

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

BOBBIE ALBERT MCCANN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000196

APPENDIX

WANDA H. CARTER
Deputy Chief Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

KAREN RATIGAN
Senior Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,

PLAINTIFF,

-VS-

BOBBY ALBERT MCCANN,

DEFENDANT.

2012-GS-39-00497, 00498, 00499

APRIL 23, 2012

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE ROBIN STILWELL, JUDGE

APPEARANCES:

JENNY HAMAKER, ESQUIRE
ATTORNEY FOR THE STATE

DAVID CANTRELL, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

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JURY VOIR DIRE

Juror #	Name	Race	Sex	<u>Strikes</u>			Accept
				Court	Plaintiff	Def.	
37	Durham, Jonathan D	W	M				x
18	Brothers, Leesa H	W	F				x
102	Porter, Geraldine E	W	F		x		
81	Marburger, Allena J	W	F		x		
3	Arment, Christopher W	W	M			x	
71	Hughes, Jacquelyn N	W	F				x
99	Patterson, Robert T	W	M				x
19	Brown, Timothy D	W	M				x
61	Hawkins, Robin E	W	F		x		
70	Horne, Johnny R	W	M				x
64	Hendrix, Samantha A	W	F		x		
121	Sykes, Laura A	W	F				x
97	Parke, Charles W	W	M				x
76	Kitchens, Stacey R	W	F			x	
95	Owen, Michael L	W	M				x
75	Kelly, Timothy D	W	M				x
2	Anders, Tonya D	W	F				x
48	Garrett, Carolyn J	W	F				x
4	Atkins, Harold D	W	F				x
53	Goodell, William D	W	M				x

1 April 23, 2012

2 (WHEREUPON, Court convened with all parties present
3 and the following proceedings were had.)

4 (WHEREUPON, the jury panel entered the open court at
5 approximately 11:00 a.m.)

6 THE COURT: Good morning. It's good to see
7 y'all again, upstairs as opposed to downstairs. Now, we
8 are going to go through a similar process now that we did
9 downstairs. I remind you that you continue under oath to
10 answer the questions that are posed to you truthfully.
11 The questions that I'm going to pose to you now are
12 designed to determine not whether you're qualified to
13 serve as jurors, but whether it's appropriate for you to
14 serve as jurors in the specific case that's being called
15 to Bar. So all of the questions that I'll pose to you
16 relate specifically to the case for which we are going to
17 select a jury this morning.

18 Now, ladies and gentlemen, the State has called to
19 Bar the case of the State versus Bobby Albert McCann.
20 And ladies and gentlemen, those are indictments 2012-GS-
21 39-499, 2012-GS-39-497, and 2012-GS-39-0498. Now, I am
22 going to read for you the allegations that the State is
23 making in this case.

24 Now, before I read to you the allegations that are
25 presented on the indictment, I want to make real clear

1 something that's important for you to know before we get
2 started, and that is this. In the State of South
3 Carolina, in the United States of America, in Pickens
4 County, each and every Defendant is presumed innocent
5 until proven guilty beyond a reasonable doubt. The State
6 has the burden of proving the Defendant and proving each
7 and every element of the offense beyond a reasonable
8 doubt. Ultimately, the twelve jurors who sit and decide
9 this case will make a determination as to whether the
10 State has met that burden or proof. But as we sit here
11 right now, the Defendant is presumed innocence. The
12 Defendant essentially wears a cloak of innocence and that
13 will not be removed unless and until twelve jurors decide
14 that the State has met its burden of proving each and
15 every element beyond a reasonable doubt.

16 Now, the reason I tell you that now is because I
17 don't want you to think that because I am reading the
18 allegations on the indictments that I am presenting to
19 you as an Officer of the Court as the Judge, that these
20 are the facts of this case, because ultimately you will
21 be charged with determining what the facts are. I don't
22 make any representation to you other than these are the
23 allegations which appear on the indictments.

24 So in the first indictment, the State versus Bobby
25 Albert McCann, 2012-498, the Defendant is charged with

1 criminal sexual conduct with a minor, first degree. The
2 State alleges that Mr. McCann did, in Pickens County, on
3 or about the dates of December 1st, 2007 through December
4 31st, 2009, willfully and unlawfully commit a sexual
5 battery on E.D., who was less than sixteen years of age.

6 Ladies and gentlemen, in indictment 2012-GS-39-0497,
7 the Defendant is charged with lewd act upon a child. And
8 the State would allege that Mr. McCann did, in Pickens
9 County, on or about December 1st, 2007 through December
10 31st, 2009, being over the age of fourteen years, did
11 willfully and lewdly commit or attempt a lewd and
12 lascivious act upon the body or its parts of E.D., a
13 child under the age of sixteen.

14 Ladies and gentlemen, in indictment 2012-GS-39-499,
15 the State versus Bobby Albert McCann, the State has
16 charged the Defendant with criminal sexual conduct with a
17 minor, first degree. And the State would allege that Mr.
18 McCann did, in Pickens County, on or about the dates of
19 December 1st, 2007 through December 31st, 2009, willfully
20 and unlawfully commit a sexual batter upon E.D., who was
21 less than eleven years of age.

22 Now, ladies and gentlemen, the reason I read those
23 allegations to you is so that you can intelligently
24 answer the questions that I pose to you.

25 And the first question that I would have for you is

1 whether there is anyone among you who has any prior
2 knowledge, any prior disposition, any opinion, any bias
3 or prejudice towards any of the parties to this case or
4 the allegations in this case.

5 (No response.)

6 THE COURT: All right. Let the record reflect
7 no affirmative response.

8 All right. Ladies and gentlemen, as I've indicated
9 to you, the Defendant in this case is Mr. Bobby Albert
10 McCann. Ladies and gentlemen, is there anyone among you
11 who has a personal, professional or family relationship
12 with Mr. McCann?

13 (No response.)

14 THE COURT: All right. Let the record reflect
15 no affirmative response.

16 Ladies and gentlemen, Mr. McCann is represented by
17 Mr. David Cantrell of the Pickens County Bar. Is there
18 anyone among you who has a personal, professional or
19 family relationship with Mr. Cantrell?

20 (No response.)

21 THE COURT: All right. Let the record reflect
22 no affirmative response.

23 Ladies and gentlemen, this case is being prosecuted
24 by the Thirteenth Circuit Solicitor's Office, and Ms.
25 Jenny Barwick, who is an associate -- excuse me -- an

1 Assistant Solicitor with the Thirteenth Circuit
2 Solicitor's Office is prosecuting this case. I'll ask
3 you, is there anyone among you who has a personal,
4 professional or family relationship with Ms. Barwick or
5 with any employee of the Thirteenth Circuit Solicitor's
6 Office?

7 (No response.)

8 THE COURT: Let the record reflect no
9 affirmative response.

10 Ladies and gentlemen, I'm going to read to you a
11 list of potential witnesses in this case. Now, this may
12 be all of the witnesses and it may be more than all of
13 the witnesses who are called, but these, I understand,
14 are the potential witnesses that may be called in this
15 case.

16 Mr. Cantrell, I know you had a handwritten list. If
17 you'd give that to me, I'll ...

18 After I read them, I'll ask you the same question,
19 so if you'll listen to them, I'm going to ask you if you
20 have any personal, professional, or family relationship
21 with any of these prospective witnesses. [REDACTED] [REDACTED]

22 Tony Durnil, Detective Rita Burgess with the Pickens
23 County Sheriff's Office, Deputy Robert Porter with the
24 Pickens County Sheriff's Office, Christine Carlberg, Dr.
25 Elizabeth Willingham, Dr. Mary Fran Crosswell, Michelle

1 Gerald, Dr. Bill Chiles, Loretta Addington, David Scott
2 Bagwell, Mike Whelan, Michelle Johnson, Donald Anglin,
3 Danielle Anglin, Amber Lackey, Debra Lackey, Neil Smith,
4 Larry Pendergraft, Margaret Durnil. Anyone have a
5 personal, professional, family relationship with any of
6 those individuals?

7 (No response.)

8 THE COURT: All right. Let the record reflect
9 no affirmative response.

10 Ladies and gentlemen, is there anyone among you who
11 has -- who is a contributor to or a member of an
12 organization which advocates for either criminal
13 prosecution or victims' rights. And just by way of
14 example, MADD, Mother's Against Drunk Driving, or SADD,
15 Student's Against Drunk Driving, or any other
16 organization that advocates for prosecution or victims'
17 rights?

18 (No response.)

19 THE COURT: All right. Let the record reflect
20 no affirmative response.

21 Is there anyone among you who has been a victim of a
22 violent crime?

23 All right. If you'll stand up, please, and tell me
24 your name and juror number.

25 THE JUROR: Candace Whitfield, 135.

1 THE COURT: Yes, ma'am. Now, what type of
2 crime were you victim of, ma'am?

3 THE JUROR: Victim. It was the same kind ...

4 THE COURT: Okay. And was that case prosecuted
5 in Pickens County?

6 THE JUROR: Yes, it was.

7 THE COURT: It was? By the Thirteenth Circuit
8 Solicitor's Office, as far as you know?

9 THE JUROR: I guess.

10 THE COURT: Okay. Knowing that, do you think
11 you could be ---

12 THE JUROR: It's been a long time.

13 THE COURT: --- a fair and impartial juror in
14 the trial of this case?

15 THE JUROR: Yes, sir.

16 THE COURT: Thank you for telling me. I
17 appreciate that.

18 Yes, ma'am.

19 THE JUROR: Cynthia Ray, Juror number 106. I
20 was a victim of a robbery at my place of business in
21 Greenville.

22 THE COURT: Okay. Do you feel like you could
23 be a fair and impartial juror in the trial of this case?

24 THE JUROR: Yes, sir.

25 THE COURT: Okay. Thank you for telling me. I

1 appreciate.

2 Okay. Yes, sir.

3 THE JUROR: I had a girl burn my house, a
4 mobile home, about ten years ago. She was prosecuted.

5 THE COURT: And your name and juror number?

6 THE JUROR: Harold Atkins, Juror number 4.

7 THE COURT: Mr. Atkins, do you feel like you
8 could still be a fair and impartial juror in the trial of
9 this case?

10 THE JUROR: I do.

11 THE COURT: Okay. Thank you for telling me. I
12 appreciate it.

13 Okay. All right. Is there anyone among you who
14 served on the Grand Jury during the term in which this
15 indictment was handed down?

16 (No response.)

17 THE COURT: No affirmative response.

18 Is there anyone among you who has an immediate
19 family member who is employed by law enforcement?

20 Yes, ma'am. I'll let you go first. Name and juror
21 number?

22 THE JUROR: Geraldine Porter, 102. I have a
23 cousin who is a deputy sheriff, Robert McKinney.

24 THE COURT: Okay. Do you think you could still
25 be fair and impartial in this case?

1 THE JUROR: Yes, sir.

2 THE COURT: Okay. Thank you for telling me.

3 Yes, sir.

4 THE JUROR: My name's Christopher Arment; I'm
5 number 3. And I have an uncle who's with Pickens County
6 Sheriff's Department, Jeremy Arment.

7 THE COURT: Do you think you could still be
8 fair and impartial?

9 THE JUROR: (Affirmative nod.)

10 THE COURT: Okay. Thanks for telling me.

11 Yes, ma'am.

12 THE JUROR: My name is Teresa Chavis, juror
13 number 24. And my granddaughter is employed with Pickens
14 County Sheriff's Department.

15 THE COURT: Okay. Do you think you could still
16 be fair and impartial in this case?

17 THE JUROR: Yes.

18 THE COURT: Okay. Thank you very much.

19 I'm sorry. Yes, ma'am.

20 THE JUROR: My name is Patricia Bell. And my
21 niece works at the courthouse.

22 THE COURT: What does she do here at the
23 courthouse?

24 THE JUROR: She works downstairs and lets
25 people in and out. Well, she works at the law

1 enforcement center.

2 THE COURT: All right. Do you think you could
3 still be fair and impartial in this trial?

4 THE JUROR: Yes, sir.

5 THE COURT: Okay. Thank you for telling me. I
6 appreciate it.

7 Is there anyone among you who is more likely or less
8 likely to believe the testimony of a child simply because
9 that witness is a child. That is, could you impartially
10 look at the testimony of a child?

11 (No response.)

12 THE COURT: Okay. Let the record reflect no
13 affirmative response.

14 Counsel, any additional questions or voir dire?

15 MS. BARWICK: Your Honor, the State has the
16 voir dire up there.

17 THE COURT: Okay.

18 MS. BARWICK: I'm sorry.

19 THE COURT: That's all right. I got it. I got
20 it.

21 Has anyone been accused, charged or convicted of a
22 crime against a child?

23 (No response.)

24 THE COURT: Let the record reflect no
25 affirmative response.

1 Does anyone have a family member or close friend
2 that has been accused, charged or convicted of a crime
3 against a child?

4 Yes, ma'am.

5 THE JUROR: Geraldine Porter, 102. I have an
6 uncle that was under house arrest for molesting his
7 children.

8 THE COURT: Okay. Do you think you could still
9 be fair and impartial in the trial of this case?

10 THE JUROR: I do.

11 THE COURT: Okay.. Thank you for telling me. I
12 appreciate it.

13 Yes, ma'am.

14 THE JUROR: I have a neighbor that has been
15 convicted of molesting a child.

16 THE COURT: Okay. Do you think you could still
17 be fair and impartial?

18 THE JUROR: Yes.

19 THE COURT: Okay. Good enough. Thank you.

20 All right. Anything additional?

21 MR. CANTRELL: Your Honor, can we approach just
22 one second?

23 THE COURT: Sure. Yeah.

24 (WHEREUPON, Ms. Barwick and Mr. Cantrell approached
25 the bar.)

1 THE COURT: All right. Ladies and gentlemen,
2 it has been brought to my attention that someone who is
3 not affiliated with this case in any way, shape and form,
4 doesn't have any knowledge about this case and isn't
5 involved in it, may have made an untoward statement, an
6 inappropriate statement, in the hallway to the Defendant
7 on the way up here in front of some jurors. To
8 paraphrase that comment, I believe what the person
9 exclaimed was, they're going to put you in jail; or
10 something to that effect. Is there anyone among you who
11 heard that statement?

12 (No response.)

13 THE COURT: Okay. Good enough. And I will
14 tell you that if someone may have made a statement,
15 they're not qualified to make that determination. So if
16 anybody did hear it or you heard about it, then know that
17 it is of no importance and no effect and that person
18 isn't in a position to say one way or the other what the
19 State -- what will happen in this trial, much less
20 whether the sun's going to rise or set tomorrow. So
21 don't put any credence on what somebody who doesn't know
22 anything about this case says. Okay. Good enough.

23 All right. What we're going to proceed with doing
24 now is our peremptory challenges, jury strikes. We're
25 actually going to pick the jury for this case. The

1 attorneys have the opportunity to make peremptory
2 challenges, to strike people from the jury of the case.
3 The Clerk of Court has a list, a list which was populated
4 at random. And what he's going to do is he's going to
5 call you in the order that you appear on that computer
6 generated list. When he calls your name, what I'm going
7 to ask you to do is just stand up, stand up just where
8 you are, okay? And the attorneys are going to make their
9 strikes, their challenges. And under the law, they have
10 the right to make a strike for just about any reason.
11 There are some limitations, but they're few. So you are
12 going to hear one of several things. If you hear from
13 both sides, the State and the Defense, please swear the
14 juror or please seat the jury, then what I ask you to do
15 is bring all of your stuff, backpacks, pocketbooks, man
16 purses, whatever you got, and come sit in the jury box.
17 If you hear from either side, from either side, please
18 excuse the juror from the trial of this case, please
19 strike the juror from the trial of this case, then you
20 will have been stricken from the trial of this case. As
21 I suggested to you, lawyers can strike for just about
22 every reason, so don't try to figure out why they may
23 have stricken you or why they may have put you on the
24 jury. To try to get into a lawyer's head, you might be
25 just as crazy as we are. So don't try it, okay? So

1 having said that, what I am going to do is I am going to
2 turn it over to Mr. Welborn and let him begin to call the
3 names of jurors.

4 THE CLERK: Juror number 37, Jonathan D.
5 Durham.

6 What says the State?

7 MS. BARWICK: Please present the juror.

8 THE COURT: And the Defense?

9 MR. CANTRELL: Please seat this juror.

10 THE CLERK: If you'll come forward, please,
11 sir, and have a seat in the jury box.

12 Juror number 18, Leesa H. Brothers. What says the
13 State?

14 MS. BARWICK: Please present the juror.

15 THE CLERK: And the Defense?

16 MR. CANTRELL: Please seat the juror.

17 THE CLERK: If you would come forward, please,
18 ma'am, and have a seat in the jury box.

19 Juror Number 102, Geraldine E. Porter. What says
20 the State?

21 MS. BARWICK: Please excuse the juror.

22 THE CLERK: If you'll just have a seat, please,
23 ma'am.

24 Juror number 81, Allena J. Marburger. What says the
25 State?

1 MS. BARWICK: Please excuse the juror.

2 THE CLERK: If you'll just have a seat, please,
3 ma'am. Thank you.

4 Juror number 3, Christopher W. Arment. What says
5 the State?

6 MS. BARWICK: Please present the juror.

7 THE CLERK: And the Defense?

8 MR. CANTRELL: Please excuse Mr. Arment from
9 this trial.

10 THE CLERK: If you would have a seat, please,
11 sir.

12 Juror number 71, Jacquelyn N. Hughes. What says the
13 State?

14 MS. BARWICK: Please present the juror.

15 THE CLERK: And the Defense?

16 MR. CANTRELL: Please seat Ms. Hughes.

17 THE CLERK: If you would come forward, please,
18 ma'am, and have a seat in the jury box.

19 Juror number 99, Robert T. Patterson. What says the
20 State?

21 MS. BARWICK: Please present the juror.

22 THE CLERK: And the Defense?

23 MR. CANTRELL: Please seat Mr. Patterson.

24 THE CLERK: If you would come forward and have
25 a seat in the jury box, please, sir.

1 Juror number 19, Timothy D. Brown. What says the
2 State?

3 MS. BARWICK: Please present the juror.

4 THE CLERK: And the Defense?

5 MR. CANTRELL: Please seat Mr. Brown.

6 THE CLERK: If you would come forward, please,
7 sir, and have a seat in the jury box.

8 Juror number 61, Robin E. Hawkins. What says the
9 State?

10 MS. BARWICK: Please excuse the juror.

11 THE CLERK: You may be seated.

12 Juror number 70, Johnny R. Horne. What says the
13 State?

14 MS. BARWICK: Please present the juror.

15 THE CLERK: And the Defense?

16 MR. CANTRELL: Please seat this juror.

17 THE CLERK: If you would come forward, please,
18 sir, and have a seat in the jury box.

19 Juror number 64, Samantha A. Hendrix. What says the
20 State?

21 MS. BARWICK: Please excuse the juror.

22 THE CLERK: Okay. You may be seated.

23 Juror number 121, Laura A. Sykes. What says the
24 State?

25 MS. BARWICK: Please present the juror.

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21

1 THE CLERK: And the Defense?

2 MR. CANTRELL: Please seat Ms. Sykes.

3 THE CLERK: If you would come forward, please,
4 ma'am, and have a seat in the jury box.

5 Juror number 97, Charles W. Parke. What says the
6 State?

7 MS. BARWICK: Please present the juror.

8 THE CLERK: And the Defense?

9 MR. CANTRELL: Please seat Mr. Parke.

10 THE CLERK: If you would come forward, please,
11 sir, and have a seat in the jury box.

12 Juror number 76, Stacey R. Kitchens. What says the
13 State?

14 MS. BARWICK: Please present the juror.

15 THE CLERK: And the Defense?

16 MR. CANTRELL: Please excuse Ms. Kitchens from
17 this trial.

18 THE CLERK: You may have a seat, please.

19 Juror number 95, Michael L. Owen. What says the
20 State?

21 MS. BARWICK: Please present the juror.

22 THE CLERK: And the Defense?

23 MR. CANTRELL: Please seat Mr. Owen.

24 THE CLERK: If you would come forward, please,
25 sir, and have a seat in the jury box.

1 Juror number 75, Timothy D. Kelly. What says the
2 State?

3 MS. BARWICK: Please present the juror.

4 THE CLERK: And the Defense?

5 MR. CANTRELL: Please seat Mr. Kelly.

6 THE CLERK: If you would come forward, please,
7 sir, and have a seat in the jury box.

8 Juror number 2, Tonya D. Anders. What says the
9 State?

10 MS. BARWICK: Please present the juror.

11 THE CLERK: And the Defense?

12 MR. CANTRELL: Please seat Ms. Anders.

13 THE CLERK: If would you come forward and have
14 a seat in the jury box, please, ma'am.

15 Juror number 48, Carolyn J. Garrett. What says the
16 State?

17 MS. BARWICK: Please present the juror.

18 THE CLERK: And the Defense?

19 MR. CANTRELL: Please seat Ms. Garrett.

20 THE CLERK: If you would come forward, please,
21 ma'am, and have a seat in the jury box.

22 THE COURT: Okay. That's twelve?

23 THE CLERK: Yes, sir.

24 THE COURT: Do y'all want one alternate or two
25 alternates? I'll defer to y'all in that regard.

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Jury Voir Dire

23

1 MR. CANTRELL: Two.

2 THE COURT: Okay. We'll pick two.

3 THE CLERK: This will be for the first
4 alternate.

5 Juror number 4, Harold D. Atkins. What says the
6 State?

7 MS. BARWICK: Please present the juror.

8 THE CLERK: And the Defense?

9 MR. CANTRELL: Please seat Mr. Atkins.

10 THE CLERK: If you would come forward, please,
11 sir, and have a seat in the jury box.

12 This will be for the second alternate.

13 Juror number 53, William D. Goodell. What says the
14 State?

15 MS. BARWICK: Please present the juror.

16 THE CLERK: And the Defense?

17 MR. CANTRELL: Please seat Mr. Goodell.

18 THE CLERK: If you would come forward, please,
19 sir, and have a seat in the jury box.

20 THE COURT: All right. All right, counsel, any
21 issues or matters of law to take up with respect to the
22 qualification or selection of this jury?

23 MR. CANTRELL: None from the Defense.

24 MS. BARWICK: None from the State.

25 THE COURT: Okay. All right. Thank you.

1 All right. Ladies and gentlemen, if you were picked
2 for the jury or not picked for the jury, I extend to you
3 either congratulations or condolences, whatever your
4 predisposition is. Those of you who weren't selected,
5 thank you for coming up. I appreciate it.

6 Mr. Welborn, do you want them to go back downstairs
7 to courtroom one?

8 THE CLERK: Yes, sir, I do. And I'd like to
9 send this with the bailiff.

10 THE COURT: Okay. There's another jury trial
11 and they're going to -- Judge Verdin is going to pick a
12 jury for that trial, as well, this morning. So after
13 that jury is selected, you'll know whether you're on a
14 jury or not. You may not even be on the jury pool that
15 Mr. Welborn sends down to that courtroom, you may or may
16 not. But in any event, if you will please go back to
17 courtroom one. You'll go through this process once again
18 and then you'll have an idea of what you'll be doing for
19 the next couple of days. Thanks for coming up. If I
20 don't see you again, thank you for performing jury duty.
21 I appreciate it.

22 (WHEREUPON, the jury panel exited the open court at
23 approximately 11:45 a.m.)

24 THE COURT: All right. Ladies and gentlemen,
25 we're going to begin this trial, but not quite yet.

1 Remember downstairs I told you sometimes I need to take
2 up some matters of law, some matters bearing upon the
3 evidence that's going to be presented and that's what I'm
4 going to do. Before we even get started, we're going to
5 have a few motions, a few hearings. I'm going to hear
6 some issues that are going to bear upon how we will
7 proceed in this case. So I'm going to ask y'all to go to
8 lunch and be back at two o'clock. That seems like kind
9 of a long lunch, but we're probably going to be in here
10 for another hour taking up these issues that may come up
11 in trial at some point. Again, that's designed to help
12 us go more efficiently when we actually start presenting
13 evidence in the trial of the case.

14 Now, please don't discuss the case. And please
15 don't go out and do any self-help to try to find out
16 anything about this case. I would suggest to you that
17 there's probably not a whole lot that you could find out
18 about it, but don't try. The only thing that's
19 appropriate for your deliberations, for your
20 consideration in this case is that evidence that is
21 presented in accordance with the law, in accordance with
22 the rules of evidence in this courtroom. Anything that
23 you consider outside of this courtroom would taint your
24 deliberations, taint your decision. So don't go out --
25 don't get on your smart phone or your computer and try to

1 find out something about this case, because that would be
2 inappropriate and it would violate the oath that you are
3 going to take in this case. Also, don't discuss the case
4 with anybody.

5 Now, ultimately, this case will be determined by the
6 twelve people who ultimately sit and analyze and discuss
7 the evidence that was presented. It's inappropriate for
8 you to go and discuss the case with anyone else because
9 they're not part of that deliberative body, they're not
10 part of the jury that considers the case. And if you
11 discuss this case with someone else, then what happens is
12 you will have discussed the case, deliberated with
13 someone other than those persons on the jury.

14 At the end of the case, you'll have the opportunity
15 to discuss this case as you need to. And I'll talk to
16 you a little bit more about that, but I'll just tell you,
17 at this point -- when you've heard everything, when
18 you've heard all of the evidence, when you've heard both
19 sides, you've heard everything that everybody has to say
20 about it, that's when it's appropriate for you to start
21 discussing the case. But until then, don't discuss it.
22 And if someone offers to discuss it with you, whether it
23 be a significant other, husband/wife, kids, whomever,
24 just say, we'll discuss it later. I can't discuss it
25 right now. And you'll have plenty of opportunities to

1 talk to them about it perhaps this weekend. All right.

2 It's my anticipation this case is going to last
3 about two days so if we start right after lunch, I'm
4 guessing, I'm guessing, that we'll be done on Wednesday.
5 That's my best guess. And as I know more about it, and I
6 know more about how many witnesses we're going to have
7 and how long it's going to take, I will let y'all know so
8 that y'all will know what to expect as we go forward.

9 All right. Y'all have a great lunch and I'll see
10 you back at two.

11 (WHEREUPON, the jury exited the open court at
12 approximately 11:47 a.m.)

13 THE COURT: All right. All right, counsel do
14 we have motions? I know you need to do the presentment
15 to begin with.

16 MS. BARWICK: Yes, sir.

17 THE COURT: Okay.

18 MS. BARWICK: Well, I sent the arraignment.

19 THE COURT: I think I have the original
20 indictments here.

21 MS. BARWICK: Do you mind us using your copies

22 ---

23 THE COURT: Yeah. You're welcome to.

24 MS. BARWICK: --- because I don't know where
25 mine are. I have copies of -- true certified copies that

1 will suffice.

2 THE COURT: I'm comfortable with that,
3 notwithstanding the objections that you intend to make.
4 I presume you're comfortable with that, Mr. Cantrell?

5 MR. CANTRELL: I am, Your Honor.

6 THE COURT: Okay.

7 MR. CANTRELL: And, in fact, the Solicitor sent
8 me certified true copies. I've got those.

9 THE COURT: Okay. Good enough. All right.
10 Okay. So Ms. Barwick, the State has made a presentment
11 of indictments to the Defendant. Mr. Cantrell, you
12 acknowledge receipt of the same, sir?

13 MR. CANTRELL: I do, Your Honor.

14 THE COURT: Okay. Do you waive formal
15 arraignment at this time, sir?

16 MR. CANTRELL: Yes, sir.

17 THE COURT: Okay. Good enough. All right.
18 Anything else that needs to be put on the record by the
19 State with respect to the presentment of the indictments?

20 MS. BARWICK: No, sir, Your Honor.

21 THE COURT: Okay. Now, it's my understanding
22 that you have motions related to the indictment. Is that
23 correct, Mr. Cantrell?

24 MR. CANTRELL: Yes, sir.

25 THE COURT: All right. I'd be happy to hear

1 those, sir.

2 MR. CANTRELL: Your Honor, I would ask that
3 these indictments be dismissed. The basic groundwork is
4 that Mr. McCann was indicted in 2010 on a charge of
5 criminal sexual conduct with minor, first degree. That
6 this case and the allegations are from December of 2009.
7 That indictment listed the dates of the offense, or
8 allegedly, between December 1st and December 31st of
9 2009. He was indicted in 2010 and these indictments have
10 continued. That indictment is continuing to be the
11 charging document in this case.

12 This case was put on the trial docket last year at
13 some point in 2011. And then in February of 2012, I
14 believe the first week of February 2012, after I was, in
15 fact, advised by the Solicitor, the Solicitor or someone
16 on the State's part presented -- took direct presentments
17 of the indictments that we're here for today.

18 This is essentially one indictment that charges
19 criminal sexual conduct in the first degree. And I think
20 the basic difference there from the previous indictment
21 was that it expanded the time frame from January of 2007
22 to December of 2009; some twenty-three months larger time
23 frame.

24 There was charge -- another charge of criminal
25 sexual conduct in the first degree alleging a different

1 act during that same two-year period of time. And that
2 indictment, in fact, added as part of one of the
3 elements, that the Defendant has a prior conviction that
4 placed him on the sex offender registry. That was an
5 added matter or issue in that indictment, as well as the
6 description of the act itself. Then, thirdly, there was
7 a third indictment direct presented in February of this
8 year for lewd act or attempting to commit a lewd act on a
9 child, that alleged a different activity or action. It
10 would be our position that after -- essentially more than
11 two years after the alleged incident, and I think it's
12 uncontroverted, no additional evidence has come up in at
13 least eighteen to twenty months during that period prior
14 to the direct indictments, that this would be -- and this
15 is after the Defendant has requested his right to a jury
16 trial -- that to then do these direct presentments or
17 indictments on such widely changing facts and
18 circumstances, time frames, and elements, is an unfair
19 and prejudicial infringement of this Defendant's right to
20 a fair trial that is guaranteed to him by the
21 constitution.

22 I will advise the Court that we received notice from
23 the Solicitor prior to the indictments and the last term
24 of Court Judge Hill did grant us a continuance because of
25 the changes. So I quite candidly am not attempting to,

1 at this point, allege surprise. Certainly, two months is
2 not even a lot of time when you're talking about such a
3 wide time frame and these allegations, but I was granted
4 a one-month continuance.

5 It's at this point that this is unfairly and unduly
6 prejudicial, a violation of his Constitutional rights
7 including that right to a trial by jury because none of
8 this took place until a great deal of time after he
9 requested the trial by jury, and an even longer time
10 after which this investigation was essentially closed to
11 the extent any investigation of a pending case could be
12 closed. There was no other evidence discovered at any
13 point in the last, I would say, eighteen to twenty
14 months.

15 For those reasons, I believe this is improper. It
16 is a prejudicial violation of his Constitutional rights.
17 I would ask that these three indictments be dismissed.

18 THE COURT: All right. Good enough.

19 All right. Ms. Barwick.

20 MS. BARWICK: Thank you, Your Honor. Back in
21 January of this year the State became aware of some
22 interactions that was going on, you know, between the
23 Defendant's family and the victim's family. At this
24 point in time, the State knew that it was a somewhat
25 urgent matter to go ahead and put the Defendant on the

1 docket. At this point in time, Steven Alexander, who was
2 the Defense attorney on the case, notified the State that
3 he had a conflict because of some family core issues he
4 had dealt with. I was notified that a new attorney would
5 be appointed. A new attorney was appointed. It was Mr.
6 Cantrell, Your Honor.

7 As soon as the State found out that Mr. Cantrell was
8 on the case, on February 6th, the State emailed Mr.
9 Cantrell, told him what the State planned to directly
10 present for. So, essentially, it's been almost three
11 months, Your Honor, since February 6th. The State
12 notified what the direct presentments would be for, the
13 language that would be in them, as if it was -- as if the
14 State emailed the actual direct presentments.

15 Your Honor, the State had a different Solicitor on
16 the case when it was indicted. It was Peter Them. I'm
17 imagining he simply indicted based on the warrant. And
18 the warrant was issued before the forensic interview was
19 done. In the forensic interview was done on January 4th
20 -- I'm sorry -- February 1st and February 4th of 2010,
21 which is about two weeks after the arrest warrant was
22 made, the child did allege that it happened when she was
23 three, four and five years old. So the State did
24 increase the time frame to the ages when she was three,
25 four and five and a few days when she reported it. So

1 that's why the State increased that.

2 The State doesn't have case law for Your Honor, but
3 it's been well established that the time frame can be as
4 large as five years, especially with continuing acts of
5 abuse, and the State doesn't have to narrow it. The
6 dates are not an element of the crime.

7 THE COURT: Okay. All right. Any response you
8 need to make to that, sir? I'll give you the last word.

9 MR. CANTRELL: Your Honor, simply to state that
10 I think the fact that the forensic interview took place
11 in January of 2010, which was less than a month after the
12 alleged incident in the first indictment makes that
13 insignificant. That is still two years and several
14 months -- two years and three months ago. So all of that
15 information was available. And I think that just further
16 confirms that beyond that there was no other evidence
17 after January 2010 that warranted changing these
18 indictments.

19 THE COURT: Okay. All right. After having
20 heard the argument of counsel, I respectfully deny the
21 motion to quash the indictments. They are notice
22 documents and I don't hear anything that would compel the
23 Court to come to the determination that there is a
24 prejudice which visits upon the Defendant as a
25 consequence of the modification to the indictments. Same

1 victim, the time frame complained of in the new
2 indictments are included in the others. And I do think
3 that as a practical matter the forensic interview changed
4 the allegations to some degree.

5 I also take note of the fact that Judge Hill
6 continued the case so that there could be additional time
7 to address the difference and distinction and the
8 indictments direct presentment. Therefore, I
9 respectfully deny the same.

10 MS. BARWICK: Thank you, Judge.

11 THE COURT: All right. Additional motions?

12 MS. BARWICK: Your Honor, in indictment number
13 ending in 498, that alleges CSC first degree. Under the
14 provision of the statute, when the victim is under the
15 age of sixteen and the Defendant has a previous
16 qualifying conviction that places him on the sex offender
17 registry.

18 Your Honor, the State passed up the motion to you
19 stating the law on the case. I know it was just
20 recently, and you haven't had a chance to read it, but
21 case law equates the CSC first statute a lot like a
22 burglary first statute, where aggravating factors can be
23 prior burglaries and thus the prior convictions become
24 admissible, as an element of the offense, so therefore,
25 it becomes admissible. And the State would seek to

1 introduce his prior conviction for Peeping Tom back in
2 1996.

3 THE COURT: Okay. What's the Defense's
4 position on that?

5 MR. CANTRELL: Your Honor, I cannot argue with
6 the language of the statute, but I do believe that the
7 Court could determine that to be unduly prejudicial or
8 that it could at least limit any information or
9 presentation to the jury to their being a prior
10 conviction to that extent.

11 But I think -- and I understand the Court has ruled,
12 but added to the fact that that was added to these
13 charges two years after the offense, I believe that that
14 is, in fact, unduly prejudicial and no other way be
15 corrected, that should have been charged earlier on, if
16 at all.

17 So I would ask the Court not to allow that
18 information or in the alternative to severely limit that
19 information so that it does not create any other undue
20 prejudice to the Defendant.

21 THE COURT: Okay. Let's talk practicalities.
22 The statute allows admission of the prior offense. So I
23 think that at a minimum the State is allowed to introduce
24 evidence of a prior offense. So the question then
25 becomes, do you limit the introduction of that evidence

1 to the fact that there had been a prior offense, which
2 qualifies under the Statute, or do you get into the
3 specific offense?

4 Now, I'll let you decide whether you want to do that
5 or not. On the broad scale of offenses that qualify
6 under that statute, Peeping Tom is probably the least
7 offensive to the general public. So my question is, do
8 you object to that or do you want the jury to speculate
9 as to what other potential nefarious act may have been
10 conducted in the past?

11 MR. CANTRELL: Your Honor, if it's going to be
12 admitted at all, I would ask that it be admitted as to
13 the prior conviction and the offense for what the
14 conviction was, Peeping Tom, voyeurism, but limited to
15 nothing beyond that. And I think that would be fair.

16 THE COURT: Okay. And I think the State, at a
17 minimum, is allowed to put that in.

18 You don't intend to go beyond that?

19 MS. BARWICK: No, sir, absolutely not.

20 THE COURT: Okay. Good enough. All right.
21 Yeah, I think statutorily that the statutory provides
22 that it shall be admissible. And I'll read this, but
23 right now, as I'm looking at it, it looks like its
24 admissible for the purposes of this specific offense.
25 And I'll read it.

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1 MS. BARWICK: And, Judge, we do have certified
2 copies of that sentencing sheet and that indictment. How
3 do you want us to go about entering in -- Mr. Cantrell
4 said he would stipulate to it if it is admissible.

5 THE COURT: Y'all can talk about that. I don't
6 have any particular preferred way; just the most
7 efficient way. You can stipulate to it and I can give it
8 to the jury or you can introduce it by way of your
9 investigator.

10 MS. BARWICK: Okay. I would like to be able to
11 talk about it in my opening and show it to the jury. So
12 perhaps we could go ahead and get it marked and entered
13 into evidence so I can talk about it in my opening and
14 they can have it back in the jury room.

15 THE COURT: What's your position on that?

16 MR. CANTRELL: And, Your Honor, I think we're
17 definitely getting a little bit further into the
18 prejudicial -- unduly prejudicial area. If we stipulate
19 that there's a prior conviction of voyeurism that placed
20 him on the sex offender registry, I think that meets the
21 requirements of the statute. And I think anything beyond
22 that is not relevant and unduly prejudicial.

23 Now, in all candor, this statement says that he just
24 describes the offense, by peeping through the window of
25 the home of a Teresa Perry. But I think any elaboration

1 on it ---

2 THE COURT: I'm not looking at it. Is that the
3 Code ---

4 MR. CANTRELL: This is a certified copy of that
5 indictment from 199 ---

6 THE COURT: Oh, the indictment?

7 MR. CANTRELL: Yes, sir.

8 THE COURT: Okay. All right.

9 MS. BARWICK: In the sentencing sheet.

10 MR. CANTRELL: I'm sorry. In the sentencing
11 sheet.

12 THE COURT: Okay.

13 MR. CANTRELL: My position would be that once
14 it's stipulated, they know that he has a prior offense
15 that put him on the sex offender registry, that that was,
16 in fact, the offense of Peeping Tom under this statute.

17 THE COURT: Okay.

18 MR. CANTRELL: Which, I think, is the way it
19 would have to be termed and presented to the jury. I
20 believe that's met the needs -- or met the requirements
21 that the Solicitor has and nothing further is necessary.

22 THE COURT: Okay.

23 MS. BARWICK: It has to be mentioned at some
24 point, though. It can't just be something they go back
25 into the jury room with. That's why the State was hoping

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1 that it would be permitted to say he's been charged with
2 this. He does have a prior conviction that meets the
3 element of the statute for Peeping Tom and it's already
4 been admitted into evidence. You'll have that back in
5 the jury room with you.

6 THE COURT: I think Mr. Cantrell's exception is
7 not to the admission of the evidence of a prior
8 conviction for a Peeping Tom. It's the admission of that
9 documentary evidence. And I don't know if under -- how
10 it's necessarily going to be offered. I tend to also
11 agree with the Defense that if there's a stipulation on
12 the record that there has been a prior conviction for
13 Peeping Tom, I think that is sufficient ---

14 MS. BARWICK: Okay.

15 THE COURT: --- to meet the burden of proof for
16 the State, particularly when I tell them it is a fact
17 that you can assume to be true by way of a stipulation
18 between the parties. And I don't -- the reason why I'm
19 reluctant to give them those documents is because then it
20 brings attention to it and it puts a fine point on the
21 prior conviction and the facts of that conviction, as
22 opposed to the fact that there was a conviction that
23 qualifies it under the offense as charged. I don't want
24 them to focus on that. I don't think that's fair. I
25 want them to focus on this charge.

1 MS. BARWICK: Yes, sir. Just for the record
2 purposes, in *State versus Benton* it said that due process
3 did not require the State to accept the Defendant's offer
4 to stipulate that he had two prior burglary convictions
5 in lieu of the State's introduction of such evidence to
6 the jury. The issue had previously been addressed in
7 *State versus Hamilton*.

8 THE COURT: You're right. You don't have to
9 stipulate.

10 MS. BARWICK: In an effort to speed this up and
11 to be agreeable, would the State be able to -- would you
12 have already told the jury that before the State does
13 their opening?

14 THE COURT: No. I'm not going to tell them any
15 stipulation before opening. Now, I'll give you a little
16 bit of latitude in opening. If you want to talk about
17 it, you can.

18 MS. BARWICK: The State has -- or it has been
19 stipulated by both parties that he has a prior conviction
20 for this.

21 THE COURT: I'm probably not going to start it
22 out like that, okay?

23 MS. BARWICK: Okay.

24 THE COURT: When you begin with your case in
25 chief, at that time at which you either want -- you don't

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1 have to accept stipulation, just like you said.

2 MS. BARWICK: Right.

3 THE COURT: You can ask the -- your chief
4 investigating officer, does he have a prior conviction?
5 And he can say, yes. Okay? Now, I haven't heard and as
6 an academic matter, I don't have an objection that would
7 preclude you from saying, these are the charges. And we
8 intend to prove that such and such and such and such,
9 that he has a prior conviction for. And that he did this
10 -- and I'm not telling you exactly how to say it. There
11 are a million different ways of saying it. But I won't
12 preclude you from commenting on it. But unless there's
13 -- unless y'all collectively want me to tell them that
14 there's a stipulation, I'm not going to do it before we
15 even start the case in chief, okay? But you can comment
16 on it. Okay.

