go contact the police or she  
15 would have contacted the police while we were there.

16 Q. But that's just speculation on your part?

17 A. I mean, yeah, because I've never been in that  
18 situation before.

19 Q. I understand. I believe that's all I have for you,  
20 Ms. Johnson. Thanks so much.

21 THE COURT: Redirect?

22 MS. REEVES: No, sir.

23 THE COURT: Thank you, ma'am.

24 THE WITNESS: Uh-huh (affirmative).

25 THE COURT: If you'd call your next witness,

1 please?

2 MR. THOMASON: May we approach?

3 (WHEREUPON, a bench conference was held off the  
4 record.)

5 THE COURT: Would you call your next witness,  
6 please, ma'am?

7 MS. REEVES: Thank you, Judge. The State calls  
8 Jonashja White.

9 MINOR

10 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

11 DIRECT EXAMINATION

12 BY MS. REEVES:

13 Q. MINOR how old are you?

14 A. Ten.

15 Q. And where do you go to school?

16 A. Whitehall.

17 Q. And what grade are you in now?

18 A. Fifth.

19 Q. And when is your last day of school?

20 A. June 6th.

21 Q. I thought you might know that date. And who are  
22 your teachers right now?

23 A. My homeroom teacher is Ms. Mezza, my E.L.A. teacher  
24 is Ms. Jacobs and my science teacher is Ms. Truman.

25 Q. Do you have a nickname that you go by?



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MINOR - Direct Examination by Ms. Reeves

1 A. MINOR

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

3 THE COURT: Could you push that mike up a  
4 little bit further?

5 Do you mind helping her with that microphone?

6 Do you mind speaking a little bit closer to that  
7 microphone, sweetheart? There we go.

8 A. I have one sister and two brothers.

9 Q. And what are your brothers' names?

10 A. Andrew and Izia.

11 Q. And how old they?

12 A. Andrew is six and Izia is five.

13 Q. And you said you had one sister?

14 A. (Nodded head up and down in the affirmative.)

15 Q. And what's her name?

16 A. T'Aja.

17 Q. And how old is she?

18 A. Nine.

19 Q. And can you tell me if it's good or bad to tell the  
20 truth?

21 A. Good.

22 Q. And is it good or bad to tell a lie?

23 A. Bad.

24 Q. And if I said that the sky is purple, is that a  
25 truth or a lie?

1 A. Lie.

2 Q. And what happens to someone if they tell a lie?

3 A. They get in trouble.

4 Q. And in the courtroom is it good or bad to tell a  
5 lie?

6 A. Bad.

7 Q. And can you tell the truth today about what  
8 happened?

9 A. Yes, ma'am.

10 THE COURT: Any issues regarding this witness'  
11 competency to testify?

12 MR. THOMASON: I don't have any, Your Honor. I  
13 believe she's competent to testify.

14 THE COURT: Very good. You may proceed.

15 MS. REEVES: Thank you, Judge.

16 Q. How do you know Andrew Clemons?

17 A. Because he's my sister and brothers' dad.

18 Q. And does he have a nickname or something else you  
19 call him?

20 A. Yes, ma'am.

21 Q. What is that?

22 A. Moochie.

23 Q. And did Moochie used to live with you?

24 A. Yes, ma'am.

25 Q. Where?

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- 1 A. On [REDACTED].
- 2 Q. And did Moochie ever touch you in a way that you
- 3 didn't like?
- 4 A. Yes, ma'am.
- 5 Q. And did this happen once or more than once?
- 6 A. More than once.
- 7 Q. And do you remember how it started?
- 8 A. Yes, ma'am.
- 9 Q. Can you tell us about that?
- 10 A. It started in the house in the bathroom. He walked
- 11 into the bathroom.
- 12 Q. What else happened after that?
- 13 A. He said, oops, sorry, and walked back out.
- 14 Q. Then what happened?
- 15 A. When I came out of the bathroom, I was in my room.
- 16 And my sister and him was in the living room watching TV.
- 17 And so I went in the living room with them. And they
- 18 both were sitting in a chair together. And she asked me
- 19 did I want to sit with them? And I went and sat with
- 20 them. And so my sister fell asleep and he took her and
- 21 put her on her bed, and it was just me and him in the
- 22 living room.
- 23 Q. And then what happened?
- 24 A. And then he -- we were still watching TV. And then
- 25 he went over to the short couch and told me to come over

1 to the short couch. And he made me pull down my clothes,  
2 and he pulled down his clothes.

3 Q. And what clothes did he have you pull down on you?

4 A. My panties and my pants.

5 Q. And what clothes did he pull down on him?

6 A. His sweat pants.

7 Q. And what happened after that?

8 A. He made me touch his private parts, and he touched  
9 my private parts.

10 Q. What did he touch your private parts with?

11 A. His private parts.

12 MR. THOMASON: I'm sorry. His what?

13 THE COURT: Would you repeat that, please? And  
14 speak up a little bit.

15 Q. What did he touch your body with?

16 A. His private parts.

17 Q. And where on your body did he touch?

18 A. My private parts between my legs.

19 Q. Did you see his private part?

20 A. Yes, ma'am.

21 Q. What did it look like?

22 A. It was -- it was brown, and it kind of felt hard.

23 Q. And you said this happened where?

24 A. In the living room.

25 Q. How was he -- you said in the living room, and I

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- 1 think you said on the couch; is that right?
- 2 A. Yes, ma'am.
- 3 Q. How was he on the couch?
- 4 A. He was laying down.
- 5 Q. And was he laying on his stomach or his back?
- 6 A. Back.
- 7 Q. And how were you on the couch?
- 8 A. I was -- I was like -- I was like on my back on top
- 9 of him.
- 10 Q. And you said that he touched your private part with
- 11 his private part; is that right?
- 12 A. Uh-huh (affirmative).
- 13 Q. And where exactly?
- 14 A. You talking about where he was touching his private
- 15 part on mine? It was between my legs.
- 16 Q. And was he touching skin or something else?
- 17 A. Skin.
- 18 Q. And when he was touching you, what was he doing?
- 19 A. He was moving me.
- 20 Q. You said moving you?
- 21 A. Uh-huh (affirmative).
- 22 Q. How was he moving you?
- 23 A. Like back and forth.
- 24 Q. What was he -- what part of your body was he holding
- 25 or touching to move you?

- 1 A. My waist.
- 2 Q. With his -- what was he using, his hands?
- 3 A. His hands.
- 4 Q. Do you remember another time something else
- 5 happened?
- 6 A. Yes, ma'am.
- 7 Q. And tell us about that.
- 8 A. It was my mom's bedroom. And he made me touch his
- 9 private parts with my hands. And that's the time when my
- 10 sister had seen me run out of the room with only a shirt
- 11 on. And that time he had made me take off my clothes
- 12 too.
- 13 Q. He had made you what?
- 14 A. Take off my pants and my underwear.
- 15 Q. And did you say that he -- what did he make you do
- 16 in the bedroom?
- 17 A. Touch his private parts with my hands.
- 18 Q. And what do you remember about that?
- 19 A. He just put my hands on his private part and rubbed
- 20 them up and down.
- 21 Q. So he put your hands on him; is that right?
- 22 A. Yes, ma'am.
- 23 Q. And then what happened?
- 24 A. He just -- it really -- he had his hands on top of
- 25 my hands and moving them up and down.

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1 Q. Is there anything else you remember about that?

2 A. Yes, ma'am. Something came out.

3 Q. Something came out of where?

4 A. His private part.

5 Q. Do you remember what that was like?

6 A. Not really.

7 Q. Was it pee?

8 MR. THOMASON: I think she's already said she  
9 didn't know, Your Honor.

10 THE COURT: All right. I'll give you a little  
11 bit of leeway.

12 Q. Was there another time that you might remember  
13 something else happening?

14 A. Yes, ma'am.

15 Q. Can you tell us about that?

16 A. It was again on the short couch. And he had me  
17 touching his private parts again. And my sister had  
18 tried to come in the front door, but he had locked it.  
19 And he had opened the back door, and he had the screened  
20 door locked. And then when they came back in -- my  
21 sister and my friend down the street, when they came back  
22 in there to get me, he ran me in my room. And he had put  
23 the covers over me and he had let them in.

24 Q. So you had been with Moochie on the short couch?

25 A. Yes.

1 Q. And you said your sister and your friend had come to  
2 the door; is that right?

3 A. Yes, ma'am.

4 Q. And what had been happening on the couch, on the  
5 short couch?

6 A. He was making me touch his private parts.

7 Q. And then when your sister came to the door, what  
8 happened?

9 A. She first knocked on the front door, and he yelled  
10 and told them to go around to the back. And so he had  
11 took me in my room and put the covers over me. And then  
12 he went to the back door and unlocked the screen.

13 Q. I'm going to back you up a little bit and ask do you  
14 remember on the short couch what -- you had said that he  
15 was making you touch his private part with your hand; is  
16 that right?

17 A. Uh-huh (affirmative).

18 Q. Do you remember how he was on the couch?

19 A. Yes, ma'am.

20 Q. How was he on the couch?

21 A. He was -- he was just sitting up and his back was to  
22 the back of the couch.

23 Q. And what were his clothes like?

24 A. They were halfway down to his knees.

25 Q. And how were you on the couch?



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1 A. I was -- I wasn't on the couch. I was kind of on  
2 the floor and he had my hands on his private part.

3 Q. And then you said that he took you to your room; is  
4 that right?

5 A. Yes, ma'am.

6 Q. And you said he covered you; is that right?

7 A. Yes.

8 Q. Why did he cover you?

9 A. I guess he wanted them to think I was asleep.

10 Q. How were your clothes?

11 A. I had all my clothes on.

12 Q. Was there ever a time that you remember Moochie  
13 showing you anything?

14 A. Yes, ma'am.

15 Q. Can you tell us about that?

16 A. It was a ---

17 MR. THOMASON: Your Honor, I'm going to --  
18 excuse me. I'm going to make an objection here. I think  
19 what ---

20 THE COURT: All right. Just one second.

21 Mr. Foreman, ladies and gentlemen of the jury, it's  
22 probably a good time now for you to take a brief break  
23 anyway. If you'd go back to your jury room, I'd  
24 anticipate probably ten to fifteen minutes. If you need  
25 anything, let the bailiff know, okay, sir?

1 (WHEREUPON, the jury exited the open court at  
2 approximately 2:47 p.m.)

3 THE COURT: All right. State your objection on  
4 the record, please.

5 MR. THOMASON: If it please the Court. Your  
6 Honor, as I mentioned at the pre-trial on Thursday, I  
7 would object to any mention of any sort of pornography  
8 coming in. There has been no -- he's not charged with  
9 sexual exploitation of a child or showing -- or anything  
10 having to do with pornography. It has nothing to do with  
11 what he is being actually charged with, which is either  
12 performing criminal sexual conduct or performing a lewd  
13 act. And both of those involve some sort of touching,  
14 not a showing of a video. I feel like under 402 or 403  
15 that it's just more prejudicial than probative to talk  
16 about -- that's what I anticipated, what I think she was  
17 getting ready to say.

18 THE COURT: Right. And you're right. You did  
19 bring this motion up last Thursday when we were doing  
20 pre-trial. I overruled it then. I overrule it now. I  
21 think it's part and parcel of what this little girl can  
22 testify to as to what she went through with this  
23 Defendant. And it was just part of what he was engaged  
24 in allegedly with her. But I will note your objection  
25 for the record.

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1 Let's take a ten-minute break. Now, you can't talk  
2 to anybody your testimony including your mama, including  
3 the State's witness or anybody during the break, okay?

4 THE WITNESS: Yes, sir.

5 THE COURT: But you're free to get down, but  
6 just don't speak with anybody, okay?

7 THE WITNESS: Okay.

8 THE COURT: All right. Thank you.

9 We'll be in recess until two o'clock [sic].

10 (WHEREUPON, court stood at recess for a short  
11 break.)

12 MS. REEVES: Judge, may I approach? I need to  
13 get you to change the date on this.

14 THE COURT: On the bond?

15 MS. REEVES: Yes, for the 12th. Today is the  
16 13th.

17 (Off record discussion)

18 (WHEREUPON, State's Exhibit Number 1 and 2 were  
19 marked for identification only.)

20 THE COURT: All right. Mr. Thomason, are you  
21 ready to proceed?

22 MR. THOMASON: Yes, Your Honor.

23 THE COURT: All right. Ms. Reeves, are you  
24 ready?

25 MS. REEVES: Yes, sir.

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1 THE COURT: Would you bring the jury in?  
2 (WHEREUPON, the jury entered the open court at  
3 approximately 3:05 p.m.)

4 THE COURT: Ms. Reeves, are you ready?

5 MS. REEVES: Yes, sir.

6 THE COURT: You may proceed.

7 MS. REEVES: Thank you.

8 DIRECT EXAMINATION

9 CONTINUED BY MS. REEVES:

10 Q. MINOR right before the break, I had asked you if  
11 Moochie ever showed you anything, and you said yes. Can  
12 you tell us about that, please?

13 A. He showed me this movie on his DVD player thingy.

14 Q. What was the DVD player thingy?

15 A. It was like a little TV screen.

16 Q. And would it play movies?

17 A. Uh-huh (affirmative).

18 Q. Speak up. What's that?

19 A. Yes, ma'am.

20 Q. And what did he show you?

21 A. It was people on there doing what he was doing to  
22 me, but they were older.

23 Q. And how were they dressed?

24 A. Some of them had clothes on, but some of them  
25 didn't.

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- 1 Q. Do you remember a time that he showed this to you?
- 2 A. Yes, ma'am.
- 3 Q. Where were you?
- 4 A. We were in -- I think we were in my mama's bedroom.
- 5 Q. What happened? What else do you remember?
- 6 A. That's all.
- 7 Q. Do you remember a time -- I think you said that he
- 8 put his private part on your private part?
- 9 A. Yes, ma'am.
- 10 Q. Did he ever put his private part somewhere else on
- 11 your body?
- 12 A. Yes, ma'am.
- 13 Q. Where?
- 14 A. My mouth.
- 15 Q. Tell me about that.
- 16 A. He just -- he would have his hands on my head, and
- 17 he had my hands on his private parts.
- 18 Q. You said he touched his private part to your mouth?
- 19 A. Yes, ma'am.
- 20 Q. Did he put his private part in your mouth?
- 21 A. Yes, ma'am.
- 22 Q. And what was he doing? You said he had his hand on
- 23 your head?
- 24 A. Yes, ma'am.
- 25 Q. What was he doing?

- 1 A. He just moved my head up and down.
- 2 Q. Do you remember if anything happened or came out of
- 3 his private part?
- 4 A. Yes, ma'am. I don't know what it was.
- 5 Q. But something came out; is that right?
- 6 A. Yes, ma'am.
- 7 Q. And where did it go when it came out?
- 8 A. It went in my mouth, but I spit it out.
- 9 Q. Was there ever a time that he touched his private
- 10 part to another private part on your body?
- 11 A. No, ma'am.
- 12 Q. Did he ever try to touch his private part on your
- 13 bottom or on your butt?
- 14 A. Not that I can remember.
- 15 Q. Do you remember another time that he showed you the
- 16 videos?
- 17 A. Yes. He showed it to me twice.
- 18 Q. And you described one. Can you describe the other
- 19 one?
- 20 A. It was the same thing.
- 21 Q. Was it the same video or a different video?
- 22 A. I believe it was a different video, but ...
- 23 Q. Did he say anything when he showed this to you?
- 24 A. No, ma'am.
- 25 Q. You said there was a time that you remember your

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1 sister seeing you. Can you tell us about that?

2 A. My sister, she had -- she was walking down the  
3 hallway. And she -- he had heard her walking down the  
4 hallway. And so he told me to get out, and he had told  
5 me to run in my room. So I run in my room, and I only  
6 had my shirt on. So she saw me and asked me why did I  
7 come out of my mom's room with only a shirt on.

8 Q. And do you remember what you said?

9 A. I just was trying to change the subject.

10 Q. Do you remember another time that may have been on a  
11 weekend or maybe when your mom wasn't there again?

12 A. No, ma'am.

13 Q. And where was your mom when Moochie was doing this  
14 to you?

15 A. I think she was at work.

16 Q. What time of day? Do you remember?

17 A. After school.

18 Q. And so who would have been at your house after  
19 school?

20 A. Me and my sister.

21 Q. And who else?

22 A. Moochie.

23 Q. And where was your sister?

24 A. Most of the time whenever we got home, we'd go  
25 outside and play. And then sometimes I had to stay in

1 the house.

2 Q. When Moochie had you put your hands on his private  
3 part, did that happen once or more than once?

4 A. Once.

5 Q. And I'm going to show you what's been marked as  
6 State's Exhibit 1 and 2. Can you tell on State's Exhibit  
7 1 what that's a picture of?

8 A. A girl.

9 Q. Does she have any clothes?

10 A. No, ma'am.

11 Q. And when you were telling us that Moochie put his  
12 private part on your private part, can you point on the  
13 girl what your private part was?

14 A. (Indicating)

15 MS. REEVES: Please let the record reflect that  
16 the witness pointed to the vagina.

17 Q. Anywhere else?

18 A. Here.

19 MS. REEVES: And she also pointed to the mouth.

20 THE COURT: And let the record so reflect.

21 Q. I'm going to show you State's Exhibit Number 2.  
22 What is this a picture of?

23 A. A boy.

24 Q. Does he have any clothes on?

25 A. No.



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1 Q. And when you referred to Moochie's private part  
2 touching you, can you point to that?

3 A. (Indicating)

4 MS. REEVES: Let the record reflect the victim  
5 is pointing to the penis.

6 THE COURT: So reflected.

7 Q. Anywhere else?

8 A. He touches his hand on my waist, but that's it.

9 THE COURT: Can the jury hear okay? I mean,  
10 that's my concern. Is the jury be able to hear? Okay.

11 Q. Do you remember how old you were when Moochie did  
12 these things to you?

13 A. Seven.

14 Q. And did it only happen when you were seven?

15 A. I think so.

16 Q. And do you remember what grade you were in?

17 A. Second.

18 Q. Did Moochie ever tell you what to say about what he  
19 was doing to you?

20 A. He told me not to tell anyone or I would get in very  
21 big trouble and he would get in very big trouble.

22 Q. Do you remember anything else he may have told you?

23 A. We prayed.

24 Q. You prayed? Can you tell us about that a little  
25 bit?

1 A. He would call my sister in there. And we'd all pray  
2 together, and we would just ask God to forgive us of our  
3 sins. And that's it.

4 Q. Did you tell your mom what Moochie was doing to you?

5 A. I didn't. My sister did.

6 Q. Can you tell us about that?

7 A. Well, me and my sister, we were arguing. And  
8 whenever we get mad at each other, we tell on each other.  
9 And we were arguing. What, I don't remember about. And  
10 so she went in the kitchen and told my mama.

11 Q. Why didn't you tell your mom before then?

12 A. Because I was scared I'd get in trouble.

13 Q. Just one second, okay? Nothing further.

14 THE COURT: All right. Cross-examination?

15 MR. THOMASON: May it please the Court.

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. THOMASON:

19 Q. Is it okay if I call you MINOR

20 A. MINOR

21 Q. Yes.

22 THE COURT: She said MINOR

23 Q. MINOR I'm sorry. MINOR you said that all of  
24 the things that Mr. Clemons did to you, you were seven  
25 years old?

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**MINOR** - Cross-examination by Mr. Thomason

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1 A. Yes, sir.

2 Q. Okay. Can you tell us when your birthday is?

3 A. [REDACTED].

4 Q. [REDACTED]

5 A. Yes, sir.

6 Q. All right. So you've got a birthday coming up in  
7 about a month, don't you?

8 A. Yes, sir.

9 Q. Now, when you said that he put his private part  
10 between your legs, you meant like there, correct?

11 A. Yes, sir.

12 Q. And I hate to use these words. But he did not put  
13 his private part inside your -- what was the word we  
14 used? If I were to ...

15 MR. THOMASON: May I approach the witness, Your  
16 Honor?

17 THE COURT: Yes, sir.

18 Q. If I were to draw a circle around there, what would  
19 be your word for that private part?

20 A. Penis.

21 Q. Okay. Can I write penis beside there?

22 A. (Nodded head up and down in the affirmative.)

23 Q. Okay. And on the girl picture, if I put a circle  
24 there, what would you call that?

25 A. A vagina.

1 Q. Okay. And if I put a circle around that private  
2 part, what would you call that?

3 A. Butt.

4 Q. Okay. Thank you for making that clearer.

5 Now, when you said he touched your private part with  
6 his private part, you didn't say that he put his private  
7 part inside of your private part; is that correct?

8 A. Yes, sir.

9 Q. So he did not put his penis in your vagina?

10 A. Yes, sir.

11 Q. He did not?

12 A. He didn't.

13 Q. Okay. And he did not put his penis inside your  
14 butt?

15 A. He did not.

16 MR. THOMASON: One moment.

17 Q. MINOR were there any milestones or holidays or  
18 brothers' and sister's birthdays that might be able to  
19 help you narrow down exactly when the things that you  
20 said happened happened?

21 A. No, sir.

22 Q. Okay. Well, can you tell us -- how about the first  
23 time? Would that -- could you maybe narrow that down a  
24 little bit for us? Was it hot outside or cold or ---

25 A. It was between there.

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**MINOR** - Cross-examination by Mr. Thomason

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1 Q. I'm sorry?

2 A. Sometimes it would be hot; sometimes it would be  
3 cold.

4 Q. Well, would you say it was like springtime? Were  
5 there leaves on the trees?

6 A. I don't remember.

7 Q. Okay. Do you ever watch sports?

8 A. Yes, sir.

9 Q. Do you remember what sports they were playing at  
10 that time of year when it first started happening, when  
11 it first happened?

12 A. No, sir.

13 Q. Okay. Well, if they all happened when you were  
14 seven, then that means the last one had to happen before  
15 your birthday in 2010; is that right?

16 A. Yes, sir.

17 Q. Because that's when you would have turned eight ---

18 A. Yes, sir.

19 Q. --- on June the 12th?

20 A. Yes, sir.

21 Q. Okay. Do you remember going into a room with a lady  
22 and making a video with her sometime later on?

23 A. No.

24 Q. You don't remember that?

25 A. Making a video with her?

1 Q. Well, the -- when you went into the -- do you  
2 remember Ms. Stacy where they took you ---

3 A. Is she the woman who interviewed me?

4 Q. Yes. Yes. Do you remember that?

5 A. Yes, sir.

6 Q. Okay. Now, I'm going to be -- they're going to play  
7 some of that interview or that interview. And then I'm  
8 going to be asking you some more questions after that,  
9 okay?

10 A. Yes, sir.

11 Q. All right. Well, I think that's all I have for you  
12 right now. So thank you very much.

13 THE COURT: Redirect?

14 MS. REEVES: No, sir.

15 THE COURT: You may step down.

16 For the record, we had a bench conference. Mr  
17 Thomason requested that without losing his status as far  
18 as closing goes, that he be allowed to bring some  
19 questions up about the video. At this point, based on  
20 the preparation of that video, I told him that I would  
21 put that on the record and that would be the ruling of  
22 the Court.

23 MS. REEVES: Can you remind her that she's  
24 still under oath then and ---

25 THE COURT: Yes, ma'am.

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*T'Aja J. - Direct Examination by Ms. Reeves*

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1 And MINOR you are still under oath. And right  
2 now, until I excuse you, you may not speak with anybody  
3 about your testimony. You're free to talk to other  
4 people about other things, but you can't talk about your  
5 testimony, okay?

6 THE WITNESS: Yes, sir.

7 THE COURT: If anybody tries to talk to you  
8 about your testimony, you need to let me know and let me  
9 know who it is so I can talk to them, okay?

10 THE WITNESS: Yes, sir.

11 THE COURT: Thank you, ma'am.

12 All right. Please call your next witness.

13 MS. REEVES: Yes, sir. The State calls T'Aja  
14 J.

15 T'AJA J.

16 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

17 DIRECT EXAMINATION

18 BY MS. REEVES:

19 Q. T'Aja, how old are you?

20 A. Nine.

21 Q. And what school do you go to?

22 A. Whitehall.

23 Q. And what grade are you in?

24 A. Third.

25 Q. And what is your favorite subject?

- 1 A. Math.
- 2 Q. And do you have some brothers and sisters?
- 3 A. Yes, ma'am.
- 4 Q. How many brothers do you have?
- 5 A. Two.
- 6 Q. And do you have a sister named MINOR
- 7 A. Uh-huh (affirmative).
- 8 Q. Can you tell me if it's good or bad to tell the
- 9 truth?
- 10 A. It's good.
- 11 Q. And can you tell me if it's good or bad to tell a
- 12 lie?
- 13 A. It's bad to tell a lie.
- 14 Q. And if I said that the ceiling in this room was
- 15 bright red, is that the truth or a lie?
- 16 A. A lie.
- 17 Q. And what happens to someone when the tell lie?
- 18 A. They get in more trouble.
- 19 Q. And in this courtroom, is it good or bad to tell a
- 20 lie?
- 21 A. It is bad.
- 22 Q. Can you tell the truth today?
- 23 A. Yes, ma'am.
- 24 Q. What's your daddy's name?
- 25 THE COURT: Let me ask him a question.



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1 Any issue of competency to testify?

2 MR. THOMASON: Not at this time, Your Honor.

3 THE COURT: Okay. Go ahead.

4 Q. What's your daddy's name?

5 A. Moochie.

6 Q. And he used to live with you?

7 A. No.

8 Q. Did he ever live with you?

9 A. Uh-huh (affirmative).

10 Q. And where was that? Do you remember where you  
11 lived?

12 A. Uh-huh (affirmative).

13 Q. Where?

14 A. [REDACTED].

15 Q. And do you remember when you lived on [REDACTED]  
16 and something happened between your daddy and MINOR

17 A. Yes, ma'am.

18 Q. What do you remember?

19 A. That when we was outside she had said that she  
20 wanted to go inside and play with my dad. And then when  
21 I went in there, I had asked for something to drink. And  
22 then I saw MINOR with her panties on and her shirt on.

23 Q. Where was she when you saw her?

24 A. She was running from my dad's room to our room.

25 Q. And where was your dad?

1 A. Coming out of his room.

2 Q. So MINOR had been in there with him; is that  
3 right?

4 A. Uh-huh (affirmative).

5 Q. And you saw your sister wearing what again?

6 A. Her panties and her shirt.

7 Q. And where did she go?

8 A. Into her room.

9 Q. Was that your room too?

10 A. Uh-huh (affirmative).

11 Q. And then what happened after that? Do you remember?

12 A. My mom came. And he said that -- MINOR had  
13 slipped on some pants and came out of the room.

14 THE COURT: I'm going to stop you right quick.  
15 Can the jury hear this witness okay?

16 MR. THOMASON: I'll be honest. I'm having a  
17 little trouble hearing her.

18 THE COURT: Okay. You're free to get up and  
19 move around.

20 And so I don't keep interrupting the flow of this,  
21 if you can't hear, please just raise your hand, okay? If  
22 you'll just pay attention. I just don't want to keep  
23 interrupting. I'll make sure you do.

24 Thank you. You're doing fine. If you would speak  
25 directly into the microphone, sweetheart. I know this is

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1 not what you normally do. But just if you'd try to do  
2 that for us, we'd appreciate it.

3 THE WITNESS: Okay.

4 THE COURT: Thank you.

5 Q. You said that -- tell us again what you remember.

6 A. That I was outside and MINOR said that she was  
7 going to play with my dad. And then when I came in the  
8 house, I asked for something to drink. And then I saw  
9 MINOR with her panties on and a shirt.

10 Q. And then you said something about your mom coming  
11 home; is that right?

12 A. Uh-huh (affirmative).

13 Q. And where was MINOR when your mom came home?

14 A. In her room.

15 Q. And what was she doing?

16 A. She was putting on some pants.

17 Q. Do you remember how old you were when you saw that?

18 A. No.

19 Q. And did you tell your mom what you saw?

20 A. Uh-huh (affirmative).

21 Q. Was it right after it happened?

22 A. Uh-huh (affirmative).

23 Q. Or was it sometime a little bit later?

24 MR. THOMASON: I believe she just answered  
25 that, Your Honor.

1 THE COURT: Overruled.

2 A. It was a little bit later.

3 Q. Was your dad still living with you when you told  
4 your mom what had happened?

5 A. No.

6 Q. What do you remember about when you told your mom  
7 what you saw?

8 A. I told her that I had saw my sister and they was  
9 coming out of my mom's room, and I saw her with her  
10 panties on and her shirt.

11 Q. And what was your mom doing when you told her that?

12 A. She was in the kitchen.

13 Q. And do you remember why you told her?

14 A. Because I thought it was wrong.

15 Q. Nothing further.

16 THE COURT: Cross-examination?

17 MR. THOMASON: May it please the Court?

18 THE COURT: Yes, sir.

19 CROSS-EXAMINATION

20 BY MR. THOMASON:

21 Q. T'Aja?

22 A. Uh-huh (affirmative).

23 Q. T'Aja, what time did that -- at that -- what grade  
24 were you in when you say you saw MINOR come running out  
25 of the room, the bedroom?

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1 A. I think I was in first grade.

2 Q. What time did you get out school when you were in  
3 first grade?

4 A. Two thirty.

5 Q. Okay. And it may not have been the same time every  
6 single day. But usually about what time was it when your  
7 mama came home?

8 A. I don't remember.

9 Q. Would it be light outside still, or would it be  
10 dark?

11 A. Uh-huh (affirmative).

12 Q. It would still be light outside?

13 A. (No verbal response)

14 Q. And you only saw this happen one time?

15 A. Uh-huh (affirmative).

16 Q. But you never saw, you never saw him touch her in  
17 any way?

18 A. (Shook head side to side in the negative)

19 Q. Did she ever tell you he touched her in any way?

20 A. She ---

21 Q. I'm talking about right then?

22 A. No.

23 Q. Okay. I think that's all I have for you, T'Aja.

24 Thank you so much.

25 THE COURT: Redirect?

1 Just one second, sweetheart.

2 MS. REEVES: No, sir.

3 THE COURT: All right.

4 Thank you. Now you may step down.

5 Call your next witness, please.

6 MS. REEVES: Thank you, Judge. The State calls  
7 Jonathan White.

8 JONATHAN WHITE,

9 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MS. REEVES:

12 Q. Mr. White, are you married?

13 A. Yes, ma'am.

14 Q. To whom?

15 A. Samantha White.

16 Q. And where do you work?

17 A. Sargent Metal.

18 Q. And what do you do for that -- for Sargent Metal?

19 A. Drive a forklift.

20 Q. And do you have a daughter?

21 A. Yes, ma'am.

22 Q. And what's her name?

23 A. MINOR

24 Q. And how old is she?

25 A. She ten.

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- 1 Q. Do you see her a good bit?
- 2 A. Yes, ma'am.
- 3 Q. Do you have any other children?
- 4 A. No, ma'am.
- 5 Q. Who is MINOR mother?
- 6 A. Telfia Johnson.
- 7 Q. Do you know Andrew Clemons?
- 8 A. Yes, ma'am.
- 9 Q. And who is he?
- 10 A. That's the father of her other kids.
- 11 Q. At some point did you become aware that something
- 12 had happened to Jonashja?
- 13 A. Yes, ma'am.
- 14 Q. And how did you find out?
- 15 A. Her mama called me. She called me one afternoon.
- 16 Q. And what, if anything, did you do after you found
- 17 out this information?
- 18 A. I took her to the doctor the next day.
- 19 Q. And who -- what kind of doctor did you take her to?
- 20 A. Took her to her doctor.
- 21 Q. Did you end up taking her anywhere else?
- 22 A. Yes. To the -- I think it was the health care, the
- 23 health care place.
- 24 Q. And what happened to MINOR there?
- 25 A. Well, they ran more tests on her, and she went

1 through therapy and everything else.

2 Q. Did she have an interview?

3 A. Yes, ma'am.

4 Q. Did you later have a conversation -- were you able  
5 to watch that interview?

6 A. No, I wasn't able to watch it.

7 Q. Did you later have a conversation with your daughter  
8 about what had happened to her?

9 A. Yeah, briefly.

10 Q. And without saying all of what she told you, did she  
11 tell you when something had happened to her?

12 A. Yes. Finally, she told me what happened.

13 Q. Did she tell you how old she was?

14 A. I'm thinking it was -- she was maybe like seven.

15 Seven, seven and a half, I think.

16 Q. And had it happened to her once or more than once?

17 A. It happened more than once.

18 Q. And did she tell you where it happened to her?

19 A. No. We really didn't get into too much detail. I  
20 didn't want to know too much. I just know it happened.

21 Q. No further questions.

22 THE COURT: Cross-examination?

23 MR. THOMASON: May it please the Court?

24 THE COURT: Yes, sir.

25 CROSS-EXAMINATION



1 BY MR. THOMASON:

2 Q. Mr. White, you have said -- and I just didn't catch  
3 it. When were you told or made aware of these  
4 allegations against Mr. Clemons?

5 A. I can't remember that exact date, but ...

6 Q. Just get it as close as you can for me.

7 A. She ten now. I know -- all I know is she was like  
8 seven and a half. She was like seven and half. It's  
9 been some years. I can't remember exactly what date.

10 Q. Okay. And where did this -- where did the  
11 information come from? Who made you aware?

12 A. Her mama.

13 Q. Her mother? Ms. Telfia?

14 A. Yeah.

15 Q. All right. And how long after that did you take her  
16 to the doctor?

17 A. The next day, I believe. Yeah.

18 Q. That was Dr. Syad?

19 A. Syad.

20 Q. And do you remember Dr. Syad's findings?

21 A. I believe she -- I believe -- I remember her saying  
22 that she had -- it looked like she had been touched, so  
23 she had to go -- she referred her to another doctor so  
24 they can do further tests on her.

25 Q. But she also said everything looked pretty normal

1 down there, that she had not been penetrated, didn't she?

2 A. That's what -- that's what the further tests was  
3 for, I think. She said there was ---

4 Q. No. I'm just talking about what Dr. Syad said.

5 A. Yeah.

6 Q. Okay. Okay. Suffice it to say that all of your  
7 knowledge about any of these events and questions are  
8 secondhand? In other words, they've been told to you by  
9 others. You have no firsthand knowledge of anything that  
10 happened, correct?

11 A. Yeah. I have firsthand knowledge at the doctor.

12 Q. Well, no. I'm saying ---

13 A. You talking about the event, what happened?

14 Q. Yes.

15 A. Oh, yeah, it was secondhand.

16 Q. All right, sir. So everything you know was told to  
17 you?

18 A. Yeah.

19 Q. All right, sir. Thank you very much.

20 THE COURT: Redirect?

21 MS. REEVES: No, sir.

22 THE COURT: May Mr. White be excused?

23 MS. REEVES: Yes, sir.

24 THE COURT: Any objection?

25 MR. THOMASON: No, sir.

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1 THE COURT: Okay. Thank you, sir. You may be  
2 excused.

3 MS. REEVES: Judge, the next witness is on her  
4 way. Sorry, we went quicker than I anticipated.

5 THE COURT: Okay.

6 MS. REEVES: So she's on her way. It should  
7 not -- I don't think it should take more that hopefully  
8 ten to fifteen minutes.

9 THE COURT: Okay. All right. Mr. Foreman,  
10 sometimes trying cases is like herding cats. The best  
11 made plans, no matter how you make them, you just  
12 sometimes have to wait. And this is one of those times.  
13 If you'd go back to your jury room. Do you have  
14 everything you need back there?

15 MR. FOREMAN: I think so.

16 THE COURT: Okay. Again, if you need anything,  
17 Buck will let you know. He'll take care of you. If  
18 you'd go back to your jury room, please, sir.

19 (WHEREUPON, the jury exited the open court at  
20 approximately 3:39 p.m.)

21 THE COURT: We'll be in recess. Let me know.

22 MS. REEVES: Yes, Judge.

23 (WHEREUPON, court stood in recess for a short  
24 break.)

25 MS. REEVES: Judge, I was going to mention for

1 timekeeping purposes and -- you know, what do we need  
2 today and tomorrow. I was going to mention that I have  
3 two more witnesses to call today that I think we can  
4 easily fit in in the next thirty minutes maybe.

5 THE COURT: All right.

6 MS. REEVES: So what I was going to propose --  
7 that would leave Stacy Gianiodis, the forensic  
8 interviewer, and Dr. Carter. What I was going to suggest  
9 is perhaps we come in in the morning but maybe the jury  
10 stay out for a little bit so we can do those housekeeping  
11 matters like perhaps in-camera Dr. Carter's testimony.  
12 Make sure -- that will give us time this evening to watch  
13 the forensic interviews, make sure that we can play them  
14 without issue. And then take all of that -- those  
15 matters up in front of you tomorrow morning instead of  
16 the jury waiting.