17 MS. BARWICK: All right. Thank you, Judge.

18 MR. CANTRELL: Thank you, Your Honor.

19 THE COURT: Any additional motions we need to
20 take up before we get started?

21 MR. CANTRELL: None for the Defense at this
22 time.

23 THE COURT: All right. Good.

24 MS. BARWICK: Your Honor.

25 THE COURT: Yes, ma'am.

1 MS. BARWICK: The State would ask that all
2 witnesses be sequestered.

3 THE COURT: Without objection I believe that
4 you had indicated ---

5 MR. CANTRELL: That's correct.

6 THE COURT: Okay. Good enough. Then I will
7 issue an order of sequestration, which applies to any and
8 all witnesses beyond the Defendant, the victim, who
9 statutorily have a right to stay in the courtroom and the
10 chief investigating officer.

11 MS. BARWICK: And one more concern. I'm sorry,
12 Your Honor.

13 THE COURT: That's okay.

14 MS. BARWICK: The State -- and this is probably
15 too early to raise this matter. But the State would like
16 to raise it now before we get the jury back in here. The
17 State believes that Mr. Cantrell is going to introduce
18 evidence of other suspects that may or may not have
19 molested the child, but other allegations of other
20 suspects. That being the case, I know the State is
21 prohibited under the hearsay rules from having witness
22 one or witness two saying what the victim said as far as
23 to who did it. If that door does get opened, as to this
24 child might get confused and we might be going down that
25 route, the State would ask that all witnesses be allowed

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1 to state who the child said did it to show the jury that
2 this child was not confused about who did this touching
3 to her.

4 THE COURT: Okay. Any issues with that?

5 MR. CANTRELL: Your Honor, I don't know if I
6 have an issue yet, because I don't know if we're getting
7 to that point or we'll get to that point. I would
8 probably have to ask the Court to allow us to address it
9 if and when it arises.

10 THE COURT: I agree. We'll take that as it
11 comes up. And to the extent that the Defense may have an
12 objection to it, you can lodge it contemporaneously with
13 the evidence that's being offered.

14 MS. BARWICK: I just wanted to make Your Honor
15 aware of that.

16 THE COURT: I understand. I understand. Okay.
17 All right. If there's nothing else, then we'll come back
18 on the record at two. I'll be here a little bit earlier
19 so if y'all need me for anything, please feel free to
20 come back and get me, okay?

21 MS. BARWICK: Thank you, Your Honor.

22 MR. CANTRELL: Thank you, Your Honor.

23 THE COURT: All right. Thanks.

24 (WHEREUPON, the court stood at recess for a lunch
25 break.)

1 (WHEREUPON, State Exhibit Numbers 1, 2, and 3 were
2 marked for identification.)

3 THE COURT: Okay. All right. With respect to
4 the motion for the introduction of the out-of-court
5 statement by the victim, when do you intend to put her on
6 the stand?

7 MS. BARWICK: Second, Your Honor.

8 THE COURT: Second?

9 MS. BARWICK: Yes, sir.

10 THE COURT: Do we need to conduct an out-of-
11 court or -- excuse me -- an in-camera hearing to
12 determine those elements?

13 MS. BARWICK: Your Honor, I was hoping we could
14 do that tomorrow around lunchtime and I'll have that
15 witness up here.

16 THE COURT: Oh, okay.

17 MS. BARWICK: You're talking about the forensic
18 interview, right?

19 THE COURT: Yes, ma'am, exactly.

20 MS. BARWICK: Yes, sir. If that's okay with
21 Your Honor.

22 THE COURT: Well, it may be -- let me ask you
23 this. Do you have an objection to that?

24 MR. CANTRELL: To the -- I'm not sure I
25 followed exactly. To the forensic video?

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1 THE COURT: Yes, 'sir.

2 MR. CANTRELL: Obviously, once it meets the
3 standards and the court approves, that's fine, I don't
4 ...

5 THE COURT: And here's the reason I ask you
6 that. If you're going to put her on the stand then one
7 of the issues I have to determine is that she's subject
8 to cross-examination. Now, she will obviously be subject
9 to cross-examination, but the nature of your cross-
10 examination may be different based on whether I let the
11 video in or not. So you might -- it's up to you.

12 MR. CANTRELL: Right.

13 THE COURT: You might want a ruling on that
14 before she takes the stand because it may affect your
15 cross-examination. But if you're telling me, no, you
16 don't think so, then I'm perfectly willing to wait until
17 you offer that into evidence.

18 MR. CANTRELL: I do think I would need that
19 ruling. Quite frankly, I was jumping ahead a little bit
20 to my right to possibly recall the victim after the
21 video, or something to that effect. But I think I would
22 perhaps be -- serve the interest of justice better to ask
23 the Court to rule on that.

24 THE COURT: I would be, you know, I mean, I
25 don't know. A little girl is the victim, right?

1 MS. BARWICK: Yes, sir, Your Honor. She's
2 seven years old. It's just ---

3 THE COURT: And I'm not going to call her twice
4 to the stand.

5 MS. BARWICK: And I apologize. It's just never
6 been an issue before. As long as the child's subject to
7 cross-examination and we play the video later, we've
8 always introduced the video at a later point and done
9 that hearing at a later point. If it was -- I know he
10 doesn't want to call my victim as a witness and give up
11 last closing for no reason. The State would be more than
12 willing to put the victim back up on the stand after the
13 forensic interview is played so he could recross her if
14 he would like and that would solve that problem.

15 THE COURT: It would just be more efficient for
16 us for me to make that determination before the fact.
17 Who's going to be your first witness?

18 MS. BARWICK: The mother. I could try to get
19 that witness up here now from Greenville.

20 THE COURT: Well, I tell you what, you may, you
21 may ---

22 MS. BARWICK: She'll be subject to cross-
23 examination on that.

24 THE COURT: I understand. I understand. But
25 it may -- it could potentially affect specific questions

1 that he wanted to ask. It may not change your cross-
2 examination substantially or significantly at all. So
3 we'll cross that bridge when we come to it, okay?

4 MR. CANTRELL: And I think I probably can't
5 answer that until I hear her direct testimony.

6 THE COURT: Okay. Okay.

7 MS. BARWICK: And I think Your Honor would need
8 to review the tapes. And it's just always traditionally
9 been done at lunchtime so Your Honor would -- and I
10 apologize. I just didn't know better.

11 THE COURT: No, you're fine. I mean, every
12 case is different; it's like a snowflake. And the way I
13 like to do it is different from the way the other Judges
14 like to do it. I like to handle it all before we every
15 start. So then y'all know what's going to happen.

16 MS. BARWICK: Okay.

17 THE COURT: Y'all know what I'm going to let in
18 and what I'm not going to let in and you could tailor all
19 of your examination to that evidentiary ruling.

20 MS. BARWICK: Yes, sir.

21 THE COURT: I'm not saying it's right or wrong.

22 MS. BARWICK: Okay.

23 THE COURT: I'm fine with proceeding the way
24 you suggest.

25 MS. BARWICK: I can try to get her up here.

1 THE COURT: No, let's go ahead and just move
2 forward, okay?

3 MS. BARWICK: Okay.

4 THE COURT: You move forward like you
5 anticipated moving forward.

6 MS. BARWICK: Okay. All right. And then we
7 would -- just so I'm clear, we would provide the victim
8 to the Defense so he can cross-examine her after the
9 forensic is done.

10 THE COURT: Perhaps.

11 MS. BARWICK: Okay.

12 THE COURT: I suspect that he would need to do
13 that.

14 MS. BARWICK: Okay. All right.

15 THE COURT: But I can anticipate that there
16 could be circumstances where he may have one or two
17 questions that he didn't anticipate ---

18 MS. BARWICK: Yes, sir.

19 THE COURT: --- based on the ruling. Now, what
20 you can do, you can make an assumption. I haven't seen
21 it so I'm not prejudging it yet, but you can assume --
22 you've seen it and you're a seasoned attorney and you
23 know whether it's going to meet that criteria and you can
24 fashion your cross-examination based on your professional
25 opinion as to whether it's going to come in or not.

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1 Okay.

2 All right. Are we ready for the jury?

3 MS. BARWICK: Your Honor, if -- when the child
4 does testify, if would empty out the courtroom of any
5 non-essential people.

6 THE COURT: Okay. Okay. Will you bring the
7 jury in?

8 THE BAILIFF: Yes, sir.

9 (WHEREUPON, the jury entered the open court at
10 approximately 2:11 p.m.)

11 THE COURT: All right. Ladies and gentlemen,
12 welcome back. Thank you for being on time. I do
13 appreciate it. We are about to start the trial of this
14 case. But I find that a lot of times it's helpful for
15 me, before we start the trial, to tell y'all a little bit
16 about what we're about to do, about the process going
17 forward and about what your role is as jurors and
18 distinguish that from my role as the Judge in the case.
19 So let's start there.

20 Your role as jurors is to be the triers of fact.
21 You are the judges of the facts. You will determine in
22 this case what the facts are. You have the sole and
23 exclusive authority to do that. You will determine what
24 the facts are in this case by looking at all of the
25 evidence that is presented in the case. You'll have the

1 opportunity at the close of the case to go back into the
2 jury room and to analyze all of the evidences that has
3 been presented and to determine, based on the evidence,
4 what the facts are.

5 Again, nobody can tell you what the facts are. I
6 can't tell you what the facts are. The parties can't
7 tell you what the facts are. They will simply present
8 the evidence and you will decide, based on that evidence,
9 what the facts are, okay? And based on the facts you'll
10 determine whether the State has met its burden of proving
11 the Defendant guilty beyond a reasonable doubt.

12 Now, I am the judge of the law, which means that I
13 will tell you what the law is in the case. At the end of
14 the case, after the attorneys have made arguments, I will
15 give you a charge on all of the law, the law that is
16 applicable to this case. You'll apply the law as I give
17 it to you to the facts as you determine them to be and
18 come back with your verdict.

19 Now, I do not have any opinion about what the facts
20 of this case are. I do not have any stake in this trial.
21 It makes no difference to me what your determination is.
22 I am simply the umpire calling balls and strikes. I am
23 just an objective person making sure that both parties
24 have a fair trial. And, by extension, that y'all have a
25 fair trial as well.

1 So, if at any time in this case you think that I say
2 anything that gives you the impression that I have an
3 opinion about the facts or that I am biased one way or
4 the other, or that I have a preference one way or the
5 other, please ignore that because I truly don't. I truly
6 do not. During the course of this case you'll hear the
7 attorneys from time-to-time make motions or make
8 objections on the record to pieces of evidence or matters
9 of procedure, and I'm going to rule on those motions.
10 And I'm making a sterile and objective determination of
11 whether the evidence is admissible or not admissible
12 based on my understanding of the law, not based on any
13 preference one way or the other.

14 But do know when I rule one way or the other, I am
15 either going to sustain or overrule an objection, which
16 means I'm ruling for someone and against the other, but
17 don't think that that means that I'm prejudiced or biased
18 one way or the other. That's just a clinical
19 determination based on my understanding of the law.

20 Now, the way this -- the procedure that we'll follow
21 in this case is this. After I give you this short
22 opening statement, the attorneys have the opportunity to
23 make opening statements to you. Opening statements to
24 you are not evidence. The attorneys have the opportunity
25 essentially to introduce themselves and their theory of

1 the case, but know that that's not evidence, that's
2 simply argument. It's advocacy from the respective
3 attorneys. And you will listen to that, take it in the
4 context in which it's presented, meaning argument, not
5 evidence. Each side will have the opportunity to make
6 short opening arguments to you, opening statements. The
7 State will go first and then the Defense will have the
8 opportunity to make an opening statement.

9 And after you've heard opening statements, then the
10 State will have the opportunity to put into the record
11 its case in chief. That is, put witnesses on the stand,
12 begin to introduce evidence. The State goes first
13 because, as I told you before, the State has the burden
14 of proof. And because the State has the burden of proof,
15 they go first. They may put witnesses on the stand.
16 After that witness has testified and answered questions
17 from the State, then the Defense will have the
18 opportunity to cross-examine those very same witnesses.
19 The State will have the opportunity thereafter to conduct
20 -- to ask a few more questions based on what was elicited
21 in cross-examination and then under certain
22 circumstances, the Defense then has the opportunity to
23 ask questions about what may have been elicited in
24 redirect. Anyway, each side will have the opportunity to
25 fully examine the witnesses.

1 After the State has put into the record all of the
2 witnesses that it intends to present, then the Defense
3 will have the opportunity to put evidence into the record
4 as well; that is to call witnesses or to introduce other
5 objects, documents, tapes, into the record.

6 After the Defense has put all of the evidence into
7 the record that it intends to put into the record, then
8 the State has the opportunity, under certain
9 circumstances, to present evidence in reply. Ordinarily,
10 that's fairly short and it's responsive to something that
11 came out of the Defense's case. But they can put up
12 evidence in reply.

13 After you've hear any reply testimony or evidence
14 from the State, if any at all is presented, then we will
15 go to closing arguments. Now, closing arguments is just
16 like opening statements in that it's not evidence. At
17 that point, you will have heard all of the evidence and
18 the lawyers will simply be advocating their positions.
19 And what they'll be doing at that point is commenting on
20 the evidence that has been presented in the case and
21 making arguments based on what was elicited in the
22 record, on the stand.

23 After you've heard closing arguments from counsel,
24 then I will give you a closing charge on the law. The
25 reason I wait to the very end is because I am in the same

1 exact spot y'all are right now. That is, I don't -- I've
2 not listened to a single witness and I don't know anymore
3 about this case than y'all do. That is, I read the
4 indictments just like y'all did. I mean, I've heard some
5 arguments, but I really don't know anything more about
6 this case than y'all do. So I'm not in a position now to
7 tell you all of the law that applies to the evidence that
8 we're going to see. I have to wait, just like y'all do,
9 until the end to see what law is applicable to the
10 evidence that's presented. So I wait until the end and I
11 will give you that charge on the law.

12 Then what will happen is I'll send you back to your
13 jury room. When you go back to your jury room, I'll send
14 you a signal to begin your deliberations. And, again,
15 you'll apply the law as I give it to you to the facts as
16 you determine them to be and determine whether the State
17 has found the Defendant guilty beyond a reasonable doubt.

18 Now, please don't begin any deliberations until such
19 time as I tell you to at the end of the case. And that's
20 important, as I suggested to you before, because it's not
21 fair for you to begin deliberations, begin thinking about
22 the case, being making any decisions, until you've heard
23 everything that needs to be heard. You know from your
24 own common sense and your own personal experiences that
25 if you hear one side of a story you do not have an

1 intelligent, well-informed perspective on the facts.
2 Before you can make an intelligent and thoughtful
3 decision, you must hear all of the evidence that's
4 presented in the record. So please don't discuss the
5 case among yourselves. When you go home at the end of
6 the day, don't discuss it with anybody else. Just wait
7 until I give you the specific instructions to begin your
8 deliberations.

9 Now, right now as I sit here, I believe that the
10 State's going to have approximately ten witnesses, all
11 right, which should take us through tomorrow early
12 afternoonish. I don't know exactly because it could go
13 longer or short than I anticipate, but that's what I'm
14 guessing.

15 The Defense is going to have probably half that
16 many. Now, it may change; could have more, could have
17 less. But as I sit here right now, based on what I know,
18 the Defense may have about half that many if they elect
19 to put anything into the record. So that should run us
20 into Wednesday, I'm guessing. So hopefully, what will
21 happen is we'll finish the introduction of all the
22 witnesses and the testimony on Wednesday and I can -- we
23 can begin argument and charge on Wednesday and hopefully
24 you can be back with a verdict sometime Wednesday
25 afternoon. That's my hope. I don't know that we'll be

1 able to accomplish that. It could be -- it could last
2 longer, it could end a little bit more quickly than I
3 anticipate, but that's kind of what I'm thinking right
4 now.

5 During the course of the trial, we're going to take
6 regular breaks. I just physically have to take a break,
7 mentally, about every hour to hour and a half. So you
8 can expect we'll be taking those regular and routine
9 breaks. If at any point during the trial you need to
10 take a break more quickly than that or for whatever
11 reason, you just need to take a break, what I'd like for
12 you to do is get my attention or get the bailiff's
13 attention and let us know, I need to take a break.
14 Because, understand, that you are the most fourteen
15 important people in this courtroom, which means it's
16 important that y'all are comfortable and that you have
17 the ability to pay attention to the evidence that's being
18 presented. And if you're thinking to yourself, gosh, I
19 wish they'd just be quiet so that I could take a break,
20 I'm missing all of this because I've got something else
21 on my mind, then I'd rather you say, hey, I need to take
22 a break. We'll take a break, we'll refresh, we'll come
23 back in on the record.

24 I anticipate going, again -- I think I had answered
25 the question earlier in qualification -- going until

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1 about five. If I see that we're going to go beyond that,
2 I'll let you know. But I don't anticipate going beyond
3 five thirty or six in any event, unless something happens
4 that I'm just not anticipating. In the morning we'll
5 start at nine. And as I suggested take our regular
6 breaks, take a regular lunch, come back and continue with
7 the introduction of the testimony.

8 Now, what I need to do now is get the Clerk of Court
9 to swear you in. You've already taken an oath to tell
10 the truth in jury qualification, but now the Clerk is
11 going to get you to take an oath to truly and verily try
12 this case in accordance with the law as I give it to you.
13 So I'll turn it over to Mr. Welborn.

14 THE CLERK: If you would, please stand. And
15 again, after the oath is administered, answer by saying I
16 will. Raise your right hand.

17 You shall well and truly try the issue joined in
18 this case of the State versus Bobby Albert McCann, and a
19 true verdict render according to the law and evidence, so
20 help you God?

21 (WHEREUPON, all jurors answered answered in the
22 affirmative and were duly sworn.)

23 THE CLERK: Thank you. You may be seated.

24 THE COURT: Yes, ma'am.

25 MS. BARWICK: Thank you, Your Honor. Mr.

1 Cantrell.

2 **OPENING STATEMENT**

3 **BY MS. BARWICK:**

4 Good afternoon. I'm glad to get this thing started.
5 I hope y'all had a good lunch. My name is Jenny Barwick.
6 I'm an Assistant Solicitor in Pickens County. The Judge
7 has already introduced me. Some of y'all might wonder
8 what Solicitor's do. In some states they call us, DA's,
9 district attorneys or prosecutors. In South Carolina, we
10 happen to call ourselves solicitors. Our job is to
11 prosecute the criminals of this County and we represent
12 the State of South Carolina.

13 That being said, I'm going to jump right into this.
14 I like to move quickly. I'm sure y'all would like for me
15 to move quickly, so we'll just get this thing started.

16 The Defendant, Bobby McCann, who's seated right over
17 there, has been charged and indicted by the Pickens
18 County Grand Jury of three different offenses. The first
19 one is criminal sexual conduct first degree with a minor.
20 I like to call it CSC first, because that eliminates a
21 lot of that stuff, so that's what I mean when I say CSC
22 first.

23 There's two prongs to CSC first with a minor. The
24 first prong is if the victim is under the age of eleven.
25 The second prong, where you can also be guilty of CSC

1 first with a minor, is if the victim is under sixteen and
2 the Defendant has been convicted of a prior offense that
3 would classify him and put him on the sex offender
4 registry. The evidence will prove that he is, in fact,
5 on the sex offender registry and has been convicted of
6 one of those crimes. So he's charged with two counts of
7 CSC first. One for the minor being under eleven, and the
8 other one, for the minor being under sixteen and he has a
9 prior conviction. Same victim in both cases.

10 To prove CSC first, I have to prove to you that
11 there was a sexual battery. Don't think sexual battery
12 like beating and raping. A sexual battery is
13 penetration, however slight, into a person's body without
14 permission. In the State of South Carolina, we eliminate
15 the permission part when the child's a certain age. In
16 this case the child was between the ages of three and six
17 years old. I'm sorry, three and five years old. So CSC
18 first, under the first prong, under eleven. Have to
19 prove the child's under eleven years old, that there is a
20 sexual battery.

21 In this particular incident, it was digital
22 penetration of the victim's vagina, that's penetration
23 however slight. The second CSC first that he is indicted
24 for is under the second prong. The child was under the
25 age of sixteen and he had a prior qualifying conviction,

1 and the specific act we're talking about is oral sex on a
2 female, cunnilingus.

3 Third, he has a third indictment by the Grand Jury.
4 It is lewd act on a minor. Lewd act on a minor is when
5 the victim is under sixteen, the Defendant is over
6 fourteen and that person either commits a lewd or
7 lascivious act on the body or with the body of a child
8 under the age of sixteen, with the intent to arise his
9 own passions or lust or -- I think I said arise. I meant
10 to say arouse -- lust and passions or to arouse the lust
11 and passions of that child. It sounds complicated, but
12 it basically means he's doing something with this child's
13 body for the intent of arousing himself or that child.

14 That being said, we have all the elements. That's
15 what I have to prove to you. The State has to prove that
16 to you. And not only do we have to prove it to you, we
17 have to prove it beyond a reasonable doubt. Well, there
18 are very few things that we know in life with absolute
19 certainty. That's why it's a reasonable doubt. It's not
20 beyond all doubt. It's beyond a reasonable doubt that
21 you have to believe he's guilty beyond a reasonable doubt
22 in order to convict him. It's the kind of doubt that
23 would, after you hear all the evidence, hesitate -- make
24 you hesitate to act in the most important of your own
25 affairs. So it's not sitting here listening to one

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1 witness, and going, yes, guilty. And then the next, not
2 guilty. It's after listening to everything, our side and
3 if the Defense chooses, their side, and getting back
4 together in that jury room, all twelve of you, because
5 two of you won't be in there. All twelve of you have to
6 unanimously decide that he's guilty beyond a reasonable
7 doubt. So it's after discussing with each other. We
8 like to say twelve minds are better than one. And after
9 y'all discuss the evidence that you heard, if you're left
10 firmly convinced of his guilt, you must return a verdict
11 of guilty. If you're not firmly convinced, just one of
12 you, he has to be turned free. The State understands
13 that's a heavy burden and the State accepts that and is
14 convinced at the end of this, you will be, too.

15 The Judge kind of told you a little bit about the
16 structure of a trial. He's a Judge of the law. He knows
17 what comes into evidence and what gets kept out. You're
18 the judges of the fact. Y'all judge what happened. Is
19 this man guilty of what he's been indicted for?
20 Sometimes I'll object, sometimes Mr. Cantrell might
21 object. The Judge says, sustained, that means he agrees
22 with the objection. It doesn't come in. If he says,
23 overruled, then it comes in. It took me a little bit to
24 get that together in law school. I said, sustained
25 overrules. And then I finally got it. So here I am

1 today telling y'all about it.

2 I have found in prosecuting these kind of crimes,
3 these are crimes of shame, they're crimes of guilt,
4 they're crimes of fear. The shame that the child feels
5 for having been molested, the guilt that the child feels
6 and the fear that the child feels when someone they know
7 is doing this to them. They're not crimes like
8 burglaries or armed robberies where you see them on
9 videotape, or crimes where fingerprints are left, none of
10 that, or even bruises, like CDVs, criminal domestic
11 violence. These are crimes that occur behind closed
12 doors by people who are predators, people who choose
13 their victims, and choose them wisely in the hopes of
14 never getting caught.

15 I'll tell you a little bit about what the evidence
16 is going to show. I don't want to go into it, you'll
17 hear it from the witness stand. But what the evidence
18 will show, back on March 15th of 2008, three-year-old
19 ██████ was introduced to her grandmother's new
20 boyfriend. Her mother had ██████ with a gentleman who is
21 now currently incarcerated. Her mother then had another
22 child named Nick. He goes by Nicky sometimes. He's
23 ██████'s younger brother with another man, Stephen. The
24 events will show that that man's not in her life anymore.
25 The evidence will further show that a third man came into

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1 their lives. Mom's new boyfriend, Larry Pendegraff. He
2 was living with the mom at the time. Now, she's with a
3 fourth man, David Bagwell. The evidence will show at the
4 time of this incident, during this two and a half, three
5 year span, that [REDACTED] s mom was working three jobs,
6 several hours. Didn't have a lot of family around; had
7 her mother. Her mom was the babysitter. And who was
8 living in that home with the mother, the Defendant, a
9 convicted sex offender.

10 That being said, between those two and a half to
11 three years, the evidence will show that this Defendant
12 had unlimited access to that child. And in December of
13 2010 that child was able to finally come forward -- I
14 apologize -- December of 2009 -- was able to finally work
15 up the courage, because she already told her grandma what
16 happened and nothing was done, finally worked up the
17 courage to tell her mother. And that's what started the
18 ball rolling and that is why you're here.

19 And I'm going to go ahead and warn you, I'm not
20 happy with the mother. I don't like her. I think she's
21 terrible. Not happy with the grandmother either, don't
22 like her. I think she's terrible. I do not think these
23 children are safe with either of them. Y'all are going
24 to find and probably feel the same way, but that's not
25 why we're today. We are here to determine if he did what

1 he has been indicted for doing. No, mother and
2 grandmother did not make the right choices. That's
3 probably why we're here in the first place. But listen
4 patiently from this witness stand as little [REDACTED] [REDACTED]
5 tells you what happened to her. In these kinds of cases,
6 you can choose to believe just her testimony to convict
7 him. There does not need to be corroborating evidence.
8 So everything else is everything else. Listen to the
9 victim tell you what happened for the last two and a half
10 to three years.

11 I thank you for your time. I know there's lots of
12 other things y'all would rather be doing and I was there
13 when some of you could have been excused and chose not to
14 be. So thank you for your service.

15 THE COURT: Mr. Cantrell.

16 MR. CANTRELL: Please the Court.

17 THE COURT: Yes, sir.

18 MR. CANTRELL: Ms. Barwick.

19 **OPENING STATEMENT**

20 **BY MR. CANTRELL:**

21 We've been introduced briefly. I am David Cantrell,
22 the attorney for this gentleman right here, Bobby McCann.
23 He's the person that has been charged. He's the person
24 that has had allegations made against him in this case.
25 You've learned a little bit about Bobby already. And

1 part of that is that he has a prior conviction. But the
2 fact of the matter is that is a seventeen-year-old
3 Peeping Tom conviction. The Legislature of the State of
4 South Carolina saw fit to categorize that as a sex
5 offense, not just his, any Peeping Tom, regardless of the
6 circumstances, and require those people to be on the sex
7 offender registry. That's pretty harsh. You can agree
8 or disagree with that statute, but that's what has him on
9 the sex offender registry, Peeping Tom.

10 Now, you've been told that this young girl's mother
11 had her in the home with a sex offender, that's what
12 they're talking about, someone that was convicted
13 seventeen years ago of Peeping Tom. But, more
14 importantly, Bobby's a hardworking man, earns a living,
15 works hard. He came into the life of all of these people
16 as you've been told in mid -- early to mid 2008. Now, of
17 course, the indictment says it starts in 2007. Well, if
18 it did, it couldn't have been him, he wasn't there. But
19 the indictment says these allegations go over a two-year
20 period. You're going to have to try to figure that part
21 out based on the evidence that you hear.

22 A little bit more about this process that you're
23 involved in. The criminal process starts with something
24 happening or something allegedly happening and it gets
25 reported. It goes to law enforcement. Law enforcement

1 investigates. It submits paperwork when they see fit to
2 a Magistrate. A warrant is issued. The person is
3 arrested. Then the case goes to the Solicitor. And
4 eventually, over a period of time -- in this case, the
5 allegations took place in December of 2009, or before,
6 and it comes to court here April of 2012.

7 Now, one thing I will disagree with my colleague
8 here on, who is a very good Solicitor, very good
9 Solicitor, when she told you she prosecutes criminals.
10 Just because somebody's being prosecuted does not mean
11 they're a criminal. Bobby McCann is presumed innocent.
12 People come into court accused of crimes and are innocent
13 and are not criminals. So a citizen, a hardworking man,
14 is being prosecuted at this point.

15 It is up to you to listen to all of the testimony
16 and then make a determination beyond a reasonable doubt
17 of guilt. If not, then you return a verdict of not
18 guilty. And one thing I'm going to caution you on -- and
19 I use the word caution, not to be condescending because
20 if I were sitting there someone would need to caution me
21 about this, you've heard the allegations, you've heard
22 what's been said and I can see one of several things
23 happening. One is, if you determine after all the
24 evidence that there is guilt beyond any reasonable doubt,
25 then you're going to find Bobby guilty. But what you may

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1 do and you have to be sure and basically just think it
2 through -- and, again, I would have to if I were sitting
3 in one of those chairs -- is if you decide that this
4 little girl has been victimized in some way, you're going
5 to want to do something. You are going to want to do
6 something to protect this little girl. I've got
7 children. I've got grandchildren. You may well have
8 children and grandchildren and you want to protect
9 children. But your job in this courtroom is more limited
10 than that. And it's sad there's not more that you can
11 do. If you decide that this girl has been victimized,
12 but there's not proof beyond a reasonable doubt that
13 Bobby did it, you're still going to want to do something
14 to protect her, and you can't. You cannot do that. That
15 will have to be someone else's job because your job is
16 only to determine that this man is guilty beyond a
17 reasonable doubt and find him guilty or find him not
18 guilty. You may even decide, well, I'm not sure anything
19 really happened to her, but this poor child is up here
20 talking about it. This poor child has reported it. This
21 child has been in this lifestyle or in this home or in
22 this situation for years, so something's got to be done.
23 Well, there, again, it's not your job, unfortunately.

24 So I think when you leave this place you're going to
25 go out a little dissatisfied no matter what, but you

1 still must do your duty. You still must do what is
2 legally and morally your obligation, and that is to
3 listen to all of this testimony. Then and only then can
4 you reach a verdict, if it is beyond any reasonable
5 doubt, based on everything you hear, and, yes, you can
6 believe just this little girl, and you may choose to, but
7 you may not choose to. And you've got to think and
8 consider all of the evidence, and if it's not beyond a
9 reasonable doubt, you find Bobby McCann not guilty. And
10 that is what I'm going to be asking you to do based on
11 the evidence that you will be hearing.

12 We do appreciate your attention. I'm not going to
13 go back over the information the Judge gave you. What he
14 said is exactly right. Your duties, his duties, the way
15 the trial goes. I'm not going to go back over what Ms.
16 Barwick told you about the charges because she didn't
17 misstate them. She stated what the law is, I believe,
18 accurately. At the end of this trial, the Judge will
19 repeat that to you and that's what you go by. I have
20 nothing else to repeat to you, except our thanks and ask
21 you to listen to this testimony. Thank you.

22 THE COURT: All right. Ms. Barwick, you may
23 call your first witness.

24 MS. BARWICK: The State would call Toni Durnil
25 to the stand.

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1 THE CLERK: Place your left hand on the bible
2 and raise your right.

3 Do you solemnly swear or affirm the testimony you're
4 about to give will be the truth, the whole truth and
5 nothing but the truth, so help you God?

6 THE WITNESS: Yes, sir.

7 THE CLERK: If you would have a seat and state
8 your name for the record, please.

9 THE WITNESS: My name is Toni Durnil.

10 TONI DURNIL,

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MS. BARWICK:

14 Q. Ms. Durnil, how many kids do you have?

15 A. I have five. I have my two children ---

16 Q. What are their names?

17 A. [REDACTED] and Nicholas.

18 Q. Okay. And then your other three?

19 A. My other three are step-children. I've got Logan,
20 Thomas and Austin.

21 Q. Who's their father?

22 A. David Bagwell.

23 Q. Who's David Bagwell to you?

24 A. My boyfriend.

25 Q. Okay. When did y'all start dating?

1 A. We started dating in October 30th of 2010.

2 Q. And [REDACTED] when's her birthday?

3 A. Her birthday is December [REDACTED] of '[REDACTED]

4 Q. Are you a little nervous today?

5 A. Yeah, because I get my son and my daughter's name --
6 my daughter's birthdays confused.

7 Q. Okay. And when's Nick's birthday?

8 A. Is December [REDACTED] of '[REDACTED]

9 Q. Okay. Let's back up to -- a little bit. Who's
10 [REDACTED]s father?

11 A. John Howard.

12 Q. And where is he right now?

13 A. He's in prison.

14 Q. For what?

15 A. For drugs.

16 Q. Okay. Nick's father, who's his father?

17 A. He's Robert Price.

18 Q. Where's he right now?

19 A. He's in Seneca, South Carolina. He has nothing to
20 do with Nicky.

21 Q. What about [REDACTED]?

22 A. [REDACTED]s father had nothing to do with her either.

23 Q. Okay. And back in, let's say 2009, were you dating
24 David then, who were you dating?

25 A. I was dating Larry Pendergraft.

- 1 Q. Okay. When did you start dating him?
- 2 A. I started dating him around March of '08. It was
- 3 like the -- first mama and Bobby got together of '08, and
- 4 then a week afterwards, I got with Larry.
- 5 Q. Okay. And you and Larry broke up?
- 6 A. Yes, ma'am.
- 7 Q. When did y'all break up?
- 8 A. We broke up around -- if I'm not mistaken, I think
- 9 it's September or the beginning of October of 2010.
- 10 Q. Okay. And you started dating David at the end of
- 11 October of 2010?
- 12 A. Yes, ma'am.
- 13 Q. Okay. Was Larry living with you?
- 14 A. At that ---
- 15 Q. Back then, when you were dating him?
- 16 A. Back then, yes, ma'am.
- 17 Q. And now you're living with David?
- 18 A. Yes, ma'am.
- 19 Q. Why did you break up with Larry?
- 20 A. Because he was doing drugs.
- 21 Q. Okay. Well, was there a final straw or ---
- 22 A. Yes. When he took my car and got it crushed.
- 23 Q. For scrap?
- 24 A. For scrap. Yeah, for scrap.
- 25 Q. All right. Tell the jury a little bit -- well, are

1 you currently working?

2 A. No, ma'am.

3 Q. And is your boyfriend David working?

4 A. No, ma'am. He's on disability.

5 Q. And y'all have five kids between y'all right now?

6 A. Yes, ma'am.

7 Q. You have a disability?

8 A. I do.

9 Q. Tell the jury a little bit about that?

10 A. I have a hard time understanding things and a hard
11 time reading, math, anxiety.

12 Q. Okay. That kind of thing?

13 A. That kind of thing.

14 Q. Do you know the Defendant?

15 A. I do.

16 Q. What's his name?

17 A. Bobby McCann.

18 Q. How do you know him?

19 A. He is my mother's boyfriend.

20 Q. When did they get together?

21 A. March of -- March 15th of '08, 2008.

22 Q. How do you remember that exact date?

23 A. Because my daughter's birthday is the [REDACTED].

24 Q. Of?

25 A. Of [REDACTED].

- 1 Q. Okay. When did they move in together?
- 2 A. Like two months when they got together. I think it
- 3 was about May of 2009.
- 4 Q. All right.
- 5 A. 2008. Excuse me. I'm sorry.
- 6 Q. That's okay. It's find to correct me. And they
- 7 live together now, Bobby and your mother?
- 8 A. Yes, ma'am.
- 9 Q. Okay. And the Defendant and your mother, they moved
- 10 in together you said in May of 2008?
- 11 A. Yes, ma'am.
- 12 Q. Where did they move in to?
- 13 A. Cecil Durham's house.
- 14 Q. Okay. And who is Cecil Durham?
- 15 A. That is Bobby's boss man.
- 16 Q. Before your mother moved in with Bobby, who was she
- 17 staying with?
- 18 A. She was staying with me.
- 19 Q. Now, describe for the jury a little bit -- yeah. Go
- 20 ahead. I cut you off.
- 21 A. Okay. She was staying with me and my two children
- 22 and Larry.
- 23 Q. And when she started dating the Defendant, she moved
- 24 in with him. What's their financial situation like?
- 25 Does your mom work?

1 A. No, she don't work. She depends a lot on Bobby.

2 Q. Okay. And the Defendant works?

3 A. Yes, ma'am.

4 Q. Does the Defendant's job make pretty good money?

5 A. Sort of, kind of.

6 Q. Okay. Back in March and May of 2008, can you tell
7 the jury about how many hours a week you were working?

8 A. I was working about sixty hours a week.

9 Q. Okay. How many different jobs?

10 A. I worked three different jobs.

11 Q. What kind of things did you do?

12 A. I was working in a nursing home in Seneca, Oconee
13 Medical Center, and I worked for this elder lady getting
14 -- putting her to bed and walking her and everything.

15 And I took care of this man at night, putting him to bed.

16 Q. Do you have a lot of family from around here?

17 A. Not really.

18 Q. Who do you have?

19 A. My mother and my aunt by marriage. But she is very
20 sick. She's legally blind in one eye.

21 Q. So when you would work, who would watch your kids?

22 A. My mother.

23 Q. How often would she watch your kids?

24 A. Often, a lot.

25 Q. And when we say kids, back in 2009 ---

- 1 A. It would be just my two.
- 2 Q. [REDACTED] and ---
- 3 A. And Nicholas.
- 4 Q. Okay. How often do you think, about every day or
- 5 how much in the week?
- 6 A. About every day.
- 7 Q. Okay. Would your children stay the night over
- 8 there?
- 9 A. Yes, ma'am.
- 10 Q. Did you, at the time, have any knowledge that he was
- 11 on the sex offender registry?
- 12 A. I did.
- 13 Q. But you still felt comfortable letting the kids go
- 14 over there?
- 15 A. I talked to my mother and she was -- she said that
- 16 she would keep an eye on the kids and make sure that
- 17 nothing would happen to them.
- 18 Q. And that's why you allowed it?
- 19 A. That's why I allowed it. Because she says she loves
- 20 her grandchildren, that she won't ever hurt them in any
- 21 way.
- 22 Q. Okay. Well, let me ask you this. How was [REDACTED]'s
- 23 relationship with the Defendant?
- 24 A. She loved him. That was her Papa. She looked up to
- 25 him like a grandfather.

1 Q. She called him Papa?

2 A. She called him Papa. She really loved him.

3 Q. What kind of things would they do together?

4 A. They would like hang out and he'd buy her things.
5 Bought her a lot of things actually.

6 Q. Did he buy Nicholas things as well?

7 A. Not really, no. Not at all. I actually asked my
8 mother and I asked her why has Bobby bought [REDACTED] stuff
9 and not Nicholas. And she said, well, because he's a
10 baby.

11 MR. CANTRELL: Your Honor, I'm going to object
12 to hearsay.

13 Q. That's okay. We just won't say what your mom said.
14 Let's talk about staying the night a little bit. How
15 many bedrooms were in your mother's and the Defendant's
16 house?

17 A. There are three bedrooms. Two rooms had two beds.

18 Q. Two beds in each room so four beds or one bed in
19 each room?

20 A. One bed in each room.

21 Q. What about the third bedroom, any bed in there?

22 A. No, ma'am. It was like a play area.

23 Q. Okay. And who -- did they just live with
24 themselves?

25 A. Yes, ma'am.

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1 Q. And was there a couch?

2 A. There was a couch in the living room and there's a
3 kitchen, a bathroom.

4 Q. And the bed that your mom and the Defendant slept
5 in, what size bed was that?

6 A. A king-sized bed.

7 Q. You remember back in about December of 2009 having a
8 conversation with [REDACTED] that was disturbing?

9 A. Yes, ma'am.

10 Q. Tell the jury about that conversation, where and
11 when, you know, that kind of thing.

12 A. It was in September -- no, I'm sorry. It was in
13 December 29th of 2009. My daughter and I were at Country
14 Corner, a gas station in Pickens, and my boyfriend at the
15 time, Larry, he went into the store and my children
16 [REDACTED] and Nick -- Nicky was asleep in the back of the
17 car in his carseat. And [REDACTED] asked me, Mama, ---

18 MR. CANTRELL: Your Honor, object to hearsay.

19 MS. BARWICK: It's a question. It's not a
20 statement.

21 THE COURT: Okay. I'm not certain -- I think
22 I'm going to sustain that objection.

23 Q. Who brought up the conversation?

24 A. She did.

25 Q. Okay. And in that conversation did she disclose any

1 sexual abuse to you?

2 A. Yes, ma'am.

3 Q. Did she say where the abuse happened?

4 A. Yes, ma'am.

5 Q. Where did she say the abuse happened?

6 MR. CANTRELL: Your Honor, we're still in the
7 hearsay category, as what she said, what she described,
8 so I still believe it's the same thing. And we've got
9 leading questions each time, also.

10 THE COURT: Okay. Yes, ma'am, I know you're

11 ---

12 MS. BARWICK: Time and place, Your Honor, the
13 exception for CSC cases.

14 THE COURT: Okay. All right. I'm going to
15 overrule the objection. You may proceed.

16 MS. BARWICK: Thank you, Your Honor.

17 Q. Did she say where the abuse occurred?

18 A. Yes, ma'am.

19 Q. And where did she say the abuse occurred?

20 A. She said it happened at my mother's house.

21 Q. The house she shares with the Defendant?

22 A. Yes, ma'am.

23 Q. When she was telling you this, how was she acting?

24 A. Very scared.

25 Q. Okay.

1 A. She was scared that she was going to get in trouble
2 and the person that done this to her was going to get in
3 trouble. And she would just keep on saying it. I'm
4 sorry.

5 Q. You can't say what she said. I know.

6 A. I know.

7 Q. And in response to this conversation you had with
8 her, what did you do?

9 A. I took her to the ER. I took her to Oconee Medical
10 Center.

11 Q. Okay. When you took her to Oconee, who was with
12 you?

13 A. It was -- I dropped Larry and Nicky off and then I
14 took -- me, my daughter and my friend Carla, I picked her
15 up, and we went to the ER.

16 Q. How come you picked -- why did you pick ---

17 A. Because when [REDACTED] told me what happened, I was in
18 shock and I was really upset, so my friend Carla kind of
19 helped me out, coached me through it.

20 Q. Right. Well, what time do you think you arrived at
21 the Oconee Medical Center?

22 A. Eight o'clock that night.

23 Q. Okay. Did you and [REDACTED] speak with the nurse
24 there?

25 A. Yes, ma'am.

1 Q. Did y'all also get to meet with the doctor?

2 A. Yes, ma'am.

3 Q. About what time do you think you met with the doctor
4 with [REDACTED]?

5 A. I would say like around, I think, three o'clock in
6 the morning. We didn't get out until like four in the
7 morning.

8 Q. Right. Did you ever that evening, or I guess we're
9 into the early morning hours of the 30th at this point,
10 did you notify law enforcement that morning?

11 A. No, ma'am, I didn't.

12 Q. What about that afternoon?

13 A. That afternoon, okay, my friend Carla, she called
14 and the police was waiting on me. I was working another
15 job and I had to leave my last job I work at.

16 Q. About what time do you -- well, we'll back up a
17 little bit. Your friend called the police?

18 A. Yes, ma'am.

19 Q. You did not call law enforcement?

20 A. No, ma'am.

21 Q. Had you reported what [REDACTED] had said to anybody
22 prior to your friend calling law enforcement?

23 A. No, ma'am.

24 Q. Okay. Was that a confusing question?

25 A. Yeah.

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- 1 Q. Before Carla called law enforcement, had you
2 notified DSS or law enforcement or anybody else of the
3 abuse?
- 4 A. No, ma'am.
- 5 Q. What time were you supposed to be at work?
- 6 A. The night shift, I was supposed to be up there at
7 seven thirty, seven, seven thirty.
- 8 Q. About what time do you think you spoke with law
9 enforcement?
- 10 A. It was right at seven thirtyish, seven thirty-five,
11 somewhere around there.
- 12 Q. And where did you speak with them at?
- 13 A. At Carla's house.
- 14 Q. Did they call you to come over there or did they
15 just happen to be there when you got there?
- 16 A. They happened to be there.
- 17 Q. Did you tell law enforcement what [REDACTED] had told
18 you?
- 19 A. Yes, ma'am.
- 20 Q. Do you remember that deputy's name?
- 21 A. No, ma'am, I don't.
- 22 Q. After that point in time, do you recall ever
23 speaking with this lady seated right here, Detective Rita
24 Burgess?
- 25 A. Yes, ma'am.

1 Q. About when do you think you spoke with her?

2 A. It was like a couple of days after, about three,
3 four days afterwards.

4 Q. Okay. Did you tell Detective Burgess what your
5 daughter had conveyed to you?

6 A. Yes, ma'am.

7 Q. Did you give a statement?

8 A. Yes, ma'am.

9 Q. Between your daughter's initial disclosure of the
10 sexual abuse and the time that you spent with Detective
11 Burgess, did your daughter go into further details with
12 you?

13 A. Yes, ma'am.

14 Q. Did she tell you additional places where the abuse
15 happened?

16 A. Yes, ma'am.

17 Q. What did she say?

18 A. It happened at Dollar General in Pickens -- well, in
19 Six Mile, I'm sorry, and at Durham's Gas Station at Six
20 Mile. At my mother's bedroom and the living room of my
21 mother's house and in the bathroom. And on the swing
22 that I got for her for Christmas.

23 Q. Okay. That Christmas that just happened?

24 A. Yes, ma'am.

25 Q. Okay. Who brought up those conversations?

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- 1 A. She did.
- 2 Q. [REDACTED] did?
- 3 A. Uh-huh (affirmative.)
- 4 Q. And when she spoke with you about that, did you keep
- 5 notes or anything of those conversations?
- 6 A. I did. Every time she said something, I wrote it
- 7 down in like a little journal and I gave it to Ms. Rita
- 8 Burgess.
- 9 Q. Okay. After [REDACTED] disclosed to you, did you notice
- 10 any changes in her behavior?
- 11 A. Yes, ma'am. There was a lot of changes. That she
- 12 was wetting the bed and she was always protecting her
- 13 private area. If you touch her, she'll jump. And she's
- 14 scared of the dark.
- 15 Q. Were those things she was doing before?
- 16 A. She had never done that. Plus, she was grinding her
- 17 teeth, and she'd never done that before.
- 18 Q. Do you remember around the time the Defendant was
- 19 arrested?
- 20 A. Yes, ma'am.
- 21 Q. After he was arrested, did you allow contact between
- 22 your child and him?
- 23 A. Yes, ma'am.
- 24 Q. About when was that?
- 25 A. That was like, I want to say like -- probably like

1 around nine or ten months after it happened.

2 Q. Okay. When was the first time [REDACTED] saw the
3 Defendant after his arrest?

4 A. It was at Trunk or Treat in 2010, October 30th.

5 Q. Okay. And that's when you started dating David?

6 A. Yes, ma'am.

7 Q. And how did she -- how did your daughter come to see
8 the Defendant? How did they have contact with each other
9 that day?

10 A. Because when they were playing games and we were
11 taking the kids to get their candy and my mother was
12 passing out candy and Bobby was standing right next to my
13 mom.

14 Q. Okay. After the Trunk or Treat, I'm saying that
15 right, Trunk or Treat?

16 A. Trunk or Treat.

17 Q. After Trunk or Treat, did you allow your daughter to
18 again have contact with the Defendant?

19 A. Yes, ma'am.

20 Q. And when was that?

21 A. That was a couple of days or a day after Trunk or
22 Treat.

23 Q. Okay. And how many times did your child have
24 contact with the Defendant between Trunk or Treat, and
25 say, around Thanksgiving time?

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1 A. It was about five, six times.

2 Q. So where would these contacts take place?

3 A. A couple at my house and a couple at their house.

4 Q. Why did you allow your child to continue to have
5 contact with him?

6 A. Because I love my mother.

7 Q. Okay.

8 A. And I want -- I just love her, you know, and ---

9 Q. Do you need some water?

10 A. Yeah.

11 Q. Take your time.

12 A. It hurt so bad, you know. Thank you, sir. Because
13 I tried -- I begged her and begged her to leave him, I'll
14 take care of her, and she wouldn't.

15 Q. Your mom wouldn't leave him?

16 A. No, ma'am. I'm sorry for crying.

17 Q. That's okay. During this time period, did your mom
18 ever have conversations with [REDACTED] about the abuse?

19 A. Yes, ma'am.

20 Q. What kinds of things would she tell her?

21 MR. CANTRELL: Objection, Your Honor. Again,
22 this is hearsay and this not related.

23 MS. BARWICK: If we could approach, Your Honor.

24 MR. CANTRELL: This is two other people have a
25 conversation.

1 THE COURT: Yeah, come around.

2 (WHEREUPON, Ms. Barwick and Mr. Cantrell approached
3 the bar.)

4 THE COURT: All right. With respect to that
5 question you just asked as to what her mother
6 specifically said, I'm going to overrule the objection
7 and find that it's not offered to prove a fact of the
8 matter asserted or the truth of the matter asserted.
9 Therefore, you can ask that question.

10 MS. BARWICK: Thank you, Your Honor.

11 Q. Ms. Durnil, did your mother say anything to [REDACTED]
12 about this incident?

13 A. Yes, she said that -- can ---

14 Q. Yes, you can. Go ahead and say it.

15 A. That, you know, Papa never done it and that blame it
16 on somebody else.

17 Q. Okay. And did your mom say anything to you?

18 A. Yes.

19 Q. What kind of things did she convey to you?

20 A. She told me that if I don't drop the charges that
21 she was going to get DSS after me and she was going to
22 have friends that's going to be on her side. And that
23 she has pictures.

24 Q. Pictures of what?

25 A. Of us all hanging out.

1 Q. Okay. Were you scared that your kids might get
2 taken away?

3 A. Yes. I love my children and I would do anything for
4 them.

5 Q. Let's see. Do you remember when -- some of the
6 contact would occur at the Defendant's house, too; right?

7 A. Yes, ma'am.

8 Q. And what kinds of things would they do over there?

9 A. Watched TV. We'd play the Wii at my house. I
10 cooked them supper and we had -- the children were
11 playing on the swing at my mother's house.

12 Q. Is that the same swing that [REDACTED] told you about
13 that it happened on?

14 A. Yes, ma'am.

15 Q. And you saw him pushing her on that swing after he
16 was arrested?

17 A. Yes, ma'am.

18 Q. And you allowed that?

19 A. Yes, ma'am.

20 Q. Do you remember getting any kind of gifts from the
21 Defendant around this time period when you're hanging out
22 with him?

23 A. Yes, ma'am. My boyfriend at the time, Larry, he
24 scrapped my car for metal and ---

25 Q. You can say Bobby.

1 A. Okay. Bobby gave me a car.

2 Q. Do you remember towards the end of November [sic]
3 calling Detective Burgess?

4 A. Yes, ma'am.

5 Q. And when I say the end of December, I mean, the end
6 of December 2010 after his arrest?

7 A. Yes, ma'am.

8 Q. And you called her. Why did you call her?

9 A. Because my daughter was saying that Bobby didn't do
10 it.

11 Q. Okay. And you told Detective Burgess this?

12 A. Yes, ma'am.

13 Q. After you told Detective Burgess this, did you go
14 and meet with Detective Burgess?

15 A. I didn't, but my daughter and my boyfriend, David
16 Bagwell, did.

17 Q. So you didn't go down to meet with Detective
18 Burgess?

19 A. No, ma'am. I was at work.

20 Q. Okay. And they met with her that same day you
21 called her?

22 A. I think it was a day after.

23 Q. Okay. Do you remember being contacted by DSS and
24 Detective Burgess after that?

25 A. Yes, ma'am.

1 Q. What did they tell you? Did they give you any
2 instructions?

3 A. That I cannot have my children around him.

4 Q. Did Detective Burgess give you any additional
5 instructions?

6 A. I cannot be around my mother or Bobby.

7 Q. And when was that meeting that you met with
8 Detective Burgess, do you remember around when?

9 A. I think that was in 2011 or 2000 and -- I think I
10 was ---

11 Q. How many months after you called Detective Burgess
12 to say that [REDACTED] s taking it back?

13 A. Twice?

14 Q. No.

15 A. What now?

16 Q. Here's the question. You just said towards the end
17 of November of 2010 you called Detective Burgess.

18 A. Uh-huh (affirmative).

19 Q. How many months after that was it before Detective
20 Burgess and DSS contacted you about him having contact
21 with your child?

22 A. I think it was like a couple of days after.

23 Q. After Detective Burgess gave you the instructions
24 not to allow your mother or the Defendant near your
25 children, or near [REDACTED] did you again allow your mother

1 around Ericka?

2 A. Yes, ma'am.

3 Q. And when was that?

4 A. That was ...

5 Q. Do you remember what time of year it was?

6 A. It was like winter because it was ...

7 Q. Okay. Well, you might remember. We'll get back to
8 that. Why did you go over to your mother's house?

9 A. Of 2011, right when all of this ---

10 Q. The second time, after DSS and Detective Burgess
11 told you no more contact with your mother and Ericka,
12 when's the next time you had contact with her?

13 A. (No verbal response).

14 Q. Do you remember why you were over there?

15 A. Yes. Because I was begging my mama to leave Bobby.

16 Q. Where was David, your boyfriend?

17 A. David and I had been having an argument.

18 Q. Okay. So where were you -- were you still living
19 with David at that point or had you moved out?

20 A. We got into a fight and I left.

21 Q. Okay. And where did you stay?

22 A. I stayed at -- right here is like my mother's house.
23 Right behind it is a friend's house of my mom's.

24 Q. And what was that friend's name?

25 A. Donnie.

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- 1 Q. Donnie what?
- 2 A. I forgot his last name.
- 3 Q. Do you know his daughter's name?
- 4 A. Yes, Danielle.
- 5 Q. Okay. So you were staying at the house behind the
- 6 Defendant's house?
- 7 A. Yes, ma'am.
- 8 Q. And you went over to your mother's house. Was the
- 9 Defendant there?
- 10 A. No, ma'am. He was at work.
- 11 Q. And you still don't remember the time?
- 12 A. Yes, it was Christmas. I just remembered that it
- 13 was Christmas.
- 14 Q. Christmas of what year?
- 15 A. Christmas Eve of 2011.
- 16 Q. So this past Christmas?
- 17 A. Yes, ma'am.
- 18 Q. After Detective Burgess told you no?
- 19 A. Yes, ma'am.
- 20 Q. Do you remember coming up to the Solicitor's office
- 21 ---
- 22 A. I do.
- 23 Q. Around that same time?
- 24 A. Yes, ma'am.
- 25 Q. Was that before or after you saw your mother?

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1 A. That was before I seen my mother.

2 Q. It was before Christmas?

3 A. No, it was after Christmas.

4 Q. Well, I'll ask you this. Who told you -- did anyone
5 tell you to come to the Solicitor's office?

6 A. Yes. Actually, I went down to my mom's and Bobby's
7 lawyer, Alexander, Mr. Alexander, Steven Alexander,
8 because my mama told me to drop the charges and that's
9 what I tried to do, I tried to drop the charges. She
10 said, go over there and talk to Mr. Steven Alexander.
11 And so I went and talked to him and then my mother -- no,
12 I'm sorry -- Mr. Alexander said, well, you go talked to
13 the Solicitor's office ---

14 MR. CANTRELL: Objection, Your Honor.

15 THE COURT: Okay. I'll sustain that objection.

16 Q. Okay. So why did you come to the Solicitor's
17 office?

18 A. Because that's what Mr. Alexander told me to do.

19 Q. And you came up to the Solicitor's office and what
20 was the purpose of your visit to the Solicitor's office?

21 A. To say that [REDACTED] is taking it back. She's taking
22 it back.

23 Q. Recanting?

24 A. Recanting.

25 Q. So did you bring [REDACTED] up to the Solicitor's

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1 office?

2 A. No, ma'am. It was just me and David.

3 Q. Were you told to bring her up to the Solicitor's
4 office the next day?

5 A. The next day, yes.

6 Q. Did you bring her up to the ---

7 A. No, I didn't because we didn't have no gas. We ran
8 out of gas.

9 Q. How far away were you living from the Solicitor's
10 office?

11 A. Not that far. About -- just from -- about ten
12 miles, something like that. Not that far.

13 Q. When you didn't show up to the Solicitor's Office,
14 did Detective Burgess come out to meet with you?

15 A. Yes, ma'am.

16 Q. And did she meet with [REDACTED], as well?

17 A. Yes, ma'am.

18 Q. Did your mother ever tell you about putting cream on
19 [REDACTED]'s privates?

20 A. No, ma'am, she did not.

21 Q. At the time -- we're talking about at the time that
22 [REDACTED] disclosed. Did your mom, before [REDACTED] disclosed,
23 ever tell you about that cream?

24 A. [REDACTED] did.

25 Q. Okay.

1 A. My mother had it. I asked my mother why did you put
2 cream on [REDACTED]'s private area?

3 Q. Okay. So you had to ask her. She didn't tell you?

4 A. She didn't tell me. No, ma'am.

5 MS. BARWICK: Just one moment, Your Honor. I'm
6 sorry. Nothing further at this time.

7 THE COURT: Mr. Cantrell, how long do you
8 anticipate cross-examination?

9 MR. CANTRELL: A few minutes. A little while,
10 close to thirty to forty-five.

11 THE COURT: Okay. All right. So we've been at
12 it about an hour and ten minutes. I'm afraid that I need
13 to take a break. So let's take a short break. We'll be
14 out just ten or fifteen minutes and then come right back
15 in for further examination of this witness. Please don't
16 discuss the case.

17 (WHEREUPON, the jury exited the open court at
18 approximately 3:12 p.m.)

19 THE COURT: All right. We'll be at ease. Ms.
20 Durnil, you can take a break, as well, but you can't
21 discuss your testimony with anybody, okay, because you're
22 still under oath.

23 THE WITNESS: Okay.

24 (WHEREUPON, the Court stood at recess for a short
25 break.)

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1 THE COURT: All right. Ms. Durnil, you can
2 come back up and sit on the witness stand now.

3 All right. Whenever the jury's ready.

4 (WHEREUPON, the jury entered the open court at
5 approximately 3:26 p.m.)

6 THE COURT: Mr. Cantrell, your witness, sir.

7 MR. CANTRELL: Thank you. May it please the
8 Court?

9 THE COURT: Yes, sir.

10 **CROSS-EXAMINATION**

11 **BY MR. CANTRELL:**

12 Q. Ms. Durnil, go back to 2007. At that time, you were
13 living with Mr. Pendergraft?

14 A. No, sir. That wasn't 2007. It was 2008.

15 Q. Okay. Who were you living with in 2007?

16 A. 2007, I had my son in 2007. I was staying with my
17 aunt, my mother and my daughter and my son.

18 Q. All right. And did you ever live with your son's
19 father?

20 A. Yes.

21 Q. Okay. When did you quit living with him?

22 A. It was when Nicky was about -- when I was five
23 months pregnant with Nicky.

24 Q. And then after Nicky was born is when you started
25 living with Mr. Pendergraft?

1 A. It was after Nicky was born, yes, sir.

2 Q. So that would have been late 2007 and on into 2008.

3 I think you said up until September of 2010?

4 A. Uh-huh (affirmative).

5 Q. Is that correct?

6 A. Yes, sir.

7 Q. And he did some things you didn't like and you moved
8 out?

9 A. Yes, sir.

10 Q. Was that -- I'm assuming that wasn't the first time
11 he'd done something you didn't like, when he crushed your
12 car?

13 A. Yes, sir.

14 Q. You said y'all had disputes and arguments and break-
15 ups before all of that; didn't you?

16 A. No, sir. When we -- Larry and I never argued.

17 Q. Never argued? You never broke up?

18 A. Uh-uh (negative).

19 Q. And then out of the blue he crushed your car and you
20 moved out?

21 A. No. When I found out what he was doing, okay, is
22 when I decided to leave.

23 Q. Now, in all ---

24 A. And that's when he -- I'm sorry.

25 Q. Go ahead.

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1 A. That's when crushed my car.

2 Q. So you didn't move out because he crushed your car.

3 He crushed your car because you were moving out?

4 A. Yes, sir.

5 Q. So there had been some type of disputes or

6 disagreement for you to decide to move out?

7 A. Yes, sir.

8 Q. Okay. And prior to that, when you were five months

9 pregnant with Nicky and his father, I believe that's Mr.

10 Price?

11 A. Uh-huh (affirmative).

12 Q. He moved out also or y'all separated?

13 A. Yes, sir.

14 Q. And then right after Mr. Pendergraft moved out,

15 David moved in or you moved in with David. Is that

16 correct?

17 A. Yes, sir.

18 Q. Okay. And [REDACTED] was living with you all throughout

19 all of this?

20 A. Yes, sir.

21 Q. Was [REDACTED] still living with you when you and David

22 got into arguments and you moved out in 2010?

23 A. You mean 2011?

24 Q. I stand corrected if that's when it was, yes. So

25 [REDACTED] was living with you through all of that; correct?

1 A. Yes, ma'am -- yes, sir.

2 Q. And it's your testimony that you've known Bobby
3 since early or mid 2008. Is that correct?

4 A. March. Yes, sir.

5 Q. And it's your testimony that he and your mom moved
6 in together in May?

7 A. Yes, sir.

8 Q. How old was [REDACTED] in May of 2008?

9 A. 2008, May. She was three years old.

10 Q. What is her date of birth?

11 A. December [REDACTED], [REDACTED].

12 Q. Now, you said Bobby was working when your mom moved
13 in with him?

14 A. Yes, sir.

15 Q. Where did he work?

16 A. He worked at -- he worked for Cecil at the saw mill.

17 Q. Did he work nine to five or did he work whatever
18 hours Mr. Durham needed him to work?

19 A. I guess whatever hours Mr. Durham needed him.

20 Q. Because he wasn't home everyday by five; was he?

21 A. Not that I know, no, sir.

22 Q. He could be working late, into the evening; true?

23 A. Yes, sir.

24 Q. Did he do that a lot?

25 A. I'm not sure.

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1 Q. Well, now you told us ---

2 A. Because I was working. I had three jobs.

3 Q. But you were around your mom. You were around your
4 mom's home. You've talked about depending on them for
5 childcare.

6 A. Yes, sir.

7 Q. But you're telling us you don't know when he was
8 there and when he wasn't?

9 A. I'm not sure about his schedule, you know, because
10 sometimes he does work over for Cecil and sometimes he
11 don't.

12 Q. And when did you quit working those three jobs?

13 A. I quit working my -- the two jobs I was sitting
14 with, it was the end of 2010.

15 Q. And during that period of time, you didn't leave the
16 children at home with Larry?

17 A. My son.

18 Q. Why not [REDACTED]?

19 A. Because mama always wanted [REDACTED].

20 Q. So you would leave one at one place and one at the
21 other?

22 A. Yeah. Because mama did not want to take care of
23 Nicky.

24 Q. Well, tell me what your hours were? What was your
25 schedule during that time?

1 A. I worked at Oconee Medical Center from seven o'clock
2 -- they changed it. It was from seven o'clock to three
3 o'clock. And after that, there was this lady that lived
4 in Oconee Medical Center -- I worked at Lila Doyle
5 Nursing Home. Well, after I get done clocking out from
6 Oconee Medical Center, I took care of this lady from
7 three-thirty -- yeah, from three-thirty till, I want to
8 say about seven o'clock. And I take care of this elderly
9 man around seven o'clock, seven-thirty, seven o'clock
10 until eight, eight-thirty.

11 Q. And then you would go home?

12 A. And I would go home.

13 Q. Would you pick up the children and take them back
14 home?

15 A. Sometimes yes, sometimes no.

16 Q. Now, your testimony is that you had this
17 conversation with [REDACTED] on December the 29th and took
18 her to the emergency room?

19 A. Yes, sir.

20 Q. And the next day you went back to work?

21 A. Yes, sir.

22 Q. She didn't need any further medical treatment?

23 A. No, sir.

24 Q. The fact of the matter is nothing was found; was it?

25 A. They didn't tell me that, the doctor didn't.

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1 Q. Did you seek any type of medical treatment for her
2 after that?

3 A. No, sir.

4 Q. You testified that [REDACTED]'s behavior changed after
5 she told you about this?

6 A. Yes, sir.

7 Q. So your testimony is you noticed no difference until
8 she talked to you about it?

9 A. I noticed that ---

10 Q. You didn't notice a change ahead of time?

11 A. I noticed that she was scared of the dark. And she
12 didn't used to be that way until after she started
13 telling me stuff is when it got ...

14 Q. And was that before she talked to you and you took
15 her to the emergency room? Or after?

16 A. It was after.

17 Q. So you noticed nothing wrong, nothing seemed amiss
18 with [REDACTED], until the 29th when she sat down and talked
19 to you. Is that true?

20 A. Well, after -- she was scared of the dark and she
21 used to not be that way until she was -- first she was
22 scared of the dark and then that's when she told me that
23 -- what she said, what happened to her.

24 Q. So do you need to change that? She did tell you she
25 was scared of the dark before you took her to the

1 emergency room?

2 A. Oh, I could tell she was scared of the dark because
3 she wanted a nightlight in her room where she'd never had
4 one before.

5 Q. She was how old?

6 A. She was three. When she told me?

7 Q. Yes?

8 A. All right. She was five.

9 Q. Okay. Wait a minute. She told you at five that she
10 was afraid of the dark?

11 A. Uh-huh (affirmative).

12 Q. Okay.

13 MR. CANTRELL: Your Honor, permission to
14 approach the witness?

15 THE COURT: Yes, sir.

16 Q. Let me show you this and ask you just to read to
17 yourself that paragraph right there.

18 A. This right here?

19 Q. Yes.

20 A. Okay.

21 Q. All right. Are these the notes you wrote that you
22 kept on a daily basis when this first started?

23 A. Yes, sir.

24 Q. And I'd ask you to read that paragraph out loud for
25 us.

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1 A. It says, I picked up ---

2 Q. You can hold it.

3 A. Okay. It says, I picked up [REDACTED] at December 29,
4 Tuesday, and she told me this and I took her to OMC. I
5 was off Wednesday, December 30th of '09. Nanny and Papa
6 hasn't seen the kids since December 29th, '09.

7 Q. All right. So the fact of the matter is you did not
8 go back into work the next day, did you?

9 A. Sir. I did not work at Oconee Medical Center. I
10 did take care of that elderly man, which was my third
11 job.

12 Q. But you wrote, I was off December 30th?

13 A. Yes, from Oconee Medical Center, but not with that
14 elderly man because I worked with that elderly man every
15 day, seven days a week without a day off.

16 Q. So you were not with her the day this was reported
17 to Pickens County Sheriff's Department and you had to be
18 called over; correct?

19 A. With the elderly man, yes. For one hour.

20 Q. You worked over there one hour?

21 A. Uh-huh (affirmative).

22 Q. Morning or afternoon?

23 A. It was morning and the afternoon. Well, I didn't
24 work -- the 29th or the 30th?

25 Q. I'm asking about the 30th?

1 A. The 30th. Okay. It was the morning. I didn't work
2 that night.

3 Q. Now, you also reported some changes that you noticed
4 in [REDACTED] that she was touching herself?

5 A. Yes, sir.

6 Q. Had you ever noticed or observed her touching
7 herself prior to December the 29th?

8 A. No, sir.

9 Q. Never ever?

10 A. Never ever.

11 Q. And you've indicated that you love your children?

12 A. I do love my children.

13 Q. Would do anything for them?

14 A. I'd do anything for them.

15 Q. So when you took them back around Bobby, you did not
16 think that was harmful or detrimental to them; did you?

17 A. I was there to see my mother, not Mr. McCann.

18 Q. When you took them back around Bobby, did you
19 believe that was detrimental to them?

20 A. Yes, sir.

21 Q. So you did it anyway?

22 A. I knew it was wrong and I done it. I'm sorry.

23 Q. You saw him at one point, you said, out in the yard
24 with [REDACTED] on the swing?

25 A. I was there with them.

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1 Q. Where were you?

2 A. In the back yard with them.

3 Q. So it wasn't a matter of looking out the window, out
4 from the house, you were there with them?

5 A. Uh-huh (affirmative). My mom was outside on the
6 bench and Bobby was on the bench and the kids was playing
7 in the back yard.

8 Q. And then [REDACTED] was playing on the swing and Bobby
9 was over there with her?

10 A. Yes, sir.

11 Q. And you didn't think that was detrimental, you
12 didn't think there was a chance of him harming her; did
13 you?

14 A. No, sir. He was pushing her on the swing.

15 Q. In fact, every time you've had [REDACTED] around Bobby
16 after this, she was happy. Correct?

17 A. That's true. Yes, sir.

18 Q. In fact, it was you that asked your mother to lie
19 about you being around them; wasn't it.

20 A. Because she said that ---

21 Q. First, answer the question, please. Did you ask
22 your mother to lie about you being around them?

23 A. Yes, sir.

24 Q. Okay. When was the first time -- because I
25 misunderstood your testimony or just don't remember it.

1 When was the first time you said [REDACTED] retracted or took
2 back her statements?

3 A. It was around -- it was like around the end of
4 November, like Thanksgiving, that time.

5 Q. So from December ---

6 A. It was Fall.

7 Q. --- 29th until the following November, she never
8 retracted or there was never anything said?

9 A. No, sir.

10 Q. And if she had, you would know it? Is that true?

11 A. Yes, sir.

12 Q. You indicated that you didn't understand something
13 about some cream that your mom had given [REDACTED]. Are you
14 saying you never knew about any cream that [REDACTED] was
15 using?

16 A. Not until she told me.

17 Q. You never knew of any needs that [REDACTED] had for
18 using cream on her private area?

19 A. No.

20 Q. Did you periodically take [REDACTED] to Carolina Kids
21 Pediatrics in Clemson? Or, I'm sorry, in Seneca?

22 A. Yes, sir.

23 Q. Did they ever diagnose her with something called
24 vaginitis and other irritations in the vaginal area?

25 A. I don't remember.

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1 Q. You just don't remember that?

2 A. No, sir.

3 Q. Do you remember them giving you and her mother --
4 your mother, if she was there, cream or ointment, or
5 prescribing it for [REDACTED]?

6 A. I don't remember that. I really don't.

7 Q. Do you remember reporting any other unusual behavior
8 or conduct or statements that [REDACTED] made when you took
9 her to that doctor's office?

10 A. Yes, sir.

11 Q. Do you remember doing that in the year 2007?

12 A. Yes, sir.

13 Q. Tell us what you told the doctor?

14 A. That I thought that my ex-boyfriend at the time
15 touched [REDACTED] because she was touching herself.

16 Q. She was touching herself long before you ever met
17 this man; wasn't she?

18 A. Yes, sir.

19 Q. A while ago you said she never touched herself;
20 didn't you?

21 A. Well, she was like scratching, you know, not
22 touching.

23 Q. You did say to everyone in this courtroom that she
24 did not ever touch herself; true?

25 A. That's true, yes.

1 Q. And that is not true because you reported that she'd
2 been touching herself to the doctor. Is that true?

3 A. That's true. She was scratching. Not ...

4 Q. Let me ask you to read that full paragraph. First
5 just read it and tell me if those are things you reported
6 to that doctor?

7 A. Yes, sir.

8 Q. Okay. Now, I want to ask you to read that
9 paragraph. That is your statement to the doctor when you
10 took [REDACTED] over there. I want you to read that to the
11 jury?

12 A. Mom states that she has a ---

13 Q. A little louder, please.

14 MS. BARWICK: Your Honor, ---

15 A. I have a hard time reading out loud, sir.

16 MS. BARWICK: Hold on one second. I'm going to
17 object. If she's going to talk about what she told the
18 doctor and she can remember from her memory, that's fine.
19 If he wants to use the statement to impeach her, he's
20 going to have to lay the foundation for this.

21 THE COURT: Okay. I'm going to overrule the
22 objection. I believe her statement was that was her
23 report to the doctor and I'll let her read from the
24 report.

25 Q. Take your time. Read as loud as you can. But go

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1 ahead and read it. But take your time.

2 A. Mom states that she has a runny nose and a rash on
3 her bottom. Mom and grandmother suspects sexual abuse
4 from mother's ex-boyfriend. Mom states while changing
5 daughter's diaper the child asked for her mother to lick
6 her privates. Grandmother says child has been humping
7 her stuffed animals. Grandmother states that ex-
8 boyfriend left child in locked car with windows up.
9 Police were called by somebody standing by. Someone
10 standing by.

11 Q. The only other thing I'm going to ask you to read to
12 the jury is the date of that report?

13 A. August 16th, 2007.

14 Q. Which would have been, by your testimony, nine
15 months before Bobby McCann ever entered your life?

16 A. Yes, sir.

17 Q. And, lastly, every time [REDACTED] talked to anyone, to
18 law enforcement about this case, was after she had talked
19 to you and reported -- allegedly reported things to you.
20 Is that true?

21 A. Can you repeat that again?

22 Q. Every time that [REDACTED] was taken to talk to law
23 enforcement about these allegations was after she had
24 reported something to you, by your testimony, and then
25 you reported it and took her -- took her somewhere?

1 A. Yes.

2 Q. But only after you talked to her?

3 A. Well, she talked to me. And then I wrote everything
4 down, what she was saying to me. And I took it to Ms.
5 Rita Burgess.

6 Q. Just like you reported this information to your
7 doctor; correct?

8 A. Yes, sir.

9 MR. CANTRELL: That's all I have, Your Honor.

10 THE COURT: Redirect, ma'am?

11 MS. BARWICK: Yes, sir, Your Honor.

12 **REDIRECT EXAMINATION**

13 **BY MS. BARWICK:**

14 Q. That incident with you going to the doctor back in
15 August 16th of 2007, did you or your mother ever report
16 that to law enforcement or DSS?

17 A. No, sir. I mean, no, ma'am.

18 Q. That's okay. Y'all never reported that to law
19 enforcement or DSS?

20 A. No, ma'am.

21 Q. Why did you ask your mom to lie for you about [REDACTED]
22 seeing the Defendant?

23 A. Because I didn't want my kids taken away.

24 Q. Why did you think your kids were going to get taken
25 away?

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1 A. Because I had my children around a predator.

2 Q. Did your mom ever make any kind of threats?

3 A. Yes, ma'am.

4 Q. What did she say?

5 A. That she will do her best to get my kids taken away.

6 I'll never see them again.

7 Q. If what?

8 A. If I do not drop the charges.

9 Q. When did those threats start?

10 A. It was right -- every time I seen her, really. I

11 mean, from the first time we had contact in October.

12 Q. What about the day when you went down to the law
13 enforcement with [REDACTED] to talk to Detective Burgess, did
14 your mom have contact with you that day, back in January
15 of 2010?

16 A. 2010?

17 Q. Yeah?

18 A. Yes, ma'am.

19 Q. I think it might have been January 4th of 2010. I'm
20 not sure.

21 MR. CANTRELL: Your Honor, I think we're
22 outside the scope of any cross-examination. It started
23 out talking about why she asked her mother to lie about
24 visiting, but now we're going backwards and getting into
25 areas that were not part of the scope of cross-

1 examination.

2 THE COURT: What's your recollection of that?

3 MS. BARWICK: My recollection of that?

4 THE COURT: Yes, ma'am.

5 MS. BARWICK: Well, my recollection to -- I'm
6 not sure I understand your question.

7 THE COURT: Obviously, redirect is limited to
8 the scope of cross-examination.

9 MS. BARWICK: Yes, sir.

10 THE COURT: So what I would tell you is,
11 confine your redirect to the scope of cross-examination.

12 MS. BARWICK: The question was asked of her if
13 she asked her mom to lie for her. And now she gets to
14 explain why she did that.

15 THE COURT: I understand.

16 Q. On January 4th of 2010, did your mom come over and
17 talk to you?

18 A. Yes, ma'am.

19 Q. And what did she say?

20 A. That, drop the charges, that I should drop the
21 charges on him.

22 Q. Okay. Throughout this incident, did you have fear
23 that your kids would be taken away from you?

24 A. Yes, ma'am.

25 Q. Today do you have fear that your kids might be taken

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1 away from you?

2 A. Yes, ma'am.

3 Q. Would you do anything for them?

4 A. I'll do anything to protect my kids.

5 Q. Do you regret the choices you made?

6 A. I do. I regret it. The only reason why I done it
7 is because I want mama to leave him and I would take her
8 in, take care of her.

9 MS. BARWICK: Nothing further at this time.

10 THE COURT: Any questions?

11 MR. CANTRELL: Your Honor, just a couple of
12 questions.

13 **RECROSS EXAMINATION**

14 **BY MR. CANTRELL:**

15 Q. You just told Ms. Barwick that every time you saw
16 your mother she threatened you, that starting about, now
17 your testimony, January of 2010, she was threatening you
18 and told you to drop the charges. But yet you
19 continually went back over there. You continually went,
20 even though you, by your testimony, were being
21 threatened, you were being told to drop charges, you were
22 being harassed, but you continually went back over there;
23 right?

24 A. Yes, because I love my mother.

25 Q. Because you love your mother ---

1 A. I do.

2 Q. --- you took your children over there?

3 A. Yes, sir.

4 Q. And you took your children over there and let them
5 play with Bobby and you took your children over there in
6 spite of continued threats?

7 A. Yes, sir.

8 Q. You just kept going over there because you love and
9 wanted to be with your mother?

10 A. Yes, sir. And I want her to -- we wanted her back,
11 you know.

12 Q. Well, what you meant to say instead, a while ago, is
13 you wanted her to leave this man?

14 A. Yes, I did.

15 Q. But you took his money or his car when they were
16 willing to give you one; didn't you?

17 A. Yes, sir.

18 Q. And you let your daughter and your son play with him
19 while you were there?

20 A. Yes, sir. We played the Wii.

21 Q. You said you'd do anything to protect your children?
22 Does that mean you would do anything to keep them?

23 A. Yes, sir.

24 Q. Do you think your chances are better of keeping them
25 if you can convince people that he committed this

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1 offense?

2 A. (No verbal response).

3 Q. Do you?

4 A. (No verbal response).

5 MR. CANTRELL: No further questions, Your
6 Honor.

7 THE COURT: Okay. Thank you, Ms. Durnil. You
8 can step down.

9 All right. You may call your next witness.

10 MS. BARWICK: The State would call [REDACTED]
11 [REDACTED] to the stand.

12 Judge, at this time, the State would like to clear
13 the courtroom of any unnecessary ...

14 THE COURT: Okay. All right. I will, but I
15 don't know how we characterize those that may be
16 necessary or unnecessary. Therefore, what I would ask
17 you to do is look at those people in the courtroom that
18 are employed by the State and you may tell anyone that
19 you wish to depart, to depart.

20 MS. BARWICK: Yes, sir.

21 THE COURT: Anyone employed by the Defense
22 who's not necessary, you can tell to depart, if there is,
23 indeed anyone else.

24 All right. The remainder of those in the courtroom
25 are court personnel. You may proceed.

██████████ - Direct Examination by Ms. Barwick

1 THE CLERK: Place your left hand on the bible
2 and raise your right.

3 Do you solemnly swear or affirm the testimony you're
4 about to give will be the truth, the whole truth and
5 nothing but the truth, so help you God?

6 MS. BARWICK: Hi, ██████████. Repeat what this man
7 says to you. Okay?

8 THE CLERK: Yes or no, just say yes or no.

9 THE WITNESS: Yes, sir.

10 THE CLERK: Speak up to where this lady can
11 hear you. Okay? You can sit down.

12 ██████████ ██████████,

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MS. BARWICK:

16 Q. Hey, ██████████.

17 A. Hey.

18 Q. Can you sit closer to the microphone? We'll scoot
19 you up for a second. Are you good? ██████████, what's your
20 last name?

21 A. ██████████.

22 Q. And how old are you?

23 A. Seven.

24 Q. Are you a big sister?

25 A. Yes.

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██████████ - Direct Examination by Ms. Barwick

- 1 Q. Who's your little brother?
- 2 A. Nick.
- 3 Q. Yeah. How do y'all get along?
- 4 A. Fighting.
- 5 Q. Yeah. Do you take care of him sometimes?
- 6 A. Yes.
- 7 Q. Are you a good big sister?
- 8 A. Yes.
- 9 Q. It's kind of weird with that microphone; isn't it?
- 10 A. Yes.
- 11 Q. Did you have a good lunch today?
- 12 A. Yes.
- 13 Q. What did you have?
- 14 A. I had a sandwich and chips.
- 15 Q. Are you a little nervous?
- 16 A. Yes.
- 17 Q. Do you know why you're here today?
- 18 A. Yes.
- 19 Q. Do you want to be here?
- 20 A. Not really.
- 21 Q. Right. What grade are you in?
- 22 A. First.
- 23 Q. What's your favorite subject?
- 24 A. Math.
- 25 Q. Yeah. Who do you live with right now?

1 A. Mom, dad and my four brothers.

2 Q. Yeah. Are some of them your stepbrothers?

3 A. Yes.

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

5 A. David Scott Bagwell.

6 Q. Okay. Well, do you know the difference between a
7 truth and a lie?

8 A. A truth is what really happened and a lie was what
9 really didn't happen.

10 Q. And what happens if you tell a lie?

11 A. You'll get in trouble.

12 Q. And what's our number one rule?

13 A. Tell the truth.

14 Q. Right. So we're going to tell the truth today;
15 right?

16 A. Yes.

17 Q. Do you know about certain body parts that shouldn't
18 be touched?

19 A. Yes.

20 Q. Okay. I'm going to point to some of them and you
21 tell me what name you use for it, okay? The light's
22 fine. You can leave it on. What do you call these body
23 parts?

24 A. Boobies.

25 Q. It's okay to say it in here today. And what do you

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- 1 call that body part?
- 2 A. Chicky.
- 3 Q. Chicky?
- 4 A. (Affirmative nod).
- 5 Q. What do you call this body part?
- 6 A. Butt.
- 7 Q. I'm going to show you a boy. On a boy, what do you
- 8 call this body part?
- 9 A. (No verbal response).
- 10 Q. Do you have a name for it?
- 11 A. Uh-uh (negative).
- 12 Q. No? Well, what do you go pee with?
- 13 A. My chicky.
- 14 Q. And what does Nicholas go pee with?
- 15 A. His weiner.
- 16 Q. Okay. So you call that a weiner?
- 17 A. Yes.
- 18 Q. Do you know the difference between a bad touch and a
- 19 good touch?
- 20 A. A good touch is like a hug and a bad touch is when
- 21 somebody touch you in the wrong place.
- 22 Q. Okay. I'll give you some examples. Say that your
- 23 mom gave you a hug. Would that be a good touch or a bad
- 24 touch?
- 25 A. Good touch.

[REDACTED] - Direct Examination by Ms. Barwick

1 Q. Say that a doctor wanted to touch your chicky to
2 make sure it was okay, good touch or bad touch?

3 A. Good touch.

4 Q. Say that a stranger -- what did you call these up
5 here again?

6 A. Boobies.

7 Q. Say a stranger wanted to touch your boobies, good
8 touch or bad touch?

9 A. Bad touch.

10 Q. Okay. Well, now you know all your body parts;
11 right? And good touches and bad touches. Has anyone
12 ever done a bad touch to you?

13 A. Yes.

14 Q. Who?

15 A. (No verbal response).

16 Q. You don't have to point him out. You can just say?

17 A. Bobby.

18 Q. Okay. Well, just look at me, [REDACTED]. Do you like
19 talking about this?

20 A. No.

21 Q. How does it make you feel?

22 A. Nervous.

23 Q. Yeah. Okay. Well, let's start off with your
24 boobies. Has Bobby ever touched your boobies?

25 A. Yes.

- 1 Q. Was it under your clothes or over your clothes?
- 2 A. Over.
- 3 Q. Every time?
- 4 A. No.
- 5 Q. Did he ever touch under your clothes?
- 6 A. No.
- 7 Q. So did he touch over your clothes or under your
- 8 clothes?
- 9 A. Over.
- 10 Q. Every time?
- 11 A. No.
- 12 Q. Okay. Would he use -- what would he use to touch
- 13 your boobies?
- 14 A. His mouth.
- 15 Q. What would he do with his mouth?
- 16 A. Bite them.
- 17 Q. Okay. Well, let's talk about your chicky, okay?
- 18 Did he touch under -- did Bobby ever touch your chicky?
- 19 A. Yes.
- 20 Q. Was it under your clothes or over your clothes or
- 21 both?
- 22 A. Under.
- 23 Q. Yeah. What would he touch your chicky with?
- 24 A. His mouth or his fingers.
- 25 Q. Okay. What would he do with his mouth?