17 THE COURT: So you would have them come in  
18 about ten?

19 MS. REEVES: Like ten, ten-thirty maybe.

20 MR. THOMASON: Maybe eleven.

21 MS. REEVES: He's mumbling eleven.

22 MS. REEVES: So I don't know how long, you  
23 know, it will take. But ---

24 THE COURT: Are your tapes done?

25 MS. REEVES: Yes, they are done. And Mr.

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1 Thomason has copies. But of course, neither of us have  
2 watched them.

3 THE COURT: So you'll have to look at those  
4 this evening. Okay.

5 MS. REEVES: We're actually going to watch them  
6 together, make sure they can play in here.

7 THE COURT: Oh, are you? All right. Well,  
8 good. I mean, I'm fine to do whatever. I mean, it's not  
9 a big deal to me.

10 MR. THOMASON: I just thought that it would  
11 make sense for us to watch them together so that, you  
12 know, we don't have to sit there and compare notes again  
13 tomorrow.

14 THE COURT: I can't hear you, my man.

15 MR. THOMASON: I'm sorry. Usually -- like I  
16 say, usually I'm accused of being too loud. We thought  
17 we would watch them together so that if any disagreements  
18 as to their redactions were found, then we would be, you  
19 know, right there on top of it together.

20 THE COURT: Okay.

21 MR. THOMASON: We wouldn't have to sit there  
22 and write times down and all of that.

23 THE COURT: I mean, how long do you think that  
24 Dr. Carter's testimony is going to take?

25 MS. REEVES: I don't think very long. I really

1 don't. It should not take very long. It's just the  
2 questions that we have. Of course, how long we argue is  
3 may be more appropriate. So ...

4 THE COURT: Okay. That's fine.

5 MS. REEVES: Okay.

6 THE COURT: That's certainly fine with me.

7 MS. REEVES: Good. So then I thought once --  
8 then those are the last two. We can hit the ground  
9 running after that.

10 THE COURT: Now, who's your next witness?

11 MS. REEVES: Next is Megan Overton. Megan  
12 Overton.

13 THE COURT: Megan Overton?

14 MS. REEVES: Yes, sir.

15 THE COURT: Okay. And you have two more that  
16 you propose to put up today after Ms. Overton?

17 MS. REEVES: Megan and one more. So two total.

18 THE COURT: I got you. Okay. Well, we should  
19 be able to get that done the way they're going now.

20 MS. REEVES: Yes.

21 THE COURT: Are you ready to proceed, Mr.  
22 Thomason?

23 MR. THOMASON: Yes, sir.

24 THE COURT: Are you ready?

25 MS. REEVES: Yes, sir.

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1 THE COURT: You can bring the jury in.

2 (WHEREUPON, the jury entered the open court at  
3 approximately 4:06 p.m.)

4 THE COURT: Call your next witness, please.

5 MS. REEVES: Thank you, Judge. The State calls  
6 Megan Overton.

7 **MEGAN OVERTON,**

8 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

9 DIRECT EXAMINATION

10 BY MS. REEVES:

11 Q. Ms. Overton, where do you work?

12 A. Anderson County DSS.

13 Q. And what does DSS stand for?

14 A. Department of Social Services.

15 Q. And how long have you worked there?

16 A. Since October 2008.

17 Q. And what is the general role of the Department of  
18 Social Services?

19 A. To protect children and families.

20 Q. And what is your position with them now?

21 A. My current position is I'm in an intake role. I  
22 take the reports as they're called in or as someone walks  
23 in to make a report.

24 Q. And what is -- what was your position or was that  
25 your position back in February 2011?

- 1 A. No, it wasn't.
- 2 Q. What was your position back then?
- 3 A. I was a child protective service investigator.
- 4 Q. And what were your duties and responsibilities as an  
5 investigator?
- 6 A. To investigate reports that had come in of abuse and  
7 neglect.
- 8 Q. And did you have a time frame for that?
- 9 A. When a report comes in, we have forty-five days to  
10 -- that is allotted to us to investigate. Now, if we  
11 need further time to gather further information to talk  
12 to someone, to get results to come in, we can get  
13 extensions.
- 14 Q. And at the end of that time frame, whether it's  
15 forty-five days or after an extension period, what  
16 decision do you have to make?
- 17 A. We either indicate the case which means that there  
18 was a finding of some form of abuse or neglect, or if we  
19 don't enough, we unfound the case which means -- and that  
20 closes the case.
- 21 Q. As an investigator, did you receive a referral  
22 regarding MINOR
- 23 A. I did.
- 24 Q. And when did you receive that?
- 25 A. February 18th, 2011.



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1 Q. And how did that referral come to you?

2 A. After the report is called in or ever how the  
3 report's made, it's written up by the intake worker. And  
4 that's given to the supervisor, and the supervisor makes  
5 that decision if DSS is going to be involved or not. So  
6 it was handed to me at that point, so that meant DSS was  
7 involved.

8 Q. And what, if anything, did you do after receiving  
9 that?

10 A. I investigated the case.

11 Q. And what were the steps to that?

12 A. You make, you know, contact going out to the homes,  
13 talking to the people involved, the parties involved.

14 Q. Did you make any other referrals?

15 A. It was referred to law enforcement.

16 Q. And did you -- you went to the home. Is that what  
17 you said?

18 A. That's correct.

19 Q. Did you ever meet with MINOR mother?

20 A. I did.

21 Q. And can you tell us about that?

22 A. I met her in my office. And she came up and we  
23 discussed the allegations of the report and talked about  
24 those.

25 Q. And how did she seem?

1 A. She seemed -- I mean, she was cooperative. You  
2 know, once we talked about the allegations concerning her  
3 daughter, that's what ...

4 Q. Had she already taken any steps before you got  
5 involved?

6 A. She had. She had taken her daughter to the doctors.

7 Q. And what, if anything, did you do at the end of that  
8 meeting?

9 A. After we met, I did put a safety plan in place. And  
10 that safety plan was just that, you know, she would  
11 continue to try to find counseling for her daughter at  
12 that time.

13 Q. And what happened next? Or what, if anything,  
14 happened with Jonashja?

15 A. She -- well, I forgot the -- I did refer the case to  
16 law enforcement, and then that's when a forensic  
17 interview was set up in place.

18 Q. And I think you said you visited her home?

19 A. I did visit her home.

20 Q. And what did you find there?

21 A. The home was clean. It was well organized. The  
22 kids like to talk to me about their Easter eggs they had  
23 gotten. They showed me their rooms. And you know, when  
24 we go out to the home, we're, you know, looking for that  
25 the basic needs are being met, that the kids are safe in

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1 their home and, you know, their needs are being provided.

2 Q. Did you find out at that point who MINOR  
3 biological father was?

4 A. Yes. That's Mr. White.

5 Q. And was he involved in her life?

6 A. He is involved.

7 Q. Was Andrew Clemons having contact with the family  
8 during this time?

9 A. Not when I had the case, no.

10 Q. And were -- all of the allegations that initially  
11 came in, did those prove or turn out to be valid?

12 A. Well, which ones are you talking, like ---

13 Q. When you received this report or this referral from  
14 the intake, did you have any concerns or anything that  
15 you later found through your investigation that were  
16 untrue?

17 A. Not the allegations concerning MINOR

18 Q. And at the end of your investigation period, what,  
19 if anything, did you do?

20 A. At the end of the investigation, we staffed -- I  
21 staffed my case with a supervisor. And through that we  
22 came to the decision that we were going to indicate Mr.  
23 Clemons for sex abuse.

24 Q. And then what happens to the case after that?

25 A. After our case is indicated with DSS, it moves on to

1 the treatment portion of the case.

2 Q. And how long can that portion last?

3 A. That can last up to a couple of years to six months.

4 It depends on how -- depending on what the allegations

5 are for that particular family and how the parents

6 cooperate and so forth.

7 Q. No further questions.

8 THE COURT: Cross-examination?

9 MR. THOMASON: The Defense would have no  
10 questions for this witness, Your Honor.

11 THE COURT: May she be excused?

12 MS. REEVES: Yes, sir.

13 MR. THOMASON: No objection.

14 THE COURT: Thank you. You're excused.

15 Call your next witness, please.

16 MS. PRICE: Your Honor, the State calls Melissa  
17 Partain to the stand.

18 **MELISSA PARTAIN,**

19 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

20 DIRECT EXAMINATION

21 BY MS. PRICE:

22 Q. And thank you, Sergeant Partain. By whom are you  
23 employed currently?

24 A. AnMed Health.

25 Q. Okay. And did you retire from another employment

- 1 source?
- 2 A. I'm retired, will be two years in June, from
- 3 Anderson Police Department.
- 4 Q. Okay. And when you retired from law enforcement,
- 5 what was your title with them?
- 6 A. I was a detective sergeant.
- 7 Q. And other than currently enjoying retirement, what
- 8 is it that you do for AnMed?
- 9 A. I'm a guest ambassador.
- 10 Q. A guest ambassador?
- 11 A. Yes.
- 12 Q. Okay. What were your duties and responsibilities
- 13 when you were a sergeant investigator?
- 14 A. I investigated child abuse and elder abuse.
- 15 Q. And as an investigator, did you ever receive a
- 16 report involving MINOR
- 17 A. I did.
- 18 Q. Was the investigation originally referred to you, or
- 19 was it handed off to you by somebody else?
- 20 A. It was handed to me by another detective, Scott
- 21 Kelly, who initially took the report and faxed the report
- 22 to Child Adolescent Center Foothills Alliance and then
- 23 gave it to me.
- 24 Q. Did you ever interview MINOR yourself?
- 25 A. No, I did not.

1 Q. Do you know if an interview of MINOR was ever  
2 conducted?

3 A. Not by law enforcement.

4 Q. Was she referred to any groups that would have  
5 conducted an interview by law enforcement?

6 A. We usually try not to interview the children that  
7 have been allegedly abused. We let a forensic interview  
8 take place at the Child Adolescent Center. So that's  
9 where she was interviewed.

10 Q. Okay. And that's where she was interviewed?

11 A. Correct.

12 Q. And law enforcement requested that that be done?

13 A. Right.

14 Q. And you said it took place where precisely?

15 A. At the Child and Adolescent Center Foothills  
16 Alliance on Calhoun Street.

17 Q. Foothills Alliance?

18 A. Right.

19 Q. And who performed that interview? Do you know who  
20 ---

21 A. Sallie [sic] Gianiodis.

22 Q. Say that again?

23 A. Sal -- Stacy Gianiodis.

24 Q. Without telling us what MINOR said, did she make  
25 a disclosure during that interview concerning sexual

- 1 abuse that had been committed against her?
- 2 A. She did.
- 3 Q. And through your investigation, were you able to
- 4 determine when and where this abuse likely occurred?
- 5 A. It occurred in Anderson County.
- 6 Q. And when?
- 7 A. In 2009, '10.
- 8 Q. Okay. Was a forensic interview also conducted on
- 9 T'Aja White?
- 10 A. There was.
- 11 Q. And for what purpose?
- 12 A. To make sure she was or was not a victim and also
- 13 make sure -- see if she was a potential witness.
- 14 Q. A witness to?
- 15 A. To the sister's alleged allegations.
- 16 Q. Okay. And when and where did T'Aja's interview
- 17 occur?
- 18 A. At the Child and Adolescent Center.
- 19 Q. Who conducted that interview?
- 20 A. Stacy Gianiodis.
- 21 Q. Do you know if a medical exam was ever performed on
- 22 MINOR
- 23 A. Yes, ma'am.
- 24 Q. Okay. Where did that take place?
- 25 A. It also took place at the Child and Adolescent

1 Center.

2 Q. Okay. Do you know who performed that exam?

3 A. Dr. Sallie Carter.

4 Q. What else did you do as part of your investigation?

5 Did you obtain any statements from anyone?

6 A. From the mother, Telfia Johnson.

7 Q. Okay. Through all of the investigation that you  
8 were involved in, were you able to identify a suspect in  
9 this case?

10 A. We did. After extensive investigation, follow-up  
11 and interviews, we finally came up with Andrew Clemons,  
12 known to us as Moochie.

13 Q. Okay. Did you at any point try to speak with Mr.  
14 Clemons?

15 A. We did. We went out to his father's house. We went  
16 out and tried to locate him through cousins and  
17 relatives. We also made phone calls to him and talked  
18 with him and tried to set up interview times, which the  
19 dates we set up or the times we set up. He never showed  
20 up.

21 Q. Okay. How old would Andrew Clemons, the Defendant,  
22 have been during the alleged incident dates?

23 A. I believe he was about twenty-nine.

24 Q. And as a result of your investigation, did you bring  
25 any charges against this Defendant?



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1 A. We did.

2 Q. And what were those charges?

3 A. Criminal sexual conduct in the first degree.

4 Q. Aside from testifying today, did you have any  
5 further involvement in this case?

6 A. No, ma'am, I have not.

7 Q. Okay. One moment, please. Okay. Thank you,  
8 Sergeant Partain. Please answer questions that Mr.  
9 Thomason may have for you at this time.

10 A. Yes, ma'am.

11 MR. THOMASON: May it please the Court.

12 CROSS-EXAMINATION

13 BY MR. THOMASON:

14 Q. You just mentioned an extensive investigation. But  
15 I mean, you said that you never talked to the child and  
16 you never took a statement from the child, the victim,  
17 that is, or the witness; is that correct?

18 A. That's correct.

19 Q. And that's what you consider to be extensive?

20 A. Yes, sir, it is.

21 Q. Okay. Thank you very much.

22 MS. PRICE: Brief redirect, Your Honor.

23 THE COURT: In response.

24 MS. PRICE: Yes, sir.

25 REDIRECT EXAMINATION

1 BY MS. PRICE:

2 Q. Sergeant Partain, is the reason that those  
3 interviews were not conducted by yourself because other  
4 members of law enforcement or other agencies had those  
5 responsibilities?

6 A. That's correct. And also to keep the traumatized  
7 child from experiencing any more trauma than she has to,  
8 we facilitated one location so she will only have to do  
9 this one time. And I went and I witnessed this, and the  
10 forensic interviewer was there.

11 Q. And was this a typical sexual assault investigation?

12 A. Yes, it was.

13 Q. Thank you. No further questions.

14 RECCROSS-EXAMINATION

15 BY MR. THOMASON:

16 Q. I didn't say that an extensive investigation didn't  
17 take place; it's just you pretty much didn't do it.  
18 Other people did.

19 A. That's correct. I observed.

20 Q. Thank you.

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

22 THE WITNESS: Thank you.

23 THE COURT: Mr. Foreman, I have some scheduling  
24 matters. Would you take your jury to the jury room for  
25 one second, please?

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1 (WHEREUPON, the jury exited the open court at  
2 approximately 4:20 p.m.)

3 THE COURT: Let me say this to the State.  
4 You're going to clarify or I'm going to clarify with the  
5 jury this idea of forensic interview, okay?

6 MS. REEVES: Yes, sir.

7 THE COURT: You have given the misimpression to  
8 this jury that that's something that has some kind of cut  
9 above. And it doesn't. And it's not going to go to the  
10 jury with that impression. I'm not talking about you,  
11 Officer. I'm talking about the whole line of  
12 questioning. You said in your opening statement forensic  
13 interviewer in their professional capacity, and it's been  
14 going on the whole trial. And I'm going to correct it or  
15 you're going to correct it, okay?

16 MS. REEVES: Yes, sir.

17 THE COURT: And I'm going to give you  
18 forewarning. Okay? Because that is not the case. I  
19 read the criminal case again. They're very, very  
20 limited. And I tell you what. I about stopped you  
21 myself. That was totally not in accordance with the  
22 criminal -- now, I shouldn't say totally. It goes up to  
23 the corner and passes it. Okay? Now, that being said  
24 and done, are you done for the day?

25 MS. REEVES: Yes, sir.

1           THE COURT: Okay. I want y'all to review those  
2 videos, get those resolved. If you have any problem, I'm  
3 going to be downstairs. We're going to bring the jury in  
4 here in just a second, and we'll be in recess. And you  
5 can do that. Just one second.

6           I don't mean to fuss at you because I know it's new  
7 ground. And you have a hard type of case to try. But  
8 you know, I brought up this to you last week. Criminal  
9 is clear, very clear. Okay? So it needs to be made  
10 clear to the jury that this person -- and I'm sure she's  
11 very good in what she does -- is not an expert.

12           MS. REEVES: Yes, sir.

13           THE COURT: Okay?

14           MS. REEVES: Absolutely.

15           THE COURT: All right. Would you bring the  
16 jury in?

17           (WHEREUPON, the jury entered the open court at  
18 approximately 4:23 p.m.)

19           THE COURT: All right. Mr. Foreman, for  
20 scheduling purposes, let me tell you where we are. We  
21 have some matters we're going to take up for the  
22 remainder of the afternoon, so we're going to excuse the  
23 jury. We have some other matters that we will get into  
24 in the morning before you get here. So we're going to  
25 ask the jury to be in its jury room at about ten fifteen.

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1 And then we'll get you back in the courtroom as soon as  
2 we can. Do you have everything you need for the night?

3 MR. FOREMAN: I believe so.

4 THE COURT: Okay. If each of you would, leave  
5 your notes in the jury room. And let me remind you not  
6 to speak amongst yourselves or with anybody else. And  
7 please do not engage in any independent jury research,  
8 okay? But I'm going to excuse you for the evening.  
9 Thank you. See you in the morning.

10 (WHEREUPON, the jury exited the open court at  
11 approximately 4:25 p.m.)

12 THE COURT: All right. Anything from the  
13 State?

14 MS. REEVES: No, sir.

15 THE COURT: Okay. From the Defense?

16 MR. THOMASON: No, sir.

17 THE COURT: All right. We'll be in recess  
18 until nine o'clock in the morning.

19 MS. REEVES: Yes, sir.

20 THE COURT: Okay. Be ready to go. Let me know  
21 what y'all want to do about how you intend to -- you  
22 don't have to tell it to Scott or Mr. Thomason. I just  
23 want to know what it is you're going to plan on doing to  
24 make sure the jury understands the status of a forensic  
25 examiner, okay?

1 MS. REEVES: Yes, sir.

2 THE COURT: If you would. You don't have to  
3 tell me now.

4 MS. REEVES: Okay. Well, I'm just making sure  
5 that -- I mean, I am not going to offer her as an expert.  
6 I'm going to go through the ---

7 THE COURT: The innuendo that's been going  
8 throughout this trial is that they have some kind of  
9 special status and special abilities, and ---

10 MS. REEVES: But I can ask her about her  
11 training, right? I mean, that she ---

12 THE COURT: Let me just tell you, I'm  
13 forewarning you right now. If you step over the line,  
14 which I felt like you did today ...

15 I felt like you did.

16 MS. PRICE: Sir, I ---

17 THE COURT: No, ma'am, I'm not going to ask you  
18 anything. I'm just telling you what I think. I'm going  
19 to stop it, and I'm going to tell them they're like any  
20 other witness that appears in this courtroom, and their  
21 testimony is not entitled to any higher consideration  
22 than anyone else. Okay? So I'm just trying to ---

23 MS. REEVES: Okay.

24 THE COURT: I tried to tell you last week about  
25 it.

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1 MS. REEVES: Yes, sir.

2 THE COURT: All right. But I agree that you  
3 should be able to talk to them about their background.

4 MS. REEVES: Right. You know, that's all I'm  
5 going to do. Her experience, her training to do it and  
6 how often she's done it.

7 THE COURT: I'm just going to remind you the  
8 Cromer case. I read it again thoroughly, thoroughly at  
9 lunchtime. There is a list of dos and don'ts in there.  
10 Okay? And just please stay in line with that.

11 And listen, I never -- you've got an uphill battle  
12 with these kind of cases. I understand. However, if we  
13 go too far afield on these cases, it's going to be a  
14 problem for everybody, including, you know, the Court,  
15 and you ---

16 MS. REEVES: No, I understand.

17 THE COURT: --- would have to try the case  
18 again. That's what I'm trying to avoid. Okay?

19 MS. REEVES: I understand. I'm trying to walk  
20 that line and not come anywhere near it. So ...

21 THE COURT: Well, I mean, your definition and  
22 mine of near are obviously two different things.

23 MS. REEVES: Yes.

24 THE COURT: But all that being said, you need a  
25 little reign to go try your case.

1 MS. REEVES: Yes, sir.

2 THE COURT: All right. We're done. We'll be  
3 in recess until the morning. Okay?

4 MS. REEVES: Thank you.

5 THE COURT: Thank you.

6 (WHEREUPON, court stood in recess for the day at  
7 approximately 4:28 p.m.)

8 **May 14, 2013**

9 (WHEREUPON, court convened and the following  
10 proceedings were had commencing at approximately  
11 9:15 a.m.)

12 THE COURT: All right. Let me put this on the  
13 record. I met with the attorneys before coming into the  
14 courtroom today. I had stated on the record yesterday  
15 that because of comments in the opening and because of  
16 testimony we received during the trial there was  
17 impression or innuendo that the forensic examiner is an  
18 expert. And I know when we've dealt with that in the  
19 past, they have been qualified as experts. But because  
20 of the Cromer case, that's no longer the case. And I  
21 actually told Ms. Reeves that I thought what I was going  
22 to do was if they didn't make clear to the jury that  
23 she's not an expert in the law ...

24 And this no -- are you here? Is that you back  
25 there?



1 MS. GIANIODIS: Yes, sir.

2 THE COURT: I certainly mean no personal  
3 dispersion to you.

4 MS. GIANIODIS: I understand.

5 THE COURT: Okay. But that I was going to make  
6 clear to the jury that she is not an expert. I thought  
7 about that over the evening, and I really am not smart  
8 enough, I don't believe, to be able to address that issue  
9 on the record without somehow tainting the evidence. But  
10 I have reviewed with the attorneys the prohibitions, for  
11 lack of better terms, or the guidelines or guidance  
12 that's spelled out in a criminal case and what is  
13 acceptable and what is not acceptable for forensic  
14 examiner testimony. And I'm just reminding them that we  
15 need to stay close to the mark on that. Okay? And I  
16 know that's not an easy task.

17 But that being said, I'm not going to tell the jury  
18 this person is not an expert because I don't see how I  
19 can do that. And I think Ms. Reeves' comment to me is  
20 that we intend just to treat her like any other witness  
21 is probably the appropriate way to deal with it.

22 Further, I mentioned and I brought it up to the  
23 attorneys -- they said they didn't feel like it was a  
24 problem. But I feel like out of an abundance of caution  
25 -- we have Dr. Carter who's going to testify today. Is

1 Dr. Carter here?

2 MS. REEVES: Yes, sir, I think she was -- yeah.

3 THE COURT: Dr. Carter, let me ask you this.

4 DR. CARTER: Yes.

5 THE COURT: Have I ever been -- my name is  
6 Lawton McIntosh. Have I ever been involved in any  
7 litigation with you back when I was a lawyer.

8 DR. CARTER: Not that I'm aware of.

9 THE COURT: Okay. And I'm not aware of it  
10 either. But for some reason, I have some impression I  
11 had. We checked it and I didn't come up with it. I was  
12 telling the attorneys that it was involving a real estate  
13 matter.

14 DR. CARTER: Yeah. I know what the connection  
15 is, but it doesn't have really to do with me.

16 THE COURT: That's what I thought too, but I  
17 wanted to make sure that I disclosed that to make sure  
18 that nobody had a problem with me continuing on. My  
19 memory, if it is in fact you -- of course, I can't tell  
20 you that it is -- it was involving a house that was put  
21 on a lot allegedly in contravention to some deed  
22 restrictions. But it has nothing to do with your  
23 professional career or anything like that. It wouldn't  
24 -- it certainly wouldn't -- it wouldn't impact on my  
25 ability to be fair and impartial in this case. I just

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1 wanted to make sure that, you know, out of an abundance  
2 of caution I disclosed that if, in fact, that was you.  
3 I'm not sure it is or not.

4 DR. CARTER: I don't recall those  
5 circumstances.

6 THE COURT: Well, then obviously I'm just  
7 mistaken then. And I just wanted to be, out of an  
8 abundance of caution, safe about that.

9 Okay. With all of that being said and done, then  
10 the idea this morning is we had a pre-trial Thursday when  
11 we were going over the forensic examiner's interview and  
12 redaction of that tape. Ms. Reeves indicated that she  
13 had some testimony that she intended to elicit from Dr.  
14 Carter, and she described it. And I just wanted to see  
15 it before we got it out in front of the jury to see, you  
16 know, how far we're going to go with it. I just wanted  
17 to see it in-camera before we went further with it so I  
18 could rule on it. Okay?

19 MS. REEVES: Yes, sir.

20 THE COURT: At this point, let's bring Dr.  
21 Carter around, swear her and let's do that, please.

22 **SALLIE CARTER, M.D.,**

23 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

24 IN-CAMERA DIRECT EXAMINATION

25 BY MS. REEVES:

1 Q. Dr. Carter, we're going to -- I'm going to ask you a  
2 few questions basically without the jury being present so  
3 hopefully we can talk a little bit freer. But we're  
4 going to go through what your testimony hopefully will  
5 later be. So what is your position currently?

6 A. I'm a physician at the Anderson Oconee Pickens Child  
7 and Adolescent Mental Health Center. And for the last  
8 ten years I've done the child sexual abuse exams for  
9 Foothills Sexual Trauma Center.

10 Q. Okay. And what is your undergraduate degree?

11 A. Psychology. That was a long time ago.

12 Q. Where was that from?

13 A. Mercer University.

14 Q. And do you have a master's?

15 A. I do.

16 Q. From where?

17 A. Yale Divinity School.

18 Q. And when did you decide to go to medical school?

19 A. When I was about twelve.

20 Q. Where -- what medical school did you go to, and when  
21 did you graduate?

22 A. I went to the Medical College of Georgia in Augusta,  
23 and I graduated in 1986.

24 Q. And did you do a residency?

25 A. I did an internship at Emory University Affiliated

1 Hospitals which included Grady Memorial Hospital and a  
2 pediatric residency at Yale New Haven Hospital in New  
3 Haven, Connecticut.

4 Q. And after your residency, what did you do?

5 A. I came to Anderson.

6 Q. And where did you work?

7 A. I had a private practice for about eleven or twelve  
8 years, and then it became the practice, the teaching  
9 practice, for the Family Practice Program, the pediatric  
10 practice. And then about nine and a half or ten years  
11 ago, I left that and went to work at the Anderson Oconee  
12 Pickens Department of Mental Health.

13 Q. So in your own practice, you said it became a  
14 training practice; is that right?

15 A. Yes. It was a large pediatric practice. And so the  
16 pediatric aspect of the family medicine training, that's  
17 where they rotate through, and that's where, you know,  
18 the patient load comes from.

19 Q. And what patients -- what type of patients did you  
20 see while you were in your own practice?

21 A. I've always seen primarily the Medicaid population,  
22 but it was children, you know, down from -- I guess the  
23 oldest person I would see would be, say, twenty-one or  
24 twenty-two if they have pediatric-type problems. And  
25 then, of course, for about thirteen years, I was the

1 director of the newborn nursery. So I saw preemies and  
2 newborns. A thousand a year about.

3 Q. A thousand a year. And as part of them being your  
4 patients, did you have to perform exams on them?

5 A. Yes.

6 Q. Including vaginal exams on the female children?

7 A. Well, vaginal inspection or external inspection,  
8 because we don't typically do a speculum exam or any sort  
9 of internal exam on newborns or young children.

10 Q. And during that practice, did you treat children  
11 that may have been victims in sexual assaults?

12 A. Yes.

13 Q. You mentioned also doing some work with the Child  
14 Advocacy Center?

15 A. Yes.

16 Q. And that's been for the last ten years?

17 A. Yes.

18 Q. And what are your duties and responsibilities there?

19 A. I see children for genital exams. So I mean, I do a  
20 full pediatric exam, but primarily it's for genital exams  
21 and documentation.

22 Q. And how many sexual assault exams would you say you  
23 perform on children in about a month?

24 A. Oh, in a month it's probably anywhere from three to  
25 nine. It's a wide range because some months we don't

- 1 have as many referrals as other months.
- 2 Q. So how many exams would you say you've done in a
- 3 year?
- 4 A. Well, in a year?
- 5 Q. Or in the last ten?
- 6 A. Usually, about fifty. It averages out to about
- 7 fifty.
- 8 Q. Did you receive any specialized training to perform
- 9 these sexual assault exams?
- 10 A. Yes.
- 11 Q. What type?
- 12 A. There's an organization nationwide -- I'm sorry, I
- 13 may not -- I'm going to stumble on the name of it. I
- 14 can't remember the name. But at any rate, all that they
- 15 do is train physicians to do exams for sexual abuse and
- 16 sexual assault. And I've had both the basic and the
- 17 advanced course. And one of those I did in Minneapolis,
- 18 St. Paul/Minneapolis. You know, they're like sister
- 19 cities or twin cities. And the other was in -- at
- 20 Scottish Rite in Atlanta.
- 21 Q. Have you previously been qualified as an expert in
- 22 the area of child sexual assault examinations?
- 23 A. I have.
- 24 Q. And do you know how many times approximately?
- 25 A. Somewhere between thirty-five and fifty is a pretty

1 good guess, I guess.

2 MS. REEVES: At this point in the trial, we'd  
3 offer her as an expert in the area of child sexual  
4 assault exams.

5 THE COURT: The area is child sexual assault  
6 ---

7 MS. REEVES: Examination.

8 THE COURT: --- examination? All right.

9 Mr. Thomason, do you wish to voir dire this witness  
10 with regard to her expertise?

11 MR. THOMASON: No, sir.

12 THE COURT: Do you stipulate that Dr. Carter is  
13 an expert in the area of child sexual assault  
14 examinations?

15 MR. THOMASON: Yes, sir.

16 THE COURT: Okay. Very well. Then she'll be  
17 stipulated to be an expert in that area.

18 MS. REEVES: Excellent. Now, for the jury, I'd  
19 like for them to hear her qualifications.

20 THE COURT: Yeah. I mean, all of this has been  
21 in-camera. You're going to have to do it again. But you  
22 know, for the purposes of the record, she's an expert.  
23 Okay.

24 MS. REEVES: Thank you. If it's okay, I would  
25 go on because the question of the photographs that Dr.



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1 Carter took of my victim were raised at an earlier  
2 hearing. So I'd like for you to hear her testimony on  
3 that.

4 THE COURT: Yes, ma'am.

5 MS. REEVES: In addition, I think we're -- now,  
6 that you've qualified her, I think that we still need to  
7 make sure that -- as to what she's going to talk about is  
8 her specific findings of the exam. We want to make sure  
9 that those are reliable and allowable.

10 THE COURT: Just one second. That's not your  
11 client back there, is it?

12 MR. THOMASON: No.

13 THE COURT: Okay.

14 MR. THOMASON: I don't know who he is.

15 THE COURT: Okay. I just wanted to be safe.  
16 All right. Go ahead.

17 Q. Dr. Carter, did you perform an examination on

18 MINOR

19 A. I did.

20 Q. And when did you perform it?

21 A. I would need to have a copy of the record to see the  
22 date on it.

23 Q. Let me pass you your -- pass up your report to you.

24 A. This is dated in my handwriting April the 4th, 2011.

25 Q. Okay. And how old was MINOR when you performed

1 the examination on her?

2 A. Her date of birth at that time was June the 12th,  
3 2002, so she would have been just shy of nine years of  
4 age. She would have been eight years old.

5 Q. Okay. Can you describe what type of exam you  
6 normally perform on MINOR

7 A. As I indicated to you, I do a typical pediatric  
8 examination. Oh, you've given me two records. The other  
9 one is apparently a sibling or possibly a sibling. I do  
10 a typical pediatric examination. I did one on Monday on  
11 a similar-aged child. I evaluate the eyes, ears, nose  
12 and throat, the neck to make sure if there aren't any  
13 enlarged lymph nodes or enlarged thyroid. The lungs, the  
14 heart, the abdomen, checking for masses or tenderness or  
15 any abnormality of the spine. The extremities and then  
16 the genitalia, which is done with a colposcope. And a  
17 colposcope is a medical device that -- it's kind of like  
18 a telescope. It gives magnification, and it also has a  
19 digital camera on it so that I can record digitally the  
20 images that I'm viewing.

21 Q. And so how does this colposcope aid in your  
22 examination, a genital examination?

23 A. Well, it just gives a lot higher resolution than the  
24 naked eye. And I've done plenty of exams with the naked  
25 eye, but you can't -- you know, they're small structures.

1 The younger the child, the smaller the structures. And  
2 so it magnifies everything up to about twenty times  
3 normal. And as I say, it has a digital camera on it so  
4 that the images can be recorded and reviewed for closer  
5 inspection.

6 Q. And did you use that colposcope on MINOR in your  
7 exam?

8 A. I did.

9 Q. What were your findings in MINOR exam?

10 A. There were no abnormalities on physical exam except  
11 for the genital area where she had an absent posterior  
12 hymen. I could see clearly into the vagina, and I was  
13 not able to document transections or scars because when  
14 there isn't any hymen left, you don't have that tissue to  
15 see scars on.

16 Q. So can you describe what a hymen is generally?

17 A. A hymen is a thin, in a young child, almost  
18 translucent piece of mucus membrane that's shaped  
19 generally -- generally, it's described as being shaped as  
20 annular or concentric, concentric being, you know, only  
21 partially around the vaginal opening and annular being  
22 almost completely around the vaginal opening. And it  
23 usually, in a young child, hides the opening of the  
24 vagina. It's just a little piece of mucus membrane  
25 tissue that's there at birth and is present even in

1 mature females, but takes on a different appearance after  
2 puberty or during and after puberty.

3 Q. And so what would be significant in regards to  
4 MINOR findings?

5 A. Well, in an eight-year-old who -- rarely we will see  
6 an eight-year-old who has started her menstrual cycle and  
7 has estrogenized tissues, but that would be rare. That  
8 would be the exception. In this case, this child was  
9 prepubertal, clearly prepubertal. And the absence of the  
10 hymen was significant.

11 Q. And so in your expert opinion, what could -- is this  
12 an injury?

13 A. Something caused the tissue to be torn and to  
14 recede, to become, basically become mucus membrane tissue  
15 like the rest of the tissue. Typically, in that age  
16 child, in a prepubertal child, we would see  
17 unestrogenized tissue. That is the hormone estrogen has  
18 not acted on the tissue so that it looks kind of pale and  
19 sometimes very vascular, sometimes almost translucent.  
20 You can almost see through it. A very thin little rim of  
21 tissue which is intact, smooth and -- you know, it can ..

22 There are various other abnormalities that you can  
23 see in hymens. For instance, some children, some girls  
24 have imperfect hymens. There is no vaginal opening  
25 whatsoever and that procedure has to be dealt with. Now,

1 that condition has to be dealt with medically. In some  
2 children we see what was called a septate hymen or a  
3 hymen with, you know, more than one opening. There are  
4 some variations on the theme. But it's kind of like  
5 noses. Nearly everybody has one.

6 Q. And so is the absence of a hymen something that you  
7 can be born with, one of those abnormalities that you  
8 were speaking of?

9 A. Well, again, seeing a thousand newborns a year  
10 roughly, you know, a half or sixty percent would be  
11 females, I have never seen that nor have I seen it  
12 recorded in the medical literature.

13 THE COURT: What was that that you've never  
14 seen, Doctor?

15 THE WITNESS: Absence of a hymen.

16 THE COURT: Oh, okay.

17 Q. And so ---

18 THE WITNESS: Congenital abnormality.

19 THE COURT: Got you.

20 Q. So what is this absence of a hymen consistent with?

21 A. Well, I didn't say that it was an absent hymen. I  
22 said it was an absent posterior hymen.

23 Q. Sorry.

24 A. Meaning that there was residual tissue, kind of  
25 around the edges, but nothing posterial. And that's

1 typically where injuries appear in penetrating type. You  
2 know, that's typically where abnormalities appear after  
3 penetrating injuries.

4 Q. Okay. I am going to -- did you -- as part of your  
5 examination, you stated that your colposcope has a  
6 digital camera attached; is that correct?

7 A. It does.

8 Q. And did you take some images during your exam of

9 MINOR

10 A. I did.

11 (WHEREUPON, State's Exhibit Number 3 was marked for  
12 identification only.)

13 Q. Dr. Carter, I'm going to show you what's been marked  
14 as State's Exhibit Number 3. Can you tell me what this  
15 is a picture of?

16 A. This is a picture of a prepubertal child's, female  
17 child's, genital exam with an absent posterior hymen.

18 Q. Is that from MINOR exam?

19 A. Well, it doesn't have a name on it. But I have  
20 reviewed these pictures on the computer, and this appears  
21 to be MINOR exam.

22 Q. Okay. And again, what are you looking at in her in  
23 that picture?

24 A. I see a small amount of hymen laterally and none  
25 posteriorly, and the light shines directly into the

1 vagina.