- 1 A. Lick it.
- 2 Q. He would lick your chicky?
- 3 A. Yes.
- 4 Q. Was it on the outside of your chicky or the inside
- 5 of your chicky?
- 6 A. Outside.
- 7 Q. Well, let's talk about his finger or his hand. What
- 8 did he do with his hands on your chicky?
- 9 A. He just moved it around.
- 10 Q. Did he ever put it inside?
- 11 A. Yes.
- 12 Q. Was it very far?
- 13 A. No.
- 14 Q. Can you show the jury how he did it, how far.
- 15 A. (Demonstrating).
- 16 Q. So just a little bit?
- 17 A. Yes.
- 18 Q. When he did that on your body to your chicky, how
- 19 did it make your body feel?
- 20 A. Not good.
- 21 Q. Okay. How did you feel inside about it?
- 22 A. Not good.
- 23 Q. Did -- what do you call the downstairs area of a boy
- 24 again?
- 25 A. Downstairs?

- 1 Q. No. What does Nicky go pee with?
- 2 A. His weiner.
- 3 Q. Okay. Did he ever do anything -- did Bobby ever do
- 4 anything with his weiner in your chicky?
- 5 A. I don't remember if he did or didn't.
- 6 Q. Okay. Let's talk about your butt. Did he ever
- 7 touch your butt?
- 8 A. Yes.
- 9 Q. Bobby did?
- 10 A. Yes.
- 11 Q. Under or over your clothing?
- 12 A. Under.
- 13 Q. Okay. And what did he touch your butt with?
- 14 A. His weiner.
- 15 Q. Did it go inside of your butt?
- 16 A. No.
- 17 Q. Okay. What did he do with his weiner on your butt?
- 18 A. He just put it there.
- 19 Q. In your hole or on the side of your butt?
- 20 A. He tried to put it in the hole.
- 21 Q. What made him stop?
- 22 A. It wouldn't fit.
- 23 Q. Okay. Did he ever touch your butt with his hand or
- 24 his fingers?
- 25 A. I don't remember if he did or didn't.

[REDACTED] - Direct Examination by Ms. Barwick

- 1 Q. Did ever touch your butt with his mouth?
- 2 A. No.
- 3 Q. How many times did he do these bad touches to you?
- 4 A. Every time, every time I went over there.
- 5 Q. How often were you over there?
- 6 A. A lot.
- 7 Q. How old were you when this happened to you?
- 8 A. I don't remember.
- 9 Q. Where was your grandma when he did this kind of
- 10 stuff to you?
- 11 A. In the kitchen washing dishes, in the bed or making
- 12 breakfast or watching TV.
- 13 Q. Did your grandma ever see Bobby do this to you?
- 14 A. No.
- 15 Q. Where was Nicky when Bobby would do this to you?
- 16 A. With Uncle Robbie or mom and dad.
- 17 Q. So did Nicky ever seen him do this stuff to you?
- 18 A. No.
- 19 Q. Where would he do this stuff to you?
- 20 A. On the swing, at the store, on the bed and in the
- 21 living room.
- 22 Q. Which store?
- 23 A. Dollar General.
- 24 Q. Any other stores?
- 25 A. No.

- 1 Q. Okay. Tell me about looks. Did Bobby ever give you
2 any looks?
- 3 A. Yes.
- 4 Q. What kind of looks?
- 5 A. Like this.
- 6 Q. When he was doing this to you, did you give him any
7 looks?
- 8 A. Yes.
- 9 Q. What kind of looks did you give him?
- 10 A. (Demonstrating).
- 11 Q. Why would you give him those looks?
- 12 A. Because I didn't want him to do it.
- 13 Q. Did you ever tell him no?
- 14 A. I don't remember if I did or didn't.
- 15 Q. After he would do a bad touch to you, would he say
16 anything to you?
- 17 A. Yes.
- 18 Q. What would he say?
- 19 A. He says, does that feel good?
- 20 Q. And what did you say?
- 21 A. I don't remember if I said something.
- 22 Q. Okay. That's okay. Did you ever try to do anything
23 to keep him from doing this to you?
- 24 A. Yes.
- 25 Q. What kinds of things would you do to keep Bobby from

██████████ - Direct Examination by Ms. Barwick

1 doing this to you?

2 A. Saying stop.

3 Q. Have you ever seen Bobby's weiner?

4 A. Yes.

5 Q. What did that look like?

6 A. A cylinder and a ring around it, and a half-circle
7 on top.

8 Q. Okay. Was it hard or soft?

9 A. Both.

10 Q. When would it be hard?

11 A. When it, when it was on my leg.

12 Q. So he touched your leg with his penis?

13 A. Yes.

14 Q. How did that make you feel?

15 A. Not good.

16 Q. Have you ever seen anything come out of his penis?

17 A. Yes.

18 Q. Or his weiner. I'm sorry. What did you see come
19 out of his weiner?

20 A. Yellow stuff.

21 Q. And this was Bobby's weiner?

22 A. Yes.

23 Q. Was he doing anything to his weiner when the yellow
24 stuff came out?

25 A. Yes.

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- 1 Q. What was he doing?
- 2 A. Squeezing it.
- 3 Q. Where were y'all when he did this?
- 4 A. Dollar General.
- 5 Q. Were you in the store or outside of the store?
- 6 A. Outside.
- 7 Q. Where outside?
- 8 A. In the back.
- 9 Q. Okay. Behind -- when you say the back, do you mean
- 10 behind the store or in front of the store?
- 11 A. Behind it.
- 12 Q. Was anyone around?
- 13 A. No.
- 14 Q. Were your clothes on or off?
- 15 A. Off.
- 16 Q. Who took them off?
- 17 A. He did.
- 18 Q. When you were behind the store, were y'all in his
- 19 truck or outside of his truck?
- 20 A. Outside.
- 21 Q. Okay. After he would do these bad touches to you,
- 22 did you say anything to Bobby?
- 23 A. Yes.
- 24 Q. What would you -- what did he say to you?
- 25 A. What did I say to him?

- 1 Q. I guess I'm confusing you, huh? I asked the
2 question wrong. That was my fault. After Bobby would do
3 bad touches to you, did he say anything to you?
- 4 A. Yes.
- 5 Q. What kinds of things would he say to you?
- 6 A. Does that feel good?
- 7 Q. Did Bobby ever make you touch his weiner?
- 8 A. Yes.
- 9 Q. How did he force you to touch his weiner?
- 10 A. Hold it.
- 11 Q. How long do you think you held it for?
- 12 A. For a little bit.
- 13 Q. Tell me about pictures. Did Bobby ever take
14 pictures of you?
- 15 A. Yes.
- 16 Q. Were your clothes on or off?
- 17 A. Off.
- 18 Q. Who took them off?
- 19 A. He did.
- 20 Q. What kind of camera would he use when he did this?
- 21 A. One that the picture comes out on a little piece of
22 paper.
- 23 Q. Out of the camera?
- 24 A. Yeah.
- 25 Q. Did your mom or did your grandma ever see those

- 1 pictures?
- 2 A. Yes, but there was X's and scribbles.
- 3 Q. What do you mean by X's and scribbles? On the
- 4 picture?
- 5 A. Yeah, over my private parts.
- 6 Q. So the X's and scribbles -- correct me if I'm wrong.
- 7 Are you saying that they blocked out your private parts?
- 8 A. Yeah.
- 9 Q. Okay. Did he ever say anything about what would
- 10 happen if you told?
- 11 A. Yes.
- 12 Q. What did he say?
- 13 A. He said if I tell, my family will get killed and
- 14 I'll be in trouble and he'll go to jail.
- 15 Q. Did he ever blame you for the bad touches?
- 16 A. Yes.
- 17 Q. What would he say?
- 18 A. She did it.
- 19 Q. What did you say, [REDACTED]?
- 20 A. She did it.
- 21 Q. He would say that about you?
- 22 A. Yes.
- 23 Q. Do you know what the word sex means?
- 24 A. Yes.
- 25 Q. What does that word mean?

- 1 A. When somebody falls in love.
- 2 Q. How do you know what the word sex means?
- 3 A. He told me.
- 4 Q. Who's he?
- 5 A. Bobby.
- 6 Q. Okay. Do you know what the word humping means?
- 7 A. Yes.
- 8 Q. And how do you know that word?
- 9 A. He told me, too.
- 10 Q. Bobby told you?
- 11 A. Yes.
- 12 Q. What does that mean?
- 13 A. That, that means when somebody falls in love.
- 14 Q. Does that mean the same thing as sex?
- 15 A. Yes.
- 16 Q. Did you ever tell your mom -- your grandmother what
- 17 happened, your nanny?
- 18 A. Yes.
- 19 Q. And what did she say?
- 20 A. She would say that wasn't true.
- 21 Q. Did you tell your nanny before you told your mom?
- 22 A. Yes.
- 23 Q. How come?
- 24 A. Because I was over at her house before.
- 25 Q. Did you see your mom a lot back then?

- 1 A. No.
- 2 Q. And did your -- after you told your nanny, did she
- 3 do anything?
- 4 A. No.
- 5 Q. Has your nanny ever put any cream on your chicky?
- 6 A. Yes.
- 7 Q. Why did she do that?
- 8 A. Because there was a red spot on it.
- 9 Q. Okay. Did you eventually tell your mom what
- 10 happened?
- 11 A. Yes.
- 12 Q. What did you tell your mom?
- 13 A. He touched me.
- 14 Q. Bobby touched you?
- 15 A. Yes.
- 16 Q. Okay. Now, who else have you told that Bobby
- 17 touched you?
- 18 A. You, the doctor.
- 19 Q. Who's this lady?
- 20 A. (No verbal response).
- 21 Q. Do you recognize her?
- 22 A. Yeah. But I forgot her name.
- 23 Q. Is it Rita?
- 24 A. Rita Burgess.
- 25 Q. Okay. And did you tell Rita Burgess what happened

1 to you?

2 A. Yes.

3 Q. Okay. Have you ever -- after Bobby got -- do you
4 remember when Bobby got arrested?

5 A. Yes.

6 Q. Have you ever told anyone that Bobby didn't touch
7 you?

8 A. I don't remember if I did or didn't.

9 Q. Has anyone told you to say that Bobby didn't touch
10 you?

11 A. Yes.

12 Q. Who told you that?

13 A. Margaret.

14 Q. Who's Margaret?

15 A. She used to be my nanny.

16 Q. You don't call her nanny anymore?

17 A. No.

18 Q. And how come?

19 A. Because she's mean to me.

20 Q. Okay. Did your nanny or did Margaret ever say
21 anything to you about what happened if you didn't say
22 that Bobby didn't do it?

23 A. Yes.

24 Q. What did she say would happen?

25 A. My family will get in trouble, I'll get in trouble

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1 and he'll get in trouble.

2 Q. Were you scared that you might get in trouble?

3 A. Yes.

4 Q. Are you scared that your family might get in
5 trouble?

6 A. Yes.

7 Q. Good job, ██████████. ██████████, I have one last question
8 for you for now. If somebody ever touched you again in a
9 bad touch way, the way Bobby did, what would you do?

10 A. Tell you and tell Rita Burgess, mom and the police.

11 Q. Okay. Would you tell your teacher?

12 A. No.

13 Q. How come?

14 A. Because some teachers call DSS.

15 MS. BARWICK: No further questions.

16 THE COURT: Cross-examination, sir.

17 **CROSS-EXAMINATION**

18 **BY MR. CANTRELL:**

19 Q. Hey ██████████. My name is David and I'm going to ask
20 you some questions just like she did; okay?

21 A. Okay.

22 Q. Just answer loud and clear. If you can't hear me
23 you tell me to speak up, okay? Because you're here to
24 tell the truth, just the truth; aren't you? Just like
25 everybody is supposed to, big folks and little folks are

1 supposed to tell the truth up there; aren't they?

2 A. Yeah.

3 Q. Okay. And I'm curious. The first thing is, why are
4 you worried about a teacher telling DSS?

5 A. Because I don't, I don't want to be taken away from
6 my mom.

7 Q. And has your mom ever talked to you about that
8 happening?

9 A. Yeah.

10 Q. Your mom has?

11 A. Yeah.

12 Q. Now, you were asked who you told about this. And I
13 think I wrote it down, but if I'm wrong, you're going to
14 tell me; okay?

15 A. Okay.

16 Q. So if I mess up, I want you to let me know. That
17 you told Jenny, Ms. Barwick, here; right, ---

18 A. Yeah.

19 Q. --- about what happened. And you told Rita, Ms.
20 Burgess?

21 A. Yeah.

22 Q. And I think you said you told the doctor?

23 A. Yeah.

24 Q. Did you tell anybody else what happened?

25 A. Yeah.

- 1 Q. Who did you tell?
- 2 A. Mom. And the police.
- 3 Q. Okay. What did your mom -- I'm sorry. Let me
- 4 change that.
- 5 A. Well, I actually didn't tell the police. My mom's
- 6 friend did. But I don't think I was there.
- 7 Q. Okay. So you might not have talked to the police
- 8 until you talked to Rita here; right?
- 9 A. (Affirmative nod).
- 10 Q. Okay. Now, when you told your mom, had this just
- 11 happened, had what you're talking about just happened to
- 12 you?
- 13 A. When he touched me?
- 14 Q. Uh-huh (affirmative).
- 15 A. No, it happened before I told my mom.
- 16 Q. Okay. How long before?
- 17 A. A few days.
- 18 Q. Just a few days?
- 19 A. Yeah.
- 20 Q. And was that when he touched you with his finger?
- 21 A. Yeah.
- 22 Q. Was that also when he took you to the Dollar
- 23 General?
- 24 A. Yeah.
- 25 Q. Was that also when he took you to Durham's Store?

1 A. Yeah.

2 Q. And is that also when he touched your butt?

3 A. Yeah.

4 Q. So all of that happened within a few days before you
5 told your mom?

6 A. Yeah.

7 Q. So other than those times, a little bit before you
8 told your mom, had anything else ever happened?

9 A. Yeah.

10 Q. Okay. When did that happen?

11 A. Well, one weekend away from that..

12 Q. One weekend ---

13 A. Yeah.

14 Q. --- before that?

15 A. (No verbal response).

16 Q. Take your time. I'm not sure I understood what you
17 meant. So the other time, when do you remember that
18 happening?

19 A. The weekend before the other stuff happened.

20 Q. Okay. All right. Now, when you talked to your mom,
21 you had just turned five; hadn't you? Does that sound
22 about right?

23 A. I think so.

24 Q. Okay. So did everything you're talking about, the
25 way you remember it, happen right about then when you are

- 1 just a brand new five-year-old, just had been five?
- 2 A. Yeah.
- 3 Q. So that's when everything happened? Nothing
- 4 happened at other times?
- 5 A. Well, it happened -- no, it happened in October.
- 6 Q. Now, what month is October?
- 7 A. The tenth.
- 8 Q. The tenth month?
- 9 A. Yeah.
- 10 Q. What comes after October?
- 11 A. November.
- 12 Q. So it happened October before this other happened?
- 13 A. Yeah.
- 14 Q. How do you remember it being in October?
- 15 A. Because it was the tenth month and it was long ago.
- 16 Q. It was what? I'm sorry.
- 17 A. Long.
- 18 Q. Okay. Now, but you just remember it because it
- 19 happened to be the tenth month?
- 20 A. Yeah.
- 21 Q. Now, has anybody helped you remember that it was the
- 22 tenth month?
- 23 A. No. Just me thinking about that stuff.
- 24 Q. So you just remembered it being the tenth month?
- 25 A. Yeah.

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1 Q. Okay. Other than October and December when you --
2 about the time you told your mom, was there any other
3 time that it happened?

4 A. I don't remember.

5 Q. Those are all the times you remembered?

6 A. Yeah.

7 Q. Is that true?

8 A. (Affirmative nod).

9 Q. Okay. And those are all the times you've just been
10 talking about to Ms. Barwick?

11 A. Yeah.

12 Q. Okay. When you were at the Dollar General, you're
13 saying that you and Bobby were in the truck together or
14 outside?

15 A. Outside.

16 Q. And was it daytime?

17 A. No.

18 Q. It was at night?

19 A. Yeah.

20 Q. Where was everybody else?

21 A. At their house, I think, because there was nobody on
22 the road or nothing.

23 Q. So was this just really, really late at night or
24 something?

25 A. Yeah.

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1 Q. Why were y'all at the Dollar General that late at
2 night?

3 A. I don't know.

4 Q. Was it the same thing at Durham's Store?

5 A. No.

6 Q. Was that in the daytime?

7 A. No. It was at night, the next night.

8 Q. Okay. And was it -- that late at night also?

9 A. Yeah.

10 Q. Okay. So you're saying both nights it was late and
11 nobody else was around?

12 A. Yeah.

13 Q. Now, you said that Bobby told you what sex was and
14 Bobby told you what humping was. Has anybody else ever
15 talked to you or explained that to you?

16 A. No.

17 Q. Nobody? Your mama's never tried to explain those
18 things to you?

19 A. No. She wouldn't let me know it when I was littler.
20 Then he told that to me. She wouldn't let me know it.

21 Q. Did she say why she wouldn't let you know it?

22 A. Because she -- she didn't -- no, she didn't.

23 Q. Did you ask her about it? Did you try to talk to
24 her about sex?

25 A. Yes.

1 Q. Okay. Why did you ask her about sex?

2 A. Because he told it to me and I didn't, I didn't
3 really remember what he said.

4 Q. So now, did you ask her about what he said or try to
5 remember what he said or ask her to remember what he
6 said? What were you asking her?

7 A. What do sex mean.

8 Q. Now, you said when you were little. So when you
9 were little, did you ask your mom about sex?

10 A. Yes.

11 Q. Before all of this?

12 A. Yes.

13 Q. Okay. Tell me then what your mom said?

14 A. She said, you should not know that. How do you know
15 that word?

16 Q. And what had made you ask about sex back then when
17 you were even littler than when this happened? What made
18 you -- did something make you think about it or make you
19 ask about it? And there's nothing wrong with that. Just
20 what made you ask her?

21 A. Because I wanted, I wanted to know because mom keeps
22 on asking me, asking me what happened.

23 Q. All right. But now I'm talking about before this
24 happened. Did you ever see anything or hear anything
25 that made you ask your mom about sex?

- 1 A. I don't ---
- 2 Q. Just take your time. All we want to do is let you
- 3 tell us the truth.
- 4 A. I don't remember.
- 5 Q. But you do remember talking to your mom or asking
- 6 her about sex before all of this happened?
- 7 A. Yes.
- 8 Q. But you don't remember if you saw anything or heard
- 9 anything that made you think about it?
- 10 A. Yes. I'm sure.
- 11 Q. You're sure you don't remember?
- 12 A. Yeah.
- 13 Q. Okay. What did you used to call Margaret? Was that
- 14 Nanny?
- 15 A. Yeah.
- 16 Q. Okay. What did you used to call Bobby?
- 17 A. Papa.
- 18 Q. And you're -- who is that you're calling dad now?
- 19 A. David Scott Bagwell.
- 20 Q. Now, was there someone that lived with you, another
- 21 dad that lived with you, before that?
- 22 A. Yeah. Lots.
- 23 Q. Lots of different dads?
- 24 A. Yeah.
- 25 MR. CANTRELL: I don't have any further

1 questions, Your Honor.

2 THE COURT: Any redirect?

3 MS. BARWICK: No, sir, Your Honor.

4 THE COURT: Okay. [REDACTED], you can step down.

5 Will you tell [REDACTED] where to go?

6 MS. BARWICK: Yes, sir.

7 THE COURT: Thank you.

8 Ms. Barwick, do you have any additional witnesses
9 today?

10 MS. BARWICK: Yes, sir, there's two more, but
11 they're brief, that I'd like to get through with, a
12 doctor and a nurse.

13 THE COURT: Anybody need to take a break before
14 we move on to the next witness. Anyone?

15 Okay. You may call your next witness.

16 MS. BARWICK: The State would call Loretta
17 Addington to the stand. I'll go get her.

18 THE CLERK: Place your left hand on the bible
19 and raise your right.

20 Do you solemnly swear or affirm the testimony you're
21 about to give will be the truth, the whole truth and
22 nothing but the truth, so help you God?

23 THE WITNESS: Yes, sir.

24 THE CLERK: If you would have a seat and state
25 your name for the record, please.

1 THE WITNESS: My name is Loretta Addington.

2 LORETTA ADDINGTON,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MS. BARWICK:

6 Q. Ms. Addington, where do you work?

7 A. I work at Oconee Medical Center.

8 Q. Back in December of 2009 where did you work?

9 A. I worked in the emergency department.

10 Q. Okay. And what's your profession?

11 A. I'm a Registered Nurse.

12 Q. And how long have you been a nurse?

13 A. Twelve years.

14 Q. All right. Back in December of 2009, do you recall
15 meeting with [REDACTED] [REDACTED] and her mother at the hospital
16 in the ER?

17 A. According to my notes, I was her primary nurse in
18 the emergency department that night.

19 Q. Okay. And did you have a chance to speak with
20 [REDACTED]?

21 A. I did.

22 Q. When you meet with a patient, do you get their
23 history?

24 A. I do.

25 Q. And what's the purpose of getting their history?

1 A. The purpose of the history is to give us a clear
2 understanding as to why they were brought to the
3 emergency department and also to give us an understanding
4 of what tests might be performed and what treatments will
5 be needed.

6 Q. And did you get a history from [REDACTED]?

7 A. I did.

8 Q. And what was that history?

9 A. According to my notes, during our interview, she had
10 told me that she had gone to the bathroom, to use the
11 bathroom on her own, and that her Papa came in to help
12 her.

13 Q. Uh-huh (affirmative).

14 A. And that he touched her down there. And she asked
15 him to stop and he did.

16 Q. Okay. And did she convey anything else to you?

17 A. Only that she loved her Papa very much and did not
18 want him to go to jail.

19 Q. Okay. Did she say anything about her Nanny putting
20 cream on her down there?

21 A. She did. She had also said that she was red and it
22 burned down there and that her Nanny had put some cream
23 on down there to help her.

24 Q. About what time did you meet with [REDACTED] and her
25 mother?

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- 1 A. According to my notes, it was around one 1:31 a.m.
- 2 Q. In the morning hours?
- 3 A. In the morning hours, yes, ma'am.
- 4 Q. Do you know about what time she went into the exam
- 5 room for the doctor?
- 6 A. That is in the exam room.
- 7 Q. Okay.
- 8 A. She was admitted into triage earlier in the night
- 9 and that was around 11:06.
- 10 Q. Okay.
- 11 A. Typically, patients come in, they check in in triage
- 12 and then there's a waiting time before a nurse comes to
- 13 get them. And around 1:30 was when I went to the waiting
- 14 room to get her and brought her back to the exam room.
- 15 Q. I understand. So that would been 11:06 p.m.?
- 16 A. Yes, ma'am.
- 17 Q. And is that the same -- I'm sorry. I'm not familiar
- 18 with this. Is that the same time she got to the hospital
- 19 is 11:06 or is that the time she just went to triage?
- 20 A. That's the time she went to triage.
- 21 Q. Okay. Do you know about what time she actually got
- 22 to the hospital?
- 23 A. Our electronic records stated that she was checked-
- 24 in to our system at 22:31 on 12/29. She went in to be
- 25 interviewed by a triage nurse at 23:06. She went back to

1 the waiting room and I brought her back to the exam room
2 at 1:31, which would have 12:30, of course, because we go
3 past midnight.

4 Q. Yes, ma'am.

5 MS. BARWICK: No further questions.

6 THE COURT: Mr. Cantrell, any cross-
7 examination?

8 **CROSS-EXAMINATION**

9 **BY MR. CANTRELL:**

10 Q. And it's your testimony that you talked to [REDACTED]
11 herself?

12 A. Yes, sir.

13 Q. And after you finished talking to her, you then had
14 to wait on the doctor to complete a full exam?

15 A. Yes, sir.

16 Q. You did not, at that point, make any determination,
17 diagnosis or anything? You just gathered information in
18 preparation for the doctor to ---

19 A. Yes, sir. That's my position, is not to make those
20 decisions but just to aid in the assistance.

21 MR. CANTRELL: I believe that's all I have.

22 Thank you.

23 THE COURT: Any redirect?

24 MS. BARWICK: No, sir, Your Honor. May she be
25 excused?

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1 THE COURT: Yes, if there's no objection.

2 MR. CANTRELL: No objection, Your Honor.

3 THE COURT: Yes, ma'am. Thanks for being
4 here. You may step down.

5 You may call your next witness.

6 MS. BARWICK: The State would call Dr. Chiles
7 to the stand.

8 THE CLERK: Place your left hand on the bible
9 and raise your right.

10 Do you solemnly swear or affirm the testimony you're
11 about to give will be the truth, the whole truth and
12 nothing but the truth, so help you God?

13 THE WITNESS: I do.

14 THE CLERK: Thank you, sir. If you would have
15 a seat and state your name for the record, please.

16 THE WITNESS: My name is Bill Chiles.

17 BILL CHILES, M.D.,

18 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

19 DIRECT EXAMINATION

20 BY MS. BARWICK:

21 Q. Dr. Chiles, where do you work?

22 A. Oconee Medical Center.

23 Q. And how long have you been working there?

24 A. This is my twentieth year.

25 Q. And what's your profession?

1 A. I'm an emergency physician.

2 Q. What kind of education and training have you had?

3 A. I have a Bachelor's Degree in Science from the
4 University of Alabama at Birmingham. I have a Medical
5 Degree from the University of Alabama School of Medicine.
6 And I performed a post-graduate residency in emergency
7 medicine at University of Alabama at Birmingham and again
8 at Methodist Hospital of Indiana.

9 Q. And what kinds of license and board certifications
10 do you have?

11 A. I am board certified by the American Board of
12 Emergency Medicine and I'm a Fellow of the American
13 College of Emergency Physicians, licensed to practice
14 medicine in the State of South Carolina.

15 Q. Is your speciality emergency medicine?

16 A. It is emergency medicine, yes, ma'am.

17 Q. Okay. And what kind of training have you had
18 specifically in emergency medicine?

19 A. Our niche is consider the first hour of any disease
20 or illness or injury.

21 MS. BARWICK: Well, that being said, Your
22 Honor, at this time the State would like to move the
23 doctor in as an expert in emergency medicine.

24 THE COURT: Any objection.

25 MR. CANTRELL: So stipulated, Your Honor.

1 THE COURT: Okay. All right. So admitted.

2 Ladies and gentlemen, a person may be admitted as an
3 expert witness because of his or her education, expertise
4 and/or experience. And someone may be admitted or a
5 party may want to admit a witness as an expert witness
6 because expert witnesses can testify to opinions that lay
7 witnesses could not necessarily testify to. And an
8 expert witness's testimony can assist you in analyzing
9 and reviewing the evidence that you receive.

10 Now, understand, that just because someone may be
11 admitted as an expert witness, it doesn't lend greater
12 value to that person's testimony or greater weight to
13 that person's testimony. It is just a piece of evidence
14 like any other piece of evidence, like any other
15 testimony that you receive from a lay witness or any
16 other witness and you put whatever weight or value on an
17 expert witness's testimony that you feel is appropriate,
18 just like any other piece of evidence you receive.

19 Ms. Barwick, you may proceed.

20 MS. BARWICK: Thank you, Your Honor.

21 THE COURT: Yes, ma'am.

22 Q. Doctor, are you paid to be here today? Are you
23 being paid to be here?

24 A. I am not, no.

25 Q. Are you here because you're under a subpoena?

1 A. I do have a subpoena.

2 Q. That being said, back in December 29th or 30th of
3 2010 -- I'm sorry -- 2009, did you have an opportunity to
4 see [REDACTED] [REDACTED]?

5 A. I did, yes.

6 Q. Was she with her mother, Toni?

7 A. That is correct.

8 Q. About what time and what day did you see her?

9 A. She actually checked into our department just before
10 midnight and I saw her after midnight. I don't know the
11 precise time, but it was around 2:00 a.m., 3:00 a.m. time
12 frame.

13 Q. Okay. And when you meet with a patient, do you get
14 the patient's history beforehand?

15 A. That is correct. We take a history.

16 Q. And why do you do that?

17 A. In the assessment of a patient we consider that the
18 most important piece of information in making a diagnosis
19 and forming a plan of management or treatment.

20 Q. And did you speak with [REDACTED] and Toni about that
21 history?

22 A. Correct. I first reviewed the nurses' notes, the
23 triage nurse and the treating nurse, and then talked to
24 the mother and tried to interview the patient, as well.

25 Q. Okay. And what kind of history did the mother give?

1 A. The mother advised me that another family member had
2 touched her child. The child had a name for -- I think
3 she called it her chicky or -- the mother translated that
4 in her family that meant her vaginal area or vagina.

5 Q. Okay.

6 A. And so she told me she had been touched by a member
7 of her family in that spot.

8 Q. Did you perform a physical exam on [REDACTED]?

9 A. Yes, I did.

10 Q. And tell the jury about that physical exam, what
11 does that entail?

12 A. When I'm doing a physical exam on a child that age
13 we typically -- we obviously have the child get
14 undressed. We take off their pants and their underwear.
15 I generally have the child sit in a family member's lap
16 facing me so it would appear to the child that the family
17 member is holding them. With her -- we bend the knees
18 and flex the hips and then have the parent spread the
19 child's knees so we can gain access to the vagina with a
20 light and with magnification to take a look.

21 Q. And did you take a look?

22 A. Yes, I did.

23 Q. And did you have any findings?

24 A. We did not see any findings when I examined her,
25 specifically looking for bruises, bites, abrasions,

1 lacerations, superficial cuts, and did not see any signs
2 of trauma at that time.

3 Q. Do you use any kind of -- do you just look or do you
4 use any kind of equipment?

5 A. I use a magnified light. It's a hand-held light
6 that has 2X magnification so I can look for small micro-
7 tears.

8 Q. Did you -- given the history, did you expect to find
9 anything in this case?

10 A. The mother was very concerned and when she told me
11 the story, she was pretty concerned that I'd be able to
12 give her a black and white answer, which is very common
13 in these cases. And I explained to the mother before I
14 examined the child that the history that she provided me,
15 based on the history she provided me, I think it's very
16 unlikely that we could find any incriminating evidence.
17 And as I told her before and after the exam, most
18 molestation does not leave any type of incriminating
19 evidence. And based on the history she gave me, I didn't
20 expect to see any incriminating evidence. And I did not
21 see any signs of trauma at that time.

22 Q. Is it normal practice for you, in the emergency
23 room, to, you know, do these kinds of exams to check for
24 molestation?

25 A. We do this, I would estimate, five to six times a

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1 month.

2 Q. Did you contact law enforcement or DSS?

3 A. I did not. The mother advised me that she was
4 already in the process of contacting the law enforcement.

5 Q. Okay. And did she say anything about contact with
6 -- any future contact with the Defendant?

7 A. And that's very important for me because if the
8 child is going to be going back into that setting, then I
9 would probably have to get DSS to come into the emergency
10 department that night. But she told me that this family
11 member did not have any legal rights to the child and
12 that she intended to withhold the child from that family
13 member to assure that nothing happened.

14 Q. About what time do you think they left the ER?

15 A. I believe it was just before 4:00 a.m.

16 MS. BARWICK: No further questions.

17 THE COURT: Cross-examination?

18 **CROSS-EXAMINATION**

19 **BY MR. CANTRELL:**

20 Q. Doctor, if this child had reported digital
21 penetration, would you still not expect to find anything?

22 A. I would not with just gentle digital penetration not
23 expect to see anything incriminating.

24 Q. Okay. I'm not saying just gentle penetration. I'm
25 saying penetration that hurt?

1 A. Not necessarily. I think -- well, I'm sorry. I
2 interrupted you. I apologize.

3 Q. No, no, that's fine. I'm saying digital penetration
4 that hurt and caused discomfort was reported, that it
5 went inside. Now, admittedly, not knowing how far
6 inside.

7 A. Yes, sir.

8 Q. But digital penetration that hurt and went inside.
9 Would it still be your testimony you would anticipate
10 finding nothing?

11 A. I think, given that story, there would be a higher
12 likelihood of finding evidence, but I still think there's
13 a significant livelihood that you would not see any
14 incriminating evidence with that story. As you can
15 imagine, that's -- you have to qualify how big is the
16 finger, how vigorous was the touching, was there any
17 lubrication used, and so all of those things kind of go
18 into play. So you may or may not, under those
19 circumstances, find any evidence.

20 Q. And going a little further, if the statement was it
21 was an adult male, normal size man, normal size hand, no
22 lubrication, no other substances or materials, and it
23 hurt and it went in, not knowing how much, but it went in
24 ---

25 A. Yes, sir.

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1 Q. --- increased likelihood of evidence of some type of
2 irritation or damage?

3 A. I would say that with that story there would be an
4 increased likelihood that you would find some evidence.
5 But, again, I think the sensitivity would still be very
6 low. There's still a significant chance you wouldn't
7 find anything.

8 Q. And is the child normally upset when you see them?
9 I'm not asking about this case, but normally. Is it --
10 is the child usually upset?

11 A. That's a difficult question to answer because it's
12 -- a lot of kids with a -- a lot of kids at that age are
13 just afraid of being in the emergency department at all.
14 So I don't know that there's a single answer that can
15 answer that question.

16 Q. Now, in this case, if I remember the notes
17 correctly, when you saw her, [REDACTED] was asleep. Is that
18 correct?

19 A. I don't have that recollection. I don't recall her
20 being asleep. If she was asleep she certainly woke up
21 and I did have some interaction with her. She was afraid
22 of me. She was shy around me.

23 Q. The mother told you that she was contacting the
24 police?

25 A. That's correct.

1 Q. And that she was keeping the child away from the
2 alleged perpetrator. Is that what she reported to you?

3 A. Yes, sir. That's correct.

4 MR. CANTRELL: All right. If you can indulge
5 me one second, I may have one more question.

6 That's all I have. Thank you, Your Honor.

7 THE COURT: Any redirect?

8 **REDIRECT EXAMINATION**

9 **BY MS. BARWICK:**

10 Q. Would it increase or decrease the chances of any
11 kind of findings if the digital penetration was slight?

12 A. That would decrease the chances.

13 Q. What if it was a couple of days before?

14 A. That would decrease the chances.

15 MS. BARWICK: Nothing further.

16 THE COURT: Any recross.

17 MR. CANTRELL: Nothing, Your Honor.

18 THE COURT: Thank you, Doctor. I appreciate
19 your being here, sir. You may step down.

20 MS. BARWICK: May he be excused, Your Honor?

21 THE COURT: Any objections, Mr. Cantrell?

22 MR. CANTRELL: No objection.

23 THE COURT: Okay. Good enough. Thank you.

24 Have a great day.

25 All right. Any additional witnesses today?

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1 MS. BARWICK: Not today, Your Honor.

2 THE COURT: Okay. All right. How many
3 additional witnesses do you intend to call? Six?

4 MS. BARWICK: Five, Your Honor.

5 THE COURT: Five. Good enough.

6 MS. BARWICK: You have six on your paper, but
7 that deputy's wife is having a baby.

8 THE COURT: Okay. Fair enough.

9 All right. Ladies and gentlemen, we're going to
10 take a break for the afternoon. And if you'll be back
11 here tomorrow at 9:00, we'll start -- we'll resume the
12 testimony in this case. As I asked you before, please
13 don't discuss the case. If your spouses or significant
14 others are like mine, when you get home, he or she is
15 going to ask you, what did you do today? And you say, I
16 can't tell you. And they're going to just keep beating
17 you up about it. And you're just going to say, I took an
18 oath and I'm under orders from the Judge, who has the
19 power to fine me or put me in jail, and I can't talk to
20 you about it. But they're going to want to. And just
21 tell them I can't talk to you yet. So -- and tell them
22 sooner or later you'll have the opportunity to talk to
23 them about it.

24 And please, again, don't do any self-help, going on
25 the internet and trying to find out anything additional

1 in this case. Everything that is relevant to your
2 consideration will be submitted in count in this case.

3 Y'all have a great evening and I'll see you tomorrow
4 morning.

5 (WHEREUPON, the jury exited the open court at
6 approximately 4:50 p.m.)

7 THE COURT: All right. Counsel, for purposes
8 of the record, I know we did not have an in-camera
9 competency hearing with respect to young Ms. Durnil. But
10 I do find, after having listened to her testimony, that
11 she was a competent witness and the jury shall determine
12 whether, in fact, her testimony was then credible.

13 Anything else that y'all need to put on the record
14 this afternoon?

15 MS. BARWICK: If Your Honor would like, we can
16 give you the pre-marked forensic interview DVDs.

17 THE COURT: Yeah, that would be nice. Are
18 these two separate and distinct interviews?

19 MS. BARWICK: Yes, sir.

20 THE COURT: Okay. Good enough. And you intend
21 to introduce each of these?

22 MS. BARWICK: Yes, sir.

23 THE COURT: All right. And do you intend to
24 object to the introduction of these videos?

25 MR. CANTRELL: I expect that there will be a

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1 proper foundation, so I don't expect so. As long as it's
2 the same one she gave me.

3 THE COURT: I understand. I understand. Okay.
4 Well, good enough. And I'm not saying this to patronize
5 either of you, but a lot of times the forensic
6 interviewer's testimony can be very emotional. And
7 forensic interviewers are passionate people, I find.
8 Read *State versus McCurley* again, Judge Few. And just be
9 mindful of what she can and can't say. Okay?

10 MS. BARWICK: I will go ahead and put Your
11 Honor at ease. She's not testifying as to anything
12 regarding whether the child is telling the truth, whether
13 it's compelling, whether it's consistent. None of that.

14 THE COURT: Good enough. Then you've prepped
15 her appropriately.

16 MS. BARWICK: Judge Few has prepped me
17 appropriately with that, Your Honor.

18 THE COURT: Good enough. All right. Well,
19 good. Well, he did something right then; right?

20 MS. BARWICK: Yes, sir.

21 THE COURT: Okay. Y'all have a great evening
22 and I'll see y'all tomorrow. When I say 9:00, I mean
23 9:00. If y'all want me before then, come see me before
24 then, okay? Because when I tell the jury to be back at
25 9:00, I want to start precisely at 9:00.

1 MS. BARWICK: Yes, sir.

2 MR. CANTRELL: Great. That sounds good. Thank
3 you, Your Honor.

4 (WHEREUPON, the court stood at recess for the day.)

5 **April 24, 2012**

6 (WHEREUPON, court convened with all parties present
7 and the following proceedings were had.)

8 (WHEREUPON, the jury entered the open court at
9 approximately 9:04 a.m.

10 THE COURT: Good morning, ladies and gentlemen.

11 THE JUROR: Good morning.

12 THE COURT: I hope everybody had a good
13 evening. It's good to see you.

14 Ms. Barwick, it's your case, ma'am. You may call
15 your next witness.

16 MS. BARWICK: Thank you, Your Honor. The State
17 would call Rita Burgess to the stand.

18 THE CLERK: Place your left hand on the bible
19 and raise your right.

20 Do you solemnly swear or affirm the testimony you're
21 about to give in this case will be the truth, the whole
22 truth and nothing but the truth, so help you God?

23 THE WITNESS: I do.

24 THE CLERK: State your full name for the
25 record.

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1 THE WITNESS: Rita Burgess.

2 RITA BURGESS,

3 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

4 DIRECT EXAMINATION

5 BY MS. BARWICK:

6 Q. Detective Burgess, where do you work?

7 A. Pickens County Sheriff's Office.

8 Q. And how long have you worked there?

9 A. Twenty-one years.

10 Q. What's your current position there?

11 A. I'm an investigator in the juvenile division.

12 Q. And how long have you been doing that particular
13 job?

14 A. Probably about seven years or so.

15 Q. As an investigator in the juvenile division, what
16 are your duties?

17 A. I investigate any case that comes in that may
18 involve a juvenile, whether they're a victim or suspect,
19 anything related to a juvenile at all. I also do
20 internet crimes against children. I work sex crimes.
21 And also if we have a homicide, I'll get involved in
22 those.

23 Q. So you investigate crimes in which a child might be
24 the Defendant. Is that true?

25 A. Yes.

1 Q. Okay. But you also investigate crimes where the
2 child might be the victim?

3 A. Correct.

4 Q. Okay. That being said, did you come into contact
5 with this case that we're here about today?

6 A. I did.

7 Q. And how did that come about?

8 A. One of our road deputies responded and took the
9 initial report on the case, and then it was turned over
10 to me.

11 Q. And is it normal course of business for the law
12 enforcement center or the Pickens County Sheriff's Office
13 to keep CAD sheets?

14 A. Yes.

15 Q. And what is a CAD sheet?

16 A. CAD is short for computer aided dispatch. Anytime a
17 call comes into our communications center, it's entered
18 into the computer; the complainant's name or the caller's
19 name, what they're calling about, and it's automatically
20 -- the computer generates the date and time that goes
21 along with that. And the computer also generates a case
22 number to go along with that call.

23 Q. And which deputy responded to a call about this
24 case?

25 A. Deputy Robert Porter.

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1 Q. Where is he today?