2 THE COURT: Would you mind defining for me what  
3 you mean by posteriorly and laterally, please?

4 THE WITNESS: Oh, yes. That's a great  
5 question. Because children can be examined in different  
6 positions. And in this case, posteriorly means nearest  
7 the anus. I mean, it's a typical female lithotomy  
8 position so that the urethra, the anterior and the  
9 perineum, which is the tissue that's cut during child  
10 birth for the episiotomy, it's posteriorly, and then the  
11 anus is even further back than that. And I suppose you  
12 could say inferior because you're talking about, you  
13 know, up and down. But generally, we refer to it  
14 posteriorly.

15 THE COURT: And laterally would be to the  
16 sides?

17 THE WITNESS: Yes.

18 THE COURT: Okay. I got you. Thank you.

19 Q. And I think you've already described how this might  
20 differ from that of a normal child of this age?

21 A. Yes.

22 (WHEREUPON, State's Exhibit Number 4 marked for  
23 identification.)

24 Q. Okay. So now I'm going to show you what's been  
25 marked as State's Exhibit Number 4 in preparation for

1 this case. Would you tell me what that is a picture of?

2 A. Yes. This is a similar aged child, same colposcope,  
3 same position, but a dramatically different picture  
4 because this is a normal hymen.

5 Q. And what would you characterize as a normal hymen  
6 again, please?

7 A. Well, again, usually you're not -- I usually use  
8 this, Your Honor, to say that it's a piece of tissue  
9 that's shaped like that, but much thinner. It's mucus  
10 membrane, and it's like the mucus membrane inside your  
11 mouth or inside your nose. It's moist and sometimes so  
12 thin it's translucent. It's very, very smooth in  
13 appearance, and it usually covers a large part of the  
14 opening of the vagina so that you can't see directly into  
15 the vagina. And it's normally there in children.

16 THE COURT: Okay.

17 Q. Dr. Carter, that's about it.

18 THE COURT: All right. Mr. Thomason, what, if  
19 any, objections would you have to the admission of any of  
20 these photographs, exhibits 3 or 4, or the related  
21 testimony to those photographs, please, sir?

22 MR. THOMASON: Well, first of all, Your Honor,  
23 yesterday in MINOR testimony, she testified that he  
24 never penetrated either her anus or her vagina. She said  
25 that out of her own mouth. So you know, I don't know why



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1 we really need this testimony at all. Because if she's,  
2 out of her own mouth, saying he never put anything inside  
3 me, then why are we -- how could he have possibly caused  
4 whatever has been caused?

5 THE COURT: So you're saying it's not probative  
6 to the facts in this case, I guess. Is that what you're  
7 saying?

8 MR. THOMASON: Yes, sir.

9 THE COURT: Ms. Reeves, I do recall the child  
10 testifying yesterday that there was no penetration either  
11 vaginally or anally, if I'm not mistaken. I think that  
12 orally there was some different testimony.

13 MS. REEVES: Yes, sir.

14 THE COURT: But the other two, I think that she  
15 said that it did not occur.

16 MS. REEVES: Yes, sir. And I think her  
17 forensic interview is a little bit different. What she  
18 remembered on the forensic interview was that he did try  
19 to put his private part or his wee wee, I think she said,  
20 between her butt. So there is -- the interview on the  
21 tape is a little bit different than what she testified to  
22 yesterday. However ---

23 THE COURT: Well, let me ask you this.  
24 Assuming -- and I seem to recall that there was some  
25 testimony to that regard on the tape, but that was

1     anally, not vaginally; is that correct?

2                   MS. REEVES: Well, that's going to kind of be  
3     my argument. I mean, I had the mom testify that she  
4     didn't know what her anatomy was. And so she knows that  
5     he was rubbing his penis between her legs, but -- I'm  
6     going to argue that she doesn't even know that she has  
7     two openings down there other than bathroom functions.  
8     And so we have this injury that is consistent with  
9     penetration. And there's been no other reported injury  
10    that she's suffered, so how -- like a bike accident or  
11    falling on a fence or something to that degree. So how  
12    else did this penetrating injury get there other than  
13    when he was rubbing, he penetrated however slight.

14                  Part of my other questions that I didn't ask Dr.  
15    Carter that we intend to do at trial was would this --  
16    would a penetration of the vagina -- would that hurt,  
17    would that bleed? Some of those things that didn't  
18    happen to MINOR but could still cause this injury.

19                  THE COURT: Say that again, please.

20                  MS. REEVES: I was going to ask Dr. Carter if  
21    causing an absent posterior hymen consistent with  
22    penetration, would hurt or would bleed a person. And I'm  
23    anticipating her answer to be no because MINOR said,  
24    you know, on the interview that it did not hurt. It did  
25    not bleed. Her mother asked her that. So she may not

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1 know if this penetration occurred however slight. It  
2 could be something that occurred and she didn't know.  
3 All she knew was that there was rubbing. She's eight.  
4 She doesn't know what he's doing with his penis on her  
5 private part.

6 THE COURT: Well, let me ask you this, Dr.  
7 Carter. Clearly, Dr. Carter is an expert in the field.  
8 I mean, there's no question. Can you say to a reasonable  
9 degree of medical certainty that some type of intrusion  
10 caused the hymen not to be present in this specific case?

11 THE WITNESS: Yes, something caused the hymen  
12 not to be present. And that would be certainly  
13 consistent with a penetrating type of injury. Now, other  
14 types of injuries can cause hymenal damage and urethral  
15 damage. And I've seen other types of injuries cause  
16 damage in the genital area, and I could comment on some  
17 of those.

18 And I'll also say, Your Honor, that I could comment  
19 on the -- both the literature and my own personal  
20 experience of children's understanding and memory of and  
21 you know, way of dealing with things they are unfamiliar  
22 with in the genital area. They don't really have a  
23 language to describe what happened, as the D.A. has  
24 suggested. And a lot of times their testimony is  
25 incomplete. There's a certain percentage of young

1 teenagers who are pregnant who report they've never had  
2 intercourse at all of any kind, you know. And so unless  
3 there are a lot of virginal conceptions out there, we  
4 have a problem.

5 THE COURT: And I hear you. Here's the concern  
6 I have and I think that is being raised, is that you're  
7 introducing a certain degree of speculation into this  
8 case, I believe, from what you're saying and what Dr.  
9 Carter is saying. And what I -- and you correct me,  
10 please. And I want you to feel free to. But what you're  
11 saying is that the absence of this child's hymen in this  
12 case could have been caused by a physical intrusion?  
13 That normally it would be there in a child of her age  
14 because that's what you see in the population based on  
15 your experience and the literature. But you can't say to  
16 a reasonable degree of medical certainty that the event  
17 that this gentleman is being charged for caused the  
18 absence to occur. Is that ---

19 THE WITNESS: That is exactly right. And a lot  
20 of times I even write that -- well, in fact, I wrote in  
21 this one it's consistent with a penetrating injury. But  
22 if there are other types of injuries, for example, a  
23 child who falls on a fence post or something like that.

24 THE COURT: Bicycle? Would a bike ---

25 THE WITNESS: Yeah, a bicycle. It depends on

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1 what -- like if it was the handlebar, you know, a hoe, a  
2 rake lying out in the yard, one of those stiff pointed  
3 rakes, you know. There's just all sorts of injuries. I  
4 saw a child once who had fallen on the faucet of the tub.  
5 And you know -- so there's just all sorts of things that  
6 can cause genital injuries. And so although I can say  
7 that it is consistent with penetration, I cannot tell you  
8 what caused the injury.

9 MS. REEVES: But she can tell you, as part of  
10 her exam ...

11 Correct me, Dr. Carter, if I'm wrong.

12 THE COURT: It was not there.

13 Q. You asked if she has had any other types of injuries  
14 to her vaginal area?

15 A. We do ask. Not in those words but, yes, we  
16 interview generally the parents about the types of  
17 injuries the children have had. Surgeries, injuries.

18 THE COURT: Mr. Thomason, I'll be glad to hear  
19 you further.

20 MR. THOMASON: Yes, sir. Well, you know,  
21 expanding on a theme that I initially brought up, we  
22 don't know the who, what or when of this injury. We  
23 can't -- we don't have any testimony that's going to say  
24 that it was not caused by some other source, that it's  
25 any more likely than Mr. ---

1 THE COURT: Well, you know, going back -- let  
2 me -- go ahead. I'm sorry.

3 MR. THOMASON: Well, another point I was going  
4 to make is that this bit about not knowing your body -- I  
5 mean, on the tape she was eight years old. And she says  
6 specifically, he rubbed it on my butt. And she  
7 specifically says, he did not put it in my butt. She  
8 never even mentions vagina at all in the tape. She is  
9 now two years older. And she testified from that witness  
10 stand yesterday after two years -- which I'm sure she has  
11 been educated about her body. If she wasn't educated  
12 about it then, she sure is now. And she testified that  
13 he never put anything inside her. He never penetrated  
14 her. So in addition to that, what's going to follow are  
15 these horrifying -- well, to me they're horrifying --  
16 pictures of little girls' vaginas. And then they're even  
17 going to try to put in pictures of other little girls'  
18 vaginas ---

19 THE COURT: She just put two pictures in. One  
20 of the victim and one of a comparison showing the hymen  
21 present, one not present.

22 Is that correct?

23 MS. REEVES: Yes, sir.

24 MR. THOMASON: Well, you know, I don't care,  
25 you know, the ---

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1           THE COURT: Well, let me -- here's what I was  
2 driving at a minute ago. I was looking at the case of  
3 Graves versus C.A.S. Medical Systems. And as you guys  
4 know or show know, in the last couple of years the  
5 Supreme Court has given several pronouncements about  
6 becoming experts -- or not becoming experts -- about  
7 expert testimony and the judge's job as being the  
8 gatekeeper. And number one, you have -- number -- is the  
9 information that is sought to be put forth something that  
10 would be the subject of expert testimony in that it's not  
11 -- it's helpful to the jury understanding the facts of  
12 the case. And for a lack of better terms, it's not  
13 something that's subject to everyday knowledge and common  
14 understanding of the lay person. Okay? And I know  
15 that's not the -- it says if scientific, technical or  
16 other specialized knowledge will assist the trier of fact  
17 to understand the evidence or determine the fact at  
18 issue. Well, clearly, it falls -- that testimony falls  
19 within that, correct?

20           MR. THOMASON: I don't have any problem ---

21           THE COURT: Well, hold on. Hold on.

22           MR. THOMASON: I'm sorry.

23           THE COURT: Just do you agree with me that the  
24 subject of Dr. Carter's testimony is something that is  
25 appropriate for an expert to testify to? In other words,

1 if it's scientific, technical or other specialized  
2 knowledge that will assist the trier of fact understand  
3 the facts. Let me just say this. It is. Okay?

4 Number two, she has been qualified as an expert by  
5 your own stipulation.

6 MR. THOMASON: Yes, sir.

7 THE COURT: Okay. So the only other part that  
8 I look at, number one -- or number three in this analysis  
9 is whether what she says is reliable. Okay? I guess  
10 going into that probative to our facts in this case, she  
11 says based on her experience, based on the literature and  
12 in her common experience, that that is something that's  
13 present and not present. So I guess the issue for me is  
14 under the facts of this case, are there sufficient facts  
15 and evidence or will there be sufficient facts and  
16 evidence that would lead this not to be mere speculation  
17 but is probative to the issue before the jury for their  
18 determination. Is that a fair statement?

19 MR. THOMASON: Well, I think you are going to  
20 rule that it's a fair statement.

21 THE COURT: Well, no, I'm not. I want you to  
22 tell me where I'm wrong.

23 MR. THOMASON: I just ---

24 THE COURT: Let me tell you. I have a tendency  
25 to agree with you. But at the same time, you know, this



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1 is an important case. And so -- for both sides. And so  
2 thus far, the child unequivocally testified yesterday  
3 that no penetration occurred. My memory -- and it's  
4 certainly not exact -- of the video, was that there was  
5 anal penetration, if I recall. I don't know otherwise,  
6 but ---

7 MS. REEVES: No. I think that's a fair  
8 characterization that he -- that in the video she says  
9 that he tried to stick it in my butt cheeks or between my  
10 butt. Now, where I would tell you is that I think he is  
11 inserting his penis from a posterior position. But where  
12 he's headed -- you know, what I mean? Like we're  
13 assuming it's anal just because he is going into her  
14 butt. But then again, we don't really know.

15 THE COURT: Well, that is exactly the issue.  
16 And that is we don't really know.

17 MS. REEVES: Right.

18 THE COURT: And does that not lead us to mere  
19 speculation in this case?

20 MS. REEVES: Right. And I would argue no. I  
21 think it is an element that I have to prove, and I think  
22 that based on what the child is going to testify to in  
23 her interview and what Dr. Carter can say is that she's  
24 just not clear. And there could have been a penetration  
25 however slight that she is not clear on. That she

1 doesn't know the difference. She doesn't even know that  
2 she has two orifices to enter from. So he is putting his  
3 penis from behind, through her butt cheeks but still  
4 between her legs. And that's what she testified to on  
5 the stand anyway. That he put his penis between her legs  
6 and was rubbing on her vagina. So was there a  
7 penetration however slight that she was unaware of at  
8 eight? Even if she knows now at ten what body parts she  
9 has, she's remembering incidents that happened two and a  
10 half years ago. She doesn't remember hurting  
11 necessarily, but that does not rule out that there was a  
12 penetration however slight.

13 MR. THOMASON: I just don't see how you get  
14 around the speculation argument. I just -- she testified  
15 -- it's on the video -- that he put it between my butt  
16 cheeks, but he didn't put it in -- he didn't put it in my  
17 butt. That much I will -- I went and I watched -- I got  
18 up at four o'clock this morning, and I went over to my  
19 office and I watched these things three times this  
20 morning already. And I know that's what she says. He  
21 did not put it in my butt. He put it between my butt  
22 cheeks and he moved me up and down.

23 MS. REEVES: And again, the statute reads --  
24 moved me up and down. And the statute reads that it is a  
25 penetration of any part of the body or orifice. So he's

1 ---

2 THE COURT: At this point, the child testified  
3 that there was an oral intrusion anyway. So you've met  
4 the elements for your case for the jury.

5 MS. REEVES: Yes, sir.

6 THE COURT: My concern ...

7 And Dr. Carter, please, this is certainly no  
8 dispersion of you.

9 ... is that what she's saying -- I was looking at it  
10 from a reliability part from the experts under the Graves  
11 case. But as I sit here and listen to it, what I keep  
12 coming up with is whether or not it's probative to  
13 anything in the evidence and whether or not its  
14 significantly more prejudicial than probative under 403.  
15 And I will tell you right now that I believe it probably  
16 is more prejudicial than probative based on what I've  
17 heard and what's in evidence at this stage. Okay?

18 THE WITNESS: Could I make one comment?

19 THE COURT: Please.

20 THE WITNESS: Which I really don't know that  
21 it's going to be pertinent to your ruling.

22 THE COURT: Yes, ma'am.

23 THE WITNESS: But in general in child sexual  
24 abuse allegations, ninety-five percent of exams are going  
25 to be normal, no matter.

1 THE COURT: Right.

2 THE WITNESS: Now, of course, you have to look  
3 at the realm of abuse. It could be oral. It could be --  
4 you know, it could be this. It could be that. It could  
5 be other types of sexual abuse. But in general ninety-  
6 five percent of the exams are normal. So here's one  
7 that's clearly abnormal. What do you do with that? And  
8 secondly, with regard to the child's forensic testimony,  
9 which I have not heard -- but I will say that for a child  
10 to comment that he put it between my butt cheeks and  
11 rubbed up down may be the very best description that she  
12 can give because that would not be unusual for an eight-  
13 year-old not to know that there was a vaginal opening.

14 THE COURT: How long is the child's testimony?

15 MS. REEVES: The DVD? The whole thing, I  
16 think, was forty-two minutes. Now, you understand ---

17 THE COURT: The child's?

18 MS. REEVES: --- it's not cut. It's just  
19 muted. So it's still forty-four minutes. But we've just  
20 redacted those -- I mean, muted those parts.

21 MR. THOMASON: If you were to fast forward  
22 through, it would probably be more like thirty minutes  
23 maybe?

24 MS. REEVES: If you wanted to watch it again

25 ---

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1 THE COURT: No. Here's what I'm thinking. And  
2 I'm going to ask Dr. Carter if she'd do this. Would you  
3 mind viewing the child's testimony?

4 THE WITNESS: No. And again, I didn't comment  
5 on this when I was asked about the exam. But I generally  
6 like to go into these exams blind, without knowing what  
7 the allegations are.

8 THE COURT: Sure.

9 THE WITNESS: So I examined this child without  
10 any preconceived notion of what I'm supposed to find.  
11 And -- you know, whether it's a lewd act or whether it's  
12 oral sex or whatever. And so I haven't heard her  
13 testimony. And at the time I examined her, I was  
14 unaware. In fact, I was unaware until your discussion  
15 this morning what the child reported.

16 THE COURT: Well, Mr. Thomason, I'm going to  
17 ask Dr. Carter ...

18 If you're willing, obviously.

19 ... to view that.

20 The reason being whether there's sufficient evidence  
21 on that tape to warrant the findings that she's  
22 testifying about in the courtroom. Otherwise, right now,  
23 it seems like a bit of speculation. But if she feels  
24 like, based on her professional opinion that there's  
25 sufficient facts on that tape to warrant, maybe it may

1 change my mind. I don't know.

2 I mean, guys, I'd like to be perfect over here, and  
3 I'm not. And I think that's probably the safest course  
4 to do. So I'm going to ask that she do that now.

5 Do you mind doing that, Dr. Carter?

6 THE WITNESS: No.

7 THE COURT: Are you sure?

8 THE WITNESS: No. I am sure.

9 THE COURT: Okay. I'm going to do that. I'm  
10 going to take a break. I'm going to go look up some more  
11 stuff too while I'm here, while we're waiting. I'm going  
12 to send word, if there's no objection from the lawyers,  
13 that we're viewing some things in here and it'll be a few  
14 minutes later than we anticipated. Any problem with  
15 that?

16 MS. REEVES: No, sir.

17 THE COURT: I'm not ruling yet, Mr. Thomason.  
18 I'm just trying to get my arms around it, okay?

19 MR. THOMASON: I understand.

20 THE COURT: All right.

21 (WHEREUPON, State's Exhibits Number 5 and 6 were  
22 marked for identification after which court stood at  
23 recess.)

24 THE COURT: I guess, based on your review of  
25 the video, do you have a medical opinion or do you have

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1 an opinion to a reasonable degree of medical certainty  
2 that this event related by this child is most likely one  
3 of the causes of the lack of the hymen being present?

4 THE WITNESS: I can't speak to that because  
5 there wasn't enough information in her description to  
6 really determine. What did surprise me about the video  
7 -- and it was the first time I had seen it -- was that  
8 there were multiple occasions, and there were -- was  
9 genital, male genital, contact from the rear and male  
10 genital contact from the front. But there just wasn't  
11 enough description to determine whether or not there was  
12 penetration. And that's very hard for a child to, you  
13 know, know, you know, at what point the penis crosses the  
14 line to the vagina or the anus to really be able to tell  
15 us.

16 The other thing I didn't know was about the use of  
17 the pornographic material in these episodes.

18 THE COURT: Right.

19 THE WITNESS: So it certainly does seem that  
20 there was a pattern of -- there was primisity (phonic)  
21 with regard to this that I was not aware of previously  
22 which I think does increase the likelihood that there was  
23 penetration. If someone has groomed a child and feels  
24 free to perpetrate sexual acts on a child multiple times,  
25 including ejaculation multiple times, it does seem to me

1 that it increases likelihood that there was penetration.

2 But there was no description of that.

3 THE COURT: So Doctor, I guess what I'm asking,  
4 I mean, is if any opinion you would have as to the lack  
5 of the hymen, its presence in this particular child,  
6 related to the event or events that this gentleman is  
7 charged with, would that just be speculation on your  
8 part?

9 THE WITNESS: No. I think it would be more  
10 than speculation. And I guess that's what I was trying  
11 to say.

12 THE COURT: Okay.

13 THE WITNESS: You have a pattern of events  
14 which are, you know, inappropriate for an adult taking  
15 sexual liberties with a child. You have a child that's  
16 really unable to articulate the full, the full -- unable  
17 to describe the extent of the acts. In fact, you have a  
18 child who was able to say, when other children showed her  
19 a video of, quote, school girls doing something nasty on  
20 the video, there were men and women without their clothes  
21 on, and they were hunching. But then she could not  
22 proceed to say what -- describe what hunching was. So  
23 either you have a child who was just unable to go further  
24 in terms of the description or who simply didn't know how  
25 to describe -- didn't have the words and concepts to



1 describe what she saw.

2 THE COURT: But your opinion is that the events  
3 related, regardless of her lack of description of more  
4 particularized intrusion, could have been the cause of  
5 the lack of the hymen's presence in this child?

6 THE WITNESS: Yes, because I think we have a  
7 situation where a person repeatedly engaged in sexual  
8 activity with a child. I mean, it started with kissing  
9 her and proceeded to drawing her under the covers and on  
10 top of him. And on a number of occasions -- and the  
11 child says maybe five occasions -- there was sperm, is  
12 what she said. And so, you know, again, this is a  
13 pattern of events with an adult male taking -- engaging  
14 in sexual activity with an eight-year-old child which  
15 leads me to think that there was every opportunity for  
16 there to be penetration.

17 THE COURT: All right.

18 Mr. Thomason, I mean, you're going to have to give  
19 me some particularized objections for me to consider.

20 MR. THOMASON: All right, sir. Number one,  
21 this child, out of her own mouth yesterday -- this is one  
22 of many, this is one of several -- out of her own mouth  
23 yesterday said that she was not penetrated except for  
24 orally.

25 THE COURT: Stand up.

1 MR. THOMASON: On the video that I went and  
2 watched Dr. Carter watch, the child describes ---

3 THE COURT: Let me interject something here.

4 MR. THOMASON: Certainly.

5 THE COURT: What are you -- your argument is  
6 there's not sufficient facts in the record for her to  
7 give that opinion in this case?

8 MR. THOMASON: There's just -- I'm not saying  
9 there's not sufficient -- I'm saying that there are  
10 absolutely contradictory facts. The child says, he  
11 rubbed it on my butt, but he didn't put it in me, in my  
12 butt. And then she points on the drawing, on the  
13 anatomical drawing, points, he put it between my legs, my  
14 thighs. Right here. And she points to that on the  
15 picture. She doesn't point up here. She points down  
16 here.

17 She said, it didn't hurt. You've got to be kidding  
18 me that that's not going to hurt an eight-year-old child.  
19 I mean, if he's -- and so if you've got the child saying  
20 that she wasn't penetrated, how is it anything other than  
21 speculation that she -- by this Defendant. How in the  
22 world is it anything other than speculation that she was?  
23 And that ...

24 Of course, there's the 403 argument that it's more  
25 prejudicial than probative. And the case that you just

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1 cited a moment ago, you know, about the -- to a medical  
2 certainty. And there's just no way that you can get to a  
3 medical certainty that the child was penetrated when  
4 she's saying that she wasn't and even demonstrated that  
5 she wasn't?

6 THE WITNESS: May I respond to that?

7 THE COURT: Yes, ma'am.

8 THE WITNESS: My view of the video -- and I  
9 looked on the times for this. It's seventeen minutes and  
10 oh nine seconds into it. My feeling -- what I jotted  
11 down was that she said, in front and pointed to the  
12 genital area on the pictures that were displayed as  
13 opposed to between the legs. The child said, in front.  
14 And I thought she pointed to the genital area. I would  
15 have to review the video again.

16 THE COURT: But -- and let me make sure I'm  
17 clear on one thing, okay?

18 THE WITNESS: Okay.

19 THE COURT: Excuse me, Dr. Carter.

20 THE WITNESS: Uh-huh (affirmative).

21 THE COURT: Although you can't say to a hundred  
22 percent that these events caused the lack of the hymen, I  
23 believe from what you're telling me that from a  
24 reasonable degree of medical certainty, that you could  
25 say that they could most probably be one of the causes of

1 the lack of the hymen; is that correct?

2 THE WITNESS: Well, if there was penetration,  
3 yes.

4 THE COURT: Okay.

5 Scott, I'm going to let that come in. I understand  
6 your objection. However, that's the kind of information  
7 that experts can look at in forming their opinion. Going  
8 back over, at first when I heard this Friday or Thursday  
9 last week, I was concerned about a reliability aspect of  
10 what the doctor's testimony anticipated would be. But  
11 looking at it -- and I'm going to let you be heard --  
12 clearly, the topic is subject to expert testimony because  
13 it assists the trier of fact. Number two, the doctor's  
14 been stipulated to be an expert in child sexual assault  
15 examinations.

16 MR. THOMASON: Yes, sir.

17 THE COURT: And number three, she said that  
18 based on her view of the evidence, she can't say one  
19 hundred percent that this caused it, but to a reasonable  
20 degree of medical certainty it could be one of the causes  
21 for the lack of the hymen. At this point, then that goes  
22 to its weight, not its admissibility. Okay? That's the  
23 way I view it. Okay?

24 I understand your objection. I want you to place  
25 your objection on the record. If I'm incorrect, somebody

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1 will correct me. But that's going to be my ruling. But  
2 go ahead so you are protected on the record. Go ahead  
3 and give me your objections to it, if you would. And  
4 maybe you didn't hear me. Go ahead and put your  
5 objection on the record.

6 MR. THOMASON: Oh, you want me to do it now?  
7 Oh, I'm sorry.

8 THE COURT: That's all right. I know you're  
9 disdained. But go ahead.

10 MR. THOMASON: I object to the introduction of  
11 Dr. Sallie Carter's testimony not because she's not an  
12 expert, but because her testimony is going to be more  
13 prejudicial than probative because the victim or alleged  
14 victim, herself, has stated that she was not penetrated  
15 by this Defendant. And that is about as simple as I can  
16 make it. She has said it in the videos. She has said it  
17 on the witness stand. And that's as simple as I can make  
18 it.

19 THE COURT: All right. Now, from the State,  
20 you will need to make sure that the proper questions are  
21 asked for this to come in the record, okay? If not, then  
22 it will be excluded, okay?

23 MS. REEVES: Yes, sir.

24 THE COURT: All right.

25 Now, Dr. Carter, thank you. I'm going to ask that

1 you take a seat in the stands. That way they can call  
2 you back to the witness stand when it's appropriate for  
3 the testimony in this case, okay?

4 (WHEREUPON, the witness stepped down from the  
5 witness stand.)

6 Now, are you ready to proceed?

7 MS. REEVES: Can we just have five minutes, two  
8 minutes really, to make sure that we're asking her -- now  
9 that she's spoken, to make sure that we're asking her  
10 what we need to ask her?

11 THE COURT: Okay.

12 (Off record discussion)

13 MR. THOMASON: Oh, I'm sorry, Your Honor. I  
14 would like to add to my objection that it also includes  
15 the argument that it is, at best, speculative.

16 THE COURT: Yes, sir.

17 (Off record discussion)

18 THE COURT: Are y'all ready?

19 MS. REEVES: Yes, sir.

20 THE COURT: All right.

21 Mr. Thomason, are you ready?

22 MR. THOMASON: Yes, sir.

23 THE COURT: Would you bring the jury in,  
24 please, sir?

25 (WHEREUPON, the jury entered the open court at

1 approximately 11:15 a.m.)

2 THE COURT: Good morning, ladies and gentlemen  
3 of the jury. First, let me thank you for your patience.  
4 I can assure you we started at nine o'clock this morning.  
5 And sometimes things are not as quick as we'd like them  
6 to be. Remember, I told you that trials are sometimes  
7 slow and methodical, and you just had evidence of that.  
8 But thank you for your patience. And I believe what we  
9 did today will alleviate some other time that you may be  
10 down. Okay.

11 Is the State ready to proceed, Ms. Reeves?

12 MS. REEVES: Yes, sir.

13 THE COURT: Mr. Thomason?

14 MR. THOMASON: Yes, sir.

15 THE COURT: Would you call your next witness,  
16 please?

17 MS. PRICE: Your Honor, the State calls Stacy  
18 Gianiodis to the stand.

19 **STACY GIANIODIS,**

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 DIRECT EXAMINATION

22 BY MS. PRICE:

23 Q. Thank you. And who do you work for?

24 A. Foothills Alliance Child Advocacy Center.

25 Q. And what is your current position with them?

1 A. Forensic interviewer.

2 Q. How long have you been in that position?

3 A. I began my employment there in April of 2009, and  
4 I'm still employed there.

5 Q. And what are some of the duties and responsibilities  
6 associated with being an interviewer?

7 A. I conduct an interview of children when there's been  
8 allegation or a reported abuse. I also participate in  
9 the multi-disciplinary team meeting following the  
10 interview as well as a care giver conference following  
11 the meeting.

12 Q. Are you a licensed social worker in South Carolina?

13 A. Yes, I am.

14 Q. And what educational background do you have?

15 A. I have a bachelors in social work from the State  
16 University of New York at Albany as well as my masters in  
17 social work from the State University of Maryland at  
18 Baltimore.

19 Q. What is a forensic interview?

20 A. A forensic interview is a neutral fact-finding  
21 interview when there's been an allegation or a report of  
22 abuse. It is an opportunity for the child to express  
23 what may or may not have happened to them in their own  
24 words.

25 Q. And do you have to have specialized -- specific



1 training to conduct that interview? Or do you have any  
2 training?

3 A. I do have.

4 Q. In conducting those interviews?

5 A. Yes.

6 Q. Okay. What type of training?

7 A. I've completed the Child First Training which is a  
8 training that focuses on the appropriate ways to  
9 interview a child to use open-ended and non-leading  
10 questions.

11 Q. Okay. And how many interviews have you conducted?

12 A. I've conducted over nine hundred interviews.

13 Q. Can you give me interview of -- an overview of your  
14 interview style?

15 A. Sure. The first part of the interview is rapport  
16 building. In other words, just talking with the child,  
17 trying to give them a sense of being comfortable in the  
18 room. Just talking about things in general that  
19 interests them. Also using that time to assess the  
20 child's developmental skills or communication skills and  
21 vocabulary.

22 Q. And what information are you provided with before an  
23 interview typically?

24 A. Just basic demographic information.

25 Q. Is the interview recorded?

1 A. Yes.

2 Q. Is the child informed that the interview is being  
3 recorded?

4 A. Yes.

5 Q. Is anyone else present in the room other than  
6 yourself and the child while the interview's taking  
7 place?

8 A. Not in the room.

9 Q. Why is that?

10 A. Because it's made so the child is more comfortable,  
11 that they're just having to speak to one person. The  
12 interview is being observed via the live feed from the  
13 camera.

14 Q. Okay. So someone else is observing from another  
15 area?

16 A. Yes.

17 Q. Okay. Can you describe the room where the interview  
18 is conducted?

19 A. Sure. It's a small room. There's two chairs in the  
20 room, one for myself and one for the child. There is a  
21 small table between the two chairs and a large pad of  
22 paper just to write down the basic information that the  
23 child may provide during the interview.

24 Q. Okay. And whaty type of questioning format do you  
25 use when questioning a child?

1 A. I use open-ended, non-leading questions. I'm  
2 encouraging the child to use free recall as well as  
3 narrative responses.

4 Q. How do you determine a child's knowledge of their  
5 anatomy during your interview?

6 A. Typically, I use the anatomical drawings. I use  
7 those so the child can identify different parts on the  
8 female and male drawings and tell me what words they use  
9 for those parts so that we have a common understanding of  
10 what those parts are called.

11 Q. Did you have an occasion to meet with MINOR  
12 White?

13 A. I did.

14 Q. Where did her interview take place?

15 A. The Child Advocacy Center.

16 Q. And when did that occur?

17 A. I interviewed MINOR on March 28, 2011.

18 Q. Do you know how old she was at the time of that  
19 interview?

20 A. She was eight years old.

21 Q. Was her interview recorded?

22 A. Yes.

23 Q. I'm showing you what's been marked as State's  
24 Exhibit 5. Can you tell me what this is?

25 A. That's the interview of MINOR

1 Q. Okay. And how do you know?

2 A. I watched it earlier today.

3 Q. Okay. And have you made any markings to indicate  
4 that this is the copy you've reviewed?

5 A. Yes. I initialed a copy.

6 Q. Okay. Thank you. When you reviewed it, was it a  
7 true and accurate representation or depiction of your  
8 interview with MINOR

9 A. It is. There are some areas that have been muted,  
10 which is my understanding was agreed upon through the  
11 Court.

12 Q. Okay.

13 MS. PRICE: Your Honor, at this time the State  
14 would move to admit State's Exhibit Number 5, please.

15 THE COURT: Mr. Thomason, subject to already  
16 raised issues?

17 MR. THOMASON: I'm going to have an issue for  
18 that, for the ---

19 THE COURT: All right. Mr. Foreman, would you  
20 take your jury back to the jury room right quick?

21 THE FOREMAN: Yes, sir.

22 (WHEREUPON, the jury exited the open court at  
23 approximately 11:22 a.m.)

24 THE COURT: Mr. Thomason, address the -- no --  
25 we're going to put it on the record. Put it on the

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1 record, please, sir.

2 MR. THOMASON: Okay. Your Honor, I would  
3 object to the introduction of these forensic interviews.  
4 I understand that they are done in most cases these days.  
5 But they are cumulative. They are not the best evidence.  
6 They are not -- they are not -- they can be overly -- the  
7 word I'm searching for has suddenly dropped out of my  
8 head -- bootstrapping. That's still not the word. I'm  
9 objecting to the introduction of these tapes because we  
10 have a live witness here to testify as to what happened  
11 and the events that took place.

12 THE COURT: All right. What is the code  
13 section, Ms. Reeves?

14 MS. PRICE: Your Honor ---

15 THE COURT: It's § 19-23 ---

16 MS. PRICE: § 17-23-175, sir.

17 THE COURT: § 17-23-125?

18 MS. PRICE: § 175.

19 MR. THOMASON: I would ---

20 THE COURT: That statute still is the law even  
21 though the Cromer case has limited a lot of what is  
22 admissible. I'm going to note your objection that you  
23 stated on the record now and also last week. And I  
24 assume that those would be repeated today. I'm going to  
25 overrule your objection.

1 MR. THOMASON: All right, sir.

2 THE COURT: Yes, sir.

3 Would you bring the jury in, please?

4 MR. THOMASON: Bolstering was the word I was  
5 looking for.

6 THE COURT: Bolstering and vouching.

7 (WHEREUPON, the jury entered the open court at  
8 approximately 11:24 a.m.)

9 THE COURT: All right. Counsel?

10 MS. PRICE: Your Honor, once again, the State  
11 would move to admit State's Exhibit Number 5 into  
12 evidence.

13 THE COURT: It will be admitted.

14 MS. PRICE: Thank you, Your Honor.

15 (WHEREUPON, State's Exhibit Number 5 was admitted  
16 into evidence.)

17 Q. Did you also conduct an interview of T'Aja J.

18 A. Yes, I did.

19 Q. When did you conduct that interview?

20 A. I interviewed T'Aja on April 14, 2011.

21 Q. And how old was she at the time of that interview?

22 A. Seven years old.

23 Q. Okay. Was her interview also recorded?

24 A. Yes.

25 Q. I'm showing you what's been marked as State's

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1 Exhibit Number 6. Are you familiar with this exhibit?

2 A. Yes.

3 Q. Okay. What is it?

4 A. That is a recorded interview of T'Aja that I watched  
5 earlier today and initialed.

6 Q. Okay. And that's how you can be certain, your  
7 initials?

8 A. Yes.

9 Q. And when you watched it earlier today, was it a true  
10 and accurate representation of the interview that you  
11 initially did with her?

12 A. Yes. Again, certain parts of it are muted, which is  
13 my understanding agreed upon through the Court.

14 MS. PRICE: Your Honor, at this time, the State  
15 would seek to move State's Exhibit 6 into evidence.

16 THE COURT: Admitted based on the same ---

17 MR. THOMASON: I'm ---

18 THE COURT: I understand.

19 MR. THOMASON: I'm not going to make them get  
20 up and leave again. Same objection, same reasons.

21 THE COURT: All right. It'll be admitted  
22 subject to objections.

23 MS. PRICE: Thank you, Your Honor.

24 (WHEREUPON, State's Exhibit Number 6 was admitted  
25 into evidence.)

1 Q. Did you at any time leave the room during your  
2 interview with T'Aja?

3 A. Yes.

4 Q. And why did you leave the room during your interview  
5 with her?

6 A. During the interview, I leave near the end of the  
7 interview to take a break to consult with the other  
8 observers to determine if there's any additional  
9 questions or to clarify any questions that I needed to  
10 ask the child.

11 MS. PRICE: Your Honor, at this time, the State  
12 would ask for permission to publish State's Exhibits 5  
13 and 6 to the jury and ask that you please give them the  
14 limiting instruction agreed to by the parties earlier.

15 THE COURT: All right. That will be granted.

16 Ladies and gentlemen, just to let you know, these  
17 videos have been reviewed with the Court and counsel.  
18 And they've been edited with oversight by the Court,  
19 which means that certain aspects of it would be muted and  
20 you'll not hear them because I've held that they're not  
21 admissible. But certain other aspects will be presented  
22 to you. So when you hear or don't hear something, that's  
23 because they have been edited. Okay?

24 You may go ahead and publish your videos, please.

25 MS. PRICE: Thank you, Your Honor.



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1 (WHEREUPON, State's Exhibit Number 5 was published  
2 for the jury.)

3 Q. When you stepped out of the room to ask if you had  
4 missed anything, which you testified to earlier, who did  
5 you consult with?

6 A. At that time I consulted with Malika (phonic) Queen,  
7 our Child Advocacy Center advocate.

8 Q. Was anyone else observing?

9 A. Not that time, no.

10 Q. Parents aren't allowed to observe?

11 A. No.

12 MS. PRICE: Your Honor, we're now playing  
13 State's Exhibit Number 6.

14 THE COURT: Okay.

15 (WHEREUPON, State's Exhibit Number 6 was published  
16 for the jury.)

17 Q. After conducting the interviews, and aside from  
18 coming to court to testify today, have you had any  
19 further involvement in this case?

20 A. No.

21 Q. Thank you. Please answer questions that Mr.  
22 Thomason may have for you at this time.

23 A. Okay.

24 THE COURT: Just one second, Mr. Thomason.

25 Mr. Foreman, let's take a quick break and it will

1 probably be about ten minutes.

2 MR. THOMASON: I don't have but one question.

3 THE COURT: Oh, really?

4 MR. THOMASON: Yes.

5 THE COURT: Okay. Then go right ahead, and  
6 then we might go ahead and break for lunch after that.

7 All right. Go ahead.

8 CROSS-EXAMINATION

9 BY MR. THOMASON:

10 Q. I know I'm going to butcher your name. Gianiodis?

11 A. Gianiodis.

12 Q. Gianiodis. Ms. Gianiodis, I know that you weren't  
13 watching just now basically because it's physically  
14 impossible the way you're seated.

15 A. Correct.

16 Q. But you have gone back and watched these videos at  
17 some point in time, right?

18 A. Yes, that's correct.

19 Q. All right. When the first video was being played of  
20 the -- of MINOR you took out the anatomical drawings?

21 A. Okay.

22 Q. And you had her point to what body part had touched  
23 what body part?

24 A. Yes.

25 Q. Could you please answer for me what body part, the

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1 third body part -- she identified what she call the wee  
2 wee first?

3 A. Okay.

4 Q. Then the butt on the female?

5 A. Yes.

6 Q. And then what was she identifying on the third body  
7 part? I mean the second body part on the female?

8 A. On the female on the anatomical drawing? She  
9 indicated the upper leg and vaginal area.

10 Q. Well, she didn't -- I mean, you put your ink pen  
11 there. And I don't mean to be -- but you put your pen  
12 about right there in the video? Yes? No?

13 A. From my recollection, she indicated the upper area  
14 and vaginal area -- upper leg and vaginal area.

15 Q. Well, it was the thighs and not the -- she indicated  
16 the thighs, did she not?

17 A. She indicated that area, up and down, in between her  
18 legs.

19 Q. She didn't put that pen on that vagina, did she?

20 MS. PRICE: Your Honor, I'm going to object.

21 This is asked and answered.

22 THE COURT: Overruled. Ask the question.

23 Q. Do you know what I'm asking?

24 THE COURT: Go ahead.

25 Q. She did not put her hand on the drawing of the

1 vagina, did she?

2 A. In my recollection -- again, as you pointed out, I  
3 didn't just watch it at this point ---

4 Q. Would you like for me to show it to you again?

5 A. You could. My recollection is that she -- at that  
6 point, that might have been what she pointed to. But in  
7 her interview, she talked about him putting his penis up  
8 and down in between her legs in the vaginal area.

9 Q. I never heard her say vaginal area. Did you?

10 A. She indicated on the anatomical drawings.

11 Q. Well, we may have to watch that again when you can  
12 see it when we get back.

13 MR. THOMASON: That's all my questions for now.  
14 I did not expect that answer. So if you want to take a  
15 break now, that's ...

16 THE COURT: Okay. Mr. Foreman, we're going to  
17 go ahead and have a lunch break now. I'm going to ask  
18 that you be back in your jury room by two o'clock. And  
19 then we'll resume testimony at that stage. Okay, sir?  
20 And I remind everyone not to speak with anyone or amongst  
21 themselves about this case.

22 (WHEREUPON, the jury exited the open court at  
23 approximately 12:47 p.m.)

24 THE COURT: All right. Mr. Thomason, are you  
25 asking that I not excuse this witness because you want to

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1 cross-examine her further?

2 MR. THOMASON: I do want to show her that  
3 portion of the forensic video.

4 THE COURT: I want it -- let me just tell you.  
5 I want it teed up to the place where it needs to be.

6 MR. THOMASON: Yes, sir. Because I don't want  
7 to sit and watch it all playing again.

8 THE COURT: Okay.

9 MR. THOMASON: It's just that one little ...

10 THE COURT: All right. Ms. Gioniodis, if you  
11 would, would you remain with us until we come back from  
12 lunch break? You're under oath, so you may not speak  
13 with anyone about your testimony during your lunch break,  
14 okay?

15 THE WITNESS: Okay.

16 THE COURT: All right. Thank you very much.  
17 We'll be in recess until two o'clock.

18 (WHEREUPON, court stood at recess for a lunch  
19 break.)

20 THE COURT: Mr. Thomason, have you gotten the  
21 video to the place where you want it to be?

22 MR. THOMASON: Yes, sir. We've got it cued up  
23 and I believe ready to go.

24 THE COURT: Okay. And my law clerk says you  
25 were going to speak with me with regard ---

1           MR. THOMASON: Well, I wanted to do it on the  
2 record with Kristin because we had talked about that the  
3 -- I believe we talked about this in the pre-trial. We  
4 certainly have talked about it before. You were going to  
5 allow me to recall the victim or have the victim come  
6 back to the stand ---

7           THE COURT: As part of the State's case without  
8 losing your right to close if, in fact, it remains that  
9 way throughout this trial, right? Yeah. That's right.

10          MR. THOMASON: And we were just deciding when  
11 we were going to do that. And I think I'm just going to  
12 wait until Ms. Stacy finishes.

13          THE COURT: Ms. Stacy? Okay.

14          MR. THOMASON: I can't say that last name.

15          THE COURT: Gianiodis.

16          MR. THOMASON: I just cannot say it. And then  
17 Dr. Carter, I thought I'd just wait until after Dr.  
18 Carter if it suits everybody.

19          MS. REEVES: I told him it's his choice. He  
20 can either do it at the end of Ms. Gianiodis or the end  
21 of Dr. Carter. And he said he'd like to do it at the end  
22 of Dr. Carter. That's fine.

23          THE COURT: All right. Is the State ready to  
24 proceed?

25          MR. THOMASON: Yes, sir.

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1 THE COURT: Mr. Thomason, are you ready  
2 otherwise to proceed?

3 MR. THOMASON: Yes, sir.

4 THE COURT: Would you bring the jury in?  
5 (WHEREUPON, the jury entered the open court at  
6 approximately 2:10 p.m.)

7 THE COURT: Ms. Gianiodis, would you come back  
8 around, please, ma'am?

9 Actually, do you want her to stand down there, Mr.  
10 Thomason, so she can review?

11 MR. THOMASON: Yes, sir. That way both the  
12 jury and the witness can see.

13 THE COURT: Ms. Gianiodis, you're still under  
14 oath, okay?

15 THE WITNESS: Yes, sir.

16 THE COURT: Very good.

17 MS. REEVES: Are you ready?

18 MR. THOMASON: Yeah.

19 (WHEREUPON, a portion of State's Exhibit 5 was  
20 published.)

21 MR. THOMASON: All right. That wasn't -- I  
22 want to play it again.

23 CROSS-EXAMINATION

24 CONTINUED BY MR. THOMASON:

25 Q. All right. Well, just before we start, as you

1 recall, we were talking about the anatomical drawings.

2 Do you recall that?

3 A. Yes.

4 Q. That line of questioning. And what I'm doing here  
5 is I'm going to replay that portion where she points out  
6 the portion of her anatomy.

7 MR. THOMASON: DVD, play. DVD, play.

8 Lauren?

9 (WHEREUPON, a portion of State's Exhibit Number 5  
10 was published.)

11 Q. Okay. You can go back up there.

12 (WHEREUPON, the witness resumed the witness stand.)

13 Q. So your exact words was front part of your legs?

14 A. During the interview, yes.

15 Q. So she did not point to the vagina; she pointed to  
16 the front part of her legs?

17 A. Then she went to the upper thigh and vaginal area.

18 Q. All right. Well, the butt would be the vaginal area  
19 too, wouldn't it? I mean, it's right in there pretty  
20 close?

21 A. I'm sorry. Is that a question?

22 Q. Yes.

23 A. Yes.

24 Q. Isn't the butt close to the vaginal area?

25 A. A person can put their penis on her butt and also be



1 right there at the vaginal area.

2 Q. All right. Have you -- of course you were in the  
3 room for the entire interview, and so you were there.

4 And you have watched the video that has not been edited,  
5 right?

6 A. That's correct.

7 Q. Did she ever mention anything about oral sex to you?

8 A. She did not.

9 Q. And you asked her several times, is there anything  
10 else you need to tell me. Is there anything else I need  
11 to know about, anything else that's important? And her  
12 response was?

13 A. She didn't have anything else to add at that time.

14 Q. Okay. That's all I have. And your -- one last  
15 thing. Your forensic exam -- your interview was done on  
16 March 28th of '11; correct?

17 A. Correct.

18 Q. Okay. That's it.

19 THE COURT: Any redirect?

20 MS. REEVES: Your Honor, may we approach?

21 THE COURT: Sure.

22 (WHEREUPON, a bench conference was held off the  
23 record.)

24 MS. PRICE: Nothing further from the State,  
25 Your Honor.

1 THE COURT: All right. May this witness be  
2 excused?

3 MR. THOMASON: Yes, sir.

4 MS. PRICE: No objection from the State.

5 THE COURT: Thank you, ma'am. You may be  
6 excused.

7 Would you call your next witness, please, ma'am?

8 MS. PRICE: Your Honor, the State calls Dr.  
9 Sallie Carter.

10 **SALLIE CARTER, M.D.,**

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS. PRICE:

14 Q. Dr. Carter, by whom are you employed?

15 A. South Carolina Department of Mental Health.

16 Q. And what's your position with them?

17 A. I'm a physician at the Child and Adolescent Mental  
18 Health Center in Anderson.

19 Q. How long have you been there?

20 A. Ten years.

21 Q. And where did you get your training, starting with  
22 undergraduate and ---

23 A. Well, my undergraduate was at Mercer University in  
24 Macon, Georgia. And then I have a master's degree from  
25 Yale Divinity School and my medical training at the

- 1 Medical College of Georgia in Augusta.
- 2 Q. And what year did you graduate from medical school?
- 3 A. 1986.
- 4 Q. Did you do a residency?
- 5 A. I did.
- 6 Q. Where was that?
- 7 A. I did my internship at the Emory Grady Program,
- 8 Emory University, Grady Hospital in Atlanta, and my
- 9 pediatric residency at Yale University, New Haven
- 10 Hospital in New Haven, Connecticut.
- 11 Q. And following your residency, where did you take
- 12 your career?
- 13 A. I came to Anderson.
- 14 Q. And what did you do here in Anderson?
- 15 A. I had a private practice in Anderson for about
- 16 eleven or twelve years. And then that practice became
- 17 the teaching practice, pediatric teaching practice, for
- 18 the AnMed Hospital. And after about six years or so, I
- 19 left and took the position at the Department of Mental
- 20 Health.
- 21 Q. What type of patients did you see in your practice
- 22 which eventually became a teaching practice?
- 23 A. For at least twelve years, maybe more, I was the
- 24 director of the newborn nursery. And I saw thousands of
- 25 newborns a year as the physician for those infants,

1 including premature and sick infants. And then I saw  
2 regular ambulatory pediatric patients and pediatric  
3 inpatients during those years.

4 Q. And when you're saying, pediatric, what age range  
5 are we talking?

6 A. Well, newborn to whenever they're not typical  
7 pediatric problems. In other words, I could treat a  
8 twenty-one-year-old for acne or typical pediatric and  
9 adolescent problems, but I usually wouldn't see a twenty-  
10 one-year-old for a adult-type problems like, you know,  
11 typical adult diseases, hypertension or multiple  
12 sclerosis or lupus or, you know, various other typically  
13 adult problems.

14 Q. In your former practice and currently, do you do  
15 genital inspections on those patients?

16 A. Well, as a course -- as a pediatrician I did that in  
17 the newborn nursery all the time. And then in young  
18 children, that's part of the typical pediatric exam. And  
19 then, of course, when I've seen children for urinary  
20 tract infections or other genital type complaints. But  
21 then since I've been at -- well, for the last ten years,  
22 I've been a physician for the child sexual assault part  
23 of the Foothills Sexual Trauma Center. So for ten years,  
24 I've been doing pediatric sexual abuse exams.

25 Q. Can you tell me a little bit more about what your

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1 duties consist of with the Child Advocacy Center?

2 A. I see children who are referred there for possible  
3 sexual assault.

4 Q. Approximately how many sexual assault exams would  
5 you say you've performed per month?

6 A. Typically, per month it's -- there's a range. You  
7 know, there might be as few as two or three, and there  
8 might be as many as eight, maybe nine.

9 Q. So in a year, how many?

10 A. Usually about fifty.

11 Q. Okay. Did you receive any specialized training to  
12 perform child sexual assault examinations?

13 A. I did.

14 Q. What would that be?

15 A. There are particular training programs. I had a  
16 basic course in Minneapolis-St. Paul, and then an  
17 advanced course at Scottish Rite Children's Hospital in  
18 Atlanta.

19 Q. Is that nationally recognized?

20 A. Oh, yes.

21 Q. Have you previously been qualified in court as an  
22 expert in child sexual assault examinations?

23 A. I have.

24 Q. Approximately how many times?

25 A. At least thirty-five times.

1 MS. PRICE: Your Honor, at this time the State  
2 moves that Dr. Carter be declared an expert in child  
3 sexual assault examinations.

4 THE COURT: Mr. Thomason?

5 MR. THOMASON: I have previously stipulated  
6 that, and I don't have an objection to it now.

7 THE COURT: Okay.

8 All right. Ladies and gentlemen of the jury,  
9 normally a witness is limited in their testimony to what  
10 they see, they saw, they smelled, they heard. Basically  
11 your senses. They're not allowed to give their testimony  
12 [sic] as a general rule. However, a witness because of  
13 their education or experience may become specialized or  
14 have specialized knowledge in certain areas. If they are  
15 an expert in a particular area, they are allowed to give  
16 their opinions under our rules of court.

17 Now, in this case it has been stipulated that Dr.  
18 Carter is an expert in the field of child sexual assault  
19 examination. What that simply means is she'll be allowed  
20 to give her opinion in that area. Her testimony is like  
21 any other testimony in this case. You may accept it, you  
22 may reject it or do with it what you think is appropriate  
23 based on the facts.

24 Very well. You may proceed.

25 MS. PRICE: Thank you, Your Honor. May it

1 please the Court.

2 Q. Dr. Carter, did you perform an examination of

3 MINOR

4 A. I did.

5 Q. Do you recall when that occurred?

6 A. The record in my writing states it was April the  
7 4th, 2011.

8 Q. And how old was she when you performed that exam?

9 A. She was eight.

10 Q. Could you describe exactly what was entailed in the  
11 type of exam that you gave her?

12 A. I did a full pediatric evaluation, really a head-to-  
13 toe evaluation. Eyes, ears, nose, throat, neck, heart,  
14 lungs, abdominal, extremities. And then I do a very  
15 careful genital inspection. In doing the genital  
16 inspection, I use a medical -- piece of medical equipment  
17 called a colposcope. And a colposcope is a piece of  
18 equipment used usually by OB/GYNs or female cancer  
19 doctors to evaluate the cervix. But for our purposes, we  
20 use it to magnify and examine the genital area and any  
21 lesions that we might see. It can magnify the -- you  
22 know, what you can see with the naked eye, it can magnify  
23 it up to about twenty times. It's also equipped with a  
24 digital camera so that we can take images and come back  
25 and review them later.

1 Q. Is there any additional lighting that you use?

2 A. Yes. It comes with a high-powered light. That's  
3 part of the equipment is the lighting.

4 Q. Is there anyone in the room with you when the  
5 examination occurs?

6 A. Yes. I have a nurse who -- I would have to look  
7 through and see if she was present on the day of this  
8 exam. And I can tell you that just in a moment. In  
9 this particular case, the nurse was there, Pam Parker.  
10 And the child's parents were there. And sometimes other  
11 people are there like the director of the Child Advocacy  
12 Center. But in this case, the only additional people  
13 there in addition to me and the child were both parents  
14 and the nurse, Pam Parker.

15 Q. Did you use your colposcope in the exam of MINOR

16 A. Yes.

17 Q. Aside from special lighting, is there any additional  
18 positioning you do?

19 A. Well, in the -- children can be examined in  
20 different positions. A very young child, say two, is  
21 often evaluated in a frog-like type position, with the  
22 soles of the feet together. Now, this is speaking of  
23 little girls. Little boys are generally evaluated in the  
24 standing position. But little girls are evaluated  
25 sometimes in a frog-leg position, very often in what's



1 called a lithotomy position, which is the typical  
2 position for female genital examinations with the feet in  
3 stirrups. Or sometimes there's what we call a knee-chest  
4 position, or a chest on the table position where the  
5 child is viewed from -- with the knees down and the  
6 buttocks up.

7 Q. Do you recall what positioning you used in this  
8 exam?

9 A. Yeah. She was in a typical lithotomy position, feet  
10 in the stirrups.

11 Q. What were your findings during MINOR exam?

12 A. She had a normal physical exam with the exception of  
13 the genital area. The posterior portion of the hymen was  
14 absent. That is an abnormal finding in the exam.

15 Q. You said the posterior hymen. Can you start by  
16 telling me what the posterior is, and then tell us what a  
17 hymen is.

18 A. Yes. I suppose it should be inferior, but the  
19 typical description was posterior. With the child lying  
20 flat on her back and her knees elevated with her feet in  
21 the stirrups or holders, the posterior is the portion of  
22 the hymen that's closest to the anus.

23 Q. And what is the hymen?

24 A. Oh, the hymen is a little bit of mucus membrane  
25 that's either -- and I often show people that it's like

1 between my thumb and forefinger. It's just a little  
2 slender piece of tissue. And in young children it's just  
3 so, so thin that it's almost transparent. You know, you  
4 can almost get the feeling that you can see through it.  
5 And it can be crescentic, like a part of moon, or it can  
6 be almost full round or circumferential little rim of  
7 tissue that is present in almost all females. I've never  
8 -- there are some abnormalities of the hymen that we see  
9 sometimes, but it's usually on the order of too much, not  
10 too little.

11 Q. Would a hymen allow for penetration? Does it have  
12 an opening to it?

13 A. Well, actually, one of the abnormalities that we  
14 rarely see is a hymen that doesn't have an opening. It's  
15 called an imperforate hymen. And that's one of the  
16 reasons we evaluate little girls as part of a physical  
17 exam because we do want to pick up on that. That's a  
18 problem that has to be dealt with from a medical point of  
19 view. Sometimes we'll see a hymen that has more than one  
20 opening, like there's an little extra piece of tissue  
21 down the middle. And you know, there are variations.  
22 But absent is not a variation that is typical or that is  
23 described, I guess.

24 Q. What would cause -- in your opinion, what might  
25 cause an absent hymen if it's not a variation?

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1 A. Well, you know, what we typically see is some sort  
2 of injury that has caused the hymen to be torn or worn or  
3 absent.

4 Q. Would it hurt or necessarily -- would a child  
5 necessarily have a feeling or have felt the injury when  
6 the hymen was broken?

7 A. It depends on the type of the injury. I have seen a  
8 child who had -- who was struck by a car and a pelvic  
9 fracture. And the blow was so great that there was  
10 tearing in the female area where the hymen is and the  
11 urethra. So I mean, you know, you can have terribly  
12 traumatic injuries, but the child is not going to say it  
13 hurt because the other injuries were so great that those  
14 were the least of her worries. So you know, it depends  
15 on the circumstances.

16 Q. Would there always be bleeding?

17 A. Typically, there would be bleeding, yes.

18 Q. Okay. Would you -- did you see scaring in  
19 Jonashja's exam?

20 A. No.

21 Q. Would you always have scaring in an instance like  
22 this?

23 A. No.

24 Q. So -- but you would say that what you found was  
25 atypical?

1 A. Yes. In fact, the literature in the child sexual  
2 abuse arena shows that when little girls who are clearly  
3 traumatized, clearly have had a penetrating injury in a  
4 report of sexual abuse can have a tear of the hymen and  
5 then can be evaluated six months later, reevaluated six  
6 months later, and have no apparent scar or abnormality.  
7 So these tissues do heal. But variably, not all the  
8 time.

9 Q. Dr. Carter, did you -- you said you had a digital  
10 camera on your colposcope?

11 A. Yes.

12 Q. Do you do that to capture images during your exam?

13 A. Yes.

14 Q. Did you capture any images of MINOR during your  
15 exam?

16 A. Yes.

17 Q. How did you do that?

18 A. You aim the colposcope and press the shutter button.

19 Q. Okay. Dr. Carter, without showing the jury, just  
20 looking at it yourself right now, are you familiar with  
21 what I am presenting you?

22 A. Yes, I am.

23 Q. And what is it?

24 A. Well, this is one of the images from MINOR exam  
25 that I took on the date that we've been discussing.

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1 Q. And you captured that image with your colposcope?

2 A. Yes.

3 MS. PRICE: Your Honor, at this time the State  
4 would move State's Exhibit Number 3 into evidence.

5 THE COURT: Subject to my prior rulings, Mr.  
6 Thomason, anything in addition?

7 MR. THOMASON: Well, subject to your prior  
8 rulings, I guess -- well, just to keep the record, I'm  
9 going to that object to that picture being allowed into  
10 evidence.

11 THE COURT: It'll be admitted subject to  
12 objection.

13 MS. REEVES: Thank you, Your Honor.

14 (WHEREUPON, State's Exhibit Number 3 was admitted  
15 into evidence.)

16 Q. And Dr. Carter, have you examined children that you  
17 would say had a typical normal exam?

18 A. Yes.

19 Q. In your practice?

20 A. Yes. In fact, ninety-five percent of children's  
21 exams, when they are referred for a child sexual abuse  
22 exam, about ninety to ninety-five percent of them are  
23 normal.

24 Q. And during those exams, have you also captured  
25 images using your colposcope?

1 A. Right. I do.

2 MR. THOMASON: Okay. This time I'm really  
3 objecting. They're trying to introduce a photo ---

4 THE COURT: Stop for a second. Hang on.

5 Would you take the jury out, please?

6 (WHEREUPON, the jury exited the open court at  
7 approximately 2:35 p.m.)

8 THE COURT: All right. When we object, let's  
9 do the formalities properly, okay?

10 MR. THOMASON: I'm sorry. I apologize.

11 THE COURT: All right. Go ahead.

12 MR. THOMASON: I strongly object to the  
13 introduction of this photograph. This photo has no  
14 relevance in this case. It's not involving anybody in  
15 this case.

16 THE COURT: What exhibit number is this?

17 MS. PRICE: Your Honor, this is exhibit number  
18 4.

19 THE COURT: Number 4?

20 MS. PRICE: Yes, sir.

21 THE COURT: So this was not introduced in the  
22 in-camera hearing?

23 MS. PRICE: Yes, sir, it was.

24 THE COURT: Okay. Which number ---

25 MS. PRICE: It was one of the two pictures that

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1   you reviewed.

2                   THE COURT: I didn't review them, but they were  
3   introduced at the in-camera hearing?

4                   MS. PRICE: Yes, sir.

5                   THE COURT: Okay.

6                   MS. PRICE: Oh, no. We did not move them into  
7   evidence at that time, Your Honor.

8                   THE COURT: Okay. Let me see something.

9                   MS. PRICE: We ---

10                  THE COURT: I was thinking it was 5 and 6?

11                  MS. PRICE: No, sir.

12                  THE COURT: No. That's video -- the videos,  
13   okay. All right. These are the photographs of the non  
14   -- of the hymen that's in place, and the other picture is  
15   the lack of the hymen; is that correct?

16                  MS. PRICE: Yes, sir.

17                  THE COURT: Okay.

18                  Mr. Thomason, any objection beyond what you've  
19   stated in the in-camera?

20                  MR. THOMASON: Well, just that it's showing  
21   another vagina. And in my opinion it's irrelevant, it's  
22   prejudicial. For 403 purposes, it's more prejudicial  
23   than probative. It doesn't -- you know, I'm sure  
24   everybody's vagina is different. And you know, they're  
25   -- you know, they're more the same than different, but

1 everybody has their differences.

2 THE COURT: All right. I'm overruling that.

3 And let me just say this, however. I've already told the  
4 State. Subject to the proper foundational questions  
5 being laid in this case. Okay? If not, I'm going to  
6 strike it out.

7 MS. PRICE: Yes, sir.

8 THE COURT: Okay. Very good. Would you bring  
9 the jury back in.

10 Excuse me. Mr. Thomason, anything further?

11 MR. THOMASON: No, sir. No. Thank you for  
12 asking.

13 (WHEREUPON, the jury entered the open court at  
14 approximately 2:39 p.m.)

15 THE COURT: All right. Counselor?

16 MS. PRICE: Thank you, Your Honor.

17 Q. Dr. Carter, as part of your preparation for this  
18 case, did you review some materials?

19 A. I did.

20 Q. And without showing that to the jury, just reviewing  
21 that yourself again, are you familiar with what I've  
22 presented you with?

23 A. Yes. This is another image using the same  
24 colposcope and the same exam procedure in a same-aged  
25 child with a normal hymen.



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1 Q. And did you review that photograph in preparation  
2 for the case today?

3 A. Yes.

4 MS. PRICE: Your Honor, at this time the State  
5 would seek to move State's Exhibit Number 4 into  
6 evidence.

7 THE COURT: It will be admitted subject to  
8 objection. Go ahead.

9 MS. PRICE: And, Your Honor, and 3 as well.

10 THE COURT: Same ruling.

11 MS. PRICE: Thank you.

12 (WHEREUPON, State's Exhibit Number 4 was admitted  
13 into evidence.)

14 Q. Dr. Carter, if you wouldn't mind stepping down in  
15 front of the jury and bringing State's Exhibits Number 3  
16 and 4 with you.

17 (WHEREUPON, the witness stepped down from the  
18 witness stand.)

19 Q. Would you mind, using these exhibits, showing the  
20 jury the difference that you observed between the two?

21 A. You know, in the past, I've used a white board or a  
22 paper to demonstrate. But basically what I usually tell  
23 people is that a piece of hymenal tissue is kind of like  
24 this. It should be very smooth. And in young children  
25 it's just very, very thin. It's mucus membrane like the

1 membrane inside of your mouth or inside of your nose.  
2 It's red, very vascular, heals very quickly. It's very  
3 moist, very elastic. Just normal healthy tissue.

4 And to give you a frame of reference, this is the  
5 hymen on a normal eight-year-old child. And you can see  
6 here it's just very smooth. It's very white looking.  
7 After -- during and after puberty, it becomes much more  
8 red and vascular and kind of wavy, you might say. It's  
9 just a much more abundant piece of tissue. But in a  
10 young child, it just stretches smoothly and it's kind of  
11 light-colored. And it's just normal, healthy looking  
12 tissue. That's all there is to it.

13 This is the abnormal exam which, as you can see  
14 here, shows a -- it's a different magnification. That's  
15 a larger magnification than this is. But this is what  
16 they printed up for me. But this basically shows just an  
17 absence of the tissue posteriorly so that with the  
18 colposcope we can look directly into the vaginal opening.  
19 And you just don't see that healthy kind of light-colored  
20 tissue. This is a white child. This is a dark-skinned  
21 child. But basically the mucus membrane's all the same  
22 color in everybody, no matter what the color of our skin.  
23 It should be red and pink and moist and healthy looking,  
24 just the way this one is. So it's different in this  
25 particular picture.

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1 Q. And you were talking about where the posterior is?

2 A. Yeah, I think I've demonstrated that. This is what  
3 we're calling posterior because it's closer to the anus.  
4 The same thing here. Rather than a nice smooth rim of  
5 tissue, there's just not much there. Not -- virtually,  
6 you know, a very, very thin rim of hymen present here.

7 Q. Dr. Carter, after reviewing your file and  
8 photographs, in your expert opinion, can you tell us  
9 whether or not your findings are consistent with a  
10 penetrating injury?

11 A. That is what I wrote, that this was consistent with  
12 a penetrating injury. However, I did refer that other  
13 injuries to the female genital area can occur. And you  
14 know, of course, if you have a physical abnormality, you  
15 can't always look back without any facts and say exactly  
16 what caused it unless there's a pattern. You know, if  
17 there's a pattern like a brand type burn, yes, you can  
18 look at that and, you know, somebody branded 'B' on that  
19 child or that cow or whatever it was, you know, that was  
20 branded. But without a pattern, you can just say well,  
21 there's an injury, but we don't know what caused it.

22 On the other hand, if we have a child giving a  
23 specific explanation or statement, it can suggest what  
24 caused the injury pattern that we see.

25 Q. Did you have an opportunity to watch the interview

1 of Jonashja?

2 A. Yes, about two hours ago. I had not seen it prior  
3 to that.

4 Q. Based on your review of that video and your exam --  
5 in conjunction with your exam, would the type of injury  
6 you see here be consistent with her allegations?

7 A. I was actually more concerned after hearing the  
8 forensic interview and more convinced ---

9 MR. THOMASON: Your Honor, I'm going to object.  
10 I don't know that it's worthy of taking the jury out or  
11 not, but ---

12 THE COURT: State your objection.

13 MR. THOMASON: The allegations were that there  
14 was no penetration basically.

15 THE COURT: All right. Overruled.

16 Q. Dr. Carter, please continue.

17 A. When we have an injury, we also have a history that  
18 goes along with the injury. And in this particular --  
19 and when I do these exams, I do not obtain a history from  
20 a child because I want to go to the exam as a blank  
21 slate. I don't want to bring any, what do you call it,  
22 pre -- presumption to the exam. I want to go at it as  
23 if, you know, I didn't know a thing about this child. I  
24 was just doing a normal exam. And then if I see  
25 something, I can call it normal or abnormal, not based on

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1 what I have heard, but only based on what I see.

2 So in this case, I really didn't have any history.

3 I described what I saw and I had not heard the forensic  
4 interview until the Judge asked me to listen to it about  
5 two or three hours ago. And after listening to the  
6 interview, I was more concerned because what you -- what  
7 the child -- although the child did not have perhaps the  
8 language and give the detail that would completely

9 describe how the injury occurred, the child did draw a  
10 picture of a person who groomed her for sexual activity  
11 or sexual abuse. The person had kissed her while she was  
12 sleeping, kissed her on the lips while she was sleeping,  
13 invited her under her blanket with him. You know, are  
14 you cold? Come get under the blanket, et cetera, et  
15 cetera, et cetera. And then a child who said this  
16 happened multiple times. And she did report that there  
17 was skin-to-skin contact, male genital contact on her  
18 what she called her butt and male genital contact on her  
19 front. And it happened a number of times, and it  
20 happened in the presence of pornographic media. And you  
21 know, it just -- the pattern is ---

22 MR. THOMASON: Your Honor, I'm going to object  
23 to that.

24 A. --- that the child was groomed ---

25 THE COURT: Just one second, please.

1 MR. THOMASON: There's been -- pornographic has  
2 not been used. I believe the testimony was that I saw a  
3 video of two naked people kissing. Well, I mean, I  
4 watched the Voyages and Game of Thrones last night, and  
5 there was ---

6 THE COURT: Just one second.

7 MR. THOMASON: --- there was ---

8 THE COURT: Just stop.

9 Mr. Foreman, will you take your jury back to the  
10 jury room?

11 (WHEREUPON, the jury exited the open court at  
12 approximately 2:47 p.m.)

13 THE COURT: All right. When I ask for an  
14 objection, I want the objection. I don't want this  
15 rambling ---

16 MR. THOMASON: I'm sorry.

17 THE COURT: I want the objection stated on the  
18 record. I'm going to ask you again. I want both sides  
19 to state their objection based on the rules of evidence,  
20 and I don't want these talking objections. I'm not going  
21 to do it anymore. Okay?

22 MR. THOMASON: I'm sorry.

23 THE COURT: All right.

24 MR. THOMASON: My objection is that I don't  
25 believe that the characterization of two naked people

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1     kissing is pornographic. That's on TV everyday.

2             THE COURT: That's not -- I'm going to overrule  
3     that objection. The testimony from the doctor was that  
4     they had pornographic videos or videos shown to the child  
5     is what I just heard her say. That's what the child  
6     said, and that's what the video said. Okay? And that's  
7     not a proper objection here. Okay? If you want -- I'm  
8     not trying to beat up on you.

9             MR. THOMASON: No, sir.

10            THE COURT: But number one, I want the record  
11     clear and to understand what the objection's about. And  
12     especially -- when we have the jury in here, let's not do  
13     the speaking thing. Say -- you know, if it's hearsay or  
14     something along those lines to give me enough information  
15     so I can tell you whether or not.

16            MR. THOMASON: I'm sorry.

17            THE COURT: That's okay. I mean, we've all  
18     been around before. Anything further on your objection,  
19     Mr. Thomason?

20            MR. THOMASON: No, sir. That was it.

21            THE COURT: Okay. Tell him to bring the jury  
22     back in, please.

23            (WHEREUPON, the jury entered the open court at  
24     approximately 2:51 p.m.)

25            THE BAILIFF: The jury said they're having a

1 hard time hearing Scott.

2 THE COURT: Okay. Mr. Thomason, the jury needs  
3 you when you speak up to ---

4 MR. THOMASON: Yes, sir.

5 THE COURT: And let me tell everybody on the  
6 jury, if at any time during this case if you can't hear  
7 any aspect of this case either from a witness'  
8 perspective, an attorney's perspective or from me, raise  
9 your hand so I can address that immediately, okay? Thank  
10 you.

11 Go ahead.

12 MS. PRICE: Thank you, Your Honor.

13 Q. Dr. Carter, please continue if you recall where you  
14 were.

15 A. Well, I do recall. And you know, to answer the  
16 objection, I used to work for ---

17 THE COURT: No, ma'am. No, ma'am. You will  
18 not answer the objection. I answer the objection.

19 THE WITNESS: Yes, sir.

20 THE COURT: If you will respond to the  
21 question, please.

22 THE WITNESS: All right.

23 THE COURT: Thank you.

24 A. I did comment that there was sexually explicit  
25 videotape which the child described as naked people



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1   kissing. And later she commented on a similar videotape  
2   and said they were hunching. And then she couldn't  
3   really describe what hunching was. But my point was that  
4   this -- that my -- based on my knowledge -- and I've been  
5   evaluating these cases for ten years. And of course, a  
6   lot of people say to me, why would you ever want to do  
7   that, and isn't that awful and doesn't it worry you at  
8   night and all this sort of stuff. It doesn't because I'm  
9   in a helping sort of role.

10       The child reported that there was sexually explicit  
11   material played at least some of the time when the  
12   individual was involving her in sexual activity. And she  
13   indicated that this happened a number of times. And she  
14   indicated that it was at his invitation that she get  
15   under the blanket with him, that she do this. She  
16   indicated that he had taken her pants down, you know. So  
17   that when you put that report by an eight-year-old child  
18   together with an abnormal genital exam, to me in my  
19   professional opinion, that's like saying one and one is  
20   two or two and two is four. I wasn't there. I didn't  
21   see it. But I have a lot of experience in this area.

22   Q.   Thank you, Dr. Carter. You may take the stand  
23   again.

24       (WHEREUPON, the witness resumed the witness stand.)

25   Q.   You briefly said that she couldn't come up with the

1 words really to hunching, or couldn't come up with a  
2 description. Could you explain developmentally in your  
3 experience if children are able to describe the things  
4 that have happened to them the way that an adult would be  
5 able to?

6 A. Typically, they're not, you know. And I work with  
7 children all of the time, and I've been doing it for --  
8 you know, I've been doing it in Anderson since 1989.  
9 Children have to learn the language of emotion, and they  
10 have to learn the language of sexual activity. And so if  
11 you take a child that hasn't learned, you know, the right  
12 words and the right description and the right function,  
13 for example, of body parts, they don't have a very good  
14 way to describe sometimes the things that happen to them.