2 A. He's -- his wife had a baby, so he's, I'm assuming,
3 at the hospital or they maybe have made it home.

4 Q. Okay. And what day was he called out on this case?

5 A. December 30th, 2009.

6 Q. About what time?

7 A. According to the CAD sheet, he was dispatched at
8 19:52, which would be 7:52 p.m.

9 Q. And who was the person that called in?

10 A. Carla Hancock.

11 Q. Not Toni Durnil?

12 A. No, ma'am.

13 Q. All right. And Deputy Porter, what kind of deputy
14 is he? What are his duties?

15 A. He's a uniform road deputy. He responds to calls
16 that are dispatched to him through our communications
17 center. I believe he's actually on the traffic unit, so
18 he would work any -- go to any accident, work any traffic
19 issues that we may have.

20 Q. Would he do the follow-up investigator for child sex
21 crimes?

22 A. No.

23 Q. So once he makes a report, what happens with that
24 report?

25 A. After he makes the report, it's referred to the

1 detective division and there's three of us in our unit,
2 and it would be assigned to one of us.

3 Q. Was this case assigned to you?

4 A. Yes, it was.

5 Q. When were you assigned the case?

6 A. I was assigned the case on December 31st.

7 Q. When did you first have contact with Toni and

8 [REDACTED]?

9 A. I contacted Toni Durnil on December 31st.

10 Q. Okay. And did you speak with her?

11 A. I did. I made contact with her by phone. She gave
12 me some brief information as to what she had reported to
13 Deputy Porter, and I made arrangements with her to meet
14 with [REDACTED] and she could not -- we could not meet until
15 January the 4th.

16 Q. And how come the slight delay there?

17 A. There was the holiday that fell in there for New
18 Year's, and our offices are not working, are not open
19 during those times. And also, she had -- she told me
20 that she worked three jobs and she could not meet with me
21 with [REDACTED] until she had time off from work.

22 Q. Okay. So when did you actually sit down and meet
23 with them?

24 A. On January the 4th, 2010.

25 Q. Where was that meeting?

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- 1 A. At the Sheriff's Office.
- 2 Q. And at the Sheriff's Office, did you speak with
- 3 [REDACTED]?
- 4 A. I did. I met with Toni first and then I met with
- 5 [REDACTED].
- 6 Q. Did you meet with them separately?
- 7 A. I first met with Toni, got some information from
- 8 her. And then I met with Toni and [REDACTED] together to
- 9 introduce myself, and then I met with [REDACTED] alone.
- 10 Q. When you met with [REDACTED] alone, did you talk about
- 11 the incident?
- 12 A. Yes.
- 13 Q. Did she disclose any sexual abuse to you?
- 14 A. Yes, she did.
- 15 Q. Did she say where it happened?
- 16 A. She did.
- 17 Q. Where did she say it happened?
- 18 A. She stated that it was at her grandmother's house,
- 19 her grandma and papa's house, that it occurred in their
- 20 bedroom, on the swing, in her Papa's truck. I believe
- 21 that was all that she told me at that point.
- 22 Q. Okay.
- 23 A. I apologize. She did tell me at Durham's store.
- 24 Q. Okay. And did she go into details with you about
- 25 that abuse?

1 A. She did.

2 Q. At that point, did you then go back and meet with
3 Toni?

4 A. Yes, I did.

5 Q. And did Toni provide you any notes that she had
6 taken previous to your meeting?

7 A. Yes, ma'am.

8 Q. And what did those notes detail?

9 A. When I spoke with her on the phone she told me that
10 [REDACTED] had been disclosing more and more to her ---

11 MR. CANTRELL: Your Honor, objection to hearsay
12 as to what the mother said.

13 THE COURT: Okay. All right. I don't think
14 that she was testifying quite yet as to what she said.
15 She said when she spoke to her on the phone. I don't
16 know what's coming after that, so I can't rule on it
17 until I know what said.

18 You can't testify as to hearsay.

19 Go ahead. You may restate the question.

20 Q. When you spoke with her on the phone -- well, we'll
21 just back up a little bit. When you met with Toni at
22 your office, did she disclose what [REDACTED] had disclosed
23 to her?

24 A. She did.

25 Q. And at that point in time, what was the next step in

1 your investigation?

2 A. Actually, when I spoke with her on the phone, I told
3 her if [REDACTED] had disclosed any -- if she disclosed
4 anything further to her, to make notes of it, because it
5 would be several days before we could meet. And in order
6 for her to be able to remember accurately, it was best
7 for her to write down anything that [REDACTED] may tell her.

8 Q. Okay. So you gave Toni the instructions to keep the
9 notes?

10 A. Yes, I did.

11 Q. Okay. After you met with Toni and [REDACTED] and
12 discussed what happened, what was the next step in your
13 investigation?

14 A. On that same day, I contacted the Julie Valentine
15 Center and set up an appointment for her to have a
16 medical exam and also a forensic interview.

17 Q. What is the Julie Valentine Center?

18 A. It's formerly known as the Greenville Rape Crisis
19 Child Advocacy Center and they deal with children who are
20 abused and they forensically interview children. There's
21 also a doctor on staff who will perform medical exams on
22 children.

23 Q. Okay. Were you able to go to the medical exam?

24 A. No. I don't go to the medical exams.

25 Q. That's not something you normally do?

1 A. No.

2 Q. Were you able to go the forensic interviews?

3 A. No, I was not.

4 Q. And how come?

5 A. During her first interview, my Lieutenant was out
6 with surgery and I was the only one at that point who was
7 working our division. The other individual was off. And
8 on the second interview, I had another case that someone
9 had come up from Columbia on that we'd already scheduled
10 an appointment for, and I was not able to go.

11 Q. And what was the date of that medical exam at the
12 Julie Valentine Center?

13 A. Her medical exam was scheduled for January 13th,
14 2010.

15 Q. And the forensic interview, you mentioned that there
16 were two. What were those dates?

17 A. Yes. February 1st, 2010 and February 4th, 2010.

18 Q. After the medical exam, were you given a report?

19 A. Yes, I was.

20 Q. And after the medical exam, what was the next step
21 in your investigation?

22 A. Well, the report was sent back to me and just based
23 on the disclosures that she had made to her mother, the
24 disclosure that [REDACTED] had made to me, the medical exam
25 and the disclosure that she made to the medical doctor,

1 everything was consistent. She never, she never changed

2 ---

3 MR. CANTRELL: Objection, Your Honor.

4 THE COURT: Sustained.

5 Q. Okay. Based on those reports and your
6 conversations, what did you do?

7 A. I presented the case to a magistrate and requested
8 arrest warrants.

9 Q. What day did you present that case to the
10 magistrate?

11 A. I believe it was January 22nd. I could look at the
12 date on my warrant. January 22nd, 2010.

13 Q. Okay. And did the Judge sign that warrant that day?

14 A. He did.

15 Q. What day was the Defendant arrested?

16 A. January 25th.

17 Q. Okay. So the day he was arrested was before the
18 forensic interviews were conducted?

19 A. That's correct.

20 Q. On that warrant, what were the dates of the abuse
21 that you put down on your warrant?

22 A. Would you like for me to read it from the warrant?

23 Q. No, just say the dates if you will?

24 A. During the month of December 2009.

25 Q. When you got that warrant, the forensic interview

1 hadn't been done yet?

2 A. No, it had not.

3 Q. Okay. Moving on from that point, after the
4 Defendant was arrested, did you later on become involved
5 in the case again?

6 A. I did.

7 Q. And when was that?

8 A. Well, I received a copy of the forensic interview in
9 July.

10 Q. Okay.

11 A. And then in November, on November 24th, 2010, I
12 received a phone call from Toni.

13 Q. Okay. And you were here yesterday when Toni
14 testified; correct?

15 A. Yes, I was.

16 Q. In that telephone conversation, what was the purpose
17 of her calling you?

18 A. To notify me that [REDACTED] was recanting her story.

19 Q. And if we could briefly go over what recantation
20 means again. What does it mean to recant?

21 A. That she was saying that Bobby did not do it.

22 Q. So Toni's telling you this on the phone?

23 A. Yes..

24 Q. And what other things did she say on the phone?

25 A. She said that Larry -- [REDACTED] said Larry did it.

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- 1 Q. Could you hear [REDACTED] in the background?
- 2 A. I could.
- 3 Q. And how -- tell the jury about [REDACTED]'s demeanor?
- 4 A. She was hysterically crying in the background.
- 5 Q. And what was she saying?
- 6 A. She was saying, please don't make me say it. Please
- 7 don't make me say it. Larry didn't do it. Papa did.
- 8 Q. That being said, did you make an appointment to meet
- 9 with [REDACTED]?
- 10 A. Yes, I did.
- 11 Q. And when did that appointment take place?
- 12 A. I told Toni not to ask [REDACTED] anymore questions, to
- 13 leave her as she was, leave her be. Not to allow anyone
- 14 else to ask her any questions and to bring her to my
- 15 office.
- 16 Q. Did she bring her to your office?
- 17 A. No, she did not.
- 18 Q. Did [REDACTED] come to your office?
- 19 A. She did.
- 20 Q. The same day of that phone call, November 24th?
- 21 A. Yes, ma'am. Yes.
- 22 Q. And who brought her to your office?
- 23 A. Toni's boyfriend, David Bagwell, brought her to me.
- 24 Q. Toni did not bring her to your office?
- 25 A. No, she did not.

1 Q. Did you meet with [REDACTED]?

2 A. I did.

3 Q. Was it one-on-one or was David present?

4 A. No, it was one-on-one.

5 Q. And in that conversation, did she again disclose
6 sexual abuse?

7 A. She did.

8 Q. Did she again reiterate where it happened?

9 A. She did.

10 Q. The same places mentioned before?

11 A. Yes.

12 Q. At that point in time, what did you do?

13 A. She told me that ---

14 Q. You can't say what she ---

15 A. Right.

16 Q. At that point in time, without saying what [REDACTED]
17 told you, did you give any instructions to the family?

18 A. I did. I told David while he was there, once I
19 finished speaking with [REDACTED], that they were to have no
20 contact -- or [REDACTED] was to have no contact with Margaret
21 Durnil, which is her grandmother, nor should she have any
22 contact with Bobby McCann, which I had already told the
23 family from the beginning not to allow her to have any
24 contact with Bobby McCann.

25 Q. At this point in time, were you aware that there was

1 contact going on between the Defendant and [REDACTED]?

2 A. No.

3 Q. Okay. When's the next time you became involved in
4 this incident, this case?

5 A. On December 13th, 2010.

6 Q. What happened on December 13th of 2010?

7 A. I was contacted by the Greenville Child Advocacy
8 Center.

9 Q. Okay. And did you speak with someone from there?

10 A. I did.

11 Q. In response to that conversation, what did you do?

12 A. I contacted DSS.

13 Q. Okay. And when you contacted DSS, what was the next
14 step?

15 A. DSS met with the family, and then we had a group
16 meeting on January 7th, 2011.

17 Q. Who was at that group meeting?

18 A. It was a couple of DSS workers, [REDACTED] was at DSS,
19 her brother Nicky was there, Toni Durnil was there and
20 Bobby McCann. I'm sorry. David Bagwell.

21 Q. Okay. I know there's a lot of names here.

22 A. Yes.

23 Q. And at that meeting did you give Toni and David any
24 more instructions?

25 A. Yes, I did.

1 Q. And what did you say?

2 A. The children were to have no contact, [REDACTED]
3 specifically, was to have no contact with Bobby McCann or
4 Margaret Durnil.

5 Q. And that was what date, that conversation took
6 place?

7 A. January 7th, 2011.

8 Q. Okay. So not January this past, but the one
9 previous to it?

10 A. Yes.

11 Q. Did you again become involved in this case?

12 A. I did.

13 Q. And when was that?

14 A. December 29th, 2011.

15 Q. How did you become involved in that?

16 A. I was contacted by the Solicitor's office that Toni
17 Durnil had brought [REDACTED] up for -- to say that she had
18 recanted again.

19 Q. Okay. Did you go out and again meet with [REDACTED]?

20 A. Yes, I did.

21 Q. Was it one-on-one or -- actually, when you met with
22 [REDACTED], was Toni or David around?

23 A. They were at home. They were not in the same room.

24 Q. And when you spoke with [REDACTED], did she again tell
25 you about the sexual abuse?

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1 A. She did.

2 Q. Okay. The house that the Defendant and Margaret
3 live in, is it the same house that they were living in
4 back in 2009, 2007 time frame?

5 A. Yes.

6 Q. And where is that house located?

7 A. It's on -- the address is actually [REDACTED] Crowe Creek
8 Road.

9 Q. Is that in Pickens County?

10 A. Yes, ma'am.

11 Q. Were you there at the Defendant's bond hearing?

12 A. Yes, I was.

13 Q. At that bond hearing, what were the conditions of
14 his bond?

15 A. He was to have no contact with the victim whatsoever
16 and no contact with any other child under the age of
17 sixteen years.

18 Q. When was that ---

19 A. No unsupervised contact with another child.

20 Q. When was that bond hearing?

21 A. March 22nd, 2010.

22 Q. March -- what date?

23 A. March 22nd, 2010.

24 Q. Okay. And did you later -- did Toni tell you that
25 there was contact after that date?

1 A. Yes, she did.

2 Q. Backing up a little bit, you said you first met with
3 [REDACTED] and Toni back on January 4th of 2010?

4 A. Yes.

5 Q. Did you meet with anybody on January 5th of 2010?

6 A. I did.

7 Q. Who did you meet with?

8 A. Margaret Durnil and Charles Marchbanks came to my
9 office.

10 Q. Okay. And Charles Marchbanks, who is he to the
11 Defendant and Margaret?

12 A. He stated he was a family friend.

13 Q. And what was the purpose of them coming down there?

14 A. They wanted to ---

15 MR. CANTRELL: Your Honor, I'm going to have to
16 object if she's going to convey or present what they
17 said. Hearsay in any shape, form or fashion.

18 THE COURT: I sustain on principal, but I don't
19 know what she's going to say yet.

20 MS. BARWICK: Can we approach, Your Honor, and
21 say what she's going to say?

22 THE COURT: Sure.

23 (WHEREUPON, Ms. Barwick and Mr. Cantrell approached
24 the bar.)

25 Q. What was the purpose of them coming up there? Not

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1 what they said, but what was the purpose of them coming
2 up there?

3 A. They were supporting Bobby McCann.

4 Q. Okay. And what did they want to happen with any
5 charges?

6 A. They did not want him charged.

7 Q. Okay. With that being said ... What's the
8 Defendant's date of birth?

9 A. His date of birth is September 18th, 1962.

10 Q. So back in 2009 and 2007, 2008, he would have been
11 over the age of fourteen?

12 A. Yes.

13 Q. Okay. Is he currently on the sex offender registry?

14 A. Yes, he is.

15 Q. And for what crime is he on the sex offender
16 registry for?

17 A. Peeping Tom.

18 Q. Do you know the date of that conviction?

19 A. I have a criminal history I could go back and refer
20 to.

21 Q. It's okay if you don't. That's fine. I want to
22 make sure I've asked you everything I need to. So bear
23 with me.

24 MR. CANTRELL: And, Your Honor, if I may, I
25 would stipulate that the offense they're talking about is

1 1995. So we can stipulate to that.

2 THE COURT: You accept that stipulation of the
3 year?

4 MS. BARWICK: It was in 1996, the conviction
5 was, but I will stipulate to that.

6 THE COURT: Okay.

7 MS. BARWICK: That's all the questions I have
8 for now.

9 **CROSS-EXAMINATION**

10 **BY MR. CANTRELL:**

11 Q. Ms. Burgess, you reported the CAD sheets, the call-
12 in to Detective Porter and the call-in of one of the
13 Detectives from your division, and then it was handed off
14 to you, and you took reports. All of that is standard
15 operating procedure. Is that right?

16 A. Yes, it is.

17 Q. For any case involve a juvenile as a victim or
18 defendant, I guess possibly even as a witness. But any
19 case involving a juvenile. Is that pretty much that ---

20 A. Well, any case that's reported in the end that needs
21 investigation will come to the detective division,
22 anything related to a juvenile or a sex crime will come
23 to our division.

24 Q. All right. The actual call came from Ms. Carla
25 Hancock, not from Toni Durnil?

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- 1 A. That's correct.
- 2 Q. And you were unable to meet with Toni Durnil until
- 3 7:30 the next day. Is that correct? On the 30th?
- 4 A. No. That's when it was reported to us, was on the
- 5 30th.
- 6 Q. Okay. You talked to her by phone on the 30th?
- 7 A. I spoke to her by phone on the 31st.
- 8 Q. Okay. All right. It was the reporting officer that
- 9 may have talked to her earlier on, like the 29th or 30th?
- 10 A. Right. On the 30th, when the call initially came in
- 11 from Ms. Hancock, Officer Robert Porter spoke with them.
- 12 Q. All right. Okay. And that would have been late in
- 13 the day on the 30th, I believe. Is that correct?
- 14 A. That's right. We got the call around 7:30, 7:40
- 15 p.m.
- 16 Q. Okay. The call actually came in late in the day ---
- 17 A. Yes.
- 18 Q. --- on the 30th?
- 19 A. Yes, that's right.
- 20 Q. And that was from Carla Hancock; correct?
- 21 A. Yes, sir.
- 22 Q. You were present yesterday when you heard Toni
- 23 Durnil say that she -- her notes said she didn't work
- 24 that day, but she may have worked at 7:30 in the morning.
- 25 Is that what you understood her testimony from yesterday?

1 A. I understood her to say she did not work her normal
2 full-time job on that particular day, but she took care
3 of someone, yes.

4 Q. All right. And because of various circumstances,
5 yours and hers, you were unable to meet with them until
6 January the 4th. Is that correct?

7 A. That's correct.

8 Q. You instructed her to keep notes?

9 A. Yes.

10 Q. And you've now heard her testimony first that she
11 worked on the 30th, but her notes said she didn't work on
12 the 30th, so were some discrepancies. Did you hear that,
13 that she did not work?

14 A. Right. That she did not work -- what she told me
15 was that she did not work her full-time job on the 30th.

16 Q. Did you discover any other discrepancies in her
17 notes in talking to her?

18 A. Sure. She had allowed the children to have contact
19 with Mr. McCann and Ms. Durnil both.

20 Q. All right. Let me back up. Did you discover any
21 inaccuracies in her notes other than the report about
22 working and not working?

23 A. Not that I can recall right off-hand.

24 Q. And your notes -- or these notes or every report
25 that you received until you talked with [REDACTED] about the

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1 specific allegations depended on Toni Durnil -- or came
2 from Toni Durnil. Is that correct?

3 A. That's correct.

4 Q. You reported you got the medical report from the
5 Julie Valentine Center shortly after it was -- after the
6 exam on January the 30th?

7 A. 13th.

8 Q. 13th. I'm sorry. You received that report and then
9 went to the Magistrate; correct?

10 A. I went to the Magistrate on January 22nd, yes, sir.

11 Q. And at that time, had you received any evidence of
12 any physical harm to this child?

13 A. No evidence of physical harm.

14 Q. Now, when did you receive a copy of the forensic
15 report you were talking about?

16 A. The forensic interview?

17 Q. The interview report?

18 A. I did not receive that until July 9th of 2010.

19 Q. Now, you said on July -- I'm sorry -- November 24th,
20 2010, you received a call from Toni that [REDACTED] was
21 recanting. Is that correct?

22 A. That is correct.

23 Q. Prior to that had you received any information about
24 a possible recantation with [REDACTED] -- that [REDACTED] may
25 have made?

1 A. No, I had not.

2 Q. You did not?

3 A. No, I did not.

4 Q. Did you receive both forensic reports on July the
5 9th, 2010?

6 A. I did.

7 Q. Both forensic interview reports?

8 A. I did.

9 Q. But it's your testimony you had no knowledge of any
10 prior recantation or change in her testimony or her
11 statement?

12 A. Not that she had said it did not happen.

13 Q. No. Any change in her statements?

14 A. Oh, there was some change, yes.

15 Q. And was there any statement that made it sound like
16 some of it did not happen, some of it didn't happen the
17 way she had said? Anything that made it sound like her
18 first report might have been inaccurate?

19 A. There was some differences. Nothing that led me to
20 believe it never happened.

21 Q. Well, I'm not asking that. I'm asking if there were
22 changes where she withdrew some or changed some
23 allegations, that they may not have happened or it didn't
24 happen or there was some ...

25 A. She did make some changes in some of the things that

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1 she said, yes.

2 Q. In the general way I just asked, that something
3 didn't happen that she had previously said happened?

4 A. She did. She had changed some things and said some
5 things didn't happen and she had added some things that
6 she said did happen.

7 Q. All right. And that was all before this November
8 24th possible recantation; correct?

9 A. Yes. That's right.

10 Q. So there had been changes, some withdrawing
11 information, for lack of a better word, prior to that
12 November 24th report to you from Toni Durnil?

13 A. She had made some changes in what she said had
14 happened, whether it would be adding something or taking
15 something away, but she never said it did not happen.

16 Q. Well, I understand that. But I'm saying she -- all
17 right. I think we understand what she said. Okay. So
18 by the time this is all over with, there had been reports
19 to you that there were at least two, if not three,
20 recantations on her part. Is that correct?

21 A. Twice her mother contacted -- well, her mother
22 contacted someone, whether it was me or someone else, and
23 stated that she had recanted.

24 Q. Now, did [REDACTED] presumably know you were with the
25 Sheriff's Department?

1 A. Yes. She came to my office at the Sheriff's Office.

2 Q. The times you talked to her after you were told that
3 she had recanted, were all of those at the Sheriff's
4 Department?

5 A. Every time I met with her it was at the Sheriff's
6 Office, except on December 29th, 2011, when I went to her
7 house.

8 Q. And every time you had heard of a recantation and
9 then talked to her, she gave you a story that was
10 consistent with what she had told you previously?

11 A. Right. From the beginning, yes.

12 Q. Now, you indicated you got your warrants in January
13 of 2010, your warrant?

14 A. Yes. One warrant.

15 Q. One warrant was issued?

16 A. That's right.

17 Q. That you got the forensic -- the forensic was
18 actually done a week or two later; correct?

19 A. Correct.

20 Q. And you say you did not received the information on
21 that forensic for months?

22 A. Five months.

23 Q. After you received, and you testified there were
24 other dates and other times and locations, did you seek
25 to amend or secure additional warrants?

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1 A. I did not seek additional warrants, no.

2 Q. Do you seek to amend anything at that point, any
3 arrest document or charging document of any sort?

4 A. No, I did not.

5 Q. Now, was the time that you heard something about a
6 statement that Larry did this, was that during one of the
7 same times when Toni was telling you about a recantation?

8 A. Yes, it was.

9 Q. And did you know who Larry was?

10 A. I did.

11 Q. And who was he?

12 A. It was Larry Pendergraft, Toni's -- he had lived
13 with Toni for a while. It was one of her boyfriends.

14 Q. Was she living with Larry at the time of these
15 allegations against Bobby McCann?

16 A. Yes, she was.

17 Q. And, in fact, the last -- the November, I believe,
18 2010, please correct me if I've got my dates mixed up,
19 when there was -- [REDACTED] was brought into your office, it
20 was not Toni but it was David that brought her in. Is
21 that correct?

22 A. That's correct.

23 Q. Who was her then boyfriend?

24 A. That's right.

25 Q. What was she calling him at that time, do you

1 remember by any chance?

2 A. What she called David?

3 Q. Yes.

4 A. No, I don't recall.

5 Q. And then later, I think January of '11, you said
6 there was a family meeting once DSS was involved, and to
7 make sure I'm clear, you first said Bobby McCann, but you
8 then changed it to David Bagwell that was at that
9 meeting?

10 A. That's right. That's right.

11 Q. Bobby McCann was not there?

12 A. Bobby McCann was not there.

13 Q. And suffice it to say, throughout this, until maybe
14 your last meeting with them in December of '11 or shortly
15 thereafter, Toni and [REDACTED] and other members of their
16 family were going back around Bobby and Margaret, Bobby
17 McCann and Margaret Durnil?

18 A. That's true.

19 Q. They had been told, don't initiate contact, don't go
20 around them. They continued to do that on a fairly
21 regular basis; correct?

22 A. Yes, they were.

23 Q. From the time you arrested him until December of
24 2011, did you have any direct contact with Bobby McCann?

25 A. No.

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1 Q. During that period of time, was any of the
2 information you were provided today, other than the
3 repeated contact, did any new information or new evidence
4 come to you?

5 A. Concerning Mr. McCann?

6 Q. Yes. Concerning the allegations we're here for
7 today?

8 A. Nothing concerning Mr. McCann, no.

9 Q. Now, in 2010 -- I'm sorry. Let me back up.
10 Withdraw that. Is part of your responsibility in cases
11 to present information to the Grand Jury?

12 A. It is.

13 Q. Did you present evidence to the Grand Jury in this
14 case in 2010?

15 A. We have a Grand Jury rotation.

16 Q. Uh-huh (affirmative).

17 A. And I don't recall if I actually presented this case
18 myself or if someone else presented it. But someone from
19 the detective division would have presented it to the
20 Grand Jury.

21 Q. Present information to the Grand Jury. Do you
22 remember about when in 2010?

23 A. Yes, sir, I have -- on August 24th, 2010.

24 Q. August 24th, 2010, information was presented to the
25 Pickens County Grand Jury in this case?

1 A. That's correct.

2 Q. And an indictment was issued?

3 A. Yes, sir.

4 Q. And what was that indictment for?

5 A. Criminal sexual conduct with a minor in the first
6 degree.

7 Q. At that time when that was presented, you had all
8 information, all documentation, everything that you
9 presented here on these charges, you had every bit of
10 that in your possession and had sent it up the line as it
11 was to be sent to the Solicitor's Office. Is that
12 correct?

13 A. That's correct.

14 Q. And -- well, let me back up. At one point you say
15 Margaret Durnil, who was Bobby McCann's girlfriend with
16 whom he lived, also Toni's mother and [REDACTED] s
17 grandmother, she and another individual came to the
18 office. Was this to your office or to ---

19 A. Yes, sir, it was my office.

20 Q. Asking that the charges not be prosecuted or charges
21 be dropped. Is that correct?

22 A. That's correct. At that point, there were no
23 charges. It was still an investigation.

24 Q. Okay. When was that?

25 A. January 5th, 2010.

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1 Q. Okay. All right. I'm presuming, or you would have
2 already told us, that there were no threats, there was no
3 unruly behavior, they were just saying they did not think
4 he should be charged. Is that more or less ---

5 A. That's right. That's right.

6 Q. I'm sorry. One last question. You indicated there
7 were two forensic interviews. Is that correct?

8 A. That's correct.

9 Q. Is, in your experience, and you've investigated
10 these cases for a while, is it common to have two
11 forensic interviews within a five-day period?

12 A. That's usually up to the forensic interviewer. I
13 don't schedule two interviews for one child. Normally,
14 when they go in for the interview, if the forensic
15 interviewer thinks that they need to come back for a
16 second interview, they will schedule that during that
17 time.

18 Q. And then my question would be, is that the norm or
19 is that ---

20 A. It is, especially for young children, it is common.

21 Q. All right. Thank you.

22 MR. CANTRELL: I don't think I have any further
23 questions.

24 THE COURT: Redirect?

25 MS. BARWICK: Yes, sir.

1 **REDIRECT EXAMINATION**

2 **BY MS. BARWICK:**

3 Q. Was Toni Durnil still living with Larry when she
4 tried to place the blame on him in 2010, November 24th,
5 2010?

6 A. No, she was not.

7 Q. Okay. Had he already scrapped her car by then?

8 A. Yes, he had.

9 Q. And Larry, his prior record isn't so good; is it?

10 A. No.

11 MS. BARWICK: No further questions.

12 THE COURT: Recross?

13 MR. CANTRELL: No further questions.

14 THE COURT: All right. Thank you.

15 You may call your next witness.

16 MS. BARWICK: Michelle Gerald.

17 THE CLERK: Place your left hand on the bible
18 and raise your right hand, please.

19 Do you solemnly swear or affirm the testimony you're
20 about to give in this case will be the truth, the whole
21 truth and nothing but the truth, so help you God?

22 THE WITNESS: I do.

23 THE CLERK: State your full name for the
24 record.

25 THE WITNESS: Michelle Gerald.

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1 MICHELLE GERALD,

2 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3 DIRECT EXAMINATION

4 BY MS. BARWICK:

5 Q. Ms. Gerald, where do you work?

6 A. Pickens County Department of Social Services.

7 Q. And how long have you been working there?

8 A. Five years.

9 Q. And what's your position?

10 A. Child Protective Services Investigator.

11 Q. Okay. Did you become involved in this case?

12 A. Yes.

13 Q. When did you become involved in this case?

14 A. December 15th, 2010.

15 Q. And how did you become involved?

16 A. I was notified by the Julie Valentine Center that
17 the child was no longer participating in counseling and
18 may have been re-exposed to the alleged perpetrator.

19 Q. Okay. As a result of that notification, what did
20 you do?

21 A. I met with the child at school.

22 Q. What day was that?

23 A. December 15th, 2010.

24 Q. So the same day?

25 A. Yes.

1 Q. And when you met with [REDACTED], did she disclose
2 sexual abuse to you?

3 A. She did.

4 Q. Did she say when the sexual abuse had been going on?

5 A. She stated that it had been going on for a very long
6 time.

7 Q. Okay. As a result of that conversation, what did
8 you do?

9 A. I met with her mother that same evening.

10 Q. And when you met with the mother, let me make sure I
11 have it right, did you give her any instructions?

12 A. Yes, I did.

13 Q. And what were those instructions?

14 A. We created a safety plan which stated that the child
15 was not to have any contact with Mr. Bobby McCann.

16 Q. And what is a safety plan?

17 A. A safety plan is a plan that DSS uses to determine
18 risks in the home for the child. At the time, we
19 determined that there was some risk because the mother
20 admitted that she had taken the child around Mr. McCann.
21 So the safety plan is a measure we use to just say that
22 we've addressed what the issues are and ask the parents
23 to go by that safety plan in order to protect the child.

24 Q. What happens if someone -- a parent doesn't go along
25 with the safety plan and violates it?

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1 A. We usually ask for the child to be placed with
2 either an alternative care giver, which could be a family
3 member or friend, in the next effort to keep the child
4 with, you know, family.

5 Q. And if there aren't any family or friends around
6 besides the perpetrator also being the family, what would
7 you do?

8 A. Right. Then we would petition the court to bring
9 that child into foster care.

10 Q. So DSS custody?

11 A. Yes.

12 MS. BARWICK: No further questions.

13 THE COURT: Cross-examination, sir?

14 MR. CANTRELL: I have no questions.

15 THE COURT: Okay.

16 MS. BARWICK: May she be excused, Your Honor?

17 THE COURT: Yes, ma'am. Thank you, Ms. Gerald.

18 THE WITNESS: Thank you.

19 THE COURT: We appreciate you being here.

20 Next witness?

21 MS. BARWICK: You Honor, at this time could we
22 take a brief recess?

23 THE COURT: Sure.

24 MS. BARWICK: Thanks.

25 THE COURT: Ladies and gentlemen, let's take a

1 break and please don't discuss the case. We'll come back
2 on the record in a short period of time.

3 (WHEREUPON, the jury exited the open court at
4 approximately 9:46 a.m.)

5 THE COURT: All right. Ms. Barwick, are you
6 waiting for a witness?

7 MS. BARWICK: Well, I thought I was, Your
8 Honor. But I was just informed that she's here. But if
9 I could set up my easel and take a brief ---

10 THE COURT: Sure. Yeah, yeah, yeah. That's
11 fine. Just let me know when you're ready. Is the next
12 one going to be the forensic interviewer?

13 MS. BARWICK: No, Your Honor. It's going to be
14 the medical examiner.

15 THE COURT: Okay. That's fine. While we're
16 waiting, do you have those CDs?

17 MS. BARWICK: I do.

18 THE COURT: I can finish watching those while
19 you're setting up.

20 MS. BARWICK: Okay.

21 (WHEREUPON, the court stood at recess for a short
22 break.)

23 THE COURT: Okay. Are you ready for the jury?

24 MS. BARWICK: The State is, Your Honor.

25 MR. CANTRELL: Yes, Your Honor.

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1 THE COURT: You think you got all your
2 technology hooked up and as soon as you cue it up, it's
3 going to work flawlessly?

4 MS. BARWICK: No, sir.

5 THE COURT: Yeah, I was about to say, don't
6 say, yes. You'll jinx yourself. You really will.

7 Okay. Will you bring the jury in, please, sir?

8 THE BAILIFF: All right, sir.

9 (WHEREUPON, the jury entered the open court at
10 approximately 10:06 a.m.)

11 THE BAILIFF: All present, sir.

12 THE COURT: Thank you, sir.

13 All right. Ms. Barwick, your case, ma'am.

14 MS. BARWICK: Thank you, Your Honor. The State
15 would call Dr. Crosswell to the stand.

16 THE CLERK: Place your left hand on the bible
17 and raise your right hand, please.

18 Do you solemnly swear or affirm the testimony you're
19 about to give in this case will be the truth, the whole
20 truth and nothing but the truth, so help you God?

21 THE WITNESS: I do.

22 THE CLERK: If you would have a seat and state
23 your name for the record, please.

24 THE WITNESS: Mary Fran Crosswell.

25 MARY FRAN CROSSWELL, M.D.,

1 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

2 **DIRECT EXAMINATION**

3 **BY MS. BARWICK:**

4 Q. Dr. Crosswell, where do you work?

5 A. I'm a child abuse pediatrician with the Children's
6 Hospital at Greenville Hospital System University Medical
7 Center in Greenville.

8 Q. Okay. And what are your duties there?

9 A. I am asked to evaluate children when there are
10 concerns of some form of child maltreatment.

11 Q. Okay. And how long have you been doing that?

12 A. I've been doing it for about five and a half years.

13 Q. Let's talk a little bit about your education and
14 background. Tell the jury a little bit about your
15 medical education.

16 A. Okay. I received my undergraduate degree from Wake
17 Forest University. I received my Medical Degree from the
18 University of Louisville. I completed a Pediatric
19 residency at the Greenville Hospital System. I've
20 attended numerous continuing medical courses in the field
21 of child abuse pediatrics; and became certified in the
22 field, both general pediatrics and child abuse
23 pediatrics.

24 Q. Okay. And what kind of specialized training have
25 you had in child abuse pediatrics?

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1 A. As I mentioned, I've attended numerous courses and
2 multiple hours of on-going education to keep up-to-date
3 in the field of child abuse pediatrics.

4 Q. Okay.

5 MS. BARWICK: Your Honor, at this time, the
6 State would like to introduce her as an expert in child
7 abuse pediatrics.

8 MR. CANTRELL: So stipulate.

9 THE COURT: All right. Ladies and gentlemen,
10 as I explained to you yesterday someone may be qualified
11 and admitted as an expert witness because of his or her
12 experience, expertise or education. You put whatever
13 weight on an expert witness's testimony you feel is
14 appropriate, just as any other piece of evidence that you
15 receive in the trial of this case.

16 You may proceed.

17 Q. How many times have you testified in court as an
18 expert?

19 A. I would say probably fifteen to twenty times as an
20 expert.

21 Q. Did you become involved in this case?

22 A. Yes, I did.

23 Q. Is the State paying you to be here today or are you
24 here because you're under a subpoena?

25 A. I am here because I'm under subpoena.

1 Q. Who actually pays your salary?

2 A. The Greenville Hospital System pays my salary.

3 Q. And do you work at the Julie Valentine Center?

4 A. As a cooperative agreement with the Greenville
5 Hospital System, I do many evaluations at the Julie
6 Valentine Center.

7 Q. Okay. When you became involved with this case, did
8 you do a medical exam on [REDACTED] [REDACTED]?

9 A. Yes, I did.

10 Q. And when was the date of that exam?

11 A. The date of that exam was January 13th, 2010.

12 Q. And what is the purpose of an exam like you do?

13 A. There are multiple reasons to do an exam on a child
14 who has been allegedly maltreated. In a sexual abuse
15 evaluation, the primary reason is most of the time to
16 reassure a child that their body is normal in spite of
17 what has happened to them. It can be of therapeutic
18 value to know that their body doesn't have any evidence
19 of what has happened to them. The second purpose would
20 be to document any findings that may be there because of
21 the abuse that has occurred. And, thirdly, to assess for
22 any sexually transmitted infections that may be
23 associated with the abuse.

24 Q. Okay. And if you do have findings, do you then
25 treat the child, as well?

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1 A. Yes, I do.

2 Q. In [REDACTED]'s particular case, did you sit down and
3 meet with her before the exam?

4 A. Yes.

5 Q. When you sat down to meet with her, did you explain
6 the purpose of her coming in to see you that day?

7 A. The way we work our evaluations is that the child
8 and her care giver is first met by a child life
9 specialist who is specially trained to explain to the
10 child exactly what is going to happen to them, from
11 beginning to end, so that we can limit any anxiety that
12 they may feel with the evaluation. So she brings the
13 child back, shows them all the pieces of medical
14 equipment that we use, let's the child even use the
15 medical equipment on a doll, explains the purpose of the
16 exam. Then when I come in, I meet with the care giver
17 first to obtain a detailed medical history about the
18 child. And then I try to obtain further history from the
19 child, from him or herself.

20 Q. Okay. During that time period when you're asking
21 the child about the history, is it just you and the child
22 or are other people around?

23 A. We ask the care giver to step out of the room and
24 then the child life specialist and I remain in the room
25 while I talk to the child about what has or has not

1 happened to them.

2 Q. Okay. And you sat down with [REDACTED]?

3 A. Yes, I did.

4 Q. When you sat down with her, did you explain why you
5 were talking to her?

6 A. Yes.

7 Q. And did you then proceed to get a medical history
8 from her?

9 A. Yes, I did.

10 Q. What is the purpose of getting the medical history?

11 A. As with any physician/patient interaction, I need to
12 know what has happened to the child and to -- the person
13 who knows that best is [REDACTED]. Sometimes, even though
14 she may have talked to other people, sometimes children
15 feel compelled to tell a physician something about what
16 has happened because they have concerns about their body.
17 So I do spend some time just asking them general
18 questions to see what information they will share with
19 me.

20 Q. Does the patient history affect your diagnosis or
21 treatment?

22 A. Absolutely.

23 Q. And did [REDACTED] give you a medical history in this
24 case?

25 A. Yes, she did.

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1 Q. And what did she say?

2 A. She said she had been touched in her vaginal area
3 with the perpetrator's fingers, that it was hurting when
4 he touched her. She states that he touched her with his
5 mouth and points to vaginal area when asked where he
6 touched her with his mouth. She said that he had touched
7 her with his winky dinky do, which was what her term was
8 for penis, on her chicky, which was what her term was for
9 vagina. When asked how many times he had touched her
10 chicky, she held up all the fingers on both hands and
11 said, every day. She denied anyone else ever touching
12 her. And she said one time she had had a boo-boo in her
13 chicky area.

14 Q. Did she express any concerns about her body?

15 A. Yes. Spontaneously she asked if her hole should be
16 big or little down there.

17 Q. And what did you tell her?

18 A. Ah ---

19 Q. Do you remember?

20 A. I don't remember what I told her, but I tried to
21 reassure her that I would let her know if everything was
22 okay after the exam.

23 Q. And did you do an exam on her?

24 A. Yes, I did.

25 Q. Tell the jury about the process of that exam.

1 A. Okay. The physical exam of children for a sexual
2 abuse evaluation is a head-to-toe physical exam. So we
3 start by looking in the eyes and the ears, mouth,
4 listening to the heart and lungs, palpating the abdomen,
5 checking the skin for any signs. And then the last
6 component of the exam is the genital exam. As part of
7 that exam, we use a colposcope, which is a piece of
8 medical equipment that serves several purposes for me.
9 One is it's a good light source so that we can well
10 visualize the area that we're looking at. Two, it has
11 microscopic lenses so that the area that I'm looking at
12 is magnified. And, thirdly, it has a camera attached
13 that allows digital photography of any findings so that
14 should anyone else need to review or assess my opinion,
15 then the child doesn't have to be re-examined, it can be
16 done through the photographs.
17 Q. Okay. I'm going to put up an easel. Would that
18 help you demonstrate this exam?

19 A. Sure.

20 MS. BARWICK: Mr. Cantrell, if you need to come
21 over, I understand.

22 A. The female anatomy like with what we're going to do
23 right now, when I'm first looking at the genital area,
24 there's two -- the top layer of tissue is called the
25 labia majora.

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1 Q. Would it help you if I held it for you?

2 A. I think I'm okay. And then the next layer of tissue
3 here is called the labia minora. Once those are pulled
4 aside, deep in this area, you can see the entrance to the
5 vaginal opening. This deep space that I'm not able to
6 draw between the labia minora and the vagina is called
7 the vestibule. Covering the vagina in females is a layer
8 of tissue called the hymen. And in -- I'm just going to
9 darken this area so you can see this. In children who
10 have not -- or in girls who have not gone through
11 puberty, this tissue is very thin and fragile and very
12 sensitive. As they go through puberty the hormones that
13 are associated with puberty actually change this tissue.
14 So the same hormones that cause breast development and
15 public hair will also change this tissue to become much
16 more thicker, much more elastic, and much less sensitive
17 to any type of touch.

18 Q. Okay. And when you examined [REDACTED], did you have
19 any findings?

20 A. No, I did not.

21 Q. And what, exactly, were you looking for?

22 A. So what I look for is -- you know, and this is a
23 period of several weeks after she had made a disclosure,
24 so I'm looking for any redness or scarring or tearing
25 anywhere and then looking at the hymen itself to make

1 sure they're smooth margins that aren't interrupted of
2 torn.