15 Q. Now, when a child describes what's happened to them,  
16 is that -- what is that considered? What is that called?  
17 Do you have a word for it in your profession?

18 A. No, I can't -- I'm not sure that I know what you're  
19 asking.

20 Q. Okay. Let me rephrase. Is a report of abuse from a  
21 child a process?

22 A. Very often it is.

23 Q. Does it necessarily always occur all at once?

24 A. No.

25 Q. Would it be considered abnormal for various portions

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1 of an abuse process to come out gradually?

2 A. That is often the case.

3 Q. You mentioned other things could cause a hymen to be  
4 broken or absent. Did you see anything in reviewing

5 MINOR medical history that you think would or could  
6 have resulted in this injury to her?

7 A. I did not. I'm going to just flip back through  
8 these pages that her mother completed. But the sorts of  
9 history that we like to know are whether the child had  
10 has a history of urinary tract infections or perhaps a  
11 urological procedure or some other, you know, some other  
12 injury or abnormality that would explain an abnormal  
13 finding. And in this review of the information given to  
14 me at that time, there's no record that she had any  
15 surgical procedure or injury to the genital area.

16 Q. Based on the allegations of the victim and the  
17 video, in your professional opinion and your experience,  
18 would the victim have necessarily known the difference  
19 between actual penetration and attempted penetration?

20 A. At the age of eight, it would be -- it would be  
21 really hard to say whether an eight-year-old could really  
22 put into words the experience of vaginal penetration.  
23 Now, you know, some -- you can have adults who explain,  
24 well, was it like this or was it like that, and so on and  
25 so forth, but that might be leading the child and trying

1 to entice some sort of a report from the child. And we  
2 certainly don't want to do that. So we ask very open-  
3 ended questions. And the child may not really be able to  
4 give enough detail or all the detail that we would like  
5 to hear. You do have to be -- and again, referring to  
6 the video which I just saw two or three hours ago, you do  
7 have to both watch the child and listen to the child  
8 because they will tell you things in their moments of  
9 silence or when they point to pictures, you know, as well  
10 as when they speak with their mouths.

11 MS. PRICE: One moment, Your Honor.

12 THE COURT: Yes, ma'am.

13 Q. Dr. Carter, thank you. Please answer any questions  
14 that Mr. Thomason has for you at this time.

15 THE COURT: Cross-examination?

16 MR. THOMASON: May it please the Court.

17 CROSS-EXAMINATION

18 BY MR. THOMASON:

19 Q. Dr. Carter, given your testimony, can you beyond a  
20 -- or to a reasonable medical certainty say that these  
21 injuries were caused by the Defendant in this case?

22 A. I can't say a who, Your Honor. I don't even know  
23 the Defendant. I don't know the Defendant in this case.

24 Q. I understand.

25 A. I don't see a Defendant.

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1 Q. Right. And would you be able to tell any individual  
2 unless they had left something behind, some forensic  
3 evidence such as fluid or DNA or something like that?

4 A. No. Only based on the child's testimony.

5 Q. Can you tell to a degree of medical certainty if --  
6 I believe you termed it as a penetrating injury?

7 A. What we typically say and the way we write things  
8 up; that it is consistent with a certain type of injury.

9 Q. Okay.

10 A. And I said this was consistent with penetration.

11 Q. What else is it consistent with?

12 A. Well, it is the most consistent with penetration.

13 If a child has a traumatic vaginal injury, for example,

14 being hit by a car or falling on a tree limb, falling

15 astride a tree limb or astride a fence or, God forbid,

16 falling on a rake with rigid teeth sticking up or

17 something like that, we could see an injury. But

18 typically there's a history consistent with the injury

19 that we see. I've seen children that have fallen on tub

20 faucets and children that have fallen on tree limbs and

21 bicycle -- bicycle handlebars are another bad -- but if

22 there's history consistent with the injury, then we say

23 well, you know, that's consistent with falling on a fence

24 rail or a tree limb or something like that. It's

25 consistent with the history given by the child.

1           In other types of child abuse -- I have dealt not  
2   only with child sexual abuse but child physical abuse.  
3   And again, if we see a child who has a -- who has a head  
4   injury and the child is too young to give a history and  
5   the parent says, well, they fell off the top bunk, and we  
6   know that a fractured skull didn't likely occur in that  
7   means, then we say, well, it's not consistent with the  
8   history given by the parents or it is consistent, you  
9   know, in some cases depending on the circumstances. So  
10   all I can say is the injury that I saw is consistent with  
11   a penetrating vaginal injury.

12   Q.   The same question except I'm changing it to who and  
13   what now to when. Can you ---

14   A.   Now, this was not an acute injury. Therefore, I  
15   mean, it occurred some -- presumably some weeks to months  
16   earlier because it was completely healed. There wasn't  
17   any fresh bruising, any swelling. You know, wasn't any  
18   sign that it was a recent, as in the last two weeks was a  
19   recent injury.

20   Q.   Dr. Carter, I believe that's all I have for you.  
21   And I also wanted to thank you for having me over at your  
22   office last week and showing me your machine.

23           THE COURT: All right. Redirect?

24           MS. PRICE: Thank you, Your Honor. No  
25   redirect.

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1 THE COURT: May Dr. Carter be excused?  
2 MS. PRICE: Please.  
3 THE COURT: Mr. Thomason?  
4 MR. THOMASON: No objection.  
5 THE COURT: Doctor, excuse me for barking at  
6 you like that.  
7 THE WITNESS: Oh, no ...  
8 THE COURT: Would you call your next witness?  
9 MS. REEVES: Your Honor, I believe at this time  
10 the Defense had asked that we have some redirect. So at  
11 this time we call MINOR  
12 THE COURT: Come around.  
13 THE COURT: Let me ask you -- may I ask you  
14 something, please? Do you remember when the Clerk gave  
15 you an oath earlier this week?  
16 THE WITNESS: Yes, sir.  
17 THE COURT: Do you remember you said you will  
18 tell the truth?  
19 THE WITNESS: Yes, sir.  
20 THE COURT: You're still under that oath. Do  
21 you understand?  
22 THE WITNESS: Yes, sir.  
23 THE COURT: Thank you.  
24 Mr. Thomason?  
25 MR. THOMASON: May it please the Court.

1 THE COURT: Yes, sir.

2 MINOR

3 HAVING BEEN PREVIOUSLY SWORN, TESTIFIED AS FOLLOWS:

4 RECROSS-EXAMINATION

5 BY MR. THOMASON:

6 Q. MINOR I really hate to put you back on the  
7 stand, but I have to.

8 THE COURT: I think you need to speak up.

9 MR. THOMASON: I'm sorry. Let me get a little  
10 closer. I don't want to ...

11 THE COURT: Would you repeat what you said?

12 Q. I said I'm sorry that I had to put you back on the  
13 witness stand.

14 MINOR we've seen the interview tapes that were  
15 made today. And why did you not mention the oral sex  
16 that you earlier testified to in those -- when you were  
17 doing the interview?

18 A. I don't know.

19 Q. I'm sorry?

20 A. I don't know.

21 Q. You don't know?

22 A. (Shook head back and forth in the negative)

23 Q. Okay. Well, that's a perfectly good answer. I  
24 don't know is a perfectly good answer. When did you  
25 first tell anybody?



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1 A. I told my counselor that I was talking to.

2 Q. Was that a long time ago, or was it -- how long ago  
3 has that been?

4 A. I think it was sometime last year.

5 Q. Okay. Well, do you remember the interviewer asking  
6 you several times was there anything she needed to know  
7 and should you -- did you have anything else you should  
8 be telling her about? And you said, no, several times.  
9 Do you remember that?

10 A. Yes, sir.

11 Q. Well, one of those times, either then or now, you  
12 weren't telling the truth. Which time was it?

13 A. Neither times.

14 Q. Okay. Well, I'm not going to -- I'm not going to  
15 pressure you any more. I just wanted to get that out.  
16 Thank you so much. Okay?

17 MS. REEVES: No, sir.

18 THE COURT: Any further witnesses from the  
19 State?

20 MS. REEVES: Nothing further, Judge. The State  
21 rests.

22 THE COURT: Okay. Mr. Foreman, ladies and  
23 gentlemen of the jury, the State advises that it is  
24 resting. What that simply means is that it has put up  
25 all of the witnesses they intend to call in their case in

1 chief. I have now a few things I need to take care of.  
2 It's a little early, but let's go ahead and take an  
3 afternoon break, and we'll bring you back out here after  
4 we get through. Okay?

5 Take the jury back to the room.

6 (WHEREUPON, the jury exited the open court at  
7 approximately 3:09 p.m.)

8 THE COURT: All right. Any motions?

9 MR. THOMASON: Your Honor, I would move for a  
10 directed verdict. The State has failed to put forward  
11 enough evidence for any reasonable jury to convict on the  
12 criminal sexual conduct charge. Well, actually, both  
13 charges.

14 THE COURT: Okay, sir. I'm going to deny that  
15 motion. Obviously, I know that that's no grand surprise.  
16 But there is existence of evidence in the record from  
17 which they could find that there was oral penetration,  
18 although more arguably potentially some type of  
19 penetrating intrusion in the vaginal area based on the  
20 evidence from Ms. Gianiodis and the witness or victim  
21 herself and Dr. Carter. So it's up to the jury to  
22 decide.

23 That being said, I assume that you're not going to  
24 put up any evidence?

25 MR. THOMASON: No, sir. The Defense rests as

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1 well.

2 THE COURT: Okay. Very well. I'm going to  
3 pull my charges out and then we'll have a charge  
4 conference. Okay?

5 MS. REEVES: Yes, sir.

6 THE COURT: And we'll be in recess until that  
7 time.

8 (WHEREUPON, court stood at recess for a short  
9 break.)

10 THE COURT: Let me ask the attorneys. My  
11 normal practice is if we're going to be giving a case to  
12 a jury after four, I send them home.

13 MR. THOMASON: Sir?

14 THE COURT: My practice is if the case is going  
15 to go to the jury after four o'clock, I'll send them home  
16 and then charge them in the morning.

17 MR. THOMASON: Okay.

18 THE COURT: And I'm sure they probably want to  
19 get on with other things, but at this stage it's three-  
20 thirty. And by the time we finish the charge conference,  
21 it's going to be well after, so I'd just as soon send  
22 them home. Any problem from the State?

23 MS. REEVES: No, sir.

24 MR. THOMASON: None.

25 THE COURT: Can you bring the jury in real

1 quick, please, sir?

2 While he's getting them, look up -- do you have your  
3 computer? Do you have your computer, Ms. Reeves?

4 MS. REEVES: Do I have my computer?

5 THE COURT: Yeah.

6 MS. REEVES: No, but I can get one.

7 THE COURT: Well, I just wanted y'all to pull  
8 up § 16-3-655, what the statute is. It's a special  
9 interrogatory we have to ask.

10 MS. REEVES: I have my old fashioned book.

11 THE COURT: Ma'am?

12 MS. REEVES: I have my old fashioned statute  
13 book.

14 THE COURT: Oh, good.

15 (WHEREUPON, the jury entered the open court at  
16 approximately 3:32 p.m.)

17 THE COURT: All right. Ladies and gentlemen.

18 The State has rested. The Defense has rested as well.

19 So what that means is as of this -- we've passed the  
20 presentation of the evidence phase of the case.

21 Remember, I told you each case has five phases. The next  
22 phase would be the closing arguments by the attorneys. I  
23 would then charge you on the law, and then you'd be  
24 allowed to begin your deliberations.

25 Because of the hour of the day, by the time the

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1 arguments are finished and I charge you on the law, it  
2 would be very close to five o'clock. I don't like for  
3 juries to have to start deliberating that late hour of  
4 the day. So I'm going to excuse you for the rest of the  
5 afternoon. I'm going to ask that you be back in your  
6 jury room at nine-thirty, and we'll proceed with closing  
7 arguments and the charge of the law at that time. Okay?

8 And also, if you'll leave notes in the jury room.  
9 And still the precaution please don't speak with anybody  
10 or yourselves about this case. I'll excuse you for the  
11 day. Thank you very much.

12 (WHEREUPON, the jury exited the open court at  
13 approximately 3:34 p.m.)

14 THE COURT: All right. Any exceptions or  
15 additions from the State as to my instructions?

16 MS. REEVES: No, sir.

17 THE COURT: Mr. Thomason?

18 MR. THOMASON: No, sir.

19 THE COURT: Okay. I have -- my clerk is  
20 getting the verdict form ready. But the first degree  
21 criminal sexual conduct with a minor charge is extremely  
22 short, and so is the lewd act on a minor. Let me just  
23 pass that out. I'm going to give the absent defendant  
24 charge at another location, but it's the same one I gave  
25 -- why don't y'all look at that and see if you have any

1 objections.

2 MS. REEVES: Judge, do you need the definition  
3 of minor when the ages are given in lewd act? Because  
4 the actor has to be over fourteen and the victim has to  
5 be under sixteen.

6 THE COURT: Let me see.

7 MR. THOMASON: That's okay.

8 MS. REEVES: Option. I'm just saying ...

9 THE COURT: I don't think you do.

10 MS. REEVES: Okay.

11 THE COURT: If you have the exact ages that  
12 they have to establish for the Defendant and the minor,  
13 in this case under eleven or sixteen and under or under  
14 sixteen and under, I don't think -- I think a definition  
15 of a minor would be confusing because -- I tell you what  
16 -- have you ever tried to run up a definition of a minor?

17 MS. REEVES: Yes. It's kind of narrow.

18 THE COURT: I mean, they're all over the place.

19 MS. REEVES: Yeah.

20 THE COURT: So I ...

21 What's your thoughts about it?

22 MR. THOMASON: I'm fine the way you've got it.

23 THE COURT: Okay. I'm going to -- if you want  
24 me to do it -- I'm probably not going to. But if you'll  
25 prepare me one, I'll look at it. I don't have one off-

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1 the-top-of-my-head that I use.

2 MS. REEVES: Well, I mean, my opinion would be  
3 just leave it out. Don't substitute anything, but leave  
4 it out because the definition of a minor is within the  
5 statute. I don't think an additional one needs to be  
6 given.

7 THE COURT: So is there any aspect of this  
8 charge that you have an objection to?

9 MS. REEVES: The definition of the minor, the  
10 first sentence. A minor is anyone under the age of  
11 eighteen. Isn't that what it reads?

12 THE COURT: Oh, excuse me.

13 Let me ask you, Scott.

14 MR. THOMASON: Yes, sir?

15 THE COURT: It seems confusing to me if it says  
16 you're under eighteen, then it says you've got to prove  
17 he's under sixteen. If I just strike out, a minor is  
18 under the age of eighteen years old -- which this is  
19 under the lewd act. And it would go, next the State must  
20 prove that the Defendant willfully and lewdly committed  
21 or attempted a lewd or lascivious act on or with the body  
22 or its parts of a child under the age of sixteen years,  
23 et cetera, et cetera, et cetera.

24 MR. THOMASON: Did you ever bring out how old  
25 he was?

1 MS. REEVES: Yeah.

2 THE COURT: Do you have any problem with me  
3 striking out eighteen? You put eighteen and then  
4 sixteen. It seems a little bit confusing to me, I agree.

5 MR. THOMASON: That's fine. The simpler the  
6 better.

7 THE COURT: Okay. I'm sorry. I looked  
8 straight at it. And I knew you were looking at me like I  
9 was being stupid.

10 MS. REEVES: Well, I thought we were together,  
11 but -- no, it just seems unnecessary.

12 THE COURT: All right.

13 (Off record discussion)

14 MS. REEVES: The other thing that we might need  
15 to discuss is in the specifics of the CSC with a minor  
16 first. The jury is going to have to have a finding.

17 THE COURT: All right. I've got that on the  
18 verdict form.

19 MS. REEVES: Okay.

20 THE COURT: And let me do this. We're going to  
21 go back on the record because I cut you off before you  
22 had an opportunity to finish doing your directed verdict  
23 motion. I apologize for that. But you had -- I didn't  
24 realize I didn't let you finish. You have some other  
25 grounds that you want to assert?



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1           MR. THOMASON: If it please the Court. I've  
2 only got a couple or three. When do you want me to make  
3 them?

4           THE COURT: Let's go ahead and do it now. I  
5 thought we'd finished. But let's go ahead and get that  
6 out of the way before we go into the charge conference.

7           MR. THOMASON: Your Honor, at this time, if it  
8 please the Court, I would like to finish my directed  
9 verdict motion on the following. First of all, there was  
10 not a proper foundation laid for Dr. Sallie Carter's  
11 testimony.

12           THE COURT: What, as to causation?

13           MR. THOMASON: Yes.

14           THE COURT: Okay.

15           MR. THOMASON: Further, as to the admission of  
16 the forensic videotapes, I still believe they're  
17 cumulative and bolstering. And also the child victim  
18 changed her testimony from the videos to the -- onto the  
19 witness stand. And that's about all I can think of.

20           THE COURT: Okay. Let me make sure I  
21 understand. As to the Dr. Carter testimony, you're  
22 saying that there wasn't a proper foundational question  
23 laid by the State in order for her to give her testimony  
24 as to cause of the missing hymen in this case; therefore,  
25 that leaves the jury to look to ---

1 MR. THOMASON: That's correct.

2 THE COURT: --- just engage in speculation.

3 MR. THOMASON: And is speculation. It would be  
4 causation speculation.

5 THE COURT: All right. I'm going to note your  
6 objection. Any further grounds?

7 MR. THOMASON: No, sir. I think that covered  
8 about everything.

9 THE COURT: Let me just say this. That was a  
10 big concern of mine in the case. I did some research on  
11 it. As we all know, you know, in order to prove  
12 causation in a medical case, you've got to say to a  
13 reasonable degree of medical certainty or something along  
14 those lines. But there's no magic words that you have to  
15 say. And I think it was -- it was an Anderson County  
16 case, Scoggins versus McClellion, which is 468 12 S.E.2d.  
17 It said it's enough if the testimony judicially impressed  
18 that the opinion represents his professional judgment as  
19 to the likely one among the possible causes.

20 MR. THOMASON: Who versus McClellion was that?

21 THE COURT: Sir?

22 MR. THOMASON: Who versus McClellion?

23 THE COURT: Scoggins, S-C-O-G-G-I-N-S. It's  
24 468 S.E.2d 12, which is a 1996 case. I think that was  
25 actually Judge Macaulay's. And anyway, under the test

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1 set forth in that -- and they cite other cases -- I think  
2 that their -- although it wasn't the strongest, quite  
3 candidly, that she, Dr. Carter, did ultimately get around  
4 to saying that in her professional opinion it's  
5 consistent with this type of injury. And I think that's  
6 enough to take it to the jury for their decision to make  
7 a -- for them to make a culpability call. And you  
8 certainly are free to argue that, as you well know.

9 All right. That being said, here's the proposed  
10 verdict form. The question -- I have two special  
11 interrogatories because it just seems to make sense. But  
12 the way I read the definition of sexual battery, which  
13 would include the oral side of things -- excuse me. But  
14 the question that the statute requires doesn't go into  
15 that. So you can have a sexual battery even though the  
16 jury doesn't find one of these other factors. So that's  
17 why I was asking on the verdict form, number one, do you  
18 find that the State established by proof beyond a  
19 reasonable doubt that the Defendant committed a sexual  
20 battery upon the victim? Okay. No or yes. If you  
21 answered yes to number one, then you go to question  
22 number two. Did the sexual battery involve sexual  
23 intercourse, anal intercourse or intrusion by an object.  
24 And I believe those are the requirements that I have to  
25 bring out in the statute. Okay. Then I just say go to

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1 sir?

2 THE BAILIFF: Yes, sir.

3 THE COURT: All right. Would you bring the  
4 jury in, please, sir?

5 (WHEREUPON, the jury entered the open court at  
6 approximately 9:39 a.m.)

7 THE COURT: Mr. Foreman, ladies and gentlemen  
8 of the jury, good morning.

9 THE JURY: Good morning.

10 THE COURT: We have concluded the presentation  
11 of the evidence phase of this case. The next phase we'll  
12 get into will be the closing arguments by the attorneys.  
13 Then I will charge you on the law. After I charge you on  
14 the law, I'll send you back to your jury room. You're  
15 still not to begin your deliberations until I go over  
16 with the attorneys whether or not I misstated something  
17 or omitted to say something I should have in my charge to  
18 you. Once we have that clarified, then you'll receive  
19 word from the bailiff and the verdict form and the  
20 exhibits that you may begin your deliberation. Okay?

21 All right. Mr. Reeves?

22 MS. REEVES: Thank you, Judge. May it please  
23 the Court?

24 THE COURT: Yes, ma'am.

25 CLOSING ARGUMENT

1 BY MS. REEVES:

2 At the beginning of this trial, I told you that this  
3 case was about a child being molested, and that child was  
4 MINOR You heard her testimony twice basically.  
5 You heard her on the stand, now ten years old, talk about  
6 how she's about to finish the fifth grade. You heard her  
7 talk about her family and her family members who she  
8 lives with now.

9 And you also heard her talk about her stepfather,  
10 someone that she used to live with. His name is Andrew  
11 Clemons, but she knows him as Moochie. You heard her  
12 tell you about the fact that he touched her in a way that  
13 she didn't like. She described several incidents on the  
14 stand to you as well as on the video that you saw.

15 And I told you at the beginning of this trial that I  
16 apologized that we were going to have to discuss in very  
17 frank terms body parts, specific body parts and sexual  
18 acts as they related to children. And you heard why.

19 You heard that MINOR had to go through and tell  
20 you how Moochie touched her. From the stand she  
21 described how he put his penis between her legs, how he  
22 held her by the waist and moved her up and down on him,  
23 how her bottom touched the front of his private. How he  
24 had taken his clothes off, how he had taken her clothing  
25 off. At some point she did say he left his boxers on,

1 but, again, she said he put his penis through the hole in  
2 his boxers so their skin could come into contact. And he  
3 touched his private part, his penis, to the skin of her  
4 vagina.

5 He showed her a video, in fact, of what he wanted  
6 her to do on a little small portable DVD player of people  
7 without their clothes on. And then she said this is what  
8 -- he was showing me what to do.

9 You also heard her say that he made her put her hand  
10 on his penis and then put his hands around hers and made  
11 her move them up and down until something came out. And  
12 it felt hard. A ten-year-old is telling you this. How  
13 does she know that unless she did it.

14 She also told you that he made her put her mouth on  
15 his penis. She told you that he held her by her little  
16 ponytail on the back of her head and moved her head up  
17 and down, and again, until something came out that went  
18 in her mouth. And she had to spit that out.

19 You heard her tell you that on the stand. And then  
20 you heard her again in the video and how she again  
21 described how he held her by her waist and moved her up  
22 and down. That he kissed her first, that he went -- when  
23 he thought she was asleep on the couch and he kissed her  
24 on the lips.

25 And then she described another time that he put his

1 penis between her legs from the back going near her butt.  
2 So again, skin touched. And again showed her a video of  
3 what he wanted her to do.

4 She talked about how his penis touched the skin of  
5 her butt and what it looked like. And she pointed to the  
6 picture in the video and said, his penis looked like that  
7 only it was a little bit bigger.

8 She described another time too where he put his  
9 penis between her legs when he was on top of her. And  
10 she even demonstrated on the video. She turned around  
11 and hiked her leg up on the chair to say he got on top of  
12 her that way. His penis was between her legs on her  
13 skin, and he was moving up and down. And again, that's  
14 when she described that something came out because he  
15 told her to go wash up. Take a shower or bath. Go clean  
16 up.

17 You heard in the interview trying to -- MINOR  
18 trying to explain how many times this happened to her.  
19 She said, well, I think it was maybe five or six. But if  
20 you listen closely, she said, I really don't count  
21 anymore.

22 Again, she describes another time of putting her  
23 hands on his penis and that he ejaculated -- those are  
24 not her words, those are my words -- but her words, she  
25 said something came out maybe three times. She is

1 talking about and describing sexual acts that happened to  
2 her.

3 And no, she didn't get it all out on the video. She  
4 got some out on the stand too. But it's a process. Just  
5 like any other traumatic event in your life like a car  
6 wreck, right after it happens, you're going to maybe only  
7 tell the essential details. You know, I had my blinker  
8 on. I was going to turn right, and all of a sudden  
9 somebody hit me. The essentials. It's not until later  
10 when you've had time to really sit and understand that,  
11 oh, yeah, well, you know what, I was about to turn right.  
12 But when I saw them, there was actually a car behind the  
13 car that hit me that hit them first. And those details  
14 kind of evolve as your memory works through and you kind  
15 of understand. That's what happens with any of us, with  
16 any adults, even children too. But children are at a  
17 limited advantage because -- especially in dealing with  
18 sexual instances because they don't even know what's  
19 going on. They don't understand it themselves, and now  
20 they're having to come and explain it to us.

21 Not to mention these incidents happened two and a  
22 half years ago. So imagine the difficulty in describing  
23 your last sexual encounter to a room full of people,  
24 strangers, and to members of your own family. That's  
25 what we asked MINOR to do at ten. Describe things



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1 that happened to you at eight years old. And not only  
2 that, two years ago I want you to be able to describe  
3 what you were wearing, what that other person was wearing  
4 and the exact positions that he made you get into. If  
5 you leave out some details, I think everyone's going to  
6 understand why. That's a lot to remember and a really  
7 embarrassing topic to discuss. Not to mention the fact  
8 that she was eight years old. It happened more than one  
9 time, so which time are you talking about? Which time do  
10 you want me to tell you about? I'll try to do it the  
11 best I can. That's what we asked her to do.

12 Like I said in the beginning of this trial too,  
13 children have a really difficult time remembering  
14 details. If you've ever talked to -- or dates that  
15 something happened. If you've ever talked to a child and  
16 tried to, you know, say, oh, this is going to happen next  
17 weekend, they really have no idea what you mean by next  
18 weekend or time in any way.

19 I have a three-year-old son, and he is significantly  
20 younger than the children that testified here during this  
21 trial. But he still has really no concept of time. I  
22 can take him to the zoo, and something significant will  
23 happen at the zoo. He really likes the monkeys. And if  
24 they're really loud, you know, he will remember that the  
25 monkeys were really loud. But if I asked him, was that

1 the time that we went this weekend, or was that weekend  
2 before when we went with your grandmother, he can't tell.  
3 He can just say that the monkeys were loud. This is the  
4 developmental stages of children and how they progress to  
5 have the memories of when something occurred.

6 So again, are there going to be some inconsistencies  
7 in her memory from something that happened two, two and a  
8 half years ago, whether it happened when she was seven or  
9 eight? Of course. But that's why, again, I have a time  
10 frame that we believe, based on what her mother said,  
11 this Defendant, Andrew Clemons, was living in the home  
12 between December, mid-December, of 2009 and August of  
13 2010. During that time, MINOR would have been seven  
14 and eight years old. And that's consistent with what  
15 she's told you.

16 Then you heard from her nine-year-old sister T'Aja.  
17 You heard her describe pretty much the same thing she  
18 said up here as she did on the video. She was outside.  
19 They were all outside playing. MINOR got hot and  
20 wanted to go inside, play with her dad. And this is  
21 T'Aja's dad she's talking about, Andrew Clemons. So when  
22 T'Aja comes in to get a drink and ask for a drink, she  
23 sees her sister with her shirt on coming out of her dad  
24 and her mom's bedroom. And the Defendant is also in  
25 there, and he's behind her.

1           That was significant enough for her to remember that  
2   and tell her mom about it later. Because she told you on  
3   the stand she knew it wasn't right. She saw her sister  
4   running out of that bedroom and run into their room and  
5   get under the covers because she didn't have any pants  
6   on. I believe in the video she says no pants or panties,  
7   because she pointed on the picture to the fact that she  
8   saw her sister's bottom.

9           She also said that she has this memory of when they  
10   told their mom and how their mom was in the kitchen. And  
11   she tried to tell her mom what she saw. And then  
12   MINOR    was saying, no, that's not right. My pants just  
13   slipped. My pants slipped on the dresser, because you  
14   heard T'Aja say that in the video.

15          And then if you remember, their mom Telfia Johnson  
16   said, yeah, but what was being said, what MINOR    was  
17   saying didn't really make sense. I mean, how could her  
18   pants slip off on the dresser? That's the inconsistency,  
19   I think, that the mom was trying to point out, that  
20   MINOR    version wasn't really making sense. And then  
21   you heard from T'Aja on the video when she was saying her  
22   pants slipped off.

23          But regardless this is what she saw. She saw  
24   MINOR    running out of the room with no pants on and  
25   running into their bedroom and hiding under the covers.

1 And Moochie was in the bedroom.

2 You heard from their mom Telfia Johnson, and she  
3 told you who Moochie was, who Andrew Clemons was. He was  
4 her boyfriend and the father of her three younger  
5 children. You heard her tell you that they used to live  
6 together on Queen Drive in Anderson County. You heard  
7 her tell you that they lived in this house. They had a  
8 bedroom. The girls shared a room. The boys shared a  
9 room. All of these things match up with what MINOR  
10 told you and T'Aja told you about how the house was set  
11 up.

12 You heard the mom talk about how -- again, how he  
13 lived there from December of 2009 to August of 2010. You  
14 heard her remember when T'Aja told and MINOR telling  
15 the details as well or reluctantly telling the details.  
16 All of them seem to have this same memory of mom being in  
17 the kitchen, T'Aja running in to tell on her sister, and  
18 then MINOR coming in and having a conversation with  
19 her mom later.

20 You remember that what MINOR told Ms. Johnson was  
21 significant enough for her to take her to the doctor.  
22 And she took her to the doctor, and the doctor said, you  
23 just need to follow up with some counseling. So she was  
24 listening to the professionals, and she was trying to  
25 find her some counseling.

1           You also heard her say that DSS got involved. And  
2   that really turned out to be probably the best thing  
3   because DSS got involved and reported it to law  
4   enforcement. After that, of course, MINOR received  
5   her medical exam and was set up for some counseling.

6           The mom again remembers having this conversation  
7   with MINOR to corroborate and matching what MINOR  
8   said. This happened around her eighth birthday. It  
9   happened at different places within the house. In the  
10   living room and in her own bedroom, the mom's bedroom,  
11   Moochie's bedroom.

12          She also told you how angry she was and how she had  
13   mixed emotions and she felt pretty guilty about this. I  
14   think that's pretty standard.

15          You heard from MINOR dad, Jonathan White. You  
16   heard that he really tried not to have too much  
17   conversation with his daughter about the details. He  
18   understood this to have happened more than once when she  
19   was about seven to seven and a half. But again, he  
20   didn't ask her about it. He didn't want to know the  
21   details.

22          Then you heard from Ms. Overton from DSS. And she  
23   said that once she got involved, she met with the mom,  
24   she met with MINOR She went to their home, found out  
25   that the mom may not have really known what to do in the

1 beginning but followed every step along the way after  
2 that.

3 Detective Sergeant Partain told you that this was a  
4 typical sexual assault examination -- or investigation.  
5 She said that she let other professionals do their jobs.  
6 She let the victim have a medical exam. She let the  
7 child get interviewed. And once she gathered all that  
8 information, then she went to talk to the mother about  
9 who was in the home during this time. And the victim  
10 says that Mr. Clemons is the one that did this, and the  
11 mom corroborated those details. So Detective Sergeant  
12 Partain did her job in terms of gathering the information  
13 that was necessary.

14 And then she told you that she tried to speak to the  
15 Defendant, and he never showed up for his appointments.  
16 So all of those details corroborated what MINOR told  
17 in her original telling of what happened to her.

18 And so the Judge is going to instruct you in a  
19 minute what the law is. And he's also going to tell you  
20 that a victim in a sexual assault case, her testimony  
21 need not be corroborated. What that means is a victim  
22 can come in here by herself with no other witnesses and  
23 say, this person sexually assaulted me. You don't have  
24 to have any witnesses because there usually aren't any.  
25 Don't have to have any DNA. Don't have to have any other

1 corroborating evidence to support her story.

2 But luckily in this case we do. No, nobody saw it.  
3 The Defendant made sure of that. But he came close. We  
4 have T'Aja that almost witnessed something. We have a  
5 mom to corroborate those details and how old she was and  
6 when it happened and where it happened and her dad.

7 We had the interviewer testify, Ms. Gianiodis. She  
8 said that it's her job to interview children. She's done  
9 over nine hundred interviews with children. And what she  
10 does is she asks non-leading, non-suggestive questions to  
11 let the children tell if they have anything to tell at  
12 all.

13 You watched the video. You saw in your own words  
14 what MINOR -- I mean, their own words -- what MINOR  
15 and T'Aja have to say.

16 You also heard from Dr. Carter, how she did an exam  
17 on the victim in this case. That her findings were a --  
18 absence of a posterior hymen. She told you that this is  
19 -- in her experience, that this is never something she's  
20 seen somebody be born with. It is consistent with a  
21 penetrating injury.

22 She also showed you some pictures of the victim's  
23 hymen as well as another girl of the same age and the  
24 comparison of what her hymen was. I'm not going to show  
25 you those pictures again right now. You'll have them in

1 the jury room if you care to look at them. It's up to  
2 you. It was just for comparison because we're talking  
3 about a part of the body, the hymen, that there are a lot  
4 of myths about. That even if you have one, you may not  
5 have ever even seen it. It is a part of the body that  
6 usually goes unseen, especially -- and even the doctor  
7 testified or talked to you about the fact that she had to  
8 use a colposcope in this exam to really view it clearly.

9 So not only, you know, she took these pictures, she  
10 examined, but you will have those pictures, if you care  
11 to look at them, for comparison.

12 The victim had no hymen posteriorly, at the bottom.  
13 The doctor told you that that's consistent with  
14 penetration. And the Judge will instruct you that the  
15 law says penetration however slight.

16 So the doctor also went on to tell you that this  
17 victim, MINOR wasn't really able to put into words  
18 the significant detail that we all want. When was it?  
19 Did his penis go into your vagina? Did that happen? She  
20 might not know.

21 And the doctor told you it might not hurt. And an  
22 injury like falling on something, on an object would  
23 obviously bleed. She talked about that. But this type  
24 of injury may not bleed. This type of injury may not  
25 hurt at all. Women's bodies are made to have babies.



1 She said that the hymen is stretchy. That skin is  
2 stretchy. So this penetration, however slight it might  
3 have been, however -- whatever rub happened as he's  
4 putting his penis between her legs, that penetration  
5 could have occurred and MINOR wouldn't even know it.  
6 And even if she did know it, would she be able to put  
7 that into words to tell you? Because again her mom told  
8 you that they had never had a discussion about anatomy.  
9 At eight years old, you focus on bathroom functions, not  
10 anatomy, not vaginas. There's no need to get that  
11 specific at that age.

12 Dr. Carter also talked about on the video how the  
13 Defendant had felt comfortable enough and invited the  
14 victim to be with him multiple times. So there was  
15 multiple opportunities for him, not just one, but  
16 multiple times, multiple opportunities for him to have  
17 penetrated her. And she thought that was very  
18 significant in her opinion.

19 She also told you how children need a language, that  
20 sex is foreign to them. That's kind of what I've been  
21 saying. They don't know how -- children don't know how  
22 to speak about it because it's all new to them. It's  
23 being learned. They're being shown what to do, either by  
24 the Defendant putting his hands on her hands, his hand on  
25 the back of her head, or showing her a video. This is

1    what I want to do.

2           You saw MINOR    not even be able to describe really  
3    what it felt like. Or when she saw the other video with  
4    her cousins about hunching, she couldn't really describe  
5    that. She didn't have the language to even know what  
6    that was.

7           You also heard her talk about what the girls at  
8    school had called sperm. And she thought that might have  
9    been what it was that came out of his penis. But this  
10   was happening to her, and she didn't even have a word for  
11   it. The girls at school had to tell her that that was  
12   sperm. I don't think she was telling them what was going  
13   on at home, but just, you know, that word had come up.

14          The doctor also told you that this could have  
15   happened -- you know, it did happen multiple times, and  
16   there could have been a penetration and MINOR    didn't  
17   know about it. And what she said was in her opinion, one  
18   and one is two. Those were her words.

19          Adults rule children's lives. Adults tell children  
20   when they can eat, when they need to go to bed, when they  
21   need to get up. All of those mundane things all  
22   throughout the day every day. Adults tell children what  
23   to do. And for a rule-follower, if an adult tells you  
24   what to do, you do it. The adult was Andrew Clemons. He  
25   told MINOR    what to do. He told her where to put her

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1 hands, where to put her body, where to put her clothes.  
2 He was in charge. And she was a rule-follower. She did  
3 what he told her to do.

4 Perpetrators like that have to be nice to their  
5 victims. They want them to come back. If they were mean  
6 or violent or hurtful, a child would go running to tell,  
7 first of all. And then they wouldn't want to come back  
8 to them. But they lived in the same house. So he's  
9 going to be nice to her because he wants her to come  
10 back. He's going to pray with her to forgive their sins  
11 or his sin so she comes back, so she won't run and go  
12 tell her mother.