3 Q. Okay. Would it surprise you to see no findings in
4 this case?

5 A. No, it would not.

6 Q. And why is that?

7 A. Well, there -- medical studies have shown that in
8 legally confirmed cases of sexual abuse, only fifteen
9 percent have actually specific findings of sexual abuse.
10 Most of the time, there are no findings of abuse. And
11 this can be accounted for, for several reasons. One is
12 that the nature of the abuse may not have caused injury
13 that would leave a sign on physical exam. Two, all of
14 this tissue is mucosal tissue, which heals very rapidly.
15 If you think about, if you bite on the inside of your
16 cheek that it might even tear the skin. If you don't re-
17 bite it, it'll heal within a day or two, usually. This
18 is that same type of tissue, so it heals very quickly.
19 So even if there was some type of irritation or small
20 tear, then it may have healed without leaving any signs
21 of scarring.

22 Q. And what about if there was digital penetration,
23 just slightly?

24 A. So, I think, you know, the perception of -- as I
25 described, this area is actually deep set. So there can

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1 be, you know, different forms of sexual abuse that can
2 occur outside of this tissue without doing any damage to
3 the hymen itself. The perception of the penetration of
4 all these other layers of tissue may not leave any
5 physical findings.

6 Q. Okay. And what about oral sex, would that have any
7 effect on any of that?

8 A. I would not expect any physical findings. Oral sex
9 can put a child at risk for sexually transmitted
10 infections. I did not see any sign of discharge,
11 although I did assess her for that.

12 Q. Okay. And what penile penetration where it doesn't
13 go in because it doesn't fit all the way?

14 A. Well, as I mentioned, there are reports of child
15 sexual abuse where the male perpetrator, the penis will
16 actually rub on this outside of the area, may even make
17 contact, but not penetrate deep into the vagina, which
18 would leave the hymenal tissue intact.

19 Q. Say a penis were to try to be inserted into a three-
20 year-old, a four-year-old, a five-year-old's vagina,
21 would that cause pain?

22 A. It would be very painful. As I said, when I'm even
23 doing my exam, I take a special care not to touch this
24 tissue because it is so exquisitely sensitive, it would
25 be painful to touch.

1 Q. Have you ever mistakenly touched that tissue?

2 A. Yes, I have.

3 Q. And what's the child's reaction?

4 A. They jerk up and try to move away.

5 Q. Okay. Do you examine any other parts, such as the
6 anal opening?

7 A. I do. I also -- you know, the anus sits back here,
8 and so while they're in the same position, I check the
9 anus to make sure that there's no, you know, lacerations
10 or fissures, redness or bruising in that area.

11 Q. If a perpetrator were to try to insert his penis
12 into the anal opening, but wasn't able to all the way,
13 would you expect to see any findings?

14 A. No. You know, the anus is actually designed to
15 allow things -- large things to pass without trauma in
16 most all cases. And so we know even in child sexual
17 abuse that things can go into the anus without causing
18 trauma, as well.

19 Q. And you said the exam was done in which month?

20 A. January.

21 Q. Okay. January what?

22 A. I believe it was 13th.

23 Q. Okay. So, if say, two or three weeks had passed,
24 how would that affect any kinds of signs?

25 A. Again, in this area, because it's mucus tissue, it

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1 heals very quickly and it often heals without any signs
2 of scaring.

3 Q. Okay. Thank you for that. And just so I'm sure,
4 what percentage -- you put out a percentage before of --
5 where there are findings in sexual abuse cases?

6 A. There are several studies out there. I think the
7 most recognized looks at fifteen percent of, fifteen
8 percent of legally referred cases have specific findings
9 of abuse.

10 Q. Okay. Fifteen percent?

11 A. Fifteen percent?

12 MS. BARWICK: Nothing further at this time.

13 THE COURT: Cross examination, sir.

14 **CROSS-EXAMINATION**

15 **BY MR. CANTRELL:**

16 Q. Dr. Crosswell, the gist of the medical exam is you
17 found nothing; correct? Is that pretty much it?

18 A. The gist of the medical exam is that the physical
19 exam was a normal exam.

20 Q. Which is what I meant to ask. Again, had you
21 examined the day after or a couple of days after the
22 alleged situation ---

23 A. No, I did not.

24 Q. I say, if you had ---

25 A. Oh, if I had.

1 Q. --- would you have been more likely to find ---

2 A. It just depends on what the nature of the abuse was
3 at that particular moment if it left a physical finding
4 or not.

5 Q. The fact that you were told by [REDACTED] that this
6 happened every day, all the time, would that make you
7 believe that you should be more likely to find evidence
8 of something?

9 A. No, it wouldn't. It wouldn't.

10 Q. No scarring on any part of this area? Now, you
11 talked about some of the mucus type areas, but other
12 areas, do those not leave scarring when there's abuse?

13 A. Typically, in chronic sexual abuse, the perpetrator
14 does not do anything to harm their victim because then
15 they lose their victim. So very often we don't have
16 physical findings because of the nature of the abuse and
17 what precedes it.

18 Q. But now what you just stated and your opinion on
19 that, you have no reason to know whether this was that
20 type situation or not, and you don't know if the alleged
21 abuser was afraid that they might lose ---

22 A. I don't. But it's not uncommon to see children who
23 have been chronically abused still not have physical
24 findings.

25 Q. And you base any concept of chronic abuse on the

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1 fact that you were told this happened every day?

2 A. I base it on the medical history that I obtained
3 from that patient.

4 Q. And that's maybe where I'm getting confused and
5 that's my fault. Medical history isn't just a physical
6 exam. You're talking about the interview you had, the
7 conversation you had with [REDACTED]. Is that true?

8 A. Well, in any physician/patient exam, you know, for
9 whatever I'm seeing a patient for, I'm going to take a
10 history from my patient to find out what, you know, what
11 their signs and symptoms are, what has happened to them,
12 and so a component of that evaluation is a history from
13 my patient.

14 Q. I understand. It's just that I wasn't clear on the
15 medical history versus other revelations to you or that
16 sort of thing. Now, when you're doing this medical
17 history, do you ask or do you expect to be told if there
18 have been prior irritations, in this case in the genital
19 area, from something such as vaginitis or other type
20 histories?

21 A. And that's part of the detailed history that we get
22 from the care givers to provide any history.

23 Q. Were you given any history of that sort of thing
24 with [REDACTED]?

25 A. Not to my recollection. No.

1 Q. So you were not aware. If there had been, you were
2 not aware of any prior vaginitis or other type issues
3 that [REDACTED] may have had?

4 A. No, I was not.

5 Q. You were not aware of any creams or ointments that
6 had possibly been prescribed in the past?

7 A. No, I was not.

8 Q. And you were not made aware, I assume, of any
9 possible prior allegations -- prior to the circumstances
10 of this case, prior allegations of any type of sexual
11 abuse or molestation?

12 A. No, not from the care giver; and [REDACTED] denied any
13 previous.

14 Q. And when you say care giver, you're talking about
15 the mother Toni?

16 A. Yes, I am.

17 Q. And just to clarify my question a while ago, to make
18 sure I'm more accurate, your physical examination
19 revealed nothing. Is that correct?

20 A. My physical exam revealed that she had normal
21 anatomy.

22 MR. CANTRELL: That's all I have. Thank you.

23 THE COURT: Redirect?

24 MS. BARWICK: No, Your Honor. May she be
25 excused?

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1 THE COURT: Yes, ma'am. Thank you for being
2 here. We appreciate it.

3 Next witness.

4 MS. BARWICK: The State would call Dr.
5 Elizabeth Willingham to the stand.

6 THE CLERK: Place your left hand on the bible
7 and raise your right hand, please.

8 Do you solemnly swear or affirm the testimony you're
9 about to give in this case will be the truth, the whole
10 truth and nothing but the truth, so help you God?

11 THE WITNESS: I do.

12 THE CLERK: State your full name for the record.

13 THE WITNESS: Elizabeth Willingham.

14 ELIZABETH WILLINGHAM, PH.D.

15 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

16 DIRECT EXAMINATION

17 BY MS. BARWICK:

18 Q. Dr. Willingham, where do you work?

19 A. I work at the Julie Valentine Center in Greenville.

20 Q. Okay. And what's your job there?

21 A. I'm the Clinical Director.

22 Q. And can you tell the jury a little bit about what
23 the Julie Valentine Center is?

24 A. Yes. We are a private non-profit organization. Our
25 programs are multi-faceted. We have three major

1 programs, one being the child advocacy center, which is a
2 nationally accredited child advocacy center that responds
3 to allegations of abuse for children. The other program
4 is a rape crisis program. And then we have prevent child
5 abuse, which provides community education and training.

6 Q. And which division do you work in?

7 A. Well, I am the Clinical Director, so I'm over all of
8 the clinical programs, per se, but I oversee the child
9 advocacy center.

10 Q. Okay. And what kind of education and training have
11 you had?

12 A. I have my Bachelor's Degree in Psychology from the
13 University of Georgia; I have my Master's Degree in
14 Professional Counseling from Georgia State University.
15 I'm a Specialist in Education, also from Georgia State,
16 Education Specialist Degree from Georgia State
17 University. And then I have my Ph.D. in Counselor
18 Education and Practice from Georgia State University.

19 Q. Okay. And I know you said you are kind of in a
20 supervisory role.

21 A. Yes.

22 Q. What are your daily duties at the Julie Valentine
23 Center?

24 A. I have many daily duties. Like I said, I oversee
25 all of the clinical programs and make sure that our --

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1 we're using evidenced-based practice, make sure that
2 we're in compliance, make sure that we are in compliance
3 for ethics and legal standards. I also supervise the
4 clinicians and the forensic interviewers. I provide
5 clinical supervision to them. I carry a case load of
6 treatment cases, so I see children and adolescents and
7 their non-offending care givers, provide treatment to
8 them. I see them individually and do family work. I
9 also am in charge of the non-offending care giver
10 program, so that's facilitating support and education
11 groups for the non-offending care givers. And various
12 and sundry things, writing grants and doing reports that

13 ---

14 Q. Lots of things?

15 A. Lots of things, yes.

16 Q. And what kinds of licenses and degrees do you have
17 in counseling children?

18 A. Okay. Well, I went through my degrees and my -- I
19 have my Master's, my Education Specialist, and my
20 Doctorate in Counseling. I also am a Licensed
21 Professional Counselor here in South Carolina, as well as
22 in the State of Georgia, and I am a Nationally Certified
23 Counselor. And I'm also a Victim Service Provider here
24 in South Carolina.

25 Q. What kinds of specialized training do you have in

1 the particular field of counseling children thought to be
2 sexually abused?

3 A. Well, I have a lot of specialized training. I've
4 been very fortunate over the years to be able to go to
5 many conferences and trainings and on treating child
6 abuse, forensic interviewing, I've been trained also in
7 Corner House and Child First here in South Carolina, on
8 how to talk with and interview children. I have training
9 and -- formal training in trauma focus play therapy, as
10 well as formal training in trauma focus cognitive
11 behavioral treatment.

12 Q. How many years have you been counseling children
13 thought to be abused?

14 A. I have been in this field of child abuse since 1999.
15 I took a two-year break when my twins were born. But
16 other than that, I've been practicing in this area.

17 Q. Say in a given year, how many children do you think
18 you've counseled that have been thought to be abused?

19 A. In a given year?

20 Q. An estimate's fine.

21 A. An estimate. In a given year my caseload at Julie
22 Valentine Center is rather on the small side. So I see
23 up to six clients and their families, just in individual
24 treatment. But I treat -- I do groups. I would say
25 between supervision, treatment, assessment, counseling, I

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1 would be involved with, you know, close to, I would say,
2 seventy-five to a hundred children and families per year
3 at the center.

4 Q. Okay.

5 MS. BARWICK: Your Honor, at this time, the
6 State would like to move her in as an expert in
7 counseling children thought to be sexually abused.

8 THE COURT: All right. Any objection or voir
9 dire?

10 MR. CANTRELL: No objection to her -- to that
11 particular -- to that.

12 THE COURT: Good enough. All right. She's so
13 admitted. You may proceed.

14 Q. Are you here today because we're paying you or
15 because you're under a subpoena?

16 A. I'm under subpoena.

17 Q. Okay. And do you know [REDACTED] personally?

18 A. I do not.

19 Q. Have you ever counseled [REDACTED]?

20 A. I have not.

21 Q. Okay. So you -- what's your understanding of the
22 case? What kind of information do you have?

23 A. I have very limited information. I was briefed just
24 on the allegations before the trial so I would know sort
25 of what I was speaking to. But other than that, I have a

1 very limited understanding of what has happened in the
2 case.

3 Q. Okay. That being said, let's talk a little bit
4 about children who are thought to be abused. Let's talk
5 about disclosure first. Tell the jury a little bit about
6 disclosure and delayed disclosure?

7 A. Okay. We typically say that disclosure is a process
8 ---

9 MR. CANTRELL: Your Honor. Your Honor. At
10 this time, if I could, I would like to have a motion to
11 possibly take up.

12 THE COURT: Ladies and gentlemen, if you'd
13 please return to your jury room. Please do not discuss
14 the case.

15 (WHEREUPON, the jury exited the open court at
16 approximately 10:35 a.m.)

17 THE COURT: For y'all's collective information,
18 I'm not distracted by this computer. I'm working on my
19 charge while I listen, okay? So if you see me looking
20 down, it's because right this second I'm working on the
21 verdict form. I'm just leaning forward a little bit,
22 because I don't have my clerk. She took a job at the
23 Attorney General's Office. Okay.

24 MR. CANTRELL: Your Honor, at this time, I
25 would object to the testimony. Certainly, she is an

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1 expert in her field. I cannot deny that. But I think
2 the testimony that is to be presented has to be in some
3 way to assist the trier of fact to understand the
4 evidence or determine the facts at issue.

5 We're getting ready to talk about disclosures and
6 that sort of thing, and I think it goes beyond the scope
7 of the ruling. She's acknowledged she has very limited,
8 virtually no knowledge of this case in particular. So
9 generally she's -- the rule also is going to require her
10 to testify as to any underlying facts or data. I think
11 she needs to do that and she has done it. And then in
12 Rule 703, requires also that the facts or data that is
13 being relied upon may be those perceived or made known to
14 the expert before the hearing, and the type reasonably
15 relied upon by experts in a particular field in forming
16 opinions and inferences on the subject. Again, she's an
17 expert in her field, but she doesn't have any knowledge
18 or information about this case. And I think that still
19 would lead us up to 702, that this needs to be knowledge
20 and testimony that will assist the trier of fact. And I
21 don't believe it rises to that standard. So I would
22 oppose her testimony and I would ask you that the
23 testimony be excluded.

24 THE COURT: All right. Ms. Barwick.

25 MS. BARWICK: Your Honor, she is not going to

1 testify as to anything involving this case. She is
2 testifying as to why kids, you know, delay in their
3 disclosure, what kinds of things would prevent a child
4 from disclosing right away. What kinds of -- how
5 children's memories work for sequencing and ability to
6 recall.

7 In fact, by her almost having a limited knowledge of
8 the case, it's going right along with case law that says
9 no vouching for the victim. She's not going to be
10 vouching for the victim. She's going to help explain to
11 the jury that just because a child allows something to
12 happen to them -- and a child can't allow. But,
13 figuratively speaking, allow something to happen to them
14 for two to three years, the jury is going to want to know
15 that didn't -- they'll think that it didn't happen if
16 it's not explained to them that this is a normal thing.
17 So it does help the jury understand the situation.

18 THE COURT: So if I understand you correctly,
19 the substance of her testimony is accounting for the
20 delay in reporting, but not vouching for the credibility
21 of this specific victim?

22 MS. BARWICK: Correct, Your Honor. And I want
23 to give you full disclosure. It's going to be about
24 disclosure, physical symptoms she has noticed in children
25 who are sexually abused, how the familiar link might

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1 affect the child's disclosure, talks about grooming,
2 talks about whether children are sophisticated liars. In
3 fact, I'm taking that out because I don't even want to
4 get close to that.

5 THE COURT: Okay. Yeah, that's a red flag.

6 MS. BARWICK: Child memory and ability to
7 recall and expand. And how chronic sexual abuse might
8 affect disclosure.

9 THE COURT: I'll give you the last word, Mr.
10 Cantrell?

11 MR. CANTRELL: Your Honor, just that certainly
12 some, if not all, of those issues I believe are beyond
13 the scope of assisting the trier of fact. Some are, you
14 know, I think even beyond the point of the prejudicial
15 more so than any evidentiary value or other value to the
16 jury. And I just believe that that information, that
17 testimony is beyond the scope of some of the things I've
18 heard and some of the categories I heard. I think it's
19 significantly prejudicial such that it is -- outweighs
20 any probative value or assistance to the jury.

21 THE COURT: All right. I'm going to
22 respectfully deny your motion. I think that the
23 substance of the testimony that's being offered into
24 evidence is within the scope of her prescribed expertise.
25 My concern certainly is that there is no vouching for the

1 credibility of the specific victim. If you stay away
2 from that, you can continue to lodge contemporaneous
3 objections to any testimony that suggests that there is a
4 vouching for the credibility of the victim in this case.

5 With respect to the scope of her testimony and the
6 relevance, I think there has been evidence put into the
7 record that there was a substantial delay in time and
8 reporting of this, and some question about to whom she
9 reported it when she reported it. And inasmuch as it has
10 been admitted into evidence, I think it is relevant for
11 the jury's consideration and can be helpful in their
12 analysis of the evidence that's been offered into and
13 admitted into the record here. Okay?

14 Now, that certainly does not preclude you from
15 lodging contemporaneous objections to specific opinions
16 that she offers during the course of her testimony.

17 MR. CANTRELL: I just have one other issue I
18 will present to the court, and I think here, again, it
19 may require contemporaneous objections, is we all
20 understand that she can't vouch for the testimony or the
21 individual's truthfulness or anything like that. I
22 expect that, as this testimony comes out, and there
23 appears to be vouching for victims in general, which I
24 believe this might could lead to. In fact, I'm assuming,
25 that's one of the reasons the Solicitor's wanting to put

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1 it in, but I will put that objection into the record,
2 that this is a vouching, not for just this alleged
3 victim, but for all victims in her category, which I
4 think may still go outside of the -- not violation but
5 contrary to the ruling that occurred. So I will tell you
6 that I intend to raise that issue if it appears that
7 she's gotten to that point, also.

8 THE COURT: I understand. I'm sensitive to
9 that issue, too. What I anticipate from this testimony
10 is essentially a sterile, clinical recitation of the
11 phenomenon of delayed reporting without any vouching for
12 credibility, only a statement did, in fact, exist and it
13 is known within the field of expertise, in which she has
14 been qualified as an expert. Okay?

15 MS. BARWICK: Yes, sir. Your Honor.

16 THE COURT: Good enough. Anything else?

17 MR. CANTRELL: Nothing the Defense.

18 MS. BARWICK: Not from the State.

19 THE COURT: Okay. Fair enough. Anybody else
20 in the courtroom need to take a break before we resume?

21 MS. BARWICK: I'm fine this time, Judge.

22 THE COURT: You're fine? Okay.

23 (WHEREUPON, the jury entered the open court at
24 approximately 10:44 a.m.)

25 THE COURT: All right. Ladies and gentlemen,

1 thank you for your patience with us. We were just
2 discussing some evidentiary issues that may come up in
3 the course of this witness's testimony, and we've
4 resolved that so we can move on.

5 I do want to tell you one other thing that I just
6 pointed out to the attorneys and everybody in the
7 courtroom. You see me -- I'm on my computer. I don't
8 want you think that I'm sending missives of love to my
9 wife or placing bets with my bookie. I'm not. I
10 ordinarily have a young lawyer who works for me that
11 prepares the legal charge and the verdict forms and
12 assists me in doing research as the case goes on. But
13 she, luckily, just got a job with the Attorney General's
14 office. So I am without a clerk. So if you see me on
15 this computer, it's because I'm working on this case. So
16 don't think that I'm distracted in any way, shape or
17 form. I'm indeed working on this case.

18 All right. You may proceed.

19 MS. BARWICK: Thank you, Judge.

20 Q. Dr. Willingham, will you tell the jury a little bit
21 about delayed disclosure?

22 A. Yes. When we think about disclosure of abuse, we
23 typically say it's a process, it's not an event.
24 Oftentimes, it -- disclosure is delayed, meaning that
25 children will wait to say something. In fact, when you

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1 look at research that surveys adult survivors of
2 childhood sexual abuse, I would say about seventy percent
3 have never told anyone. So it's very common to have a
4 disclosure that may be delayed where a child has not
5 reported events right after they have happened. And it's
6 -- oftentimes children will disclose sometimes a little
7 bit at a time. Sometimes they will disclose something
8 and wait to see what the response will be from the person
9 that they disclosed to, to kind of test the waters, you
10 know, what's going to happen if I say this. And so that
11 disclosure sometimes can be tentative or they may
12 disclose some details of the abuse at one point in time,
13 and some at another point in time during the process of
14 disclosure.

15 Q. So with delayed disclosure, and with you saying
16 disclosure is a process, is it possible that you could
17 tell a little bit, check and see how it's going, tell a
18 little bit more, and then tell a little bit more?

19 A. Yes. I mean, I think that children, especially
20 children in environments where abuse is happening are
21 really skilled at observing the reactions of the people
22 around them. It's sort of a protective mechanism,
23 actually. But they're still observing and seeing how
24 other people are going to respond. So they might tell
25 something that's happened to them and -- at one point in

1 time, and just like I said, test the waters. Is that
2 person going to believe me? Is this person going to help
3 me? Are the things that I'm worried about that actually
4 happened, so am I going to get in trouble? You know, all
5 of those questions. So they're going to test the waters
6 and if they had a response of, you know, I'm glad you
7 told me or let's make sure we take care of this. We need
8 to tell people that'll keep you safe, then they're more
9 likely to disclose more if given the opportunity and it's
10 a person that they feel like is responsive to what
11 they're saying.

12 Q. What if the person they disclose to says they don't
13 believe them?

14 A. If a person that they disclose to tells them that
15 they don't believe them, different children respond in
16 different ways. Some children will continue telling.
17 They may tell other people that they think will believe
18 them. It may be another teacher, another care giver or a
19 friend. Other children may shut down and say, okay,
20 well, nobody's going to believe me. I'm just not going
21 to tell anybody. So it just depends on the child.

22 Q. And what are some things that may prevent a child
23 from telling right away?

24 A. There are lots of reasons why kids may not tell
25 right away. I think the number one reason is fear, fear

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1 that they're going to get in trouble, fear that they're
2 going to get the person who is hurting them in trouble,
3 fear of maybe upsetting their parent or their family.
4 They may feel guilty or they might feel ashamed, which
5 might play into them not telling. Oftentimes, children
6 are very confused, too, about these types of touches. I
7 mean, if you can think about -- as adults when we think
8 about talking about sexual encounters, even adults are
9 sort of uncomfortable with talking about that. If I were
10 to ask you to tell me about your last sexual encounter,
11 you'd probably get a little like, oh, you know, and be
12 embarrassed and not really want to tell me about it. And
13 for children, you know, you've got the uncomfortable
14 nature of the topic of sex in the first place. And then
15 on top of that, you have a limited understanding of what
16 that really is. So children who are exposed to sexual
17 knowledge and behavior early on before they're supposed
18 to be, they may not necessarily even know how to talk
19 about it or who to tell or what to do. So confusion can
20 be another reason why. One -- you know, ninety percent
21 of cases of child sexual abuse, the person who is
22 committing the acts is somebody who's known and loved and
23 trusted by the child. And so, you know, the child may
24 have a relationship with that person. The child, most of
25 the time, loves that person. And so that can be very

1 difficult for them too because they don't want that
2 person to get in trouble. You know, you think about it,
3 for example, you've got a friend who has a -- you have a
4 real pet peeve with the way that she complains all the
5 time or smacks her gum or something and you just kind of
6 deal with it because, you know, she's a good friend in
7 other ways. And I don't want you to think that I am
8 comparing sort of and minimizing abuse to that. But, you
9 know, there are other things about a relationship, other
10 than sexual abuse, when the person who is committing the
11 acts is somebody that's close to you. So like I said,
12 fear, shame, and guilt, confusion, the relationship with
13 the perpetrator, fear that they're going to get -- fear
14 that the perpetrator's going to get in trouble, fear that
15 the child's going to get in trouble, fear that they're
16 going to be taken away or taken out of the home.
17 Sometimes perpetrators actually threaten children, and
18 this can be -- they can threaten them directly by saying,
19 if you tell, I'll hurt you or I'll hurt your pet or I'll
20 hurt somebody in our family that you love. But, also,
21 perpetrators can threaten children indirectly. If
22 they've witnessed things, for example, domestic violence
23 or something, the child already has sort of an inherent
24 threat that that could happen to me if I get in trouble
25 with that person. And sometimes it could be just a look,

1 you know. An intimidating look is enough to shut a child
2 down or make them fearful of telling.

3 Q. What about test touching? Would that affect
4 disclosure?

5 A. Test touching? What I think I'm hearing you say
6 about test touching is sometimes in the grooming process
7 -- and what grooming is, is a term that we use for
8 describing offenders' behavior to try to entice the child
9 or gain trust and gain access to a child. And that
10 touching, test touching would be -- would fall into one
11 of those patterns of behavior. And that would be where
12 an offender would touch a child, maybe by tickling or
13 wrestling with a child to try to confuse them. So they
14 touch them, they kind of get them used to being touched
15 and then they may touch them accidentally. And the child
16 may feel like, hum, that was weird, but was that accident
17 or did that person do it on purpose? And so sometimes
18 that will lead them not to tell because they're confused
19 about it and they don't exactly know what to do with it.
20 And then if it happens again, then some children, not all
21 children, but some children may feel like, oh, it
22 happened again, so maybe it was an accident. And maybe
23 since I didn't tell the first time, I don't really want
24 to tell now because I might get in trouble or -- you
25 know, you have to think like a child. Children think

1 very concretely. They thinking about, you know, what is
2 right there in front of them, and they're really good
3 observers, but sometimes they're not very good
4 interpreters, so they make up their own ideas of
5 sometimes what is happening. And so that test touching
6 could be confusing.

7 Q. What other forms of grooming are there?

8 A. Giving gifts is a big form of grooming. You know,
9 you might have a perpetrator who would give toys or give
10 time and attention. Say, maybe I'll take you to the
11 movies or I'll take you to Chucky Cheese. Other types of
12 grooming would be just making the child feel special.
13 And saying, you know, this is our special time together,
14 could be a way of grooming. Making the child feel like
15 this relationship is different than anybody else's; it's
16 very special. And just really getting the child to trust
17 them and to go along, go along with the abuse.

18 Q. Would time -- the passage of time affect the details
19 of the disclosure?

20 A. It could.

21 Q. And why is that?

22 A. Well, when you're talking about children, they're in
23 the process of developing. So, you know, they are
24 learning new concepts every day, they're learning new
25 words every day. And as they grow and mature and their

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1 brains develop, they have more awareness of, you know,
2 what this is or more language to be able to describe what
3 has happened to them. So that's one way that time could
4 affect disclosure. Time could also affect disclosure if
5 they've had less contact with the person who was
6 committing the abuse. So if there was no contact, maybe
7 time passes and they feel safer disclosing that
8 information. I'm trying to think how else time can
9 affect. I really think those are two main ways, just the
10 maturity and being able to describe more and have a
11 better understanding.

12 Q. If you'll go into a little bit more, what do you
13 mean by describing more. Do they always have the
14 language necessary to say what's happening to them?

15 A. No. They don't. Children, they don't have --
16 children, as I've said, they're developing, they're
17 learning new things and they think very concretely and
18 they just -- they don't have the raw experiences that
19 adults have. So what they do is, in order to try to
20 understand new things, new concepts, they sort of apply
21 them to what they already know. And they have a limited
22 life experience. So sometimes they don't have the words
23 to describe things, for example, sexual things that they
24 shouldn't know about anyway.

25 Q. Do you have an example?

1 A. Yes. In my many years of working with children, I
2 recall a case where a child was describing the offender
3 ejaculating and she said, glue came out of his pee pee.
4 So that would be an example of a child's understanding of
5 what that is. It was sticky. It was white. It looked
6 like glue. That was her -- you know, that's what she
7 could describe it as, based on her life experience and
8 her language.

9 Q. Do kids always know what's relevant to disclose?

10 A. No. I wouldn't say that they always know what's
11 relevant to disclose. I think sometimes they disclose
12 what's on their mind. Just because we as adults are
13 asking them questions doesn't mean that they're thinking
14 about what we're asking in the same way that they are.
15 They just have -- they have a different way of
16 understanding things. Like, for example, my friend's son
17 was -- we were laughing about this because he was -- he
18 heard the word forefinger on a movie or something. And
19 she was -- he was saying, you know, a forefinger, what's
20 a forefinger? And we all know what a forefinger is as
21 adults, you know, your first finger. But he instead
22 counted to the fourth finger and said four finger. So he
23 doesn't quite understand that there are two meanings for
24 the word fore. When he four, he thought, that's four,
25 you know, the number four. So that would be an example

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1 of language and understanding from a developmental
2 perspective.

3 Q. Would the form of the question affect disclosure
4 such as a general question versus a specific question?

5 A. Yes, it could. Just because of the way that
6 children think. Sometimes a more specific question can
7 lead to a more specific answer just because of the way
8 that their memories are cued, meaning that their trigger
9 or their recall, their memories are recalled. So you
10 could ask a question, for example, did so and so touch
11 you? And maybe a very young child, say, a three-year-
12 old, four-year-old, five-year-old, may not think of touch
13 in the way that we think of touch. They may be more
14 concrete or more specific. So they may say, no. But
15 then if you follow up with, well, has anybody ever kissed
16 you? Well, they can tell you, yeah, my mommy gives me
17 kisses on the cheek or, you know, my daddy kisses me
18 every night before I go to bed, and they don't
19 necessarily put kisses in the category of touch. You
20 know, so sometimes it has to do with the way that you ask
21 the question and the wording and how they're thinking
22 about what you're asking them. So you may ask one
23 question and get one answer and then ask it in a
24 different way and get more detail or somewhat of a
25 different answer.

1 Q. What are some physical symptoms children that have
2 been sexually abused display?

3 A. There's a range of symptoms and every child is
4 different. We say every child's experience is unique.
5 So one child may have, you know, a good number of
6 symptoms and other children may have no symptoms at all.
7 But some of the common symptoms that we see in children
8 are -- for young children you would see regression,
9 meaning they sort of revert back to behaviors of a
10 younger child, so it could be bed-wetting or trouble, you
11 know, wetting their pants or going to the bathroom in
12 their pants. Clinging behavior. You know how toddlers,
13 you know, cling to you and that separation anxiety. If
14 you have an older child, maybe they become more clingy.
15 Nightmares. A lot of anxiety. And children with anxiety
16 and fear sometimes show it differently than we do.
17 Sometimes they act out. Also, as -- you know, other
18 symptoms would be somatic complaints, meaning, my tummy
19 hurts or my head hurts. They -- oftentimes, children may
20 act out or become promiscuous in order to sort of gain
21 some control or try to gain an understanding of what's
22 happened to them. Sometimes self-injurious behavior
23 happens. That's when they -- children harm themselves
24 and this can take different forms. So it could take the
25 form of picking or scratching themselves or biting their

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1 fingernails into the quick until it hurts. Or some
2 children may cut. Some children may develop eating
3 disorders. School-aged children, they may start doing
4 poorly in school. So there's a whole range of symptoms
5 that children may experience if they've been abused.

6 Q. Tell the jury a little bit about children's memories
7 and their ability to recall?

8 A. Okay. As I said, you know, children are concrete.
9 And so when you ask them to recall or tell them about a
10 memory, they're going to be telling you what they
11 remember based on how you ask it. And sometimes it's
12 based on what we call, like, anchoring events. And if
13 you can think of, for example, you know, you go to the
14 grocery store every Saturday. That's when you go to the
15 grocery store and you have your routine and the way you
16 go down the shopping aisle and everything. And so when
17 you're describing that, then you really may not be able
18 to separate out different times you've been to the
19 grocery store. I mean, you know you've been to the
20 grocery store every Saturday, unless maybe there's an
21 anchoring event that helps you distinguish this Saturday
22 from last Saturday. For example, you didn't dress to go
23 to the grocery store and you ran into an old friend and
24 you were embarrassed and, you know, I know that's a silly
25 example but that kind of helps you anchor. Oh, well,

1 that was, you know, a different time than all of the
2 rest. But children will recall events that are -- you
3 know, have meaning to them. And adults do it, too. We
4 will recall events that have meaning to us in some way.
5 So ...
6 Q. Well, what about sequencing? How are children --
7 are they as good as adults at recalling the sequence of
8 things?
9 A. No. And it depends on their age, too, how well they
10 can sequence. Young children have a harder time
11 sequencing. They don't have an established time frame.
12 I mean, they're not able to give an established time
13 frame. For example, I have five-year-old twins. And
14 they still -- today's my birthday. And so when they woke
15 up, one of the said, happy birthday, mom. And the other
16 one said, it's your birthday. And I said, yeah. And she
17 talked to me about it last night and she was like, oh,
18 but I thought that that was yesterday. So she doesn't
19 have a good understanding of time. So tomorrow might be
20 -- the word tomorrow might be used for yesterday. And
21 they don't have a sense of -- they can tell you what
22 happened, but they don't necessarily -- they're not
23 necessarily able to tell you exactly when it happened or
24 a time frame for when it happened, depending on the age.
25 The older they are, the easier that is for them.

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1 Q. Okay. And chronic sexual abuse, how would that
2 affect their ability to recall a time frame?

3 A. Well, if it's chronic and it's on-going and it's
4 happening a lot, then it would affect -- typically affect
5 a child's ability to describe every single event, so they
6 all kind of run together, kind of like the grocery store
7 example that I gave you. They may be able to tell you
8 about the last time or the worst time or a time because
9 of some other anchoring event that they remember. But
10 oftentimes when it's on-going abuse and it's happened
11 multiple times and multiple ways or locations, then they
12 can't necessarily, especially young children, separate
13 out each event.

14 MS. BARWICK: No further questions.

15 THE COURT: Cross-examination?

16 CROSS-EXAMINATION

17 BY MR. CANTRELL:

18 Q. Dr. Willingham, you were talking just a moment ago
19 about symptoms, regression, bed wetting, clinging,
20 nightmares. Are there cases where none of those symptoms
21 come up?

22 A. There are cases where children do not show symptoms.

23 Q. When they do show these symptoms, do they show them
24 prior to disclosure?

25 A. They can.

1 Q. When is it most common for them to show those
2 symptoms, prior to disclosure or after?

3 A. Most common? Prior to or after? I think it would
4 just -- it would be dependent upon the child. Some
5 children are showing symptoms before the disclosure and
6 that's how the disclosure comes to light, because a child
7 might be, for example, engaging in a sexualized behavior
8 that as an adult, you're like, that child has learned
9 that from somewhere and would raise concern. But
10 symptoms following the disclosure are also common. So to
11 say before or after, I think it depends on the child.
12 You can see symptoms before and after the disclosure.

13 Q. And you're not aware of studies that show one
14 predominates over the other?

15 A. I'm not aware of any specific studies on that.

16 Q. I think what you just hit on is important. What
17 you're discussing here, there's not a one-size fits all
18 situation. What you're describing, every situation is
19 different; is that correct? Every alleged incident or
20 every case you make work on, each one is different?

21 A. I would say that each child's response can be
22 unique, and that certainly cases differ. However, what I
23 shared with you all and the court about symptoms and
24 disclosure, that is what we know from the research and
25 from clinical experience of how the dynamics of child

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1 sexual abuse affect children. So a child may have

2 multiple symptoms or they may not show symptoms.

3 Q. Which essentially is saying every case is different?

4 A. Every -- no, I wouldn't say -- every child's

5 response is unique. But when you look at studies that

6 look at children and adult survivors then -- as a whole,

7 then you have these common patterns.

8 Q. Then you throw in the other circumstances whether

9 they're legal issues or family issues or other issues,

10 those things factor into all of this; do they not?

11 A. I'm sorry. I'm not understanding what you mean by

12 the family issues.

13 Q. Other issues within the family, whether there are

14 relationships within the family, the dynamics of the

15 family, people in and out of the family, all of those

16 things would enter into a child's responses?

17 A. They could, yes.

18 Q. And the sexual knowledge that a child might have,

19 the terminology a child might use in describing sexual

20 activities, ---

21 A. Uh-huh (affirmative).

22 Q. --- that would vary from case-to-case, how they term

23 things?

24 A. I would say yes, depending on what type sub-sexual

25 knowledge and acts they were exposed to. It could vary

1 from case-to-case. However, we also -- again, when
2 you're looking at children's responses as a whole, then
3 if you -- every child's response is unique and each
4 family's circumstances may be unique as far as the
5 dynamics in the family. You know, who were the primary
6 care givers, what the relationships are, the level of
7 conflict and -- or lack of conflict or, you know, just
8 those relationships that differ from case-to-case. So,
9 yes, what you're saying is each case is different.
10 However, when you pull back and you look at the dynamics
11 of child sexual abuse and how complicated they are and in
12 looking at the research and survivors stories over and
13 over again, then you begin to see patterns emerge.
14 Q. And speaking of the sexual knowledge and that sort
15 of thing, I think you said that depends on the sort of
16 contact or observations the child has had as far as
17 sexual activities?
18 A. Yes. I would say, yes. I mean, if they have, for
19 example, experienced oral sex then a child may then play
20 out that within their dolls or something. So when you
21 would see a child engaging their dolls or their stuffed
22 animals in oral sex, then, you know, you would think that
23 that child has been exposed in some way to oral sex.
24 Now, that may be through seeing pornography on the TV,
25 walking into their family's room and witnessing it or

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1 that it has been done to them and, therefore, they have
2 knowledge of it now.

3 Q. So it can come from any of those sources, that
4 knowledge?

5 A. It can.

6 Q. And when you were talking about forms of the
7 question, whether they may be general or more specific

8 ---

9 A. Uh-huh (affirmative).

10 Q. --- can specific questions, more specific questions,
11 excuse me, be what might be termed leading questions
12 also, questions that suggest the answer within
13 themselves?

14 A. You're talking about leading questions. Leading
15 questions are questions that might give children
16 information rather than getting information from
17 children. For example, if you're talking with a child
18 and you said, you know, he pulled down your pants, didn't
19 he? That would be an example of a leading question.
20 When you're looking at specific questions, there are
21 different types of questions that you would ask a child
22 if you were trying to get information from them. Some --
23 when you're talking with younger children, you're going
24 to have to be a little more specific than you are general
25 because their level of -- their ability to be able to

1 think on a more abstract level is limited. So a specific
2 question could be more of a yes or no question or a
3 multiple choice question or something. It doesn't have
4 to be a suggestive question or leading question that
5 would give the child information or suggest to a child
6 that something happened in a way that it didn't.

7 Q. And can those questions be termed, once the
8 conversation is started and those questions be, well, did
9 Johnny ever do this to you or did Johnny ever do that to
10 you? Would that be, in your opinion, a leading question?

11 A. I think then you have to look at the way that the
12 questions are introduced. Typically -- and when you're
13 assessing a child and you're wanting to get information
14 from them, you're going to try to see what can they tell
15 you in a narrative form to begin with. So, for example,
16 you might say, tell me about your birthday party. You
17 know, you just turned -- you know, I keep saying five
18 because my children are five -- five. Tell me about your
19 birthday party. And they may be able to just free recall
20 all of the things that happened in that, in that birthday
21 party. But some children may not be able to, depending
22 on their development. And so you would have to look at
23 what the child was capable of telling you. So if a child
24 -- if you are concerned that a child is having a hard
25 time understanding the types of questions you're asking,

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1 then you may get more specific and look at specific
2 people with a lot of different types of touches. For
3 example, you would not want to say -- you know, you
4 wouldn't want to just take one person and say, did so and
5 so touch you. You would want to be able to take several
6 different people and did so and so -- who gives you hugs?
7 Who gives you kisses? Who gives you tickles? Who gives
8 you -- does anybody give you spankings? And then if
9 maybe they say one or two people, then you could take
10 that and be more specific. But here you're always
11 looking at what is the child understanding and you want
12 to be able to give -- to get the most information with
13 the least specific questions. But when you're looking at
14 a child, you have to factor in their development and
15 where they are and if they're capable of thinking sort of
16 abstractly. Does that answer your question?

17 Q. It does. And I think that's all I have. Thank you.

18 A. Okay.

19 THE COURT: Redirect?

20 MS. BARWICK: No, Your Honor. May she be
21 excused?

22 THE COURT: All right. Yes, ma'am. Thank you,
23 Doctor, I appreciate you being here.

24 THE WITNESS: Thank you.

25 THE COURT: All right. You may call your next

1 witness.

2 MS. BARWICK: Your Honor, the next witness is
3 the forensic interviewer.

4 THE COURT: Okay.

5 MS. BARWICK: So we might need to have a
6 motion.

7 THE COURT: Okay. Good enough.

8 All right. Ladies and gentlemen, we need to take up
9 a matter of law before the next witness is called. So
10 take a brief break if you would, please. And please
11 don't discuss the case.

12 (WHEREUPON, the jury exited the open court at
13 approximately 11:17 a.m.)

14 THE COURT: Okay. Your next witness is -- is
15 it Ms. Addington?

16 MS. BARWICK: No, Your Honor. It's Christine
17 Carlberg.

18 THE COURT: Ms. Carlberg, okay. Okay. And you
19 are going to put her on the stand and ask her questions
20 relating to her interview. Is that correct?

21 MS. BARWICK: Yes, sir, Your Honor.

22 THE COURT: Okay. Let's take just a brief
23 break before we get started on that.

24 MS. BARWICK: Yes, sir.

25 THE COURT: And come back in about five minutes

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1 and hear that testimony.

2 (WHEREUPON, the court stood at recess for a short
3 break.)