13 MINOR has no reason -- I don't believe you've  
14 heard one -- to make this up. In fact, she had more of a  
15 reason not to tell at all. She told you she was scared,  
16 scared that she might get into trouble. She told you  
17 that they prayed together, so she probably thought this  
18 was her sin. She told you that she was embarrassed, that  
19 one of her friends at school had told some of the other  
20 little boys. And when they asked her about it, she said,  
21 no, that's not true because she was embarrassed and she  
22 didn't want them to know.

23 This was a family member. At eight years old or  
24 even at ten year's old she's thinking, how is this going  
25 to affect my family if I tell what my step-daddy is doing

1 to me.

2 You also heard her on the videotape describe, why  
3 are you here to talk today. Because me and my sister's  
4 dad did something very bad. It wasn't just him. It was  
5 her. Me and my sister's dad did something very bad. Her  
6 fault.

7 And not to mention he threatened her. Don't tell  
8 anybody, or you're going to get in very big trouble. And  
9 do you want to get taken away? That's what she said on  
10 the video. She has more of a reason not to tell. And in  
11 fact, she didn't. Her sister did. And even when  
12 confronted with it, she still didn't want to really tell.  
13 Many, many reasons why this happened in December and  
14 August of 2010 and we didn't even hear about it or her  
15 mother didn't hear about it until March of 2011. What  
16 reason would she have to tell?

17 My job is to prove to you beyond a reasonable doubt  
18 that Moochie, Andrew Clemons, committed criminal sexual  
19 conduct with a minor in the first degree. The Judge will  
20 tell you what the law is at the end. But as I told you  
21 in the beginning, it is when someone engages in a sexual  
22 battery with a child under eleven years old. The sexual  
23 battery can be sexual intercourse, anal intercourse. But  
24 it also can be oral sex, what we refer to cunnilingus,  
25 which is oral sex on a female. Or fellatio, which is

1 oral sex onto a male.

2 In this case, it's pretty clear. MINOR described  
3 the Defendant made her perform oral sex, fellatio, on  
4 him. She also told her counselor about it. She may not  
5 have said it on the video, but she did tell her counselor  
6 about it.

7 Sexual intercourse. Again, victim really couldn't  
8 say. But we have medical evidence. We know that her  
9 hymen was absent posteriorly. I can't say that word. At  
10 the bottom. We know that it was absent. We heard the  
11 doctor tell you that.

12 You also saw her demonstrate, again, how he put his  
13 leg up and got on top of her, put his penis against the  
14 skin of her vagina and rubbed up and down. There could  
15 have been penetration, and again, the law reads, however  
16 slight. She may not know. It may not have hurt.

17 It is also my job to prove to you beyond a  
18 reasonable doubt that a lewd act was committed on her.  
19 And again, that's rubbing or touching. And the Judge is  
20 going to give you the crazy language that it's a lewd or  
21 lascivious act, done to gratify the lusts or passions of  
22 the actor, the Defendant. And basically that means, it's  
23 fancy language to say rubbing or touching in a sexual  
24 way. And boy did he ever. Put his hands on her -- put  
25 her hands on his penis, kissed her, made her rub him.

1        Again, the Defendant is in charge of when and where.  
2        He's the adult. He says when we're going to do these  
3        things. He says who's home at the time. He says no  
4        one's going to see these things. We're not going to  
5        leave any evidence behind. And I'm going to threaten  
6        her. He's going to threaten her not to tell.

7        Based on the evidence that you've heard, the only  
8        thing that the Defense can point to are inconsistencies.  
9        That's it. This isn't a who done it. It's how much did  
10       they do? That's it. How much did they do? We know who  
11       did it. She told you who did it. Andrew Clemons did  
12       this. How much did he do? That's the only question you  
13       have to answer. Of course, there are going to be  
14       inconsistencies. Whether she was seven or eight or what  
15       exactly happened. But again, try to describe a sexual  
16       act that happened to you two, two and a half years ago,  
17       and get every detail right. And maybe you told that  
18       story two, two and a half years ago, so you'd better get  
19       every detail right again now or we're going to imply or  
20       say that you're not telling the truth because of  
21       inconsistencies. Those are completely understandable.  
22       Again, it's not who done it. We don't have to figure out  
23       who. We just have to figure out how far he went with an  
24       eight-year-old.

25       The Judge is going to tell you that the evidence

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1 must leave you firmly convinced of the Defendant's guilt.  
2 He's also going to charge you that reasonable doubt is a  
3 doubt that would make a reasonable person hesitate to  
4 act.

5 The evidence in this case is not just firmly  
6 convincing, but it's overwhelming. The Defendant engaged  
7 in sexual battery with MINOR who was under  
8 eleven years old. He also committed a lewd act on her  
9 body to gratify his own lusts or passions. You have no  
10 reason to hesitate. Find him guilty of both charges.

11 Thank you.

12 THE COURT: All right. Mr. Thomason?

13 MR. THOMASON: Thank you. May it please the  
14 Court.

15 THE COURT: Yes, sir.

16 CLOSING ARGUMENT

17 BY MR. THOMASON:

18 Good morning. As I told you on Monday morning, I  
19 would only have two opportunities to talk to you  
20 directly. And this the second and final one. I don't  
21 expect to talk to you for a very, very long time. So  
22 let's get started.

23 Last night I sat at the kitchen table with a notepad  
24 and trying to develop a closing argument. And every time  
25 I did, it sounded like I was writing a speech. So I just

1 -- after a while, I just stopped. And I said, I'm just  
2 going to go talk to those folks.

3 And you know, everybody in this courtroom or most of  
4 the people in this courtroom have a job to do. Ms.  
5 Reeves' job is to prosecute. The Judge's job, as he  
6 described to you, is sort of a referee. The court  
7 reporter's job is to take down everything that's said.  
8 My job is to defend the Defendant, Mr. Clemons. And I  
9 intend on doing my job to the best of my ability because,  
10 as an officer of the Court, that's what I have sworn to  
11 do. And that's what I intend to do.

12 If you take offense to anything that I may say to  
13 you, please blame it on me. Do not take it out on the  
14 Defendant. Because in the course of my talk with you  
15 this morning, I may say some things that you might not  
16 like. I just ask you that you hold me accountable for  
17 those things and not Mr. Clemons.

18 I guess we should start off with the eight-hundred-  
19 pound gorilla in the room. And that is where is Mr.  
20 Clemons? Well, I told you Monday I don't know, and today  
21 I still don't know. However, the Judge is going to tell  
22 you in no uncertain terms, in a very vigorous fashion,  
23 that it does not matter, that you cannot take that into  
24 account in your deliberations and in your -- and when  
25 y'all are working this thing out back in the jury room,



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1 that cannot be considered. I know that it's human nature  
2 sometimes that something like that might enter your mind,  
3 but I'm telling you, you're just going to have to get  
4 over that.

5 The same goes for Mr. Clemons' failure to testify in  
6 this case. I probably would not have had him testify  
7 anyway. He's already, by having this trial, said, I am  
8 not guilty. I did not do this. And that's about all he  
9 could have said from the witness stand as well.

10 And yeah, Ms. Reeves accurately predicted that what  
11 I was going to do is point out some of the  
12 inconsistencies in the State's case. There were many.  
13 And I'm not going to go through every little single thing  
14 that there was, but I think there are some that need to  
15 be pointed out.

16 I think one aspect of this case that I find  
17 interesting is that the first indictment for criminal  
18 sexual conduct first degree was indicted in November of  
19 2011, and the indictment for the lewd act -- I'm sorry --  
20 December of 2011 for the criminal sexual conduct. The  
21 indictment for the lewd act was only a month ago. And in  
22 fact, today is -- it was April 6 of '13. So actually  
23 less -- one day short of a month ago.

24 Why is that? Well, it's the Defense's position that  
25 when they indicted on the criminal sexual conduct, the

1 State had not thoroughly gone through the facts of the  
2 case. And as time rolled on, they discovered that they  
3 were lacking an element to prove a crime that's a  
4 criminal sexual conduct. And that element is  
5 penetration. So the State goes back and gets another  
6 indictment for lewd act which does not require  
7 penetration.

8 MINOR on the witness stand yesterday -- or  
9 Monday, I'm sorry -- told you that he did not put  
10 anything inside her vaginally, anally, but she did say he  
11 did so orally. Well, the first time that the Defense  
12 heard anything about any kind of oral sex was about a  
13 week or so before the second indictment was reached. So  
14 until six -- let's say, six weeks ago, I knew nothing  
15 about any allegation of oral sex. I've never been given  
16 a medical report, a police report, a forensic report, any  
17 kind of report with -- alleging oral sex.

18 You watched the forensic interview. And she does  
19 not mention it there. I would think -- and after having  
20 been asked on several occasions, is there anything else  
21 you need to tell me, is there anything else you need to  
22 tell me, she still does not bring it up.

23 Now, you will also have the DVDs back in the jury  
24 room with you should you care to view them again. And  
25 the time line is just all over the place. I mean, first

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1 of all, the indictments say that the behavior happened  
2 between December of '09 and August of '10. Well, that's  
3 about ten months that I've got to defend. I mean, if you  
4 rob a bank, you prove that the guy robbed the bank on  
5 such and such day. I've got to -- my -- it's very  
6 difficult to defend someone every day and account for  
7 them every day for ten months. It's just -- it's almost  
8 a year.

9 It was all over the place about when it was  
10 disclosed to Mama for the first time. The last possible  
11 time it could have happened would have been August of '10  
12 because that's when Mr. Clemons left the home, and then  
13 Mama is not told until March of '11. So this business  
14 that they ran and told soon after the events occurred, it  
15 is simply not true.

16 Now, I know and I recognize that children have a  
17 different sense of time and have a different -- and a lot  
18 of things Ms. Reeves said are true, and the Defense will  
19 concede that. But when does it get to be -- when does it  
20 get to be so many inconsistencies that it leaves a  
21 reasonable doubt in your mind? To me, just the fact that  
22 she mentions -- she doesn't mention oral sex on the video  
23 when it would have been much fresher in her mind and then  
24 mentions it here today or -- sorry -- Monday, I feel like  
25 that's reasonable doubt right there as to the criminal

1 sexual conduct charge.

2 The doctor's testimony, while she testified that  
3 there was an injury down there, she could not give the  
4 who and with what and the when. And frankly, that's a  
5 lot of speculation. We don't use speculation. We use  
6 facts.

7 Now, this behavior -- it's May of '13 now. And this  
8 is supposed to have happened in August of -- I'm sorry --  
9 December '9 to August '10. If you don't believe that  
10 these children have not been going over their testimony  
11 all this time, then -- you've got a right to believe  
12 that. But it seems to me that they knew this was coming  
13 to court, they knew this was going to happen, and the  
14 stories still are not straight.

15 Now, the -- look, I don't think that it's  
16 appropriate for an eight-year-old girl to see any video  
17 of people naked kissing. But just because you see people  
18 naked kissing doesn't necessarily make it pornography. I  
19 mean, you can see that on basic cable every night. It  
20 might not show the parts, but the -- and on cable, it  
21 does frankly. So the characterization of -- I don't know  
22 what she saw. And the other allegation when she said she  
23 saw things like that were when she was with her cousins  
24 and that people were hunching. Now, we still never got a  
25 clear definition from her of what hunching was. I kind

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1 of have a good idea, but it's not my place to say.

2 But when you start adding all these things up, and  
3 especially -- again, just to drive this home, they go get  
4 an indictment in '11, and then two years later in '13 go  
5 run and get another indictment on the eve of trial. Why  
6 do you think that is? I mean, it's because they said,  
7 oops, we're missing an element here. We don't have the  
8 penetration element. We'd better go get us an indictment  
9 that'll cover that. So that's my opinion of why that  
10 second indictment was ever even filed. Y'all might  
11 disagree. But you know, why wait two years to go get  
12 another indictment and then not tell Defense counsel  
13 about any oral sex until six weeks before trial? When I  
14 asked her yesterday who did she tell about it, she said  
15 her counselor and sometime last year. Well, her  
16 counselor would have had a legal duty to report that to  
17 DSS, law enforcement, somebody. So you know, this should  
18 have been -- this information should have been in my file  
19 last year sometime, not a month before the trial.

20 The fact that T'Aja saw MINOR running across the  
21 room followed by Mr. Clemons is, in and of itself, just  
22 that. She saw her -- now, T'Aja said she didn't have no  
23 panties on. MINOR said she did. On the video if you  
24 watch it again, T'Aja says they were both giggling when  
25 they were running across the room.

1           And again, just the -- it's very difficult to defend  
2   a person when you cannot break it down and have some sort  
3   of meaningful time line that's just not all over the  
4   board. I mean, the reason that we put y'all on this jury  
5   is because we thought y'all had the common sense and  
6   plain, everyday life experience of people representative  
7   in the community. And so don't leave that in your chair  
8   when you go back to the jury room. We want you to use  
9   your common sense. But I feel like that common sense  
10   would say that after this long and this much time having  
11   passed between when the charges were filed and until we  
12   got to this room here, that they should have been able to  
13   get together a better picture of who did what when and  
14   who told what when and just a more clear picture.

15           Why did -- even the reasons for telling were all  
16   over the board. T'Aja testified from the stand that she  
17   went and told because -- told her mom because she thought  
18   it was wrong. Well, MINOR testified that she told  
19   because they would get in arguments and T'Aja would  
20   threaten to tell or say something. So even that, you  
21   know, they don't even agree on that from the witness  
22   stand.

23           I would urge you -- and you don't have to watch the  
24   whole things. But I would just leave you with the idea  
25   that by the State's own actions in this last-minute

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1 indictment was to kind of cover their rear-end in case  
2 they couldn't make their case on the first charge. And  
3 that's -- the first charge, criminal sexual conduct, that  
4 requires some form of penetration. That's the key to the  
5 whole thing is penetration. And she said right there on  
6 that witness stand that he did not put anything in my  
7 rear-end. He did not put anything in my front-end other  
8 than between her thighs. And we're just now hearing  
9 about oral sex six weeks before the trial?

10 I mean, it's just -- the subject matter of these  
11 cases is horrible. I mean, and if -- I personally don't  
12 have any children. But I certainly like children and  
13 empathize with those who do. And the thought of one  
14 being abused or molested is repugnant to me. But again,  
15 it goes back to having to prove your case.

16 Now, I don't think they've proved criminal sexual  
17 conduct in the first degree. If they thought -- and they  
18 wouldn't have run and got that second indictment at the  
19 last minute if they really thought that, which casts a  
20 lot of doubt to me on the second indictment. I mean, if  
21 you can't -- I don't know any reason that MINOR would  
22 have to make this up and tell a lie about this. But then  
23 again, that's all it is is I don't know, and neither do  
24 you.

25 And so Mr. Clemons is right now cloaked in a what

1 they used to call the shroud of innocence. And you're  
2 going to go back there and you're going to make the  
3 decision as to his guilt or innocence.

4 I do want to point out that the forensic interview  
5 lady, Ms. Gianiodis -- I can't ever say that right -- she  
6 is not an expert. She is no more of an expert than y'all  
7 are on any matter that she testified to here. She was  
8 not qualified as an expert, so you should treat her  
9 testimony just like any other witness. I feel like the  
10 doctor -- now, she was qualified as an expert which means  
11 she can give her opinions. Well, they're still opinions.  
12 They're not -- everything she testified to were not  
13 facts. And when you're an expert, you're allowed to give  
14 an expert opinion. That's what the difference between a  
15 lay witness and an expert witness is, is an expert can  
16 give an expert opinion.

17 Well, the Defense would just submit to you that it  
18 is too speculative to -- because she cannot say with a  
19 degree of medical certainty that Mr. Clemons caused these  
20 injuries or caused the injury or when they were caused or  
21 even if somebody else caused them.

22 And as I said, this is my last time that I'm going  
23 to get to speak to y'all, so I'm trying not to leave  
24 anything out. So if you'll just bear with me one second.  
25 And I think I've pretty much hit the high points.



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1           I think you really need to take a look at that  
2 business about those indictments because that is just  
3 very, very fishy to me. And I'm saying that with all --  
4 I really believe that. They thought they were missing an  
5 element to prosecute successfully a criminal sexual  
6 conduct. So they ran on the eve of trial and got another  
7 one on a different charge and did not tell the Defense  
8 anything about oral sex until about six weeks before the  
9 trial. So I have been for two years preparing for a  
10 charge that I feel like I have successfully defended  
11 because I just don't believe that business with oral sex.  
12 I think she would have told somebody before now or before  
13 then. I just don't believe it. But they had to have  
14 that element.

15           And I think that casts doubt on the lewd act charge  
16 as well which is -- and again, you must find Mr. Clemons  
17 guilty beyond any reasonable doubt. I'm not going to say  
18 any doubt at all. I guess you could doubt if the sun's  
19 going to come up tomorrow, but it doesn't go that far.

20           But the Judge is going to instruct you on the law.  
21 It's probably going to be kind of long and kind of  
22 boring. Kind of like me, I guess. But I really want you  
23 to listen. I hope you've listened to what I've said  
24 today. And I really want you to think about the  
25 difference in times between those two indictments because

1 I don't think it's fair that I was only informed about  
2 the missing element six weeks before we come to court.  
3 And I think he should certainly be found guilty [sic] on  
4 the criminal sexual conduct. And I think that that is  
5 enough to shed reasonable doubt on the charge of lewd  
6 act.

7 Thank you for listening to me. I'm going to go sit  
8 down, and the Judge can take it from here.

9 THE COURT: All right. Mr. Foreman, we've been  
10 going for about an hour. Let's take a brief break, about  
11 ten minutes. I'll bring you back in here and charge you  
12 on the law. If you'll take a break now, please.

13 (WHEREUPON, the jury exited the open court at  
14 approximately 10:37 a.m.)

15 THE COURT: All right. We'll be in recess  
16 until ten till.

17 (WHEREUPON, court stood at recess for a short  
18 break.)

19 THE COURT: All right. If you'd just man those  
20 doors, Mr. Bailiffs, I'd appreciate it, okay?

21 THE BAILIFF: All right, sir.

22 MS. REEVES: May I make a request?

23 THE COURT: Just one second. Yes.

24 MS. REEVES: Oh, no. The jury's already on  
25 their way in.

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1 THE COURT: No, they're not. What's your  
2 request?

3 MS. REEVES: Were you going to mention again to  
4 them that the indictment is not evidence?

5 THE COURT: (No response)

6 MS. REEVES: Were you going to mention again to  
7 them that the indictment is not evidence?

8 THE COURT: Uh-huh (affirmative).

9 (WHEREUPON, the jury entered the open court at  
10 approximately 10:55 a.m.)

11 THE COURT: Thank you, Buck.

12 Mr. Foreman, ladies and gentlemen of the jury,  
13 again, I'm going to give you a charge on the law. I'm  
14 going to send you back to your jury room, go over with  
15 the attorneys whether or not I made a mistake or I  
16 omitted something, and then we'll send you back word that  
17 you may begin your deliberations.

18 The alternates, when I send the jury back, I'm going  
19 to ask that the bailiff put them in the grand jury room.  
20 And I'll talk to you in just a little bit, okay?

21 CHARGE

22 BY THE COURT: With that being said, now that you've  
23 heard all the evidence and you've heard the arguments of  
24 the attorneys, ladies and gentlemen, the law requires  
25 that I instruct you on the law that applies to this case.

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1 This charge will be in three parts. The first part will  
2 be the general rules that define and control your duties  
3 as jurors. The second aspect will be the substantive law  
4 that applies to this case, i.e., what the State must  
5 prove in order to make out the charges against the  
6 Defendant. The third will be some considerations for  
7 your deliberations. And then, Mr. Foreman, I'm going to  
8 go over the verdict form with you, okay, sir?

9 Now, let me remind you before we go into the charge  
10 that under the laws of this state, a defendant may be  
11 tried even if the defendant does not attend trial. But  
12 the fact that the Defendant is not present may not be  
13 considered against the Defendant in any manner  
14 whatsoever.

15 Now, Mr. Foreman, in your deliberations, what that  
16 simply means you are not to allow discussion of the  
17 Defendant's absence from trial, okay, sir?

18 Now, you are the finders of the facts. And I told  
19 you that at the beginning of this case. And you're to  
20 determine what those facts, i.e. what verdict you are to  
21 reach, by considering all the evidence that you heard in  
22 this case. You must apply the law as I give it to you  
23 now. You must not and you shall not be considered with  
24 what you think it should be, what you want it to be, but  
25 what it is. If I am incorrect in the law as I give it to

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1 you, then I will be corrected.

2 You also shall not be influenced by any personal  
3 likes, any dislikes, opinions, prejudice or undue  
4 sympathy you may have for one side or the other. What  
5 that simply means is that you are to decide this case  
6 solely on the evidence that's been placed before you in  
7 accordance with the law as I give it to you now. In  
8 fact, when you took your oath at the beginning of this  
9 trial, you agreed to do just that.

10 Also, in following my instructions, you must follow  
11 all of them. You can't pick out the ones that you like  
12 and apply those and ignore the ones that you may not  
13 like. They're all equally important.

14 And again, I remind you that if I have done or said  
15 anything throughout the course of this trial that seems  
16 to indicate to you how you are to find facts, i.e. the  
17 verdict you're supposed to make, I'm going to ask you and  
18 I'm also to instruct you to disregard that. I can assure  
19 you I have no opinion. Our state constitution does not  
20 allow any trial judge to have an opinion of the facts,  
21 nor may I make a comment on the facts.

22 You and you alone are the judges of the facts in  
23 this case. And you decide what those facts are by  
24 evaluating and weighing the evidence and the testimony  
25 that you heard here in this courtroom.

1           Now, there's no way for you to weigh evidence in the  
2     literal sense. I cannot give you a set of scales for you  
3     to use to stack the evidence on. It is entirely a mental  
4     process that you must go through. And you evaluate and  
5     weigh the evidence simply by using your good common sense  
6     and sound judgment in accordance with the law as I give  
7     it to you now.

8           Now, there are things that are considered evidence,  
9     and there are things that are not evidence. Let me tell  
10    you what is evidence. The sworn testimony from witnesses  
11    from this witness stand is evidence. It doesn't matter  
12    if it's on direct examination or cross-examination or  
13    some continuation of either one of those. That is  
14    evidence. Also, any exhibits that I have allowed to come  
15    into evidence in this case is evidence. That is the only  
16    true evidence that you have before you in this case.

17          Certain things, on the other hand, are not evidence.  
18    For example, arguments and statements by these attorneys  
19    is not evidence. They've not been sworn. They've not  
20    come up on the witness stand and be subject to direct and  
21    cross-examination. I'm not minimizing what their job is  
22    and what they say because it's important. It is designed  
23    to help you understand what the facts are in this case,  
24    what the issues are in this case and the law is.  
25    However, when you begin your deliberations, if you

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1 remember the facts other than or in a way different than  
2 these attorneys or either of them have told you, then  
3 your memory of those facts will control in your  
4 deliberations.

5 With that point, I remind each of you that the fact  
6 that a fact or a note may appear in somebody's trial  
7 notes that you've been taking during this trial and  
8 somebody's memory may be in conflict, the notes do not  
9 trump somebody's memory. That's why you have  
10 deliberations. If there's a difference in your  
11 collective memories, you'll just have to hash that out so  
12 you can come to a finding on that issue.

13 Also, ladies and gentlemen, the questions and  
14 objections by the lawyers is not evidence. Attorneys  
15 have a duty to their clients in every case to object  
16 anytime that they see something or feel like they see  
17 something that is improper.

18 Now, Mr. Foreman, the fact that there has been an  
19 objection or that I've allowed you to see my ruling on  
20 that objection also would not be proper for your  
21 consideration or your discussion during your  
22 deliberations. Okay, sir?

23 Now, anything, finally, ladies and gentlemen, that  
24 you have heard while court is not in session is not  
25 evidence. In South Carolina we recognize two types of

1 evidence. The first type is pretty simplistic, and that  
2 is called direct evidence. This is direct evidence. It  
3 is testimony of a person who asserts or claims to have  
4 actual and direct knowledge of a fact, such as an  
5 eyewitness. For example, if I were sitting on a railroad  
6 -- at a sidewalk and I saw a car run a red light and I  
7 testified that I saw that car run a red light, that would  
8 be direct evidence.

9       The other type of evidence we have in South Carolina  
10 is called circumstantial evidence. This is a little more  
11 tricky, so listen closely. Circumstantial evidence is  
12 proof of a chain of facts and circumstances from which  
13 you can find that another fact exists although that fact  
14 has not been proven directly. To give you an example, if  
15 each of you were to go to bed at night and you were to  
16 have a fresh sheet of snow in your front yard. If you  
17 were to wake up in the morning and you see tracks in that  
18 snow, you may reasonably infer that someone or something  
19 walked through your yard during the night although you  
20 did not see that person or thing walk through your yard  
21 directly.

22       Now, the law makes absolutely no distinction between  
23 the weight or value that you, the jury, may give either  
24 direct or circumstantial evidence. You are entitled to  
25 consider both kinds of evidence. There's not a greater



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1 degree of certainty required for circumstantial evidence  
2 to be heard or considered by you in this case; however,  
3 the inference that you draw in your circumstantial  
4 evidence may not be speculative or surmise or conjecture.  
5 Okay?

6 With that being said, after weighing all the  
7 evidence, direct and circumstantial, as you deem it to be  
8 proper, if you're not convinced of the guilt of this  
9 Defendant, it will be your job to find him not guilty.

10 Now, in deciding what the facts are, you must decide  
11 which testimony that you wish to believe and which  
12 testimony you wish not to believe. That is what we call  
13 in the law determining the credibility of the witnesses.  
14 You have a right to disbelieve all or part of any  
15 witness' testimony. You may believe all of any witness'  
16 testimony. In making this determination of the  
17 credibility of the witnesses, you may, but you're not  
18 required to, take into consideration the following  
19 factors. You may ask yourself was the witness able to  
20 hear or see or know about the things that they testified  
21 about. You may ask yourself how well was the witness  
22 able to recall and describe the things that they  
23 testified about. What was their manner or demeanor while  
24 they're on the stand? You can consider whether or not  
25 the witness had a desire to help or hurt one side or the

1 other. Did they have an interest in the outcome of this  
2 case or any bias or prejudice concerning any party or any  
3 issue involved in this case. You can consider how  
4 reasonable the witness' testimony was considered in light  
5 of all the evidence presented and whether that witness'  
6 testimony had been contradicted by what that witness had  
7 said or done at another time or by testimony of other  
8 witnesses or by any other evidence.

9 Mr. Foreman, ladies and gentlemen of the jury, those  
10 are some but certainly not all the factors you may  
11 consider in making this determination of credibility of  
12 the witnesses. And I'll tell you that you do not check  
13 your common sense at the door when you're sworn in, and  
14 you shouldn't in this case. You should use those things  
15 that in your day-to-day lives that you find indicative of  
16 truthfulness or indicative of lack of truthfulness when  
17 you make this determination of credibility.

18 In deciding the credibility or believability of the  
19 witnesses, you can believe as much or as little of any  
20 witness' testimony as you think proper. You can believe  
21 all or part or none of any witness' testimony. But what  
22 you certainly may not do in deciding credibility is add  
23 up the number of witnesses that may have testified for  
24 one side or the other of this case because it doesn't  
25 matter to you from where the truth comes from, but your

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1   sole truth is to try to determine what the facts are  
2   based on the evidence presented to you in this courtroom.

3           Also, you have heard testimony of persons described  
4   as experts. Persons who by education or experience or a  
5   combination of both who have become an expert in a  
6   particular field may state their opinion on matters in  
7   that field and also state their reasons for that opinion.  
8   I'll tell you that expert opinions should be judged just  
9   like any other testimony in this case. You may accept  
10   it. You may reject it and give it as much weight as you  
11   think it deserves considering the witness' education,  
12   their experience, the reasons for their opinion and all  
13   the other evidence in this case.

14           Now, ladies and gentlemen, I'll remind you again  
15   that these indictments against the Defendant is not  
16   evidence in this case that can be considered by you of  
17   the Defendant's guilt. It does not raise an inference or  
18   a presumption of the Defendant's guilt. Those are simply  
19   the mechanisms by which the State of South Carolina  
20   brings the Defendant before a jury such as yourselves for  
21   a trial and a determination of guilt or innocence.

22           Also, Mr. Foreman, each indictment stands on its  
23   own. In other words, it is a separate and distinct  
24   offense. You must decide each indictment separately  
25   based on the evidence and the law applicable to it --

1 applicable to that indictment uninfluenced by your  
2 decision as to the other indictment. The Defendant may  
3 be convicted or acquitted on all or both the indictments  
4 or any combination of the above. The point being, each  
5 one must be separately considered by you. And at the end  
6 of the day once you make your decision, you'll be asked  
7 to write that down on the verdict form. And I'll go over  
8 that with you.

9 In fact, in this case, the Defendant has pled not  
10 guilty to both of these indictments. That, in this  
11 sense, puts the burden on the State of South Carolina to  
12 prove his guilt by evidence beyond a reasonable doubt.  
13 And I'll tell you that a person charged with committing a  
14 criminal offense in South Carolina is never required to  
15 prove himself innocent. I charge you that it is an  
16 important rule of law that a defendant in a criminal  
17 trial, no matter what the seriousness of the charge may  
18 be, will always be presumed innocent of the crime for  
19 which the indictment or indictments have been issued  
20 unless guilt has been proven by evidence satisfying you,  
21 the jury, of that guilt beyond a reasonable doubt.

22 The presumption of innocence, ladies and gentlemen,  
23 does not end when you begin your deliberations. It  
24 accompanies the Defendant throughout this trial until  
25 you, the jury, reach a verdict of guilt based on evidence

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1 satisfying you of guilt beyond a reasonable doubt. The  
2 presumption of innocence, it is said, is like a robe of  
3 righteousness that's been placed around the shoulders of  
4 the Defendant that remains there until it has been  
5 stripped from the Defendant's shoulders by evidence  
6 satisfying you of guilt beyond a reasonable doubt.

7 Further, the presumption of innocence is not just a  
8 mere legal theory. It's not just a legal phrase. It is  
9 a substantial right which every defendant is entitled  
10 unless you, the jury, are satisfied from the evidence of  
11 guilt beyond a reasonable doubt.

12 So that leads us to, what is a reasonable doubt. A  
13 reasonable doubt is the kind of doubt that would cause a  
14 reasonable, sincere, honest and conscientious person to  
15 hesitate to act in an important matter in their own  
16 affairs. Proof beyond a reasonable doubt is proof that  
17 leaves you firmly convinced of the Defendant's guilt.

18 Ladies and gentlemen, there are very few things in  
19 this world that we know with absolute certainty. And in  
20 criminal cases, the law does not require proof that  
21 overcomes every possible doubt. If, based on your  
22 consideration of the evidence, you are firmly convinced  
23 that the Defendant is guilty of the crime or crimes for  
24 which he has charged, then you must find the Defendant  
25 guilty. On the other hand, if you think there is a real

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1 possibility that the Defendant is not guilty, you must  
2 give the Defendant the benefit of the doubt and find him  
3 not guilty.

4 A reasonable doubt may arise from the evidence or  
5 from the lack of the evidence. And I further instruct  
6 you that a Defendant is entitled to every reasonable  
7 doubt that may arise in the case. Now, what that simply  
8 means is this. That if upon any issue of fact essential  
9 to a conviction and a verdict of guilt of the offense for  
10 which he has been charged, if you have any reasonable  
11 doubt as to how that issue should be resolved, it will be  
12 your duty to resolve that issue in favor of the  
13 Defendant.

14 Also, ladies and gentlemen, in order to establish  
15 criminal liability, criminal intent is required to be  
16 proven beyond a reasonable doubt. For example, the  
17 mental state required to be proven by the State for a  
18 particular crime might be purpose, intent, knowledge,  
19 recklessness, or criminal negligence.

20 Criminal intent must be proven by the State beyond a  
21 reasonable doubt. Criminal intent is always a matter  
22 that must be determined by you, the jury, from the  
23 circumstances shown to exist around the situation. There  
24 is no way to prove mathematical -- oh, excuse me.  
25 There's no way to prove intent to a mathematical

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*Charge by the Court*

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1 certainty. There's no way that medical science can  
2 dissect a person's brain to determine what they had in  
3 mind. So the law says that criminal intent may be  
4 inferred from the circumstances shown to have existed.  
5 And that is how you make a determination of whether or  
6 not the element requiring intent is present. It is not  
7 necessary to establish intent by direct and positive  
8 evidence, but intent may be established by inference in  
9 the same way as any other fact, taking into consideration  
10 the acts of the parties and all the circumstances of the  
11 case.

12 Criminal intent is a mental state, a conscious  
13 wrongdoing. It is up to you to determine what the  
14 Defendant intended to do based on the circumstances shown  
15 to have existed. Criminal intent can arise from action  
16 or a failure to act. It may arise from negligence,  
17 recklessness, or an indifference to duty or to the  
18 consequences that is considered by the law to be  
19 equivalent to criminal intent.

20 Finally, ladies and gentlemen, and Mr. Foreman, I  
21 instruct you and emphasize that the fact that the  
22 Defendant did not testify is not a factor to be  
23 considered by you in any manner in your deliberations.  
24 It would be improper for you to allow the jury to discuss  
25 the fact the Defendant did not testify because the State

1 at all times has the burden of proof in this matter.

2 Now, ladies and gentlemen, those are the rules that  
3 define and control your duties as jurors. The next  
4 aspect of my charge would be the substantive law that  
5 applies to criminal sexual conduct with a minor first  
6 degree and also lewd act upon a minor.

7 The law for criminal sexual conduct with a minor age  
8 eleven or under is found at code section § 16-3-655, and  
9 this is what it is. The Defendant is charged with first  
10 degree criminal sexual conduct with a minor. The State  
11 must prove beyond a reasonable doubt that the Defendant  
12 engaged in a sexual battery with the victim.

13 A sexual battery is sexual intercourse, cunnilingus,  
14 fellatio, anal intercourse, or any intrusion, however  
15 slight, of any part of a person body or of any object  
16 into the genital or anal openings of another person's  
17 body except when the intrusion is accomplished for  
18 medically recognized treatment or diagnostic purposes.

19 The State must then prove beyond a reasonable doubt  
20 that the victim was less than eleven years old at the  
21 time of the sexual battery. Consent, willingness,  
22 indifference or ignorance on the part of the minor, if  
23 any, as to what was taking place does not in any way  
24 affect the charge of criminal sexual conduct with a minor  
25 because an unmarried woman under the age of fourteen



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*Charge by the Court*

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1 cannot legally consent to sexual intercourse.

2 Also, ladies and gentlemen, I charge you that the  
3 testimony of the victim need not be corroborated in  
4 prosecutions under this code section which is § 16-3-655.

5 Next is the law of lewd act on a minor which is  
6 found at § 16-15-140. The Defendant is charged with  
7 committing a lewd act on a minor. The State must first  
8 prove beyond a reasonable doubt that the Defendant was  
9 over the age of fourteen. Next, the State must prove  
10 that the Defendant willfully and lewdly committed or  
11 attempted a lewd or lascivious act on or with the body or  
12 its parts of a child under the age of sixteen years with  
13 the intent to arouse, appeal to or gratify the lust,  
14 passions or sexual desires of the Defendant or the child.

15 Willfully means voluntarily and intentionally with  
16 the specific intent to do something the law forbids.  
17 Lewd means obscene, lustful, indecent or lecherous.  
18 Lascivious means tending to incite lust, lewd, indecent,  
19 obscene or tending to deprave the morals and respect to  
20 sexual relations.

21 Ladies and gentlemen, that is the substantive law  
22 that applies in this case, and that leads me to the final  
23 aspect of my charge. And that is some thoughts about  
24 your deliberations.

25 Let me say this, that first, you don't serve as

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*Charge by the Court*

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1 jurors to be partisans or advocates for one side of the  
2 case or the other. In fact, you were chosen by both  
3 sides because they believed that you could be fair and  
4 impartial and base this case solely on the evidence and  
5 according to the law as I give it to you. And again,  
6 when you took your oath, you agreed to do just that.  
7 That means in your deliberations you should use your  
8 experiences in life, your good common sense and your  
9 sense of logic and reason. And you apply those to the  
10 facts as you find them to be and according to the law as  
11 I give it to you now, and ultimately to reach a verdict  
12 which speaks the truth in this matter.

13 And to say something about deliberations,  
14 deliberations is defined as this. It is a careful  
15 consideration weighing up with a view to a decision.  
16 Now, I'll submit to you that regardless of what you may  
17 think about the judicial system or the criminal justice  
18 system, that the genius of our system is it allows twelve  
19 men and women such as yourselves from twelve different  
20 backgrounds, from different perspectives and life  
21 experiences to sit through a trial, to listen to the  
22 evidence, to listen to the arguments and the law, and to  
23 go back and to ultimately reach a verdict in this matter.

24 And we call them deliberations for a reason. You  
25 are to consider all the evidence very carefully and

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*Charge by the Court*

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1 deliberately and discuss it with one another in a calm,  
2 thorough and courteous manner. Remember, you're not  
3 partisans or advocates for one side, favoring one side or  
4 the other. You are judges, judges of the facts. And  
5 your sole interest in this case is to find truth from the  
6 evidence you heard in this courtroom.

7 Now, ladies and gentlemen, I'd ask you and then  
8 charge you to listen to the views of your fellow jurors.  
9 Consider their points and their points of view. Talk  
10 through and discuss all of the evidence. And remember,  
11 if you're doing it deliberately, you're not in a big  
12 hurry. And you shouldn't be today. This is the State's  
13 and the Defendant's only day in trial.

14 Now, when you go back and begin your deliberations,  
15 in order for your verdict to stand, it must be unanimous.  
16 With that being said, each of you must decide this case  
17 for yourself, but you should only do so after you have  
18 impartially considered all of the evidence, you've fully  
19 discussed it with your fellow jurors and listened to  
20 their views and points of view. Don't be afraid to  
21 change your opinion if the discussion persuades you to do  
22 so. On the other hand, do not change your opinion just  
23 to reach a unanimous decision.

24 Now, Mr. Foreman, if at any time the jury has any  
25 questions or has any need to communicate with the Court,

*State v. Andrew Antonio Clemons 2011-GS-04-1977, 2013-GS-04-569*  
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1 I'm going to ask that you write it down, that you sign  
2 your name to the piece of paper that you write it down  
3 on. You knock on the door. Our bailiff will get it.  
4 I'll receive it here in the courtroom and we'll respond  
5 accordingly. Okay?

6 Certain things will not be with you in the jury  
7 room. The indictments will not go back there with you.  
8 The videos, because of the technology we have here, if  
9 you want to review those, we'll bring all of you back out  
10 here and let you view it here in the courtroom. Okay,  
11 sir?

12 Now, once you reach a verdict, you must sign the  
13 form. The verdict options that you have is this. And  
14 the options have to come in some order, so do not give  
15 any meaning or any weight to the order that these appear  
16 in. But your first option is: We, the jury, unanimously  
17 find under indictment number 2011-GS-04-1977, criminal  
18 sexual conduct with a minor under eleven years of age,  
19 first degree, that the Defendant is, (A) not guilty or  
20 (B) guilty. Once the jury reaches a unanimous decision  
21 you check the applicable line by the options. Okay, sir?

22 Then you go to the next charge. And that is: We,  
23 the jury, unanimously find under indictment 2013-GS-04-  
24 569, lewd act, commit or attempt to commit a lewd act  
25 upon a child, that the Defendant is not guilty or guilty.

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*Charge by the Court*

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1 Once the jury has come to a decision on that, you'll sign  
2 the form. You'll fold it over and crease it. Knock on  
3 the door. We'll receive your verdict back in the jury  
4 [sic] room. Okay, sir?

5 Now, I'm going to send you back to your jury room  
6 now. I'm going to ask the two alternates to go in the  
7 Grand Jury ...

8 Buck, make sure you show them where that is.

9 Do not begin your deliberations yet because I need  
10 to make sure that I haven't misstated the law or omitted  
11 something. We'll send word back shortly that we need you  
12 back here in the courtroom or you may begin your  
13 deliberations. Okay, sir? Thank you.

14 (WHEREUPON, the jury exited the open court at  
15 approximately 11:25 a.m.)

16 THE COURT: Thank you, Buck.

17 Any additions or exceptions from the State?

18 MS. REEVES: No, sir.

19 THE COURT: From the Defense?

20 MR. THOMASON: No, sir.

21 THE COURT: Other than as stated about the  
22 verdict form and all of that?

23 MR. THOMASON: Well, yeah. Right.

24 THE COURT: Okay. Again, let me thank the  
25 lawyers for your preparation and presentation in this

1 matter. It's always helpful when we have prepared  
2 lawyers. It makes my job easier. But thank you. That  
3 being said, I'm going to give the verdict form to the  
4 bailiff. Would y'all double-check the exhibits and make  
5 sure they have all of them? Once they do, would you tell  
6 them to begin their deliberations?

7 I'm going to go excuse the two alternates.

8 (WHEREUPON, the verdict form and exhibits were  
9 delivered to the jury to begin deliberations at  
10 approximately 11:26 a.m. after which court stood at  
11 recess awaiting the verdicts of the jury.)

12 THE COURT: All right. Guys, we have a  
13 verdict. Let me get this in.

14 Is the State ready?

15 MS. REEVES: Yes, sir.

16 THE COURT: Mr. Thomason?

17 MR. THOMASON: Yes, sir.

18 (WHEREUPON, the jury entered the open court at  
19 approximately 11:56 a.m.)

20 THE COURT: Mr. Foreman, I am advised the jury  
21 has reached a verdict; is that correct?

22 MR. FOREMAN: Yes, sir.

23 THE COURT: Is it unanimous?

24 MR. FOREMAN: Yes, sir.

25 THE COURT: Would you pass it to the bailiff,

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*Verdicts*

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1 please, sir?

2 THE CLERK: If it pleases the Court?

3 THE COURT: Yes, sir.

4 THE CLERK: This is in the Court of General  
5 Sessions in the State of South Carolina, the County of  
6 Anderson. The case of the State of South Carolina versus  
7 Andrew Antonio Clemons, this is the verdict form. We,  
8 the jury, unanimously find, under indictment number 2011-  
9 GS-04-1977, criminal sexual conduct with a minor under  
10 eleven years of age, first degree, that the Defendant is  
11 guilty. We, the jury, unanimously find under indictment  
12 number 2013-GS-04-00569, lewd act, commit or attempt to  
13 commit a lewd act upon a child, that the Defendant is  
14 guilty. Dated May 15th, 2013, signed by the Foreman.

15 THE COURT: Mr. Foreman, ladies and gentlemen  
16 of the jury, if that was your verdict in the jury room  
17 and if that your verdict now, would you please raise your  
18 right hand?

19 (WHEREUPON, all jurors' right hands were raised.)

20 THE COURT: Let the record reflect that all  
21 twelve raised their right hands.

22 Okay. Ladies and gentlemen, the Court is never  
23 concerned about your verdict, but it is concerned to  
24 watch that you stay engaged throughout a trial. Y'all  
25 did that. And for you coming here and doing your civic

1 duty for Anderson County and the State, I thank you.  
2 Before I excuse you, Mr. Foreman, I need you to sign a  
3 little bit on these indictments for me. And I would like  
4 to meet with you very briefly in your jury room. Your  
5 Clerk will have any statements you may need as far as  
6 your employers. And you'll have those available to you  
7 before you're excused. If you'd go back to your jury  
8 room now, please, sir.

9 (WHEREUPON, the jury exited the open court at  
10 approximately 11:58 a.m.)

11 THE COURT: Would you be checking with your  
12 victims to see if they want to say anything else other  
13 than -- I don't want to hear a rehash of what I've heard.  
14 But if they want to add anything else, I'll be glad to  
15 hear from them.

16 MS. REEVES: Sure.

17 THE COURT: Okay. I'll be back in just one  
18 second.

19 (WHEREUPON, court stood at ease.)

20 THE COURT: Do the victims have anything  
21 further they'd like to add?

22 MS. REEVES: They do not. They just wanted to  
23 say thank you for the process and your time.

24 THE COURT: Okay. Would you tell me the record  
25 of Mr. Clemons, please?



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*Verdicts*

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1 MS. REEVES: I will. He has a 1999 assault and  
2 battery and discharging a firearm and a shoplifting; a  
3 2000, P.W.I.D. crack and a proximity charge, as well as  
4 resisting arrest; 2002, driving under suspension; 2004,  
5 failure to stop; 2005, entering after warning and simple  
6 possession of marijuana; 2008, C.D.V. and ABHAN; 2012,  
7 prowling. He has a 2010 federal conviction for  
8 possession of crack and a 2013 failure to stop, second  
9 offense, for which he was currently doing weekend time.

10 THE COURT: And I think I sentenced him to  
11 that; is that correct?

12 MR. THOMASON: That's correct, Your Honor.

13 THE COURT: All right. Mr. Thomason, I'll be  
14 glad to hear from you if you have anything further you'd  
15 like to add.

16 MR. THOMASON: Yes, sir. I would like to make  
17 a motion for a judgment notwithstanding the verdict.

18 THE COURT: For a new trial?

19 MR. THOMASON: A new trial, yes, sir. A new  
20 trial rather than -- I base that on all my previous  
21 objections and the fact that no reasonable jury could  
22 have convicted my client with the facts presented by the  
23 -- or evidence presented by the Solicitor.

24 THE COURT: And I assume that's inconsistent  
25 with your directed verdict motion as well?

1 MR. THOMASON: Yes, sir.

2 THE COURT: I'm going to deny that motion.

3 MR. THOMASON: Yes, sir.

4 THE COURT: Do you have the sentencing sheets?

5 Since he is not here, what I'll do is just issue the

6 sentence and then seal it. And when he's finally caught

7 and apprehended, then we'll open them up. So I will not

8 announce them today, okay?

9 We've issued a bench warrant on this; is that  
10 correct?

11 MS. REEVES: Yes, sir.

12 THE COURT: All right. Thanks. Thanks to the  
13 attorneys. Thank you for the family and the witnesses  
14 for being here and the victims' advocate. And it is  
15 sealed.

16 MS. REEVES: Thank you, Judge.

17 THE COURT: Yes, ma'am.

18 MR. THOMASON: Thank you, Your Honor.

19 THE COURT: Yes, sir.

20 (WHEREUPON, the trial ended at approximately 12:09  
21 p.m.)

22 \*\*\* END OF REQUESTED TRANSCRIPT OF RECORD \*\*\*

|                          |   |                               |
|--------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA  | ) | IN THE TENTH JUDICIAL CIRCUIT |
| COUNTY OF ANDERSON       | ) | THE COURT OF GENERAL SESSIONS |
|                          | ) | 2011-GS-04-01977              |
| STATE OF SOUTH CAROLINA, | ) | 2013-GS-04-00569              |
|                          | ) |                               |
| PLAINTIFF,               | ) |                               |
|                          | ) |                               |
| VERSUS                   | ) |                               |
|                          | ) |                               |
| ANDREW ANTONIO CLEMONS,  | ) |                               |
|                          | ) | DATE: SEPTEMBER 12, 2013      |
| DEFENDANT.               | ) | ANDERSON, SOUTH CAROLINA      |

---

### SENTENCE UNSEALED

#### B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

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

KRISTIN W. REEVES, ATTORNEY AT LAW  
ATTORNEY FOR THE STATE

G. SCOTT THOMASON, ESQUIRE  
ATTORNEY FOR THE DEFENDANT

PROVIDED FOR: SCCID - LORIE NE FRENCH

FOR COPIES CONTACT: JO RICE  
jrice@sccourts.ORG  
OFFICIAL COURT REPORTER  
SOUTH CAROLINA JUDICIAL DEPARTMENT

1 THE COURT: So, in May of this year we had a trial, in  
2 absence, of Mr. Clemons. Is that correct?

3 MS. REEVES: Yes, sir.

4 MR. THOMASON: Yes, sir.

5 THE COURT: All right. Mr. Clemons, I've already  
6 sentenced you. I'm just going to read the sentence. There  
7 is nothing to be said.

8 (Judge McIntosh opens sealed envelope)

9 For the charge of lewd act or attempted lewd act on a  
10 minor under Indictment 2013-569, the sentence is 15 years.  
11 It is to be concurrent with Indictment 2011-1977, criminal  
12 sexual conduct with a minor with a victim under eleven, and  
13 the sentence is 25 years, concurrent. That is the  
14 sentence. Good luck to you.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ANDERSON )                      CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, SO GIVEN ON September 12, 2013, TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 26TH DAY OF September, 2013.



JO RICE  
OFFICIAL COURT REPORTER

**WITNESSES**

M Partain, Anderson Police Dept.

**ARREST WARRANT NUMBER**

1723721

**TRUE BILL**  
**ACTION OF GRAND JURY**

DEC 6 2011

*[Signature]*  
Foreperson

Foreperson of Grand Jury

Date:

**VERDICT**

*Guilt*

Foreperson of Petit Jury

Date: 5-15-13

DOCKET NO. 2011GS04 01977

**The State of South Carolina**

**County of Anderson**

**COURT OF GENERAL SESSIONS**

DEC 06 2011

Term

**THE STATE**

**VS.**

**Andrew Antonio Clemons**

KWR

**Indictment for**

**Sex / Criminal sexual conduct with minor -  
victim under 11 years of age - First Degree**

SC Code: 16-03-0655(A)(1)

CDR Code: 0385

**A TRUE COPY**

SEP 18 2013

*[Signature]*  
CLERK OF COURT

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF Anderson )

At a Court of General Sessions, convened on DEC 06 2011, the Grand Jurors of Anderson County present upon their oath:

**Sex / Criminal sexual conduct with minor - victim under 11 years of age- First Degree**

That Andrew Antonio Clemons did in Anderson, South Carolina between December 1, 2009 and August 31, 2010, willfully and unlawfully commit

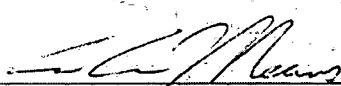
the crime of Criminal Sexual Conduct with a minor in the first degree by

engaging in sexual battery with a minor who was less than eleven (11)

years of age, to wit: whose date of birth is [REDACTED] This is in

violation of 16-3-655(A)(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.

  
ASSISTANT SOLICITOR

WITNESSES

M Partain, Anderson Police Dept.

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

APR 16 2013

Term

ARREST WARRANT NUMBER

DIRECT INDICTMENT  
REFERENCE WARRANT #1723721

THE STATE

vs.

Andrew Antonio Clemons

ACTION OF GRAND JURY

TRUE BILL

APR 16 2013

Foreperson of Grand Jury

Date: Foreperson

VERDICT

X *[Signature]*

*C. City*

X Foreperson of Petit Jury

Date: 5-15-13

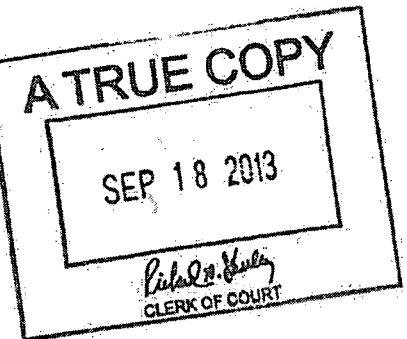
KWR

Indictment for

Sex / Lewd Act, committing or attempting lewd  
act upon child

SC Code: 16-15-0140

CDR Code: 2468





STATE OF SOUTH CAROLINA)

INDICTMENT

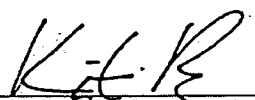
COUNTY OF Anderson )

At a Court of General Sessions, convened on APR 16 2013, the Grand Jurors of Anderson County present upon their oath:

**Sex / Lewd Act, committing or attempting lewd act upon child**

That **Andrew Antonio Clemons**, who is over fourteen years of age, did in Anderson, South Carolina, between December 1, 2009 and August 31, 2010, willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of whose date of birth is [REDACTED] with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of himself or of the child. This is in violation of 16-15-140 of the South Carolina Code of Laws (1976) as amended.

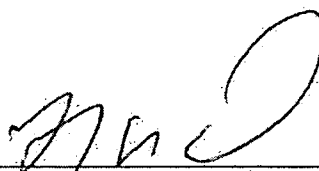
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

  
ASSISTANT SOLICITOR

## CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 31st, 2014



Robert M. Dudek  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

**RECEIVED**

MAR 10 2010

**SC SUPREME COURT**

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

APPELLATE CASE NO. 2013-001951

---

FINAL BRIEF OF APPELLANT

---

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ATTORNEY FOR APPELLANT

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### **Rules**

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### STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing Dr. Sallie Carter to testify that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCORE?

### STATEMENT OF THE CASE

Appellant was indicted at the December 6, 2011 term of the Anderson County Grand Jury for the offense of criminal sexual conduct with a minor in the first degree. R. p. 242. On April 16, 2013 appellant was also indicted by the Anderson County Grand Jury for the offense of committing or attempting a lewd act upon a minor. The alleged victim in both cases was the same stepdaughter. R. p. 244.

Appellant's case was called to trial on May 13, 2013 before the Honorable R. Lawton McIntosh, and the jury. Scott Thomason represented appellant. Kristin Reeves and Lauren Price were the Assistant Solicitors. R. p. 1.

On May 15, 2013 the jury found appellant guilty on both counts. R. p. 235, ll. 4-14. Since this was a trial in the absence, the sentence was sealed.

On September 12, 2013 Judge McIntosh revealed his sentence of twenty-five years imprisonment for criminal sexual conduct with a minor, and fifteen years imprisonment for committing a lewd act upon a minor.

This appeal follows.

## ARGUMENT

The court erred by allowing Dr. Sallie Carter to testify that the alleged victim's injuries were consistent with penetration where the alleged victim testified no penetration occurred during the lewd acts since this opinion testimony was speculative, and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403, SCRE.

### **Introduction**

The key issue in this case was whether there was any penetration of the alleged victim which differentiated criminal sexual conduct with a minor in the first degree from a lewd act. Defense counsel argued in closing that the critical element to CSC with a minor charge was penetration. He reminded the jury that the alleged victim had testified that there was no vaginal or anal penetration in this case. Defense counsel mocked the belated assertion of oral sex occurred, "and we're just now hearing about oral sex six weeks before the trial [where it was not brought up during the forensic interview]" R. p. 211, ll. 2-9. Although the alleged victim denied making up the oral sex allegation for purposes of the trial, she had no explanation for her failure to reveal the alleged oral sex where she was previously repeatedly given the opportunity to add on other lewd or sexual acts to her allegations against appellant. R. p. 172, l. 6- 173, l. 21.

As will be seen infra, even though the alleged victim specifically denied that any vaginal or anal penetration occurred, Dr. Sallie Carter was allowed to testify over objection, after watching the forensic interview of the alleged victim, that the alleged victim's injuries were consistent with her being penetrated. Dr. Carter would interestingly cite to alleged pornography the alleged victim had watched as supporting her opinion that the alleged victim was penetrated despite her testimony to the contrary. R. p. 48, ll. 5-15; 117, l. 2 – 122, l. 16; 155, l. 12 – 159, l. 12; 165, l. 10 – 169, l. 12.



## **Trial testimony**

Telfia Johnson was the mother of the alleged victim, Johnashja W. (hereinafter “Jo”), and three other children. Appellant was the father of the three younger children and the stepfather of Jo. Appellant and Johnson had lived together “on-and-off.” R. p. 11, l. 19 – 14, l. 10.

Johnson said that she first became aware of a potential incident with Jo when she heard her daughters arguing about something that had occurred between Jo and appellant. R. p. 16, l. 3 – 17, l. 25. Johnson said Jo was reluctant to tell her anything but Johnson maintained the next day “she [Jo] gave me enough details to know that I needed to try and get her checked out, but she didn’t really go deep into it.” R. p. 18, ll. 19-23.

Johnson testified that their pediatrician told her “that she couldn’t rule in or out anything, but that she did not think there was any penetration...” R. p. 19, ll. 19-22. Johnson believed a friend contacted DSS, and appellant moved out of the house in August 2010. R. p. 20, l. 1 – 21, l. 2. Johnson took Jo to the Foothills Alliances for a forensic interview, but she did not bring the allegation up to Jo again.<sup>1</sup> R. p. 21, ll. 3-19.

Jo testified at the time of trial she was in the fifth grade. She said appellant touched her in a way she “didn’t like” on more than one occasion. R. p. 31, ll. 2-22. Jo stated that appellant committed lewd acts with her, and showed her pornographic films involving sex acts. R. p. 32, l. 15 – 41, l. 9. She denied that there was any penetration involved in the lewd acts. R. p. 48, ll. 9-15.

Jo also testified that appellant told her not to tell anyone or they would both get in “very big trouble,” and she maintained appellant had her and her sister pray together for “forgiveness” for their sins. R. p. 45, l. 18 – 46, l. 3. Jo did claim at trial that appellant had her perform oral sex on

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<sup>1</sup> The defense and the solicitor were able to agree on redacting the forensic interview by muting portions of it. This was done, according to defense counsel, about a week before trial without the presence of a court reporter. R. p. 2-3.

one occasion. R. p. 41, l. 15 – 42, l. 4. This belated allegation of oral sex was strongly attacked by defense counsel as “convenient” given the fact she never made of oral sex when repeatedly given the opportunity to do so, and the fact there was no evidence of penetration anywhere in the record.

Jo’s nine-year-old sister testified that she remembered seeing Jo run out of appellant’s bedroom in her panties and shirt. Jo ran into their bedroom. R. p. 53, ll. 15-22. She told her mother about this incident “because I thought it was wrong.” R. p. 55, l. 5 – 56, l. 14.

#### **Dr. Carter**

The testimony of Dr. Sallie Carter was proffered out of the presence of the jury. Dr. Carter was a physician at Anderson Oconee Pickens Child and Adolescent Mental Health Center. R. p. 88, ll. 1-19. Dr. Carter testified that “there were no abnormalities on the physical exam [of the alleged victim] except for the genital area where she had an absent posterior hymen.” R. p. 95, ll. 9-15. Dr. Carter said this was a significant finding. R. p. 96, ll. 3-10.

Out of the presence of the jury the judge questioned Dr. Carter about her proposed testimony regarding “some intrusion” causing the hymen not to be present. Dr. Carter said “that would certainly be consistent with a penetrating type of injury.” R. 103, ll. 6-17. She said that other types of injuries could have caused the condition such as falling on a fence post or off a bicycle. However, Dr. Carter maintained that children the alleged victim’s age did not have the language skills to explain what probably happened during a lewd act. R. p. 102, l. 20 – 105, l. 19.

Defense counsel Thomason noted that there was **no testimony** about the injury being caused by some other mishap, and the alleged victim made it clear that the appellant “**never penetrated her.**” She had testified that the appellant had rubbed up against her with his penis but he had never penetrated her. R. p. 106, ll. 3-23. (emphasis added).

Dr. Carter maintained that 95% of sexual abuse exams were normal and since the alleged victim's exam here was abnormal, that was significant, and she continued to question what occurred. R. p. 112, l. 2 – 113, l. 7. The judge then asked Dr. Carter to watch the forensic interview of the alleged victim. The judge observed that Dr. Carter's testimony seemed to be "like a bit of speculation." R. p. 113, l. 1 – 114, l. 8.

After Dr. Carter viewed the forensic interview she stated it was very hard for a child to convey what really happened during a lewd situation. She cited the alleged victim watching pornographic films during whatever occurred as influencing her opinion about what may have happened. Dr. Carter testified that this case involved an adult taking "sexual liberties with a child. You have a child that's really unable to articulate the full, the full --- unable to describe the extent of events." R. p. 114, l. 24 – 117, l. 16.

Defense counsel Thomason again objected that the alleged victim specifically said she was not penetrated, and he argued that under Rule 403, SCRE whatever probative value this evidence had was outweighed by its unduly prejudicial effect. R. p. 117, l. 2 – 119, l. 18. The judge then ruled that he was going to allow Dr. Carter to opine about penetration despite the testimony of the alleged victim to the contrary. R. p. 119, l. 21 – 122, l. 11.

Dr. Carter then testified in the presence of the jury that the posterior portion of the alleged victim's hymen was absent. That was the abnormal finding in the exam. R. p. 149, ll. 11-14.

Dr. Carter said after reviewing the pertinent items that it was her expert opinion that the injuries to the alleged victim were "consistent with a penetrating injury." R. p. 159, ll. 7-24. Dr. Carter also testified that she was concerned after watching the forensic interview because it appeared to her that the child had been "groomed" for sexual acts, and there was also pornography involved. She offered that children have to learn the language of "sexual activity." Dr. Carter said

it would be difficult for the alleged victim to explain what really happened, and she again opined that the alleged victim's abnormality was "consistent with penetration." R. p. 160, l. 16 – 169, l. 12.

In making his directed verdict motion defense counsel Thomason continued to argue there was not a proper foundation for Dr. Carter's speculation that the alleged victim had been penetrated during a sex act, and that it invited a verdict on that basis. R. p. 181, l. 7 – 182, l. 19.

The solicitor argued to the jury that the alleged victim's testimony in a sexual assault case did not need to be corroborated. R. p. 194, l. 18 – 195, l. 6. The solicitor also argued that appellant had put his penis against the alleged victim and "there could have been penetration, and again, the law reads, however slight. She may not know. It may not have hurt." R. p. 201, ll. 12-16.

Defense counsel Thomason noted to the jury the inconsistencies in the testimony that led to a reasonable doubt. He argued the alleged victim did not mention any oral sex on the video when it was fresher in her mind, and she then mentioned it only before the trial much later. R. p. 207, l. 16 – 208, l. 6.

Defense counsel urged the jury to focus on the fact that Dr. Carter's testimony was "a lot of speculation. We don't use speculation. We use facts." R. p. 208, ll. 2-6. Defense counsel argued that first-degree criminal sexual conduct "requires some form of penetration. That's the key to the whole thing is penetration." R. p. 211, ll. 2-5.

## **Discussion**

Whether or not penetration occurred in this case was the key to the verdict on criminal sexual conduct with a minor in the first degree. The judge did charge the jury that any intrusion, however slight, of any part of the person's body was required for a sexual battery. R. p. 228, ll. 13-18.

Defense counsel persuasively urged that where the alleged victim did not reference any allegation of oral sex earlier and that her later assertion of it was not credible. The judge even allowed the alleged victim to be recalled for re-cross examination where she still had no explanation for why her allegation of oral sex only made shortly before trial. The alleged victim acknowledged she was given every opportunity to tell the forensic interviewer that she had performed oral sex, and she did not. Although she naturally denied that she was lying about it at trial she had no explanation for this omission from her other detailed allegations. R. p. 172, l. 6 – 173, l. 21.

The testimony of Dr. Carter here was speculative as defense counsel correctly argued. Her opinions about pornography influencing why she thought the alleged victim had been penetrated seemed objectively unusual. (Defense counsel had tried to keep the jury from hearing any allegation regarding pornography but the judge ruled it could not be separated out from what allegedly occurred here). Dr. Carter was also clearly influenced by watching the alleged victim on the forensic interview tape. Her opinion that the alleged victim suffered penetration in this case – despite the alleged victim’s **direct denial of penetration** – reveals its speculative nature.

Expert opinions can be excluded when they are not helpful to the factfinder. Generally, an opinion is not helpful if it is speculative or conjectural. Collins, South Carolina Evidence §8.3 at pp. 220-221 (2000 ed.). To the extent Dr. Carter’s testimony in this regard was relevant it nonetheless should have been excluded because of its speculative nature which made it unduly prejudicial under Rule 403, SCRE. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 191 (19991).

Dr. Carter’s testimony that she believed the alleged victim had been penetrated – “consistent with penetration” – was also highly prejudicial, and its prejudicial effect outweighed its probative value given the alleged victim’s firsthand testimony of what actually occurred to the contrary. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

Not only may evidence that is speculative in nature be excluded, See State v. Compton, 366 S.C. 671, 681-682, 623 S.E. 2d 661, 666-667 (Ct. App. 2005), but, evidence such as that in this case, is also incompetent where it is confusing. It invited the jury to speculate that the alleged victim had been penetrated even though she had testified she had not. See State v. Saltz, 346 S.C. 114, 127-128, 551 S.E.2d 240, 247-248 (2001) (even if evidence of school attendance records was relevant, it was unfairly prejudicial, confused the issues and had a tendency to mislead the jury and invite speculation about the significance of the evidence).

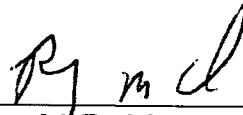
Dr. Carter's speculative testimony on the *critical element* of penetration on the criminal sexual conduct with a minor in the first degree count was undoubtedly prejudicial and confusing. Defense counsel correctly argued that any relevance this testimony had was outweighed by its unduly prejudicial effect under Rule 403, SCRE. "The admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Fowler v. Nationwide Mutual Fire Ins. Co., Op. No. 5256, Shearouse's Adv. Sh. #31 at 87 (August 6, 2014). *quoting Mali v. Odom*, 295 S.C. 78, 367 S.E.2d 166 (Ct. App. 1988)). See, also, South Carolina State Highway Department v. Graydon, 246 S.C. 509, 144 S.E.2d 485 (1965),

Appellant was sentenced to twenty-five years imprisonment for this CSC with a minor offense, and Dr. Carter's speculative testimony on penetration was obviously extraordinarily prejudicial in that respect as well. A verdict based speculation the alleged victim may have been penetrated where she denied she was penetrated was unacceptable.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Anderson County Court of General Sessions for a new trial.

Respectfully submitted,

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Robert M. Dudek  
Chief Appellate Defender

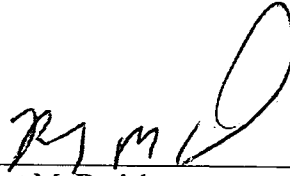
ATTORNEY FOR APPELLANT

This 20th day of January, 2015.

### **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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 20, 2015

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

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Anderson County  
R. Lawton McIntosh, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ANDREW ANTONIO CLEMONS,

APPELLANT

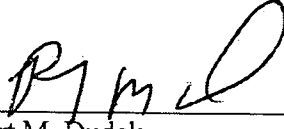
APPELLATE CASE NO. 2013-001951

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CERTIFICATE OF SERVICE

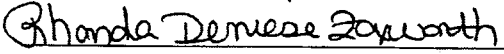
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The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe Bigelow, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of January, 2015.

  
\_\_\_\_\_  
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Chief Appellate Defender

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SUBSCRIBED AND SWORN TO before me  
this 20th day of January, 2015.

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Re: The State v. Andrew Antonio Clemons

Dear Salley:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD/rd

Enclosures

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STATE OF SOUTH CAROLINA  
In The Court of Appeals

SC SUPREME COURT

APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001951

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANDREW ANTONIO CLEMONS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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**STATEMENT OF ISSUE ON APPEAL**

**The trial judge did not err by allowing a pediatrician, who was qualified by stipulation as an expert in child sexual assault examinations, to testify that the injury to the eight-year-old victim's hymen was consistent with a penetrating injury.**



### STATEMENT OF THE CASE

Appellant was indicted in Anderson County for criminal sexual conduct with a minor in the first degree and lewd act upon a minor. On May 13-15, 2013, Appellant was tried in his absence before the Honorable R. Lawton McIntosh and a jury. The jury found Appellant guilty of both offenses, and Judge McIntosh sealed the sentences. On September 12, 2013, Judge McIntosh revealed his sentences of twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years, concurrent, for lewd act upon a minor. A timely notice of appeal was served and filed.

## ARGUMENT

**The trial judge did not err by allowing a pediatrician, who was qualified by stipulation as an expert in child sexual assault examinations, to testify that the injury to the eight-year-old victim's hymen was consistent with a penetrating injury.**

### Evidence Presented at Trial

Appellant was charged with criminal sexual conduct with a minor in the first degree and lewd act upon a minor for events occurring between December 2009 and August 2010. (See R. p. 242-45). The victim, who was the daughter of Appellant's girlfriend, was age seven during the majority of this time, although she turned eight years old in June 2010. (R. p. 13-14; p. 28). The victim was age ten at the time of Appellant's trial. (R. p. 28, lines 13-14). The victim's mother testified that she and Appellant began dating when she was nineteen and Appellant lived with her from December 2009 until August 2010. (R. p. 13-16). Since Appellant was not working at the time, he was at home with the victim and her sister after school. (R. p. 15-16). The victim's sister was Appellant's biological daughter. (R. p. 51-53).

At some point while Appellant was living in the same house with the victim, Appellant began sexually abusing the victim while her mother was not home. (R. p. 31-46). On one occasion, the victim and Appellant were alone in the living room together watching television. (R. p. 31). Appellant summoned the victim over to the "short couch" and made the victim pull down her pants and panties. (R. p. 31-32). Appellant also pulled down his clothes. (R. p. 32, line 2). Appellant then made the victim touch his private parts, and he touched the victim's private parts with his private parts. (R. p. 32, lines 8-16). Specifically, Appellant touched his private part to the victim's private part between her legs while moving the victim back and forth. (R. p. 33, lines 10-23).

During another incident, Appellant and the victim were alone in her mother's bedroom and Appellant made the victim touch his private parts with her hands and rub her hands up and down. (R. p. 34, lines 4-25). Appellant made the victim take off her pants and underwear during this incident also. (R. p. 34, lines 11-14). At the conclusion of the incident, "something came out" of Appellant's private part. (R. p. 35, lines 1-4). When the victim left the bedroom following these events, Appellant's sister observed the victim run out of the bedroom without pants on. (R. p. 34, lines 9-11; p. 42, line 25 – p. 43, line 9; p. 53-54). The victim then went into her room and slipped on some pants because her mother had just arrived at home. (R. p. 54-55).

On a third occasion, the victim and Appellant were alone on the "short couch" in the living room, and Appellant made the victim touch his private parts again. (R. p. 35, lines 12-17). However, the victim's sister and a friend from down the street tried to get in the front door, and Appellant told them to go around to the back door. (R. p. 35, lines 17-23). Then Appellant hastily took the victim back to her room and "put the covers over [her]" before the victim's sister and friend came into the house. (R. p. 35-37).

On other occasions, Appellant would place his private part in the victim's mouth, put his hands on her head, and move her head up and down. (R. p. 41-42). At least once, "something came out" of Appellant's private part and went in the victim's mouth, but she spit it out. (R. p. 42, lines 2-8). Additionally, Appellant showed videos to the victim on two occasions in the bedroom. (R. p. 41, line 4; p. 42, lines 15-17). On these videos, "[i]t was people on there doing what he was doing to me, but they were older." (R. p. 40, lines 10-22). Some of the people in the videos had clothes on and some of them did not. (R. p. 40, lines 23-25).

The victim testified that Appellant did these things to her after school when her mother was at work. (R. p. 43, lines 13-17). Although the victim's sister would generally be at home with them, she would usually go outside to play. (R. p. 43-44). When Appellant finished each episode of sexual abuse, he told the victim "not to tell anyone or [she] would get in very big trouble and he would get in very big trouble." (R. p. 45, lines 18-21). The victim testified she did not tell her mother about the abuse right away because she was scared she would get in trouble. (R. p. 46, lines 11-12). Note that the victim's mother had not ever discussed the specifics of anatomy with the victim and had only warned the victim not to let anyone touch her "chest or her butt." (R. p. 22, lines 12-18).

On cross-examination, defense counsel asked if Appellant put his penis "inside" the victim's vagina or butt. (R. p. 48, lines 5-14). The victim denied it. (R. p. 48, lines 8-15). Defense counsel also asked the victim why she did not mention "the oral sex" when she was doing her forensic interview. (R. p. 172, lines 14-17). Significantly, the victim never used that terminology during her trial testimony; she only testified that Appellant put his private part in her mouth and moved her head up and down. (R. p. 41, line 10 - p. 42, line 8). In any event, the victim testified she did not know why she did not mention "the oral sex" two years previously in her forensic interview. (R. p. 172, lines 18-22). She stated that the first person she told was a counselor she was talking to sometime last year. (R. p. 172, line 24 - p. 173, line 4).

The victim's mother found out about the sexual abuse after the victim's sister reported the incident in which she saw the victim running out of Appellant's bedroom without any pants on. (R. p. 17-18; p. 46, lines 4-10). Following the sister's revelation,

the victim's mother spoke with the victim personally and the victim provided some details about the abuse, including that it occurred in the living room and in the bedroom and that it happened when she was about to turn eight years old. (R. p. 17-18; p. 21, lines 15-22). The victim's mother then called the victim's father and they scheduled an appointment with the victim's pediatrician. (R. p. 18-19). The pediatrician performed a basic visual exam without using any specialized equipment. (R. p. 19, lines 17-18). The pediatrician told the victim's mother she could not rule anything in or out, but she did not think there had been any penetration because the victim "was still crescent-moon shaped." (R. p. 19, lines 19-22).

Subsequently, the Department of Social Services ("DSS") became involved in the case, and the victim was taken to Foothills Alliance Child Advocacy Center for a forensic interview on March 28, 2011. (R. p. 20-21; p. 123-26). The victim's sister also had a forensic interview at Foothills. (R. p. 130-31). The videos of both forensic interviews were introduced at trial and published to the jury. (R. p. 130-33). In April 2011, Dr. Sallie Carter, a pediatrician and expert in child sexual assault examinations, performed a physical examination of the victim. (R. p. 142-47). Dr. Carter made an "abnormal" finding regarding the victim's genital exam because the posterior portion of her hymen was absent. (R. p. 149, lines 13-14). She stated that typically "some sort of injury" would cause the hymen to be "torn or worn or absent" and that her findings regarding the victim were "consistent with a penetrating injury." (R. p. 151, lines 1-3; p. 159, lines 7-12).