4 THE COURT: Okay. We're back on the record.
5 Ms. Barwick, you can call your witness.

6 MS. BARWICK: Yes, sir. The State calls
7 Christine Carlberg to the stand.

8 THE CLERK: Place your left hand on the bible
9 and raise your right hand, please.

10 Do you solemnly swear or affirm the testimony you're
11 about to give in this case will be the truth, the whole
12 truth and nothing but the truth, so help you God?

13 THE WITNESS: I do.

14 THE CLERK: State your full name for the
15 record.

16 THE WITNESS: Christine Carlberg.

17 THE CLERK: Please be seated.

18 **PROFFERED TESTIMONY**

19 **CHRISTINE CARLBERG,**

20 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

21 **DIRECT EXAMINATION**

22 **BY MS. BARWICK:**

23 Q. Ms. Carlberg, where do you work?

24 A. I am employed by the Greenville Department of Mental
25 Health.

1 Q. Okay. And where's your actual office located?

2 A. I'm contracted to work at the Julie Valentine
3 Center.

4 Q. All right. And what are your duties there?

5 A. My main duty is to conduct forensic interviews.

6 Q. Okay. And what kind of training have you had to do
7 forensic interviews?

8 A. I've been through several forty-hour nationally
9 recognized training, such as Corner House, Finding Words,
10 which is now called Child First, and then some advanced
11 courses.

12 Q. Okay. Do you have any certificates or -- I don't
13 know if there would be licenses in your field, but do you
14 have anything like that?

15 A. There's not a license in forensic interviewing, but
16 I do have certificates from the trainings that I
17 attended.

18 Q. Okay. And when you do a forensic interview, what
19 kind of process do you follow?

20 A. We follow a semi-structured protocol called RATAAC.

21 Q. What is that?

22 A. It's a five-staged protocol that stand for rapport,
23 anatomy ID, touch inquiry, abuse scenario, and closure.

24 Q. And when you do a forensic interview, what kind of
25 question style do you use or avoid using?

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1 A. Well, you want to ask the most open-ended questions
2 as possible and it goes down a continuum to -- the kind
3 you don't want to use would be leading or suggestive
4 questions.

5 Q. Okay. And are your forensic interviews, are they
6 subject to peer review?

7 A. They are.

8 Q. And are they recorded with audio and video?

9 A. Yes, ma'am.

10 Q. When you meet with a child, do you tell the child
11 the purpose of them being there?

12 A. Yes, ma'am.

13 Q. Do you inform them that it's being recorded?

14 A. Yes, ma'am.

15 Q. Were those same safeguards used in your forensic
16 interview with [REDACTED]?

17 A. Yes, ma'am.

18 Q. And when you met with [REDACTED], did she give a
19 detailed account of the abuse that happened to her?

20 A. Yes, ma'am.

21 Q. And in your opinion, did you find that there was
22 internal coherence in that forensic interview?

23 A. Yes, ma'am.

24 Q. And was that interview subject to peer review?

25 A. It was not peer reviewed, but it could be, yes.

1 Q. Okay. Okay. And did you do a report with your
2 forensic interview of [REDACTED]?

3 A. Yes, ma'am.

4 MS. BARWICK: Nothing further.

5 THE COURT: Any questions, Mr. Cantrell?

6 CROSS-EXAMINATION

7 BY MR. CANTRELL:

8 Q. Did you, in fact, do both interviews for [REDACTED]?

9 A. Yes, sir.

10 Q. And did you follow the same protocol for both
11 interviews?

12 A. Yes, sir.

13 Q. And were the same people present for both interviews
14 as far as -- I'm sorry. I withdraw that. Did the same
15 people come to the Julie Valentine Center for both
16 interviews, [REDACTED] and whoever was with her?

17 A. Yes, sir.

18 Q. In addition to yourself, was anyone else at the
19 Julie Valentine Center or was it the same people involved
20 at both interviews?

21 A. It was me and the child during the interview and I
22 think observing ---

23 Q. Yes.

24 A. --- there was -- I think one time there was an
25 intern observing and then for both interviews there was

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1 an another employee observing.

2 Q. Is that standard protocol to have at least one
3 employee observing or is it just ---

4 A. We like to have the investigators observing or
5 someone else observing, but it's not standard; it doesn't
6 have to happen.

7 Q. And just for information, have you been qualified to
8 testify previously in courts of law here in South
9 Carolina?

10 A. Yes, sir.

11 Q. Have you been qualified -- I'm sorry. I withdraw
12 that.

13 MR. CANTRELL: No further questions.

14 THE COURT: All right. All right. Pursuant to
15 the requirements of Section 17-23-175, the Court's
16 required to determine whether, under the totality of the
17 circumstances, there are particularized guarantees of
18 trustworthiness regarding the videotape to be opposed to
19 being introduced.

20 I have had the opportunity to review the videotapes
21 that the State intends to produce. Specifically, in
22 keeping with the enumerated factors to determine, I did
23 not see that there were leading questions which elicited
24 the testimony. In fact, there were many allegations that
25 were simply offered by the child and, in fact, weren't

1 elicited by any particular question. I'll also say that
2 the testimony that was elicited in the videotaped
3 interview was consistent with the statements that she had
4 made previous, and consistent with the testimony that she
5 has previously given in this court under oath. I find
6 that the interviewer has been trained appropriately in
7 accordance with the mandates of the law. The statement
8 represents the same account in the same detail as it was
9 elicited both in prior statements and in court. And it
10 was internally coherent, that is, it made sense, given
11 the totality of the circumstances.

12 Therefore, I find that it's appropriate to admit the
13 videotaped interview in keeping with the, with Section
14 17-23-175. The jury, of course, will have the
15 opportunity to put whatever weight on it that they feel
16 is appropriate and determine, in fact, whether that
17 statement was credible in their analysis of the evidence.
18 All right.

19 MS. BARWICK: Thank you, Your Honor. If I
20 could have a brief moment just to make sure that this
21 thing is -- that I'm qualified to operate it.

22 THE COURT: I understand.

23 Are you going to play all of the videotapes?

24 MS. BARWICK: Yes, sir.

25 THE COURT: So if I remember correctly one's

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1 about fifty minutes and one's about thirty-eight minutes.

2 Does that sound about right?

3 MS. BARWICK: That sounds about right.

4 THE COURT: Okay.

5 MS. BARWICK: And if Your Honor and Mr.

6 Cantrell doesn't object, I know there's some lag time in

7 the beginning, if y'all don't mind I can fast forward

8 through that?

9 THE COURT: I certainly don't mind.

10 MR. CANTRELL: No problem.

11 Once this is set up, once this is set up, I have one

12 question, issue, statement or something that I would like

13 to present to the court.

14 THE COURT: Okay.

15 MR. CANTRELL: Once Jenny's set to go.

16 THE COURT: All right. Ms. Barwick do you

17 think you can multi-task and do that and listen to what

18 he needs to put on the record?

19 MS. BARWICK: I can listen too, yes, sir.

20 THE COURT: Okay.

21 MR. CANTRELL: Your Honor, I would like to

22 raise an objection in that I believe, particularly in the

23 second DVD, I'm not going to limit it just to that, but I

24 do believe there were some leading questions. The Court

25 has found that there were not. I would ask the Court to

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1 note my objection because I do believe there were some
2 leading questions in the interview process.

3 THE COURT: Okay. All right. And duly noted.

4 MR. CANTRELL: And move to exclude them.

5 THE COURT: Yes, sir. Duly noted.

6 MS. BARWICK: I'm getting better in my old age.
7 I'm ready, Your Honor.

8 THE COURT: Is this your last witness, Ms.
9 Barwick?

10 MS. BARWICK: Yes, sir.

11 THE COURT: You're still looking at four or
12 five?

13 MR. CANTRELL: I don't know.

14 THE COURT: Okay. Fair enough.

15 (WHEREUPON, the jury entered the open court at
16 approximately 11:37 a.m.)

17 THE COURT: All right. Ladies and gentlemen,
18 thanks for being patient with me. The State is going to
19 introduce into the record two videotapes. And at the
20 time they're offered into the record, I'll make the
21 determination whether it will be entered into the record.
22 But we've already had some discussions about that.

23 There are two tapes. One is approximately fifty
24 minutes and one is approximately thirty-eight minutes. I
25 may be a little bit wrong on the second one. So it's

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1 going to take some time to roll through all the tape. So
2 this is what I would propose. And that is, Ms. Barwick
3 will begin her examination of this witness and then offer
4 into evidence the first tape, fifty minutes. After we
5 have seen the first tape, I'm going to ask you,
6 collectively by a show of hands, whether you want to take
7 a break and go to lunch at that time or whether you want
8 to go through and see the second tape, as well, which
9 will be about thirty-eight minutes. So if you take into
10 consideration the tape and the testimony and then the
11 cross-examination, you're probably looking at about two
12 hours of examination. So after the end of the first
13 tape, I'm going to ask you if you want to take a break
14 and if you want to break it up at that point, or whether
15 you want to just keep on rolling. And it will be purely
16 democratic. You won't have anybody to blame but
17 yourselves as to whether you stay or go.

18 And it is my understanding that the State -- this
19 will be the State's last witness in its case in chief.
20 And then afterwards, the Defense will have the
21 opportunity to put evidence into the record this
22 afternoon. All right. Okay.

23 Ms. Barwick.

24 MS. BARWICK: Thank you, Your Honor.

25 **CHRISTINE CARLBERG,**

1 **HAVING BEEN PREVIOUSLY DULY SWORN, TESTIFIED AS FOLLOWS:**

2 **DIRECT EXAMINATION**

3 **BY MS. BARWICK:**

4 Q. Ms. Carlberg, I don't think you've been introduced
5 to the jury yet. Can you state your name for the record?

6 A. Christine Carlberg.

7 Q. Where do you ---

8 THE COURT: And let me also state for the
9 record that Ms. Carlberg has been sworn in as a witness
10 when you all were out. So she has sworn to tell the
11 truth, the whole truth, and nothing but the truth.

12 Go ahead.

13 MS. BARWICK: Thank you, Your Honor.

14 Q. Where do you work?

15 A. I'm employed by the Department -- the Greenville
16 Department of Mental Health and I'm contracted to work at
17 the Julie Valentine Center.

18 Q. So where's your office actually located?

19 A. Well, I have one at both buildings. One at the
20 Mental Health Center and one at the Julie Valentine
21 Center.

22 Q. And at the Julie Valentine Center, what do you do
23 there?

24 A. I conduct forensic interviews.

25 Q. And can you tell the jury what a forensic interview

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1 is?

2 A. A forensic interview is a non-leading,
3 developmentally appropriate method of gathering
4 information from a child or we also do interviews with
5 developmentally delayed adults for purposes of an
6 investigation.

7 Q. Okay. And what kind of environment is this
8 interview done in?

9 A. It's done in a child-friendly room. It has two
10 chairs and an easel.

11 Q. Okay. Are forensic interviews recorded?

12 A. They are video and audio recorded.

13 Q. Okay. And how do you conduct a forensic interview?
14 What are the steps?

15 A. We follow a semi-structured protocol called RATAC,
16 which is a five-stage process that stands for rapport,
17 which is just talking with the child in the beginning,
18 assessing their communication skills, telling them about
19 the room and everything. And then anatomy ID, which is
20 where you're getting their names for their body parts, so
21 we arrive at a common language. And then touch inquiry
22 where you start to talk about touches and, you know, if
23 anything's happened. And then the fourth stage is abuse
24 scenario where you're getting the details of what may
25 have happened, the who, the what, the where, the how.

1 And then the closure, which is just giving an ending to
2 the interview and doing a little safety check-in.

3 Q. Okay. And how do you test whether the child is
4 competent to tell you what they're telling you about?

5 A. Well, a lot of times you can do that just by talking
6 to them. Do they know their age, do they know where they
7 go to school, can they just effectively communicate.

8 And, also, we have used a truth/lie narrative from some
9 researchers that I've done in this interview.

10 Q. Tell the jury a little bit about truth and lie,
11 what's that about?

12 A. This was a little, a little just task that I was
13 given to -- that I gave to this child, that a lot of
14 times children have a hard time actually explaining what
15 a truth or a lie is. But this allowed them to
16 demonstrate do they know the consequences of telling the
17 truth versus a lie and can they just point on pictures,
18 like, who was telling the truth, who was telling a lie.

19 Q. Okay. And what kind of specialized training have
20 you had in the field of forensic interviewing?

21 A. I've been to several trainings that are nationally
22 recognized for conducting forensic interviews. They're
23 forty-hour per week courses where we do a lot of research
24 and actually conduct a mock interview and then we also
25 have to take and pass a test in order to complete the

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1 course. And I've done several of those, plus some

2 advanced training in forensic interviewing.

3 Q. And how many forensic interviews do you think you
4 have done total?

5 A. I've done over nineteen hundred and forty
6 interviews.

7 Q. Okay. And how many years have you been doing this?

8 A. Well, next month will be twelve years.

9 Q. And did you do a forensic interview on [REDACTED]
10 [REDACTED]?

11 A. Yes, ma'am.

12 Q. How many?

13 A. I did two.

14 Q. And what were the dates of the two?

15 A. February 1st and February 4th, 2010.

16 Q. Okay. And who's request was it for you to do a
17 forensic interview?

18 A. The Pickens County Sheriff's Office.

19 Q. And when you met with [REDACTED], was it recorded in
20 this instance?

21 A. Yes, ma'am.

22 Q. Both interviews?

23 A. Yes, ma'am.

24 Q. Okay. Are the children's parents or guardians there
25 for the forensic interview?

1 A. They're in the building, but they're not in the room
2 with us.

3 Q. So they are not sitting next to the child?

4 A. No, ma'am.

5 Q. And why is that?

6 A. Well, for several reasons. You want the child to be
7 able to talk about whatever and whomever and to be free
8 enough to do that. And, you know, you never know what
9 they might say when you start to talk to them. And if
10 they have stuff they need to share about the parent or
11 someone close to the parent, they might not feel as free
12 to do that if the parent is right there.

13 Q. And how come you did -- is it abnormal to do two
14 different interviews?

15 A. It's not. We sometimes do a second interview or
16 more interviews if we need to clarify information or we
17 just think there might be more information to gather.

18 Q. Okay. And does the child know that the interview is
19 being recorded?

20 A. Yes, they do.

21 Q. How old was she at the time of your interview with
22 her?

23 A. She was five.

24 Q. Do you have her date of birth?

25 A. I have December [REDACTED], [REDACTED].

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1 Q. She was about five years and three months old when
2 you spoke with her?

3 A. Yes.

4 Q. Have you looked at both of the tapes that the
5 State's provided to you?

6 A. Yes.

7 Q. Are those clear and accurate depictions of the
8 forensic interviews?

9 A. Yes, ma'am.

10 MR. CANTRELL: Your Honor, at this time, the
11 State would like to introduce Exhibits Number 1 and 2
12 into evidence.

13 THE COURT: Any objection, sir.

14 MR. CANTRELL: Only subject to the previous
15 objections.

16 THE COURT: All right. The same are admitted
17 into evidence.

18 (WHEREUPON, State Exhibit Numbers 1 and 2 were
19 admitted into evidence.)

20 MS. BARWICK: Thank you, Your Honor. If it's
21 too loud or too soft, let me know.

22 (WHEREUPON, State Exhibit Number 1 was published in
23 open court.)

24 THE COURT: Okay. Do you have any follow-up
25 questions related to that video?

1 MS. BARWICK: No, I don't, Your Honor.

2 THE COURT: Okay. All right. Ladies and
3 gentlemen, let's see by a show of hands who wants to take
4 a break and go to lunch and who wants to stay. So raise
5 your hands who wants to go to lunch. Okay. We'll move
6 on. Does anybody need to take a short break before we go
7 -- that next one's going to be about forty minutes?
8 Okay. Let's take a short break.

9 (WHEREUPON, the jury exited the open court at
10 approximately 12:37 p.m.)

11 THE COURT: All right. Let's take a short
12 break. We'll come back when the jury is ready.

13 (WHEREUPON, the court stood at recess for a short
14 break.)

15 (WHEREUPON, the jury entered the open court at
16 approximately 12:46 p.m.)

17 THE COURT: Okay. You may proceed.

18 (WHEREUPON, State Exhibit Number 2 was published in
19 open court.)

20 MS. BARWICK: Your Honor, at this time the
21 State has no further questions for this witness.

22 THE COURT: Okay. All right. Do you have
23 question on cross-examination?

24 MR. CANTRELL: I will have, yes, at your
25 pleasure.

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1 THE COURT: Yeah. I think probably it's time
2 to go to lunch. So why don't we take a lunch -- let's
3 take an hour and fifteen minutes, so we'll be back --
4 it's 1:15 now. Let's be back at 2:30 and we'll resume
5 the examination of this witness. Thank you.

6 (WHEREUPON, the jury exited the open court at
7 approximately 1:16 p.m.)

8 THE COURT: Okay. 2:30. You take lunch
9 too, Ms. Carlberg. Just don't discuss your testimony
10 with anyone, okay?

11 THE WITNESS: Yes, sir.

12 THE COURT: All right.

13 MS. BARWICK: Thank you, Judge.

14 MR. CANTRELL: Thank you, Your Honor.

15 (WHEREUPON, the court stood at recess for a lunch
16 break.)

17 THE COURT: Ms. Carlberg, if you could come
18 back up.

19 Okay. Bring the jury in, sir.

20 THE BAILIFF: All right, sir.

21 (WHEREUPON, the jury entered the open court at
22 approximately 2:34 p.m.)

23 THE COURT: All right. Ladies and gentlemen,
24 thank you for being on time. I appreciate it. I notice
25 that and I note it and I thank you. Not all juries are

1 as prompt as y'all are.

2 Before we get started, I need to ask you one
3 question and that is, is there anyone among you who has
4 heard any conversations or seen anything or heard
5 anything outside of this courtroom regarding this case,
6 whether it be intentionally or unintentional?

7 Yes, sir.

8 THE JUROR: The defense team were out in the
9 lobby here starting a conversation, but we promptly left
10 once we heard them discussing whatever they were going to
11 discuss.

12 THE COURT: So you didn't hear anything?

13 THE JUROR: No, nothing pertinent to the case.

14 THE COURT: Okay. Yes, sir.

15 THE JUROR: I saw the mother and daughter at
16 lunch.

17 THE COURT: But you didn't hear anything?

18 THE JUROR: No.

19 THE COURT: Okay. Good enough. So everybody
20 as we sit here is still in a position to be fair and
21 impartial and reach a verdict based on the law that I
22 give you and the evidence that's been presented in this
23 courtroom. Okay. I'm seeing head-bobs and a consensus
24 among all fourteen jurors. Good enough. Thank you.

25 All right. Ms. Barwick, you may proceed.

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1 MS. BARWICK: Your Honor, the State has no
2 further questions for this witness.

3 THE COURT: Okay.

4 All right. Mr. Cantrell, your witness, sir.

5 MR. CANTRELL: Thank you. May it please the
6 Court.

7 CROSS-EXAMINATION

8 BY MR. CANTRELL:

9 Q. Just a couple of questions. Can you tell me
10 approximately what percentage of cases you call an
11 individual back for a second interview?

12 A. I'm not sure. I don't know. It's definitely a
13 higher percentage the younger they are. I don't have
14 enough -- I don't have an exact percentage.

15 Q. And, also I noticed in both interviews, towards the
16 end especially, you would leave the room for a few
17 minutes and then come back into the room. On those
18 occasions, who would you talk to after you left the room?

19 A. Whoever's observing the interview.

20 Q. And did they or you have any notes or anything to
21 consult about, about the case when you go out of the
22 room?

23 A. I can, like -- I'm not sure I did in this case, but
24 I could.

25 Q. And I noticed that there were times when there were

1 questions about Bobby, sometimes brought up by [REDACTED],
2 sometimes you would bring up something about Bobby as a
3 part of your questioning. But I also noticed that on
4 occasion that [REDACTED] would mention names of other people
5 and other -- other people, including Nicky, her brother.
6 And, I think on occasion, it was about a -- I think about
7 a friend of her mother's and about conversations with her
8 mother, that sort of thing. Most of those times you did
9 not ask about those people. You just stayed on track
10 asking questions about Bobby. Is that your normal
11 protocol or normal procedure?

12 A. It just depends what the child is saying about that
13 person and if there are other concerns about those other
14 people.

15 Q. And is it common protocol in these situations for
16 the interviewer to ask leading questions of any sort?

17 A. No.

18 MR. CANTRELL: That's all I have.

19 THE COURT: Okay. Any redirect?

20 MS. BARWICK: No, sir, Your Honor. May she be
21 excused?

22 THE COURT: Yes, ma'am.

23 MS. BARWICK: Thank you, Your Honor.

24 THE COURT: Thank you for being here. I
25 appreciate it. Have a great day.

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1 All right. Anything further from the State?

2 MS. BARWICK: No, sir, Your Honor. At this
3 time, the State rests.

4 THE COURT: Okay. All right. Ladies and
5 gentlemen, the State rests, meaning that they have put
6 into the record all of the evidence which they intend
7 introduce in its case in chief. This is at a point at
8 which I have to take a break to hear some legal
9 arguments. Sometimes it takes a very, very short period
10 of time. Sometimes it takes a little bit longer. But in
11 order for us to proceed, I'm going to have to hear those.
12 So I'm going to ask you to retire to your jury room and
13 we'll come back in on the record in fairly short order.
14 Thank you very much. Don't discuss the case yet.

15 (WHEREUPON, the jury exited the open court at
16 approximately 2:39 p.m.)

17 THE COURT: Okay. Motions?

18 MR. CANTRELL: Your Honor, at this time
19 renewing my prior motions that are already on the record,
20 I believe, and also I just wanted to move for a directed
21 verdict of not guilty.

22 THE COURT: Okay. Good enough. All right.
23 Under the law, I am required to view the light -- view
24 the evidence in the light most favorable to the non-
25 moving party, and not to weight the evidence but to

1 determine whether in fact there is evidence in existence
2 which will support the charges propounded by the State.
3 On that basis, I would respectfully deny your motion for
4 directed verdict. Anything else?

5 MR. CANTRELL: Nothing, Your Honor.

6 THE COURT: Okay. And it's my understanding,
7 Mr. Cantrell, that you need to speak to Mr. McCann about
8 his right to testify and I believe you had asked me
9 before we began at bar that you needed a few minutes.

10 MR. CANTRELL: Yes, sir. Just a few minutes.
11 If I could have five minutes?

12 THE COURT: Sure. Let me know when you're
13 ready. I might stay here a little bit. I'm trying to
14 send my charge to the clerk so that she can print it.

15 MS. BARWICK: And Judge?

16 THE COURT: Yes, ma'am.

17 MS. BARWICK: As far as -- [REDACTED] is
18 here in case Mr. Cantrell wanted to cross-examine her on
19 the forensic interviews. I don't know if he wants us to
20 keep her here when he presents his case.

21 THE COURT: We'll ask him.

22 MR. CANTRELL: Your Honor, I'd say if she can
23 stay here five more minutes we'll handle that.

24 MS. BARWICK: Okay. All right.

25 THE COURT: Okay. Good enough.

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1 (WHEREUPON, the court stood at recess for a short
2 break.)

3 THE COURT: All right. Mr. Cantrell, does your
4 client intend to testify in this case, sir?

5 MR. CANTRELL: Your Honor, he has indicated to
6 me that he does not wish to testify.

7 THE COURT: Okay. All right. Would you like
8 me to do perform an allocution at this point?

9 MR. CANTRELL: If the Court pleases, yes, sir.

10 THE COURT: Okay.

11 Mr. McCann, just for a few seconds, would you stand
12 up raise your right hand?

13 Do you swear or affirm the testimony you're about to
14 give is the truth, the whole truth and nothing but the
15 truth so help you God?

16 THE WITNESS: Yes, sir.

17 THE COURT: Okay. You can sit back down.

18 Mr. McCann, I recognize that you just had a
19 conversation with Mr. Cantrell regarding your right
20 against self-incrimination and your right to remain
21 silent. Indeed, under the Constitution, you have a right
22 to remain silent, a right against self-incrimination,
23 which means that you're not compelled in this proceeding
24 to do or say or prove anything, which means you don't
25 have to take the stand, you don't have to say anything,

1 you don't have to present any evidence. That is your
2 Constitutional right. It's guaranteed to all of the
3 citizens of the United States under our Constitution.
4 That right is sacred and I will charge -- if you elect
5 not to testify, I will charge the jury that they can't
6 hold that against you. As a matter of fact, I'll go so
7 far as to tell the jury that not only can they not hold
8 it against you, but that it's not even appropriate for
9 them to consider it in the jury room during their
10 deliberations.

11 Now, you do have the right, as well, a corresponding
12 right, to testify if you want to, which means you can
13 take the stand and you can tell the jury your side of the
14 story and explain to them what you think is appropriate
15 and necessary. But understand, of course, when and if
16 you take the stand and testify, that the State would have
17 the ability to ask you questions in cross-examination and
18 would, in fact, attempt to impeach your credibility. And
19 they could potentially, and I don't know if there's a
20 prior record, other than the one, which is the basis of
21 one of these indictments, I don't know if there's any
22 prior record that they could bring up to impeach you
23 with, but if there is, then they could ask you about that
24 and bring it into the record.

25 Now, do you fully understand your right to remain

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1 silent?

2 THE WITNESS: Yes, sir.

3 THE COURT: Do you understand the ramifications
4 of not testifying, sir?

5 THE WITNESS: Yes.

6 THE COURT: And you understand that you can
7 testify if you want to?

8 THE WITNESS: Yes, sir.

9 THE COURT: And at this time, what is your
10 decision?

11 THE WITNESS: Not to.

12 THE COURT: Okay. Good enough. Thank you very
13 much, sir. Do you have any questions you want to ask me
14 about that before we move on?

15 THE WITNESS: No, sir.

16 THE COURT: Okay. All right. Thank you, Mr.
17 McCann.

18 Mr. Cantrell, does the Defense intend to offer any
19 evidence into the record, sir?

20 MR. CANTRELL: Nothing, Your Honor. The

21 THE COURT: Okay. Good enough.

22 All right. Well, let's do this. Let's take a
23 short break. If y'all will come back in chambers we'll
24 just -- we'll talk about the charge for just a few
25 minutes and then we can come back in and we can go to

1 arguments and charge, okay?

2 MS. BARWICK: Yes, sir.

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

5 THE COURT: Counsel, are you ready for the
6 jury? Oh, somebody, Ms. Barwick -- oh, there you are.
7 There you are. Are you good?

8 MS. BARWICK: Yes, sir.

9 (WHEREUPON, the jury entered the open court at
10 approximately 3:02 p.m.)

11 THE COURT: All right. Ladies and gentlemen, I
12 have an admission to make and that is that I was wrong.
13 I'm wrong all the time. And this is just further proof
14 that I'm always wrong. I indicated that I thought we'd
15 be putting evidence into the record through tomorrow
16 morning. Well, the State has rested and the Defense has
17 advised me that they do not intend to put any evidence
18 into the record. As I told you earlier, the Defendant --
19 the State has to prove the Defendant guilty beyond a
20 reasonable doubt. The Defendant has the right to remain
21 silent, which means the Defendant is not compelled to do
22 or say or prove anything, doesn't have to put anything
23 into the record and he is guaranteed that right under the
24 Constitution and he's exercising that Constitutional
25 right. That, in deed, is his right. It can't be held

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1 against him and I'll talk to you a little bit more about
2 that as we go forward.

3 Now, so what we're going to do now is go to closing
4 arguments. As I told you at the beginning of the case
5 yesterday, arguments from counsel are not evidence. All
6 of the evidence that's been introduced in this case has
7 already been introduced by and through witnesses who have
8 taken the stand and have taken the oath. The attorneys
9 now will simply make arguments advocating their
10 respective sides, commenting on the evidence that's been
11 introduced. So take it, accept the argument in the light
12 in which -- in the light and in the context in which it's
13 offered and that is as argument.

14 Now, I do need to take up one matter of
15 housekeeping. Mr. Brown.

16 THE JUROR: Yes, sir.

17 THE COURT: I'm going to appoint you as the
18 foreman of the jury. Congratulations.

19 THE JUROR: Thank you. Thank you very much.

20 THE COURT: You can put that on your job
21 applications going forward.

22 THE JUROR: Okay.

23 THE COURT: Now, the duties of a foreman of the
24 jury are fairly ill-defined. The specific duties are to
25 make sure when you begin your deliberations that everyone

1 has the opportunity to be heard, that everyone in the
2 jury room has a voice. Over and beyond that, I can't
3 tell you want to do because I can't invade the province
4 of the jury room. I can't come in there. If I were to
5 come into your jury room before this case was over, then
6 it would be automatically a mistrial and I would be in a
7 world of trouble. So I can't tell you how to conduct
8 your deliberations. All I can tell you is that you're --
9 you are charged with the responsibility to make sure that
10 everybody has the opportunity to be heard.

11 THE JUROR: Okay. Thank you very much.

12 THE COURT: Okay. Now, that I've said that,
13 Ms. Barwick, you may proceed.

14 MS. BARWICK: Thank you, Your Honor.

15 **CLOSING STATEMENT**

16 **BY MS. BARWICK:**

17 Good afternoon. We're at the close of the case.
18 You've heard all of the evidence. The State has put up
19 all of its witnesses; the Defense didn't have to. It's
20 not their burden of proof, it's the State's proof.

21 I know in the beginning I told you about the
22 elements of each of the crimes that the Defendant has
23 been charged with. I'm going to go through those with
24 you again now that you have heard the evidence.

25 Criminal sexual conduct with a minor, first degree,

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1 and the Judge is going to explain this to you after Mr.
2 Cantrell and myself get done speaking with you. But
3 criminal sexual conduct first degree with a minor, the
4 victim is under the age of eleven, there is a sexual
5 battery, those are the two elements. The indictment says
6 digital penetration. You saw the victim say, he put his
7 finger in my chicky just a little bit. And she even
8 showed you how much. CSC first degree where the child is
9 under eleven.

10 The other CSC first degree is when the child is
11 under sixteen and has a prior conviction. You have heard
12 that he was placed on the sex offender registry and he
13 was convicted of Peeping Tom. Those are the convictions
14 that qualify under that element, and it's for the act of
15 oral sex. You heard the victim testify that he put his
16 tongue on her chicky and even inside of her chicky. You
17 have heard that.

18 Lewd act, the Defendant has to be over the age of
19 fourteen. Ms. Burgess said his date of birth. I don't
20 remember exactly, but it was well more than qualifying.
21 You can look at him. The gentleman was over the age of
22 sixteen two years ago. I'm sorry. Over the age of
23 fourteen. The victim is also under the age of sixteen.
24 The incidents happened when she was three, four, and
25 five. You heard her say that in the forensic interview.

1 That being said, those are the elements.

2 I have the unfortunate disadvantage of being the
3 first person to do the last argument. Mr. Cantrell will
4 be able to get up after me. And I know, like many of
5 you, I will be left sitting down at that table wishing I
6 would have remembered to do one more thing. It's like
7 when we pack our suitcases to go on a trip and once you
8 get on the airplane it's just too late. So I ask you --
9 Mr. Cantrell gave me the great compliment of saying I'm a
10 good prosecutor and I appreciate that. He's a good
11 Defense attorney. So when he's making his good points,
12 think about it. What would the State say? What would
13 the State say in that case? Because I can't say it.

14 That being said, I'm going to move over a little bit
15 towards credibility. Credibility is a major issue in
16 this case obviously. We judge people everyday. That's
17 why we need twelve of y'all to come in here, both of our
18 peers, to be able to judge somebody to see if they're
19 guilty or not. You judge somebody if they're telling you
20 the truth or not, even if you don't even really know
21 them. Talk to somebody in the grocery line when they say
22 something, you know, well, that doesn't quite make sense.
23 That didn't happen. Or, yeah, it looks pretty credible.
24 You can tell not just from what they're saying but from
25 their body language. Like yesterday when [REDACTED] got up

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1 there and testified. And she sat down in that chair and
2 she told you about bad touches, and when she sat down in
3 this chair and she was asked who did that bad touch to
4 her, no, she didn't say right away, but you saw her. I
5 watched all of you see her. And she looked right over
6 there at him. She couldn't say his name right away. She
7 was fearful. I mean, who wouldn't be fearful. Dr.
8 Willingham brought up a good point, how many of you would
9 feel comfortable talking about your last sexual
10 experience? How many of you at the age of five would
11 feel comfortable coming in here to a group of strangers
12 and telling them about that?

13 At first, she was soft-spoken but she started
14 getting more comfortable, and she told you what happened
15 to her. Did she ever say it was somebody else? No.
16 Every time she said Bobby and she said Papa. Every
17 single time she said Bobby or she said Papa. When Nurse
18 Addington spoke with her at Oconee Medical Center the day
19 that she reported the incident to her mother, what did
20 she tell Nurse Addington the same day as the report was
21 made to her mother, the first time the child disclosed to
22 someone other than her grandmother, she told the nurse,
23 Papa did it. What else? You saw the forensic
24 interviews. At any point in that forensic interview did
25 she say that anybody other than Papa did it? That's the

1 Defense's strategy. They want to bring up something way
2 back in August of 2007, this is when this child was two
3 and a half years old, to say that there might have been
4 some allegations of molestation back here by the mother
5 and the grandmother, so this child must be confused.
6 That was not a confused child yesterday. The only thing
7 that was confusing about that is the Defense's strategy
8 to try to confuse you. Do not allow yourself to be
9 confused.

10 Who knows if that other man touched this child?
11 That's not what we're here to discuss today. We're here
12 to discuss if this man touched that child. And you
13 notice, mom and grandma never reported that August 2007
14 incident. Heck, the mother might not have ever reported
15 this incident if it hadn't been for her friend calling
16 law enforcement. What did Dr. Chiles say yesterday? I
17 didn't call law enforcement because of the report and I
18 didn't call DSS because the mother said she was going to
19 call law enforcement. And the mother said that she was
20 not going to allow the Defendant near the child anymore.
21 Did the mother call law enforcement? Nope. It took the
22 mother's friend who went to the hospital with them that
23 night until 7:40 the next day, 7:40 in the p.m., to call
24 law enforcement. Is this a woman who's trying to get the
25 Defendant in trouble. People lie for two reasons, to get

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1 what they want and to get out of trouble. Was she
2 wanting to get the Defendant in trouble? No. She would
3 have called law enforcement right then and there. She
4 would not have forced, you know, her friend to have to
5 make that decision to call law enforcement.

6 Let's talk about [REDACTED] a little bit more. Why
7 would she lie? What does she have to gain? What does
8 she have to lose? She had a lot to lose by saying that
9 Bobby did this to her. She was getting gifts, she had a
10 babysitter, she had somebody who was around her showing
11 her attention. Mom wasn't around. In fact, [REDACTED] said
12 that's why she couldn't even tell her mom because she
13 wasn't around her long enough to tell her. Sixty,
14 seventy hours a week.

15 The victim never recanted, not once. Who said that
16 the victim recanted? Mom. When did mom say the child
17 recanted? I'm going to show you a little time frame,
18 time line that I created as I listened to the testimony.
19 If what you heard is different from what I heard, go with
20 what you heard, but this is what I recall. 12/[REDACTED] of [REDACTED]
21 [REDACTED] -- you can't see it?

22 MR. CANTRELL: Could we dim that light?

23 MS. BARWICK: Can you dim the light, please?

24 12/[REDACTED] [REDACTED] was born. 8/16 of 2007, this is
25 when Toni and Margaret, mom and grandmother, took the

1 child to the physician about this other person possibly
2 molesting this child. The child's about two and a half
3 years old. 3/15 of 2008, the Defendant meets the
4 grandmother. At this point in time, and my math is a
5 little slippery, but she would have been three years old
6 at that time, maybe four. You'll have to do your own
7 math there. On 12/29 of '09, when the victim has just
8 turned five years old, she discloses. She goes to the
9 ER. Toni's friend does not call law enforcement until
10 7:40. Toni never calls law enforcement. She admitted
11 that. 12/31 of '09, Rita Burgess makes contact with the
12 victim's mother. On 1/4, they have a meeting. On 1/5,
13 Margaret and her friend come down to law enforcement to
14 ask Rita not to do any charges. 1/13, the medical exam.
15 Then Rita gets an arrest warrant for him based on that
16 information done in the medical exam and the
17 conversations she had. 1/25, he's arrested. 2/1 and 2/4
18 forensic interviews. Somewhere in September to October
19 of 2010, she breaks up with Larry. Why did she break up
20 with Larry? Because he's on drugs and the final straw
21 was when he took her vehicle and took it for scrap. And
22 you heard that he does not have the most outstanding
23 record of anybody out there, that he's not a good person.
24 That kind of makes him the perfect person to point the
25 finger at, doesn't it? Because nobody ever mentioned

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1 Larry before this point. October 30th, Toni starts
2 dating David, her now current boyfriend. That's four
3 boyfriends we've gone through in this child's short life.
4 [REDACTED]'s father, who's in prison. Her younger brother's
5 father, who's somewhere in Oconee, and has no part of
6 their lives. Larry, who's on drugs and scrapping cars
7 and has a prior record. And, now we have David Bagwell
8 who has three kids of his own who's on disability and now
9 she's not working. We are not dealing with the most
10 outstanding or upstanding of citizens.

11 In crimes like these, child molesters, they're
12 predators and they pick their victims. You don't think
13 he picked this victim in this case? Somebody whose
14 mother's not around, whose father is in prison, whose
15 mother has had all of these men with crazy things going
16 on in their lives. He picked this victim. He knew this
17 victim wasn't being loved the way she needed to be.
18 That's why he picked her. Moving on.

19 Toni jumps out of one relationship with Larry and
20 into another with David. Late October of 2010, so it's
21 almost been a year since the child has reported, Trunk or
22 Treat. This is where the relationship -- where the
23 mother starts allowing the victim contact with the
24 Defendant, even though his bond paperwork says he is to
25 have no contact with the victim, and not to be alone with

1 children under the age of sixteen. Through October and
2 November, Toni allows contact. November 24th, what
3 happens? November 24th, 2010, [REDACTED]'s mother calls Rita
4 Burgess up and says, my child is recanting. Larry did
5 it, not Bobby. Larry is out of the picture, Larry's
6 ticked her off by scrapping her car, the Defendant's
7 given her a car and the grandmother has had contact with
8 the mother and the child for a whole month before
9 November 24th of 2010.

10 What did Detective Burgess tell you? She said that
11 she heard [REDACTED] in the background. That vehicle the
12 Defendant gave Ms. Durnil did not come free. It came
13 with a price. It came with a price of calling Rita
14 Burgess and lying. It came with a price of causing her
15 daughter to have to cry and scream in the background and
16 say, Bobby did it; not Larry. That's the price that car
17 came with. It was not free.

18 Same day, does Toni bring the child up to see Rita
19 Burgess? Nope. David Bagwell. And I know I'm painting
20 Toni in a pretty bad light to you. It's not that I don't
21 -- it's not that she doesn't love her children. It is
22 obvious to you, she was crying on the stand whenever the
23 thought of losing her children came to her. That's a
24 pretty big incentive to lie so that you can keep your
25 children. And she made bad decisions, very bad

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1 decisions.

2 They go down to Detective Burgess. What did
3 Detective Burgess say to you? She said [REDACTED] told me
4 the sexual abuse happened, that she did not recant. So
5 the same day that her mom is saying she's recanting, is
6 the same day she reconfirms her story to Detective
7 Burgess.

8 All right. At this point in time the Julie
9 Valentine Center Counseling is getting involved. They
10 call Rita, they call DSS, something's going on with the
11 child, she's regressing, she's not being herself. They
12 sit down with the mother. They tell the mother, no
13 contact with the Defendant, no contact with the
14 grandmother. Again, contact was allowed. On 1/7/11, the
15 instruction was given, no contact with the Defendant or
16 grandmother. Almost a year comes and goes. Do you guys
17 notice a pattern? Toni cools off a little bit, she
18 starts missing her mother, wants her mother back in her
19 life, makes contact with her again in a year.

20 Toni and her new boyfriend come up to the
21 Solicitor's Office to try to get the charges dismissed.
22 When asked why she came up her, Margaret told her to go
23 to Steven Alexander's office and get the charges dropped.
24 And Mr. Alexander sent her over here is why Toni said
25 that she asked the Solicitor's office to drop the

1 charges. Did she bring the victim? Nope. Because she
2 knew [REDACTED] would not recant. A pretty strong child. So
3 ten minutes prior, Toni is given instruction to bring the
4 child up to the Solicitor's office. We'll visit with
5 them the next day. Ten minutes prior to that meeting,
6 what did Toni tell you? They canceled because they
7 didn't have enough gas money to get up here. Detective
8 Burgess tells you she goes out there to their house where
9 they are. Detective Burgess tells you that [REDACTED] sticks
10 with her story.

11 Now, usually when people ask me what it's like to
12 prosecute crimes like this, I tell them it's a crime of
13 shame, guilt, and fear. The shame that the child feels
14 having to tell somebody what happened to them, the fear
15 that the child feels of what will happen if I tell, the
16 fear that they feel once they tell what happened, and the
17 guilt for keeping it in so long.

18 Now, let's think about that fear a little bit. Dr.
19 Willingham testified that there's a lot of symptoms
20 involved with these kinds of crimes. Toni testified that
21 a lot of these symptoms didn't occur until after she
22 reported. When is the most dangerous time for a child
23 that is being sexually abused, in their mind? You heard
24 [REDACTED] say he said he would kill me and my family and I'd
25 get in trouble and he'd get in trouble and he would go to

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1 jail. No wonder she started having a hard time being
2 alone and started protecting her private areas and bed
3 wetting and crunching her teeth after she told; no
4 wonder. Because those threats were now going to become a
5 reality in her mind.