After the State rested, the defense presented no witnesses. (R. p. 174-75). Following closing argument and the jury charge, the jury deliberated for thirty minutes

and found Appellant guilty of both charges. (R. p. 234, lines 8-24). Since Appellant's trial was conducted in his absence, the trial judge sealed the sentences. (R. p. 236-38). When Appellant was apprehended in September 2013, his sentences were unsealed and read. Appellant's sentence was twenty-five years for criminal sexual conduct with a minor in the first degree and fifteen years, concurrent, for lewd act upon a minor. (R. p. 240).

#### Dr. Carter's Testimony

After several witnesses had already testified before the jury, the State requested a hearing outside the presence of the jury regarding the testimony of Dr. Sallie Carter. (R. p. 64, lines 6-11; p. 87-122). The purpose of the hearing was to determine whether or not photographs taken by Dr. Carter were admissible and to determine whether or not her specific findings were "reliable and allowable." (R. p. 92, line 24 – p. 93, line 9). Following Dr. Carter's testimony about her qualifications, defense counsel stipulated that Dr. Carter was an expert in the field of child sexual assault examinations. (R. p. 87-92). Dr. Carter then testified that she performed a physical examination of the victim when the victim was eight years old. (R. p. 93-94). After describing the exam, Dr. Carter testified there were no abnormalities except for in the genital area. (R. p. 94-95). She stated that the victim had an "absent posterior hymen" and that she could "see clearly into the vagina." (R. p. 95, lines 11-12). Dr. Carter testified that the absence of the hymen was "significant" in an eight-year-old child because it is not a condition a child is born with and such an abnormality is typically seen after penetrating injuries. (R. p. 96-98).

Following Dr. Carter's testimony, the trial judge asked defense counsel whether he objected to the photographs and related testimony. (R. p. 100, lines 18-21). Defense

counsel responded by stating that since in the victim's trial testimony, she denied that Appellant had penetrated her anus or vagina, "I don't know why we really need this testimony at all." (R. p. 100, line 22 – p. 101, line 1). The trial judge understood the objection as "saying it's not probative to the facts in this case." (R. p. 101, lines 5-8). The solicitor responded that the forensic interview was "a little bit different" than her trial testimony in regard to penetration, but that in any event, in light of the testimony that the victim "didn't know what her anatomy was" and "doesn't even know that she has two openings down there other than bathroom functions," the fact that there was a vaginal injury consistent with penetration – when there was no other type of accident that would have caused such an injury – could lead one to a conclusion that Appellant's penetration, "however slight" caused the abnormality. (R. p. 101-102). She also pointed out that the victim may not have even been aware that "penetration" as such was occurring. (R. p. 102, line 25 – p. 103, line 1). The victim stated there was "rubbing," but as an eight-year-old child, she "doesn't know what he's doing with his penis on her private part." (R. p. 103, lines 3-5).

The trial judge then asked Dr. Carter if she could say to a reasonable degree of medical certainty that some type of intrusion caused the hymen not to be present in this specific case. (R. p. 103, lines 6-10). Dr. Carter responded, "Yes, something caused the hymen not to be present. And that would certainly be consistent with a penetrating type of injury. Now, other types of injuries can cause hymenal damage and urethral damage. And I've seen other types of injuries cause damage in the genital area, and I could comment on some of those. (R. p. 103, lines 11-17). She further stated that, in her experience and in the literature, children "don't really have a language to describe what

happened” when dealing with things they are unfamiliar with in the genital area and that a lot of times, “their testimony is incomplete.” (R. p. 103, lines 18-25). In clarifying for the judge that she could not testify to a reasonable degree of medical certainty that Appellant’s actions in fact caused the absence of the victim’s hymen, Dr. Carter stated that “although I can say that [the victim’s vaginal abnormality] is consistent with penetration, I cannot tell you what caused the injury.” (R. p. 104-105). She did state that, as a part of her exam, she would have interviewed the child and the parents regarding other surgeries or injuries that could have caused the vaginal abnormality. (R. p. 105, lines 9-17).

After reviewing case law and the principles of Rule 702, SCRE, the trial judge found that the subject matter of Dr. Carter’s testimony was appropriate expert testimony because it is “scientific, technical, or other specialized knowledge that will assist the trier of fact understand the facts.” (R. p. 107-108). The trial judge then pointed out that Dr. Carter “has been qualified as an expert by your own stipulation.” (R. p. 108, lines 4-6). The judge stated that “I guess the issue for me is under the facts of this case, are there sufficient facts and evidence or will there be sufficient facts and evidence that would lead this not to be mere speculation but is probative to the issue before the jury for their determination.” (R. p. 108, lines 13-18). After some back-and-forth regarding whether it would be speculation to conclude Appellant vaginally penetrated the victim, the trial judge requested that Dr. Carter review the forensic interview DVD. (R. p. 109-14).

Following Dr. Carter’s review of the forensic interview, the judge asked whether she had “an opinion to a reasonable degree of medical certainty that this event related by this child is most likely one of the causes of the lack of the hymen being present.” (R. p.



114, line 24 – p. 160, line 3). Dr. Carter responded that “there just wasn’t enough description to determine whether or not there was penetration” by Appellant but that watching the video led her “to think that there was every opportunity for there to be penetration.” (R. p. 115-17). She also stated that her opinion regarding the child’s lack of hymen and its relation to the events for which Appellant was on trial was more than speculation. (R. p. 116, lines 3-11).

The trial judge then asked defense counsel for “some particularized objections” to consider. (R. p. 117, lines 17-19). Defense counsel again stated that the victim testified at trial that “she was not penetrated except orally.” (R. p. 117, lines 20-24). When asked if his argument was that “there’s not sufficient facts in the record for her to give that opinion in this case,” defense counsel stated “I’m saying that there are absolutely contradictory facts.” (R. p. 118, lines 5-10). He also said “if you’ve got the child saying that she wasn’t penetrated, how is it anything other than speculation that she was?” (R. p. 118, lines 19-22). Defense counsel stated that he also had the Rule 403 argument that “it’s more prejudicial than probative.” (R. p. 118, lines 24-25). After further discussion with Dr. Carter, the judge ruled that he would allow Dr. Carter’s testimony into evidence. (R. p. 119-20). He stated that he had initially been concerned about the reliability aspect of the doctor’s anticipated testimony. (R. p. 120, lines 8-10). However, he ruled, clearly the topic is subject to expert testimony because it assists the trier of fact. (R. p. 120, lines 12-13). Second, the doctor has “been stipulated to be an expert in child sexual assault examinations.” (R. p. 120, lines 13-15). Third, Dr. Carter stated that “she can’t say one hundred percent that this caused it, but to a reasonable degree of medical certainty it

could be one of the causes for the lack of the hymen. At this point, then that goes to its weight, not its admissibility.” (R. p. 120, lines 17-22).

The trial judge then again requested that defense counsel place his objections on the record. (R. p. 120, line 24 – p. 121, line 5). Defense counsel stated as follows: “I object to the introduction of Dr. Sallie Carter’s testimony not because she’s not an expert, but because her testimony is going to be more prejudicial than probative because the victim or alleged victim, herself, has stated that she was not penetrated by this Defendant. And that is about as simple as I can make it. She has said it in the videos. She has said it on the witness stand. And that’s as simple as I can make it.” (R. p. 121, lines 10-18). Before the jury returned, defense counsel added to his objection “that it also includes the argument that it is, at best, speculative.” (R. p. 122, lines 13-16).

Following these discussions and the judge’s ruling regarding Dr. Carter’s testimony, the forensic interviewer testified. (R. p. 123-42). In addition, the forensic interview DVDs of both the victim and her sister were introduced into evidence and published to the jury. (R. p. 130-33). Thereafter, the State called Dr. Carter to testify before the jury. (R. p. 142).

After Dr. Carter detailed her qualifications, the defense once again stipulated that Dr. Carter was an expert in child sexual assault examinations. (R. p. 142-46). Dr. Carter then testified that she performed a physical examination of the victim on April 4, 2011, when the victim was eight years old. (R. p. 147). Dr. Carter performed a full head-to-toe exam and then did a genital inspection using a piece of medical equipment called a colposcope, which is used to magnify and examine the genital area. (R. p. 147, lines 12-23). The colposcope was equipped with a high-powered light and a digital camera. (R.

p. 147-48). The victim had a normal physical exam with the exception of the genital area. (R. p. 149, lines 11-13). Dr. Carter made an "abnormal" finding regarding the genital exam because the posterior portion of the victim's hymen was absent.<sup>1</sup> (R. p. 149, lines 13-14). The doctor testified that "absent" is not a normal variation in the female population. (R. p. 150, lines 13-23). She testified that typically "some sort of injury" would cause the hymen to be "torn or worn or absent." (R. p. 151, lines 1-3). She also testified that her findings regarding the victim were "consistent with a penetrating injury." (R. p. 159, lines 7-12). However, she also explained that other injuries to the female genital area can occur, and that unless there is something like a brand-type burn, it is impossible for a doctor to know with certainty what actions caused the injury. (R. p. 159, lines 12-21). When asked whether the victim's allegations, as set forth in the forensic interview, were consistent with the injury found in the physical examination, defense counsel objected on the ground that "the allegations were that there was no penetration basically." (R. p. 160, lines 4-14). The trial judge overruled the objection. (R. p. 160, line 15).

Dr. Carter then explained that when she conducts physical examinations, she does not obtain any history of allegations from the child so that she will not inadvertently bring any "presumption" to the exams. (R. p. 160, lines 18-24). She stated that she followed that procedure in this case and did not have any history on the victim at the time of the exam. (R. p. 161, lines 2-3). She testified that she had not seen the forensic interview "until the judge asked me to listen to it about two or three hours ago." (R. p.

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<sup>1</sup> One of the images from the victim's genital exam was admitted at trial over objection as State's Exhibit # 3. (R. p. 152-53). In addition, an image taken from the same colposcope and resulting from the same exam procedure depicting the normal hymen of a same-aged child was admitted over objection as State's Exhibit # 4. (R. p. 153-57).

161, lines 3-5). She stated that she was “more concerned” after listening to the forensic interview because, although the victim may not have had the “language” to describe how the injury occurred, “the child did draw a picture of a person who groomed her for sexual activity or sexual abuse.” (R. p. 161, lines 5-11). When Dr. Carter mentioned that the sexual incidents happened “in the presence of pornographic media,” defense counsel objected on the ground that “pornographic has not been used” and that the testimony was that the victim “saw a video of two naked people kissing.” (R. p. 161, line 20 – p. 207, line 3). After the jury was sent out, defense counsel elaborated that he did not believe that the characterization of two naked people kissing is “pornographic” because it is on television every day. (R. p. 162, line 11 – p. 163, line 1). The trial judge overruled the objection and stated “that’s not a proper objection here.” (R. p. 163, lines 2-20).

When the jury returned, Dr. Carter pointed out the victim’s lack of sexual knowledge as an eight-year-old child, the fact that the victim was unable to explain what “hunching” was in one of the videos she attempted to describe on the forensic interview, and the fact that the victim indicated that Appellant had taken her pants down and involved her in sexual activity, and stated that when those things are considered alongside the abnormal genital exam, in her professional opinion, “that’s like saying one and one is two or two and two is four.” (R. p. 165, line 24 – p. 166, line 20). She added, however, that “I wasn’t there. I didn’t see it.” (R. p. 165, lines 20-21). Dr. Carter then explained that children are not able to describe things that happen to them in the same way as adults because children “have to learn the language of sexual activity.” (R. p. 166, lines 2-10). If a child has not learned “the right words and the right description and the right function” of body parts, then “they don’t have a very good way to describe sometimes the things

that happen to them.” (R. p. 166, lines 11-14). Dr. Carter also explained that a report of abuse from a child is often a continuing or gradual process rather than a one-time report of all allegations. (R. p. 166, line 20 – p. 167, line 2). Finally, Dr. Carter testified that, having reviewed the victim’s medical history, she did not see anything else that could have caused an absent hymen in the victim. (R. p. 167, lines 3-15).

On cross-examination, Dr. Carter testified that she could not say, to a reasonable degree of medical certainty, that the defendant caused the injuries to the victim. (R. p. 168, lines 19-22). She stated that she could not possibly say who caused the injury unless the person left genetic material such as DNA behind. (R. p. 168-69). When asked again whether she could tell to a degree of medical certainty whether this was a penetrating injury, she stated that the way she wrote it up was that it was “consistent with penetration.” (R. p. 169, lines 5-10). When defense counsel asked what else it was consistent with, Dr. Carter stated that this injury was “most consistent with penetration,” but that a child can have a traumatic vaginal injury that could cause a similar injury. (R. p. 169, lines 11-17). She elaborated that such a traumatic vaginal injury would include things like falling astride a tree limb, fence, rake with rigid teeth, or bicycle handlebars. (R. p. 169, lines 14-21). In this case, she stated, “all I can say is the injury that I saw is consistent with a penetrating vaginal injury.” (R. p. 170, lines 9-11). When asked the time frame in which this injury would have occurred, Dr. Carter stated that it was not an acute injury and that it would have happened “some weeks to months earlier” because it was “completely healed” and there was not any fresh bruising or swelling. (R. p. 170, lines 12-19).

### Issue Preservation

Appellant contends that the trial judge erred by allowing Dr. Carter to testify that the victim's injuries were "consistent with penetration" where the victim testified no penetration occurred. Appellant asserts this opinion testimony was speculative and any probative value it had was outweighed by its unduly prejudicial effect under Rule 403. Appellant's argument is not preserved for three reasons. First, Appellant did not make a contemporaneous objection when the doctor testified before the jury that her findings were "consistent with a penetrating injury."<sup>2</sup> (R. p. 159, lines 7-12). See, e.g., State v. King, 334 S.C. 504, 509-10, 514 S.E.2d 578, 581 (1999) (a contemporaneous objection is required to preserve an issue for appellate review). Although defense counsel objected later, when the solicitor asked whether the type of injury she found in the victim was consistent with the victim's allegations as set forth in the forensic interview, this

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<sup>2</sup> Although defense counsel objected in a mid-trial hearing, this hearing did not immediately precede Dr. Carter's trial testimony. (See R. p. 87-171). In fact, significant evidence was presented following the *in camera* hearing which could have changed the trial judge's ruling regarding admission of the challenged testimony. See State v. Floyd, 295 S.C. 518, 520, 369 S.E.2d 842, 842 (1988) (a ruling on an *in limine* motion is not the ultimate disposition on the admissibility of evidence; it remains subject to change based upon developments during trial). Specifically, in between the *in camera* hearing and the doctor's trial testimony, the forensic interviewer testified and the forensic interview videos of both the victim and her sister were admitted in evidence and published to the jury. (R. p. 123-41). Because the *in camera* hearing, and counsel's objection therein, did not occur immediately prior to the admission of the challenged testimony during trial, and because significant evidence was received between the initial ruling and the admission of the disputed testimony at trial, counsel was required to contemporaneously object when Dr. Carter testified before the jury in order to preserve the issue for appellate review. See State v. King, 349 S.C. 142, 149-50, 561 S.E.2d 640, 643-44 (Ct. App. 2002) (finding an issue not preserved where the defendant failed to renew his pre-trial motion at the time the evidence was offered for admission during trial and evidence was presented in between the pre-trial hearing and the admission of the challenged evidence); cf. State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (finding an issue was preserved where the defendant sought a ruling on the admissibility of a witness' testimony *immediately before* calling that witness and *no evidence* was presented in between); and State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 839-40 (2001) (finding an issue preserved was preserved where the pre-trial hearing regarding admission of the disputed evidence was held *immediately prior to* opening statements and the witness testifying about the disputed matter was the first witness called by the State; the Supreme Court held that "[s]ince *no opportunity* existed for the court to change its ruling, Forrester did not need to object a second time to the introduction of the cocaine for the issue to be properly preserved for review." (emphasis added)). Indeed, the fact that defense counsel subsequently objected to the same testimony during the doctor's trial testimony illustrated that he recognized the court's previous ruling was not a final one. (See R. p. 160, lines 4-15).

objection came too late where the “consistent with a penetrating injury” testimony was already properly in the record. (See R. p. 159, lines 11-12; p. 160, line 4-15). See, e.g., State v. King, 349 S.C. 142, 157, 561 S.E.2d 640, 647 n1 (Ct. App. 2002) (“To the extent King challenges this particular testimony as to prior bad acts of selling drugs to Kirken twenty times and to others forty times, no objection was made contemporaneously with this testimony so as to preserve the issue for review. King’s belated objection to subsequent testimony came too late.”); State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004) (holding that an objection made after several pages of testimony came too late to preserve the issue). In that vein, the previous, un-objected-to testimony was merely cumulative to the subsequent testimony to which defense counsel did object. See, e.g., State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other unobjected-to evidence is harmless).

Second, the issue is also not preserved because Appellant elicited exactly the same testimony on cross-examination without reserving any objection. (R. p. 169, lines 5-12). See State v. McKinney, 258 S.C. 570, 571, 190 S.E.2d 30, 30 (1972) (“During the course the trial certain testimony was admitted over the objection of [McKinney’s] counsel. Thereafter, counsel for [McKinney] cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby lost and if any error had been committed in the admission of the testimony it was cured.”); State v. O’Neal, 210 S.C. 305, 311-12, 42 S.E.2d 523, 525-26 (1947) (“Error is assigned because the court, over objection, permitted the witness, Bracey, to testify to certain statements made to him by Aileen Thompson, a waitress in the Five O’clock Club[.] . . . It is not necessary for this court to say whether the admission of this testimony constituted error

or prejudicial error. An examination of the record shows that counsel for appellant brought out the same evidence upon their cross-examination of the witness, Bracey. . . . An objection to the admission of evidence is waived where the same or similar evidence has been elicited by the objector.”); State v. Smith, 245 S.C. 59, 62, 138 S.E.2d 705, 706 (1964) (“After the testimony complained of had been admitted in evidence over objection, counsel cross-examined the witness thereabout without reserving the objection previously made. The objection was thereby by lost and if any error had been committed in the admission of the testimony, it was cured.”); see also State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”). Therefore, Appellant’s previous objection was waived and he is not in a position to complain about the testimony on appeal.

Finally, the argument on appeal regarding Rule 403 is not preserved because Appellant did not argue below that the doctor’s testimony was unduly or unfairly prejudicial; instead, he only argued that the testimony was “more prejudicial than probative.” (R. p. 118, lines 24-25; p. 121, lines 12-13). The aim of Rule 403 is to exclude testimony or evidence that is *unfairly* or *unduly* prejudicial - beyond the normal prejudice that results from evidence against a defendant - because it suggests a decision on an improper or inflammatory basis. State v. Collins, 409 S.C. 524, 536, 763 S.E.2d 22, 28 (2014) (“[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence.” (emphasis in original)). The limited argument made below, which failed to assert that the challenged testimony was *unfairly* or *unduly* prejudicial or that there was a danger of unfair prejudice that



*substantially outweighed* the probative value of the evidence, was not sufficient to preserve a proper Rule 403 issue. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) (“A party may not argue one ground at trial and an alternate ground on appeal.”); State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011) (“For an objection to be preserved for appellate review, the objection must be made ... with sufficient specificity to inform the circuit court judge of the point being urged by the objector.”); cf. State v. Perry, 410 S.C. 191, 763 S.E.2d 603, 611 (Ct. App. 2014) (Few, C.J., concurring in part and dissenting in part) (pointing out that an objection must be based upon a specific rule of evidence and that an objection on the ground of “improper bolstering” is of no legal consequence).

For the three reasons discussed above, the issue raised on appeal regarding Dr. Carter’s testimony is not preserved for appellate review. This Court should dismiss the appeal on error preservation grounds.

#### Discussion of the Merits

Even assuming the issue was somehow preserved, the trial judge correctly permitted Dr. Carter to testify that the victim’s injury was consistent with a penetrating injury. The reception or exclusion of evidence is a matter left largely to the sound discretion of the trial judge. State v. Groome, 274 S.C. 189, 190-191, 262 S.E.2d 31, 32 (1980). On appeal, appellate courts give “great deference” to trial judges when reviewing evidentiary rulings. State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010); see State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”). Moreover, an appellate court will not reverse a trial judge’s decision to admit or exclude evidence absent a clear prejudicial abuse of the

trial judge's broad discretion in evidentiary matters. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-848 (2006) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

All relevant evidence is admissible, and only relevant evidence should be admitted at trial. Douglas, 369 S.C. at 430, 632 S.E.2d at 848; see Rule 402, SCRE ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible."). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' ").

However, even if relevant, evidence may be excluded from trial if its probative value is substantially outweighed by the danger of unfair prejudice. State v. Wiles, 383

S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Significantly, unfair prejudice does not mean damage to a defendant’s case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998); State v. Collins, 409 S.C. at 536, 763 S.E.2d at 28 (“Moreover, the standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence.” (emphasis in original)). Indeed, all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant. Gilchrist at 630, 496 S.E.2d at 429. It is only unfair prejudice that must be avoided. Id.; see also U.S. v. Mohr, 318 F.3d 613, 618 (4<sup>th</sup> Cir. 2003) (“Rule 403 requires exclusion of evidence “only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence.”) (citation omitted).

Trial judges have particularly wide discretion in ruling on the comparative probative value and potential prejudicial effect of evidence. State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (Ct. App. 2012) (citation omitted). A trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-594 (Ct. App. 2001), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *Id.* at 358, 543 S.E.2d at 594.

In Appellant's case, the trial judge did not abuse his discretion by allowing Dr. Carter to testify that the victim's injuries were consistent with a penetrating injury because this testimony was relevant, not improperly speculative, and not violative of Rule 403. First, the results of a physical examination conducted following the minor victim's disclosure of sexual abuse are obviously relevant. Notably, Appellant stipulated below that Dr. Carter was an expert in child sexual abuse examinations. (R. p. 92, lines 2-17; p. 146, lines 1-7). Second, Dr. Carter's testimony was not "speculative." A medical doctor's opinion that a type of injury is consistent with a particular mechanism of injury is not, by itself, "speculative testimony." Instead, this is standard medical testimony that is routinely admitted. *See, e.g., State v. Douglas*, 380 S.C. 499, 504, 671 S.E.2d 606, 609

(2009) (a pediatric nurse practitioner who examined the child victim testified that the victim had vaginal tearing and scarring “consistent with past penetration”); Brown v. State, 383 S.C. 506, 510-11, 680 S.E.2d 909, 912 (2009) (expert in child sexual assault and child sexual abuse testified that she examined the child victim after the incident and that she found redness around the labia and surrounding tissue that “could be consistent with someone penetrating the child’s labia”); State v. Kromah, 401 S.C. 340, 347, 737 S.E.2d 490, 493 (2013) (pediatrician testified regarding the victim’s injuries and stated they were the result of physical abuse and not accidental); State v. Hill, 394 S.C. 280, 286, 715 S.E.2d 368, 372 (Ct. App. 2011) (doctor who was qualified as an expert in child sexual assault examinations testified that she found an abnormal area in the minor victim’s anal area that was “consistent with a penetrating injury”); State v. Kirton, 381 S.C. 7, 20-21, 671 S.E.2d 107, 113 (Ct. App. 2008) (doctor who conducted a physical examination of the child victim testified that she found a complete transection of the hymen caused by a penetrating injury); State v. Portillo, 408 S.C. 66, 68, 757 S.E.2d 721, 723 (Ct. App. 2014) (an expert in the field of pediatrics in sexual assault cases found redness and irritation between the labial lips “consistent with Victim’s allegations of sexual assault”).

To the extent Appellant is arguing that such testimony was “confusing” because it invited the jury to speculate in this particular case because the minor victim herself denied penetration, a specific argument regarding “confusion” was not made below. (See Brief of Appellant, p. 11; see R. p. 87-122; p. 160, lines 9-15). See State v. Dunbar, 356 S.C. at 142, 587 S.E.2d at 694 (“A party may not argue one ground at trial and an alternate ground on appeal.”). Regardless, despite the fact that the ten-year-old victim

denied at trial that Appellant put his penis “inside” her during the incidents that happened more than two years previously, there was circumstantial evidence supporting that penetration did in fact occur. See State v. Johnson, 334 S.C. 78, 85, 512 S.E.2d 795, 798-99 (1999) (“[I]t is not essential that penetration be proven by testimony of the victim. Instead, it may be established by circumstantial evidence.”); see also State v. Miller, 211 S.C. 306, 315, 45 S.E.2d 23, 27 (1947) (the corpus delicti of rape, including the element of penetration, may be proved in whole or in part by circumstantial evidence, just the same as any other fact in controversy). Accordingly, Dr. Carter’s testimony was not “confusing,” was sufficiently connected to the facts of the case, and was properly admitted.

The victim described at trial incidents where she and Appellant had skin-to-skin contact in the genital area. (See R. p. 31-45). In the forensic interview, the victim described an incident where Appellant put his “wee wee” between her legs from the front, and she pointed on an anatomical drawing to the area just below the vagina. (See State’s Exhibit # 5, Forensic Interview DVD, approximately seventeen minutes into the video). She stated that Appellant got on top of her, placed his leg astride her, inserted his penis into the area between her legs, and began moving up and down. When he stopped moving up and down, a clear “something” came out of his “wee wee” and ended up all over the victim’s thighs.

The foregoing account is likely the best description of sexual intercourse that an eight-year-old can provide. (See R. p. 112, lines 9-13). As Dr. Carter explained without objection, an eight-year-old child victim may not have the ability to understand exactly what is happening to her when she is being sexually abused. (R. p. 161-68). See

Johnson, 334 S.C. at 85, 512 S.E.2d at 799 (“The physician who performed the physical examination testified young children are often unable to distinguish between ‘in’ and ‘out.’”). In that vein - and particularly if she does not understand what happened - a child victim may not be able to accurately describe what happened. (See R. p. 161-68). Where a child victim, as here, is shown to have a significant “abnormal” finding on her physical examination - specifically, an absent posterior hymen, which is not a condition existing since birth - and where there is no history of any other trauma to the vaginal area, a jury could reasonably conclude that Appellant’s vaginal penetration of the victim was the cause of the victim’s hymen injury.

In State v. Mathis, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986), the six-year-old victim testified that, although she could not remember whether or not the defendant put his penis inside her, the defendant touched her with his penis and she indicated this hurt. Id. Significantly, there was no medical testimony establishing vaginal injuries. Id. Our Supreme Court held that the defendant’s directed verdict motion was properly denied despite the defendant’s claim that there was insufficient evidence of “intrusion” as is required for a sexual battery. Id.

In Appellant’s case, although the victim did not testify that the sexual contact with Appellant hurt, she did have a significant abnormal medical finding. This finding in an eight-year-old child is, in and of itself, compelling evidence of penetration where there was no explanation for it other than the sexual contact with Appellant. Compare State v. Johnson, 334 S.C. 78, 85-86, 512 S.E.2d 795, 799 (1999) (evidence was insufficient to create a jury question on the issue of penetration because the child’s testimony did not establish an intrusion where she testified the defendant touched her “lu-lu” under her

clothes and that it made her "feel bad" and where her physical examination did not reveal any signs of a sexual battery). Further, a photograph of the victim's vaginal injury was introduced into evidence and the jury was able to compare the photograph of the victim's vagina with a photograph of a normal child's vagina. (R. p. 153-57). Moreover, despite defense counsel's argument below that "[y]ou've got to be kidding me that [penetration's] not going to hurt an eight-year-old child," Appellant was obviously grooming the child and one could reasonably infer that he would have necessarily been extremely gentle with the victim so as to ensure the secrecy of the abuse and thus ensure the victim would be available for future sexual encounters. See Underwood v. State, 309 S.C. 560, 563-64, 425 S.E.2d 20, 22-23 (1992) (a case where our Supreme Court found proper a doctor's testimony explaining why the child victim's vaginal injuries were slight and why this was nevertheless consistent with sexual abuse: "A person who wants to have sex with or to accomplish penile-vagina penetration with a child may be one of two kinds of people. He may be a person who is so wound up in his own needs or so angry that he doesn't care how much it hurts the child at all. In that case, you can have a very violent rape. You can have significant damage to the child which requires a surgical repair. That is not-that is-a lot of people feel that that's the common kind of sexual abuse of children. That's not true. Very prominently, people who want to become sexually involved with children are people who want and need the children to like them, to trust them, and to come back for more. If you hurt a child very badly, that child is going-another adult is going to find out more likely. The child isn't going to come back, and you will be discovered. Therefore, many people who want to be sexually involved with children are careful of the children with whom they become sexually involved.").



fact that the victim did not testify the abuse was painful is therefore not dispositive where the genital examination revealed abnormal and significant findings.

Based upon all the evidence in the case, including the victim's trial testimony, the victim's forensic interview, the mother's testimony that the victim had not been taught about her sexual anatomy at age eight, the presence of the vaginal injury, the photograph of the vaginal injury, and the doctor's other un-objected-to testimony, a jury could reasonably conclude that Appellant's vaginal penetration of the victim was the cause of the victim's hymen injury. See S.C. Code § 16-3-651 (h) (defining "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or *any intrusion, however slight*, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes"). Such a conclusion would not be "speculation" but would instead be a rational conclusion based upon the circumstantial evidence in the case. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 413-15, 697 S.E.2d 558, 561-62 (2010) (despite appellant's objection to an expert's testimony as being "speculative," the trial court properly admitted the testimony where sufficient circumstantial evidence was presented to provide "reasonable support" the expert's opinions); cf. State v. Irick, 344 S.C. 460, 464-65, 545 S.E.2d 282, 285 (2001) (it was not error for the trial judge to exclude testimony from an expert witness that the victim had alcohol and crack cocaine in his system and therefore might have provoked the defendant by threatening him where the proffered testimony was "highly speculative" and "merely conjectural" because it was not based upon any factual predicate in the record).

To hold that the circumstantial evidence in this case was insufficient to support Dr. Carter's testimony would create a further incentive for rapists to select young minor victims who will not likely report the abuse or will be unable to accurately describe it. See Villalon v. State, 791 S.W.2d 130, 133-34 (Tex. Cr. App. 1990) ("The rules [that penetration may be proved by circumstantial evidence and that there is no requirement that a prosecutrix be able to testify as to penetration] reflect the important public policy that we cannot expect the child victims of violent crimes to testify with the same clarity and ability as is expected of mature and capable adults. To expect such testimonial capabilities of children would be to condone, if not encourage, the searching out of children to be the victims of crimes such as the instant offense in order to evade successful prosecution."). The trial judge did not abuse his discretion by finding that Dr. Carter's testimony was sufficiently connected to the facts of the case so as to be admissible for the jury's consideration.

Finally, the trial judge also did not abuse his discretion by failing to exclude the "consistent with a penetrating injury" testimony under Rule 403, SCRE. Under Rule 403, a trial judge may exclude evidence if its probative value is "substantially outweighed" by the danger of unfair prejudice. Here, the probative value of Dr. Carter's testimony on this point was high where the physical exam was the result of the victim's allegations against Appellant. Moreover, contrary to Appellant's argument on appeal that the "speculative nature" of the testimony made it "unduly prejudicial" (Brief of Appellant, p. 10), Appellant has not explained below or on appeal why the "speculative" nature of evidence would render it *unduly* or *unfairly* prejudicial as contemplated by Rule 403. (See R. p. 118, lines 24-25; p. 121, lines 10-18). While the speculative nature of certain evidence

may reduce the probative value of that evidence, the fact that evidence is speculative is wholly unrelated to whether or not the evidence is inflammatory to the jury and therefore unfairly prejudicial. See Collins, 409 S.C. at 536, 763 S.E.2d at 28 (“[T]he standard is not simply whether the evidence is prejudicial; rather, the standard under Rule 403, SCRE is whether there is a danger of *unfair* prejudice that *substantially* outweighs the probative value of the evidence.” (emphasis in original)); see also U.S. v. Mohr, 318 F.3d 613, 618 (4<sup>th</sup> Cir. 2003) (“Rule 403 requires exclusion of evidence “only in those instances where the trial judge believes that there is a genuine risk that *the emotions of the jury will be excited to irrational behavior*, and that this risk is disproportionate to the probative value of the offered evidence.” (citation omitted) (emphasis added)).

Here, the only potential prejudice that could have resulted from the admission of the doctor’s testimony came solely from the legitimate probative force of the evidence. Cf. Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429 (“The prejudice Gilchrist seeks to escape is the prejudicial impact any criminal defendant faces when the State produces relevant evidence that implicates guilt of a crime charged.”). There was no unfair or undue prejudice that could have resulted from this testimony that would have caused the jury to decide the case based upon passion or sympathy or some other arbitrary factor. Accordingly, the trial judge did not abuse his broad discretion in declining to exclude the evidence under Rule 403.<sup>3</sup> See Hamilton, 344 S.C. at 358, 543 S.E.2d at 593-594 (“If

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<sup>3</sup> Appellant argued below that the expert’s opinion regarding the injury being consistent with penetration was not appropriate because of “absolutely contradictory facts” from the victim. (See R. p. 118, lines 5-25). However, the existence of contradictory evidence in the record would not mean an expert’s testimony is inadmissible; instead, contradictory facts are pertinent only to the weight of the evidence and not its admissibility. See, e.g., Chesser v. Taylor, 232 S.C. 46, 50, 100 S.E.2d 540, 542 (1957) (“In view of the contradictory nature of the evidence given in this case, more than one reasonable inference can be drawn therefrom ... When such is the situation, it is the duty of the trial Judge to submit such questions of fact to the jury for determination.”).

judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.”). Appellant’s convictions should be affirmed.

#### Harmless Error

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). The harmlessness of an error in the admission of evidence generally depends on the materiality of the evidence in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”). “When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.” State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

In Appellant’s case, even assuming the trial judge erred in admitting Dr. Carter’s testimony that the victim’s injury was consistent with a penetrating injury, any error was entirely harmless. Initially, defense counsel was able to fully exploit - in both cross-examination and closing argument - the fact that the doctor herself could not say what caused the victim’s vaginal injury. (R. p. 168-70; p. 208, lines 2-6; p. 212, lines 9-21).

Defense counsel urged the jury not to use “speculation” in deciding the facts of the case. (R. p. 208, lines 2-6; p. 212, lines 9-21). Moreover, the jury was correctly instructed regarding credibility, the testimony of experts, and the burden of proof. (R. p. 221-26). There is absolutely no reason to believe the jurors would improperly use Dr. Carter’s testimony to reach a conclusion that Appellant vaginally penetrated the victim if they did not believe the facts of the case supported such a conclusion.

Furthermore, contrary to Appellant’s argument that vaginal penetration was a “key” issue in this case, the elements of criminal sexual conduct in the first degree were met regardless of vaginal penetration because the victim also testified about oral sex with Appellant. (See Brief of Appellant, p. 5 and p. 9; see R. p. 111, lines 2-5). See S.C. Code § 16-3-655(A)(1) (stating that a person is guilty of criminal sexual conduct with a minor in the first degree if the actor engages in “sexual battery” with a victim who is less than eleven years of age) & S.C. Code § 16-3-651(h) (specifically including “fellatio” in the definition of “sexual battery”). Significantly, while defense counsel attempted to attack the oral sex allegations as recent fabrication, he admitted in closing argument that he did not know of any reason why the victim would have made up the allegations. (R. p. 141, lines 7-13; p. 172-73; p. 206-14; p. 211, lines 21-22). In that vein, the jury in this case had no valid reason to disbelieve the victim or doubt the credibility of her allegations. Finally, it should be noted that the jury asked no questions of the court and deliberated only thirty minutes before unanimously finding Appellant guilty of both charges. See Brown v. State, 383 S.C. 506, 519, 680 S.E.2d 909, 916 (2009) (in finding no prejudice from solicitor’s improper “Golden Rule” comments in a child sex abuse case, the Supreme Court pointed out that “the jury only deliberated for thirty-eight

minutes before finding Brown guilty of both charges"). Based upon the foregoing, the State submits that any error with regard to the challenged testimony was harmless. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."). Appellant's convictions should be affirmed.

CONCLUSION

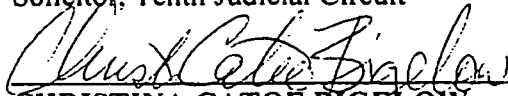
For the reasons discussed above, the State requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

January 26, 2015

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2013-001951

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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANDREW ANTONIO CLEMONS,

APPELLANT.

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's April 15, 2014, order entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

  
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ATTORNEYS FOR RESPONDENT

January 20, 2015

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ANDERSON COUNTY  
Court of General Sessions

The Honorable R. Lawton McIntosh, Circuit Court Judge

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Appellate Case No. 2013-001951

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THE STATE OF SOUTH CAROLINA,

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**PROOF OF SERVICE**

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The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Robert M. Dudek**, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina, 29211-1589, this **20<sup>th</sup>** day of **January, 2015**.

  
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