6 Now, I say it's a crime of shame, guilt and fear.
7 In this case, it also is a crime of courage. You saw
8 [REDACTED]. She was able to work up the courage to tell her
9 mom what happened to her, even after grandmother refused
10 to believe her. She was able to work up the courage to
11 come in here today and tell you what happened. So she
12 lost all the gifts, she lost all the things that her
13 grandfather was doing to her or doing for her, paying her
14 attention, buying her things. He wasn't buying Nicky
15 things. Nicky wasn't even really allowed to come over to
16 the house that much, but [REDACTED] was. And what did she
17 trade all of those good things in for? She traded those
18 good things to come in here and testify. She went
19 through two medical exams where a doctor, a stranger, had
20 to look into her privates, where she had to tell me and
21 Ms. Rita and you and a doctor over in Oconee, a nurse
22 over in Oconee, a doctor at the Julie Valentine Center, a
23 forensic interviewer at the Julie Valentine Center,
24 that's not much gain. That's not really a reason to lie.
25 We're going to leave that up for a little bit.

1 Something that kept running through my mind
2 throughout this trial, why would a man who's already on
3 the sex offender registry, why would a grandmother who
4 knows he's on a sex offender registry, why would a
5 grandmother whose daughter Toni said, Mom, don't let him
6 be alone with her because he's on a sex offender
7 registry, allow a child to sleep in his bed? That
8 doesn't make sense. Why would a man who is on a sex
9 offender registry, who's been accused of these crimes,
10 continue to have contact with this child at her house, at
11 his house, on the same swing he's accused of molesting
12 her on? An innocent man would not do that. An innocent
13 man would have stayed clear of that child. He couldn't
14 force himself to stay away from that child.

15 During the first interview she told you exactly what
16 happened. I don't know if you noticed, but about thirty
17 minutes into that, [REDACTED] started saying, do I have to
18 tell you again? Don't you remember? You already know.
19 I already told you. Started getting fidgety. Keeping a
20 five-year-old down for fifty minutes is a long time. So
21 then there's a second interview. I saw some of you
22 yawning over here. Maybe it was the lunchtime blues.
23 But I think y'all were pretty tired of even listening to
24 it, let alone being the one who has to tell about it for
25 a second time.

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1 Notice in the beginning of the second interview --
2 and I'm addressing this now because I know Mr. Cantrell
3 is going to -- in the second interview, no, she was not
4 as forthcoming. You were looking at a child who had a
5 bad day and who was tired of talking about it. She said,
6 I haven't played today. She says, I haven't gone out to
7 play today. She says, I don't want to talk about it.
8 She says, can't I go out and play? I'll talk to you
9 about this later. When she was refused, what did she do?
10 She gave the answers that would end the quickest so she
11 didn't have to go on and on about it. And she says,
12 again, do I have to tell you again? I'm tired of talking
13 about it. I don't want to tell you. But she does,
14 piecemeal-by-piecemeal, does answer the questions. What
15 you saw in the second interview is not a child, as the
16 Defense would like you to believe, who is recanting. She
17 told you the same things that happened. She just wasn't
18 as forthcoming with it this time around.

19 Dr. Willingham talked about a lot of things with
20 child abuse. Delayed disclosure. There's delay in
21 disclosing because of fears, fears that no one will
22 believe them. I'm sure that fear with [REDACTED] was real
23 after dissent with her grandmother. I don't believe you.
24 Here's some cream. You're fine. Fear of her getting
25 into trouble, fear of the Defendant getting into trouble.

1 What did she tell Nurse Addington? I don't want my Papa
2 in trouble. What did she tell Dr. Crosswell? I don't
3 want my Papa in trouble. Consistent with Dr. Willingham
4 and her testimony about patterns she has seen over the
5 years and documented scientific studies of patterns of
6 children who have been sexually abused. Grooming, the
7 gifts, the caring for, making her feel loved, that's
8 another thing. Dr. Willingham said some of the physical
9 symptoms, stomachaches, headaches. Second forensic
10 interview, what did the child say when she really didn't
11 want to talk about it? My stomach hurts. Consistent.

12 Testing the waters. She was testing the waters with
13 her grandmother. It didn't work out so well for her.
14 Luckily, she had the courage to test the waters with her
15 mom. Her mom did something about it, not as much as she
16 should have or could have, but she did do something about
17 it. And it put all of this into effect.

18 Kids have problems with sequencing. I don't know if
19 you remember, but when [REDACTED] was on the stand she said,
20 it happened every time I was over there. How often were
21 you over there? A lot. Now, the Defense tried to kind
22 of get her off that a little bit by saying, well, how
23 soon before you reported did this happen? Well, what's
24 the month of October? What comes after that? Well, what
25 does this ... I started kind of getting confused myself

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1 during that conversation, let alone if I was a seven-
2 year-old child. Dr. Willingham testified that children
3 have a hard time with sequencing, especially in cases
4 where there is chronic sexual abuse. I'm sure some of
5 you have children. I saw your juror questionnaires. You
6 can bring your own personal experiences and use your
7 common judgment and your common sense. How well do your
8 kids remember sequencing? When they were younger, how
9 well did they remember sequencing? Did they have todays
10 and tomorrows and next week and last week and three days
11 from now and last Tuesday or last month, did they have
12 those things confused? It's not about the time. You
13 have a broad range of time to choose from on each of the
14 indictments, almost a two-year span. I think it is a
15 two-year span or a little over. You have a broad range.
16 It doesn't matter about the time. It matters about the
17 act.

18 If you believe that that man put his finger in
19 [REDACTED]'s vagina, if you believe that he performed oral
20 sex on [REDACTED], if you believe that he touched her chest
21 and her breast, if you believe that he took these
22 pictures of her naked, if you believe that he masturbated
23 in front of her, and if you believe that beyond a
24 reasonable doubt, you must find him guilty. If you don't
25 believe it, turn him loose. Turn him loose. But if you

1 believe it and you have talked with all your peers about
2 it and you all believe it, find him guilty.

3 Thank you for your time.

4 THE COURT: Mr. Cantrell.

5 MR. CANTRELL: May it please the Court, Your
6 Honor.

7 THE COURT: Yes, sir.

8 **CLOSING STATEMENT**

9 **BY MR. CANTRELL:**

10 I don't envy you deliberating and making the
11 decision in this case. Quite honestly, I don't think any
12 of us want to be involved in this case. It's not easy.
13 We're here out of necessity and we all want to do our
14 jobs right. Your job is perhaps the toughest of all, and
15 that is to have to listen to all of this, listen to us,
16 and then you go back there and deliberate, remembering
17 that your duty, your obligation, your responsibility is
18 to deliberate, consider the testimony, consider the
19 facts, what you decide are the facts, consider the law
20 that the Judge gives you and then render a verdict that
21 speaks the truth. And if it is a guilty verdict, it must
22 be beyond any reasonable doubt. The Judge will tell you
23 about reasonable doubt. And follow his instructions. I
24 will tell you it's not a doubt as to anything, because I
25 guess theoretically you can doubt that you're in this

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1 place or that the lights are on, but it is a doubt that
2 is substantial enough to which you can attach a reason.
3 And if you have any of those reasonable doubts about
4 this, then you return a verdict of not guilty. But that
5 is your duty.

6 I stand by what I said earlier, and I think it's
7 just, quite honestly, it's been reaffirmed now that
8 you've heard it. You want to do something to help this
9 little girl. Everybody in this courtroom wants to do
10 something to help this little girl, make her life better
11 because her life is not as it should be. Not the fault
12 of anybody here within the sound of my voice. You can't
13 fix that. Hopefully, somebody can. Hopefully, somebody
14 is. But you can't fix and make those things better for
15 her by -- just by your verdict. And, in fact, regardless
16 of your verdict, those things will still have to be
17 fixed. Her life will have to be -- have to get better.
18 But you'll want to, and I don't blame you.

19 Again, remember you will be following the testimony
20 that you have heard yesterday and today. I'm going to go
21 over just a little bit. You heard Loretta Addington and
22 then Dr. Chiles from Oconee Medical -- Oconee Hospital.
23 Don't let me over-summarize. Remember it the way you
24 remember it, but the end result was, they found nothing.
25 They found no physical evidence of any of this conduct.

1 Remember now, this was December the 29th, the report
2 which they took, which you've heard, and which was
3 repeated, was that something had happened, there had been
4 digital penetration. If you've heard everything, there
5 had been all sorts of things happening on a regular basis
6 for an extended period of time. And you heard there was
7 no physical evidence.

8 Quite frankly, certainly for [REDACTED]'s sake, I'm glad
9 there wasn't. But for the sake of this case, that is
10 evidence that you should consider or the lack of evidence
11 that you should consider. Does that in anyway help
12 corroborate what she says happened? And it doesn't.
13 Now, you were told, the doctor was very, very sure to
14 point out. Well, that doesn't mean anything. There
15 could have still been sexual abuse. The fact of the
16 matter is, he does not know. He has no way of knowing
17 what happened. All he can say was, I found no physical
18 evidence of sexual abuse. Same with Ms. Addington.

19 Dr. Crosswell examined [REDACTED] two months later. Had
20 there been repeated trauma or repeated abuse as has been
21 described, you would expect there would be something
22 there. But, again, Dr. Crosswell says, I found nothing
23 but that doesn't surprise me. That's possible. You have
24 to take all of that testimony and all that evidence as
25 you see fit.

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1 Dr. Willingham came and gave you her opinion. She
2 was qualified as a professional. She gave you her
3 opinion about child abuse and sexual abuse and she's
4 entitled to do that. She has been to school, she has
5 gone through tons of school, tons of programs, tons of
6 seminars to become a child advocate, essentially. Her
7 speciality, her Doctorate was dealing with advocacy for
8 children who are sexually abused. And she told you about
9 the studies, she told you about the various
10 circumstances. But please understand and please
11 remember, when you're considering her testimony, she is
12 an advocate. And God bless her for it. Children need
13 advocates. But she's testifying to you as an advocate
14 for children and telling you from her perspective on a
15 child's behalf what can happen, what can be the norm.
16 But if you notice, she was very reluctant, if at all, to
17 say, but, yes, all cases are different. She is so much
18 of an advocate that she wanted to say, well, all cases
19 are going to fall into the norm. She didn't come out and
20 say that, but she would refuse to say that all cases are
21 different. And I will tell you, and you've heard it for
22 the last two days, this case is different. This case is
23 different.

24 You heard Michelle Gerald and other than hearing
25 reports that you heard that other people had heard about

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1 what [REDACTED] may have said or Toni may have said, her
2 testimony was about follow-up. Her testimony was about
3 other issues. Yes, visitation or seeing [REDACTED] and Bobby
4 or other people together, but Michelle Gerald, from the
5 Department of Social Services, added nothing to give you
6 any reason to believe that Bobby McCann did any of these
7 horrible acts.

8 You've heard from Rita Burgess, who is a well
9 respected Detective with the Sheriff's Department. She
10 works on these cases on a regular basis. I won't call
11 her an advocate, but to a certain degree I will, and that
12 is for her -- for me to say that about her is a
13 compliment. She is out to protect people. She's out to
14 protect victims. When something is reported and the
15 Sheriff's Department receives it, they're going to send
16 representatives out to investigate and protect. And
17 that's what she did. She investigated and she was
18 looking to protect a little girl, much like you may want
19 to. You don't have the luxury of being able to presume
20 that a child is telling the truth. You don't have the
21 luxury of being able to presume that a child is injured.
22 You don't have the luxury of being able to presume that
23 any one person did that and get a warrant within two
24 weeks.

25 You must remain unbiased and you must remain open

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1 and you must remember that this man is not guilty. But
2 Detective Burgess did pursue her investigation through
3 interviews, including with [REDACTED]. At that point, Ms.
4 Burgess knew who she thought did it, and she followed
5 that case along and secured a warrant. One warrant
6 against Bobby McCann. And then you heard her testimony
7 that from that point forward, there was really no new
8 evidence against Bobby McCann. Her involvement involved
9 an awful lot of dealing with other people.

10 Let me take a moment and ask you to think back.
11 From the time Bobby McCann was arrested, you heard
12 testimony and you've seen a time line of an awful lot of
13 activity. Ask yourself, how much of that activity was
14 Bobby McCann's? How much of that activity was something
15 he did? How much of that activity was something he
16 caused to happen? And I think you'll find out zero.
17 You've heard that, oh, well, there were visits. He
18 shouldn't have been around this girl. But you've also
19 heard that all of those contacts were created by somebody
20 other than him, mostly in his own home. But you're
21 having the picture painted to you that he is a horrible
22 person because he was in this girl's presence, when it
23 was not initiated by him and it was in his own home.
24 That makes him guilty of nothing. Makes him guilty of
25 nothing. Now the other people, maybe they weren't doing

1 things they should have, but not Bobby McCann. So after
2 Detective Burgess arrested Bobby McCann, there's nothing
3 else, no interaction, nothing else pertaining to Bobby
4 McCann.

5 You heard Christine Carlberg. She's the lady, of
6 course, that did the interview over at the Julie
7 Valentine Center. I will tell you without question she's
8 another advocate for children and I'm thrilled that she's
9 there. I'm thrilled that we have her. But you heard the
10 interviews. You heard the interviews. The first one
11 started off with talking about Papa. And [REDACTED] brought
12 up Papa. Ms. Carlberg talked about Papa throughout a
13 fifty-minute interview. If somebody else's name was
14 mentioned there was never anything to do to explore that.
15 An example, and maybe -- hear me out. Hear me out --
16 maybe a silly example, maybe not. The very first thing
17 that [REDACTED] said was, don't call Nicky in here. He's
18 mean. He'll do this. He'll bite you. He'll hurt you.
19 That's her little brother, two years old. He is not a
20 perpetrator, I will tell you that, but he also is in a
21 home with [REDACTED] where all sorts of things can happen and
22 go on and injuries can occur. And that's the first thing
23 she talks about and she brings his name up throughout
24 this. And there is never a question to explore any
25 possibilities about what could have happened between

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1. [REDACTED] and Nicky as playmates, as children, and nothing
2 to explore any other contact or conduct pertaining to
3 Nicky, who is in this same home. There was never any
4 desire or attempt to look into that, even though [REDACTED]
5 brought up Nicky. But [REDACTED] brought up other people.
6 But Ms. Carlberg was focused on Bobby McCann.

7 Now, I'm not trying to steer you down a useless
8 path, but I will tell you if you have a young girl that
9 is saying all of these various things happened. And you
10 heard her, she's rambling at times. She's talking about
11 this person and that person, Mama this, Nicky that. It's
12 worth asking the question to find out what is going on in
13 the home of this young child. And none of that was ever
14 done because she was focusing on Papa; and that is all.
15 And I will tell you, I think that's an indication as to
16 where Ms. Carlberg expected this to go, what she
17 anticipated. And she has the luxury, I guess, of doing
18 that, and you do not. You cannot presume anything.
19 You've got a right to wonder about other things that have
20 been brought up in this trial and were not pursued.
21 Also, you heard Ms. Carlberg acknowledge that the
22 shouldn't be asking -- that they do not use leading
23 questions. And I'll simply leave it to you as to whether
24 in that second video that lasted twenty-nine minutes, how
25 many leading questions you heard, because [REDACTED] didn't

1 want to say anything and would not mention -- did not
2 mention Papa. So Ms. Carlberg said, well, you told me
3 the other day, Papa this. Remember or recollect how many
4 times you heard her say, you told me the other day Papa
5 or you told me the other day that, or you told me the
6 other day this body part. That is leading because this
7 young lady did not want to say those things. And anybody
8 can guess as to why she did not want to say them, but she
9 did not, and it was not anybody's job to lead her and pry
10 that out on their own. And that's what happened. But,
11 again, you're going to be deciding what the facts are and
12 you have to listen to what the facts are or what the
13 testimony is and decide what the facts are.

14 You heard Toni Durnil testify. And I'm not trying
15 to be cute or smart when I say this, but I agree with Ms.
16 Barwick about Ms. Durnil. She's not mother of the year.
17 I think selfish, and I think certainly not focused on her
18 child's well-being, but I think that can also lead to an
19 awful lot of things that are not in a child's best
20 interest and I think that has happened in this case. I
21 wish I could tell you, well, you know, you saw, Toni
22 Durnil had to make all this up and make [REDACTED] say this.
23 I can't tell you that. I can't tell you that did not
24 happen, but I can't tell you that happened. Some of the
25 things that I heard and I think y'all heard were just

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1 kind of bizarre. But that is, sadly, what this little
2 girl has grown up in. So Toni Durnil said this was
3 reported to her. She did, to her credit, immediately
4 take [REDACTED] to the hospital. That's the one good thing
5 that she did because she had had something reported to
6 her. Now, please remember, according to the medical
7 reports and her testimony, something like this had been
8 reported before and she didn't pursue it. Now, [REDACTED]
9 was less than three at the time, maybe that's why she
10 didn't pursue it. But I'm going to ask you one thing to
11 please consider and put what weight on this you see fit.
12 I'm going to suggest to you that it is very significant.
13 What Toni Durnil reported almost a year before they ever
14 met this man, what she reported to that pediatrician was
15 a verbatim description of what [REDACTED] [REDACTED] reported
16 allegedly that Bobby McCann did, he licked her private.
17 Where is a three-year-old going to hear that, where's a
18 five-year-old going to hear that. Before this man was
19 ever in the picture that was described by [REDACTED] [REDACTED]
20 to Toni Durnil, who reported it to the doctor. Please
21 keep that in mind when you deliberate and determine
22 reliability, trustworthiness, and truth.

23 And you heard [REDACTED]. I don't know what to say to
24 you about that. I feel for her. I think you -- I know
25 you do. She testified. I admit she was a good witness

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1 as far as speaking to you and speaking to you in a way
2 that you could understand what she was saying. In doing
3 so, she told you things that I think are truly
4 unbelievable.

5 Now, I know you've heard from Dr. Willingham about
6 how children can't verbalize or can't relay things. But
7 I will tell you that some of the things that she said
8 point blank were totally unbelievable. This happened, at
9 one point, I believe she said every day, but all the
10 time. This happened, at one point, I believe she said,
11 out behind the store, when nobody was there, seemingly in
12 the middle of the night. But other times, it was not in
13 the middle of the night and was in the truck. I don't
14 think, even a five or six or seven year old make those
15 type of mistakes just because they're traumatized. I
16 think it's because these things did not happen and they
17 are creating or reporting a significant or a fantasy type
18 story. If everything she said was done to her as she
19 says it was done to her or even a percentage of it, the
20 medical reports would have shown you something. I truly
21 believe that; and they did not.

22 So what part of what she told you do you believe
23 because in the second interview with the forensic
24 interviewer, she wasn't wanting to say it until the
25 interviewer suggested it to her and told her what she had

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1 said, and to be honest with you, I think almost forced
2 her into saying it, repeating it. We don't believe she
3 recanted or we do believe she recanted. It's a little
4 hard to tell. But this is a case where you've heard
5 comments or possibilities of recanting on three, four,
6 five different occasions and you saw one on the video.
7 Not a clear-cut recanting, but a recanting, and then her
8 statement was rehabilitated with the help of the
9 interviewer. But her statements were a little too
10 fantastic in most cases.

11 Now, please, one other thing and I apologize to
12 this. I'm not trying to tell you you can never believe a
13 seven-year-old or a five-year-old. And I'm not saying
14 you can never believe a seven-year-old, five-year-old or
15 any child because their story sounds fantastic. I'm not
16 saying that. I told y'all I have children. I have
17 grandchildren. And that is simply not true. But I do
18 think you have to take everything you hear from any
19 child, particularly a child that's been through what this
20 child has been through, and consider what is called the
21 totality of the circumstances. And when you consider
22 everything, does that make her statements believable?
23 Does that make her statement, her information, what she's
24 conveyed to you, sufficient to convict this man and send
25 him away; put him in prison.

1 You were told that there as grooming going on, that
2 Bobby was grooming [REDACTED]. I'm not sure where I saw
3 that. He was nice to her. He was her step-grandfather
4 to that extent, so much so that she called him Papa.
5 Now, she called a lot of different people Daddy. One of
6 the saddest things I've ever had in a courtroom was for
7 her to tell me, yeah, there are lots of daddies around.
8 But that's what she said, that's what she experienced,
9 that's what she feels. This man didn't groom this child.
10 He was helping her, her mother, her brother. My
11 recollection, and correct me if I'm wrong, this is the
12 only man, the only person that you heard about that was a
13 regular hard-working person that has continued to work up
14 to this day. Nobody else had income, or if they did,
15 they were on disability and couldn't work, which is
16 understandable, but they needed him. They depended on
17 him and that's not his doing. He's just working a job,
18 long, hard hours. He was grooming nobody. He's
19 providing for two families, maybe three. There's even
20 the element here, and I -- put what weight you see fit on
21 it. I don't know. I'll just throw it out there quite
22 honestly, from [REDACTED] -- I'm sorry, of Toni's
23 relationship with her mother. She got very emotional.
24 That's about the only time she got emotional. All I want
25 my mother to do is get away from him and let us -- to

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1 come live with us. That's all I want. How long has she
2 been wanting to get this man's girlfriend away from him
3 and back with them? A pretty strong emotion. How that
4 came into play, I don't know, but I do know she cried
5 about it, probably more than anything that she shed tears
6 over.

7 One other thing I want to point out, and then I
8 promise I'll close, is -- I don't need to remind anybody
9 we're in the midst of a political season. And think
10 about it, when a politician -- we see a lot of this --
11 believes that he is in a weakened position, maybe one of
12 the other candidates is making some headway in the polls
13 or maybe one of the other candidates is saying stuff
14 about him or her that is ringing true. Whatever the
15 reason, when that political candidate believes he's in a
16 weakened position, he will use what abilities and what
17 resources he has to fortify his position, maybe even to
18 make things harder on that candidate that's giving him a
19 hard time. That's what they will do, out of fear of
20 losing, out of just concern, I don't want to let this
21 happen. Now, what they report, what they use against
22 this other candidate is nothing new. It's all old news.
23 But they bring it up, they throw it out there to try to
24 distract from their weakness, to try to put the burden on
25 that other candidate. It is uncontroverted, it is

1 acknowledged, that in 2010 Bobby McCann was indicted by
2 the Pickens County Grand Jury for one count of criminal
3 sexual conduct based on the information that both the
4 Sheriff's Department and Solicitor's Office had. You've
5 heard it acknowledged by the Detective that no new
6 evidence came up whatsoever after Bobby was arrested in
7 early 2010. You also know now that what is before you
8 are brand new indictments against Bobby McCann that were
9 indicted in February of this year, eighteen -- several
10 months later from -- almost two years later. You also
11 know that these indictments vastly change the charges
12 against Bobby McCann. He was indicted in 2010 on a
13 charge of criminal sexual conduct covering a period of
14 December 2009, that's the allegation. Three brand new
15 indictments were, what is called direct presented, to our
16 Grand Jury in February of this year. One took that
17 original charge of criminal sexual conduct and expanded
18 the time frame for the allegations to two years, 2007 to
19 December of 2009. Part of that period of time, these
20 people didn't even know Bobby McCann. They changed that
21 one indictment to expand the time frame to two years
22 instead of one month.

23 Another charge, all of these are the charges that
24 are before you, was criminal sexual conduct in the first
25 degree by someone who is on the sex offender registry.

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1 What that new charge did was allow them to put in front
2 of you that Bobby McCann has a conviction that put him on
3 the sex offender registry. You now know it was Peeping
4 Tom. Seventeen years ago. But a new indictment two
5 years ago -- two months ago threw that into your lap.

6 And then another charge of lewd act, which is other,
7 and the Judge will describe it to you from a legal
8 standpoint, but other bad conduct toward a child. I
9 submit to you, there was no new evidence -- that's
10 admitted -- that Bobby McCann was re-indicted because the
11 position was weak, because the case was weak. There's no
12 other good explanation for why you wait two years to do
13 that two months before trial. And I submit to you that
14 will tell you the opinion of the State, the Solicitor's
15 Office, of their case. Just like that politician has to
16 strike and strike fast to ward off a weakness, you've
17 received three indictments that are brand new on a over
18 two-year-old case. What does that tell you? What does
19 that tell you?

20 I told you at the beginning of all of this, Bobby
21 McCann sits before you not a criminal to be prosecuted.
22 He sits before you an innocent man, a hardworking man,
23 that has continued to work and has continued to function
24 throughout all of this. And you're being asked to
25 convict him of these -- all three of these crimes based

1 on the testimony that you have heard and based on
2 primarily the testimony of a little girl that needs help,
3 deserves help, should have help, but not through a
4 wrongful conviction of an innocent man.

5 I ask you -- I'm going to ask you to consider all of
6 that and return a verdict of not guilty.

7 Thank you very much.

8 **CHARGE**

9 **BY THE COURT:**

10 All right. Ladies and gentlemen, it's time for me
11 to give you a charge on the law. It's going to take me
12 about twenty minutes approximately. Does anybody need to
13 take a break before we start? No? Everybody's
14 comfortable? Okay. Good.

15 All right. When we started this case I told you
16 what your duties were as distinguished from my duties,
17 and your duty is to be the judges of the facts and
18 determine in this case what the facts are. My job is to
19 be the Judge of the law and to tell you what the law is
20 and to rule on motions and evidentiary matters that come
21 before the Court.

22 Now, under your oath when we first began this case,
23 you swore to truly and verily try this case in accordance
24 with the law as I give it to you, which means that you
25 now are under oath to accept the law as I give it to you.

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1 Now, if you come into this courtroom with any notions or
2 any preconceptions about what you think the law is or
3 about what you think the law should be, I'm asking you to
4 put that aside because you must accept the law as I give
5 it to you and apply the law as I give it to you, to the
6 facts as you determine them to be based on your review of
7 the evidence.

8 Now, again, in this instance and in every trial in
9 the State of South Carolina, United States of America,
10 the Defendant is presumed innocent until proven guilty
11 beyond a reasonable doubt by the State. The State has
12 the burden of proving each and every element of the
13 offense beyond a reasonable doubt. The Defendant
14 maintains that cloak of innocence until such time as you
15 determine that the State has met its burden of proof.
16 Now, the reason I told you that now for the third time
17 and maybe even fourth is because it's not just a legal
18 theory and it's not just words that we spew out that
19 sound good and sound pretty, it's because it is, in fact,
20 a cornerstone of our criminal justice system. You may
21 know from service on other juries or from just your
22 common experience that there are other burdens of proof
23 out there. And you may have served on a jury or heard of
24 a jury where a burden of proof may have been the
25 preponderance of the evidence, which means the greater

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1 weight of the evidence, more likely than not. It's a
2 heightened proof as well in some cases, clear and
3 convincing evidence. But the highest proof that there is
4 proof beyond a reasonable doubt and that is the standard
5 of proof in this case.

6 Now, it is appropriate for me now to tell you what
7 reasonable doubt is because I know that we've bandied
8 that word around and it begs definition. And reasonable
9 doubt, proof beyond a reasonable doubt, is proof which
10 leaves you firmly convinced of the Defendant's guilt.
11 Now, understand that there's nothing in this world that
12 could be proven beyond any possible doubt. And there are
13 very few things that we can know with absolute certainty,
14 but after your review of the evidence, if you are firmly
15 convinced of the Defendant's guilt, then you must find
16 him guilty. However, understand that after your review
17 of the evidence if you find that there's a real
18 possibility that the Defendant is not guilty, then under
19 your oath you must find him not guilty of the offense.

20 Now, there are multiple charges in this case. You
21 have two counts of criminal sexual conduct with a minor
22 first degree and you've got a lewd act on a child. Now,
23 those are three separate charges, three separate
24 indictments. Understand that you must consider all of
25 those separately and autonomously. You must take each

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1 and every charge and look at it independent of one
2 another. So just by way of example, you could return a
3 verdict of guilty on one and not guilty on two. You
4 could return a verdict of guilty on two and not guilty on
5 the other or you could return a verdict of not guilty on
6 all or guilty on all. You can come back in any -- with
7 any number of either guilty or not guilty pleas because
8 you'll consider them all independent of one another and
9 autonomously.

10 Now, evidence takes two different forms. You saw
11 evidence that was presented in this case. And evidence
12 is categorized as either direct evidence or
13 circumstantial evidence. Direct evidence is that type of
14 evidence which immediately establishes the fact to be
15 proven, such as an eyewitness who tells you, I saw this,
16 I touched this, I felt this. Circumstantial evidence by
17 distinction is proof of a chain of facts, which then in
18 turn prove the main fact to be proven. It's proof of
19 collateral facts, which in combination with one another,
20 prove the main fact. I'll give you an illustration of
21 that because it might make it a little bit clearer to
22 you. Let's say that one January evening you go to bed
23 and you walk past your front window or your front door
24 and you look at your front lawn or you look at your
25 parking lot and you see that there's no precipitation on

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1 the ground. It's bare. You go to sleep. That next
2 morning you walk past that same window or that same door
3 and you look out and there's a blanket of snow covering
4 your front lawn or your parking lot. Not only do you see
5 that blanket of snow, but you also see footsteps, which
6 lead to your door and away. Well, you have direct
7 evidence that it snowed that night because you see the
8 snow, you can touch it, you can feel it, you can smell
9 it. It immediately establishes, by its existence, that
10 it snowed last night. But you also have circumstantial
11 evidence that someone came to your door either that
12 morning or late that night and then left. You don't see
13 that person, you can't touch him, you can't smell him,
14 but you see the footsteps and you see the footsteps
15 leading away and because of the time frame you know that
16 someone must have come during the time frame after it had
17 snowed. So that's circumstantial evidence, that someone
18 had come.

19 Now, the law puts no preference whatsoever on either
20 circumstantial or direct evidence. Neither is preferred
21 over the other. They're just two categories, two forms
22 of evidence. You will decide what weight to put on the
23 evidence. You'll decide whether direct evidence is
24 important or whether the circumstantial evidence is
25 important, based on your analysis of the facts of this

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1 case. Likewise, you're going to determine whether the
2 witnesses were credible in this case. And you had the
3 opportunity to see all of the witnesses who took the
4 stand and based on your own common sense, on your
5 personal life experiences, you can tell and you can
6 determine whether someone is credible or not credible.
7 You base that on what you heard the person say. You base
8 it on facial expressions. You base it on body language.
9 You base it on whether there was a prejudice or bias.
10 You base it on whether somebody had something to gain or
11 somebody had something to lose by virtue of their
12 testimony. You'll decide what weight to put on the
13 evidence and on the testimony that was presented.

14 Understand that you can take a part of somebody's
15 testimony and decide that it's very credible and it's
16 very valuable. And then you can take the remainder of
17 their testimony and decide it's not very credible, it's
18 not very valuable. You can take it in whatever portions
19 that you think are appropriate and put whatever weight on
20 it that you think is appropriate. That is your sole and
21 exclusive responsibility and authority. You don't have
22 to take anybody else's word for it.

23 I told you before, I'm the Judge of the law. If
24 you've heard me say anything that gives you the
25 impression that I have any opinion about the evidence

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1 that was presented and I have any bias or preference or I
2 think you should think one way, disregard that because I
3 truly do not, I truly do not. The facts are your sole
4 and exclusive province.

5 Ladies and gentlemen, as you know, the Defendant in
6 this case elected not to testify. Now, that is a
7 Constitutional right which we all enjoy, the right to
8 remain silent. Because it is a right held sacred under
9 the Constitution, you cannot hold it against him that he
10 elected not to testify. That right, as a matter of fact,
11 is so sacred that it's not even appropriate for you to
12 discuss it in your jury deliberations. The simple fact
13 that someone may have elected to exercise his or her
14 Constitutional rights cannot be held against them.

15 All right. Ladies and gentlemen, I'm going to read
16 to you a little bit now, and I apologize for that. I
17 know it's boring when people read to you, but I need to
18 give you some precise definitions of criminal sexual
19 conduct with a minor in the first degree and lewd act on
20 a minor. And I don't want to just wax poetic. I want to
21 get it precise.

22 All right. The Defendant is charged with first
23 degree criminal sexual conduct with a minor. The State
24 must prove beyond a reasonable doubt that the Defendant
25 engaged in a sexual battery with the victim. A person is

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1 guilty of criminal sexual conduct with a minor in the
2 first degree if the actor engages in sexual battery with
3 a victim who is less than eleven years of age, or the
4 actor engages in sexual battery with a victim who is less
5 than sixteen years of age and the actor has previously
6 been convicted of, pled guilty to or nolo contendere, no
7 contest, or adjudicated delinquent for an offense listed
8 in Section 23-3-430 or has been ordered to be included in
9 the sex offender registry.

10 Ladies and gentlemen, I would charge you that
11 Peeping Tom is one of the offenses listed in Section 23-
12 3-430. A sexual battery is sexual intercourse, oral sex,
13 anal intercourse or any intrusion, however slight, of any
14 part of a person's body or of any object into the genital
15 or anal openings of another person's body, except when
16 the intrusion is accomplished for medically recognized
17 treatment or diagnostic purposes. The State must then
18 prove beyond a reasonable doubt that the victim was less
19 than eleven years old at the time of this sexual battery.
20 Consent, willingness, indifference or ignorance on the
21 part of the minor, if any, as to what was taking place
22 does not in any way affect the charge of criminal sexual
23 conduct with a minor, because an unmarried woman under
24 the age of fourteen cannot legally consent to sexual
25 intercourse. The testimony of the victim need not be

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1 corroborated in a criminal sexual conduct case.

2 Now, ladies and gentlemen, the Defendant is charged
3 with two counts of first degree criminal sexual conduct.
4 When two or more acts of criminal sexual conduct occur at
5 or about the same time, each act is a separate crime
6 rather than one continuing crime.

7 All right. As you know, the Defendant's also
8 charged with lewd on a minor. A minor is a person under
9 the age of eighteen. The State must first prove beyond a
10 reasonable doubt that the Defendant was over the age of
11 fourteen. Next, the State must prove that the Defendant
12 willfully and lewdly committed or attempted a lewd or
13 lascivious act on or with the body or its parts of a
14 child under the age of sixteen years with the intent to
15 arouse, appeal to or gratify the lust, passions or sexual
16 desires of the Defendant or the child. Willfully means
17 voluntarily and intentionally with the specific intent to
18 do something the law forbids. Lewd means obscene,
19 lustful, indecent or lecherous. Lascivious means tending
20 to incite lust, lewd, indecent, obscene or tending to
21 deprave the morals in respect to sexual relations.

22 All right. Ladies and gentlemen, I have three jury
23 verdict forms here, all right? And I'm going to send
24 these verdict forms back to you when you begin your
25 deliberations. The reason there are three separate

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1 verdict forms is just this, for the reason that I told
2 you before and that is, you have to consider them
3 independent of one another. Therefore, I've made three
4 separate and distinct verdict forms. Your verdict must
5 be a unanimous verdict. That means it must be -- twelve
6 of you must agree on that verdict. It can't be eleven to
7 one or ten to two or any other numbers or combination of
8 numbers that adds up to twelve. A unanimous verdict.
9 The verdict has to be based on the evidence that was
10 presented in this courtroom and the law as I give it to
11 you. It can't be the product of emotion or sympathy or
12 bias or anything other than the evidence that was
13 presented in this courtroom.

14 Now, these verdict forms are very simple. And I'll
15 go over one for you, because they're all going to be
16 roughly the same thing. And what it has is the caption,
17 the State of South Carolina versus Bobby Albert McCann,
18 and then the indictment number. Then you see it says, as
19 to the charge of criminal sexual conduct with a minor,
20 first degree, and this parenthetically says for a prior
21 conviction. We, the jury, unanimously find the
22 Defendant: and then you have an option, not guilty or
23 guilty. Now, I don't put these in any particular order.
24 I prepared these. It has to go in some order and I just
25 arbitrarily put it in this order. So I'm not trying to

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1 suggest anything to you one way or the other by virtue of
2 the order that I've put it in.

3 But what will happen is, Mr. Foreman, you will
4 either "X" or initial beside the unanimous determination
5 of the jury, sign as foreperson of the jury, date it. Do
6 the same for each individual one. Now, once you have
7 come to a unanimous decision regarding the verdict, then
8 please let the bailiff know and we will bring you back
9 out and receive the verdict.

10 Now, please don't begin deliberation yet. It's
11 going to be just a few minutes. Because what happens now
12 is I'm going to ask these attorneys if I have misstated
13 any proposition of the law, if I've left anything out or
14 if I need to correct myself or my charge in any way,
15 shape, or form. Once I hear from them and correct my
16 charge if I need to, then I'm going to send back to you
17 the verdict forms and I'm going to send back to you any
18 of the evidence that was admitted into the trial of this
19 case. Then what will happen is the bailiff -- I'll have
20 the bailiff give you very specific instructions to begin
21 your deliberations.

22 All right. So if you'll return to your jury room,
23 please.

24 (WHEREUPON, the jury exited the open court at
25 approximately 4:14 p.m.)

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1 THE COURT: Y'all can go back now too. I'll
2 pull you out when I need to, okay?

3 (WHEREUPON, the alternate jurors exited the open
4 court at approximately 4:14 p.m.)

5 THE COURT: All right. Counsel, any exceptions
6 to the charge?

7 MS. BARWICK: Not from the State.

8 MR. CANTRELL: None from the Defense.

9 THE COURT: Okay. Good enough. First off, I'm
10 going to give you these. What pieces of evidence were
11 introduced? If y'all want to do just an inventory of the
12 evidence, included with the verdict forms and send it
13 back. And first of all, you can tell the foreman that
14 they may begin their deliberations.

15 Now, with respect to the two alternates, if you
16 would send them back to my office. I'm going to dismiss
17 the alternates from the Chambers. Okay. All right.

18 All right. Thank you very much.

19 (WHEREUPON, all exhibits and verdict forms were
20 delivered to the jury and deliberations were
21 commenced at approximately 4:16 p.m.)

22 (WHEREUPON, the court stood at recess awaiting the
23 verdict of the jury.)

24 (WHEREUPON, Court Exhibit Number 1 was marked for
25 identification.)

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1 THE COURT: All right. It's my understanding
2 that the jury has reached a verdict. Are the parties
3 prepared to receive the verdict?

4 MR. CANTRELL: Yes, Your Honor.

5 MS. BARWICK: Yes, Your Honor.

6 THE COURT: Okay. Bring the jury in, please.

7 THE BAILIFF: All right, sir.

8 (WHEREUPON, the jury entered the open court at
9 approximately 5:01 p.m.)

10 THE COURT: All right. Mr. Brown, has the jury
11 reached a unanimous verdict?

12 THE FOREMAN: It has.

13 THE COURT: All right, sir. If you'd hand the
14 verdict form, please, to the bailiff. And Ms. Watson,
15 you can go grab it, please.

16 THE CLERK: In the case of the State versus
17 Bobby Albert McCann, 2012-GS-39-497, as to the charge of
18 lewd upon a child, we, the jury, unanimously find the
19 Defendant guilty. Foreperson, Timothy Brown.

20 2012-GS-39-499, as to the charge of criminal sexual
21 conduct with a minor first degree, we, the jury
22 unanimously find the Defendant guilty. Timothy Brown,
23 Foreperson of the jury.

24 2012-GS-39-498, as to the charge of criminal sexual
25 conduct with a minor first degree for a prior conviction,

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1 we, the jury unanimously find the Defendant guilty.

2 Foreperson of the jury, Timothy Brown.

3 If this is your verdict and still your verdict, so
4 say you all by raising your right hand.

5 (WHEREUPON, all jurors' right hands were raised.)

6 THE CLERK: Thank You.

7 THE COURT: All right. Counsel, anything
8 further for this jury?

9 MS. BARWICK: Not from the State?

10 MR. CANTRELL: Nothing, Your Honor.

11 THE COURT: Ladies and gentlemen, at this point
12 in time, we will proceed to sentencing. I want to thank
13 you for your service in this case. I know it was a
14 difficult case. But I'm thankful to you for being with
15 us and for serving on jury duty during this trial. You
16 are welcome to stay and to observe sentencing if you
17 like. Otherwise, you may leave. And I'm going to ask
18 you to be back at the courthouse tomorrow at 9:30. It
19 doesn't mean that you will be on a jury, but we will be
20 -- I will be selecting another jury tomorrow at 9:30.

21 And I hope to have the opportunity to see you again
22 this week. If I don't, I extend my gratitude to you.
23 If, after this week at any point in time any of you have
24 any questions about this case, about anything that
25 happened in this case, why it happened, you just want to

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1 talk to me about it, then you are more than welcome to
2 call me. You can get me in the phone book, in the
3 Pickens Directory or in the Greenville Directory, or you
4 can go online and you can get my number and my contact
5 information and I'll be happy to talk to you to the
6 extent that you need to talk about it or answer questions
7 to the extent that you may have questions.

8 What I like to do ordinarily is after a verdict is
9 returned is go back to the jury room and just talk to you
10 and take questions if you have any questions. But in
11 this case, I need to go to sentencing. It's after 5:00
12 and I know y'all want to get home. If you want to hang
13 around until afterwards and you want to ask me questions,
14 then I'll be happy to entertain any questions that you
15 might have. So at this point, like I say, I'm going to
16 excuse you until tomorrow morning, but if you want to
17 stay, you're welcome to. All right.

18 (WHEREUPON, the jury exited the open court at
19 approximately 5:07 p.m.)

20 THE COURT: All right. All right. Counsel,
21 Mr. McCann, if you'd approach for sentencing.

22 (WHEREUPON, Ms. Barwick, Mr. Cantrell and the
23 Defendant approached the bar.)

24 MR. CANTRELL: Your Honor, at this time, I
25 would renew the motion for a directed verdict.

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1 THE COURT: Yes, sir. You are protected on the
2 record in that regard.

3 Ms. Barwick, I've certainly heard the facts of this
4 case. Is there anything else that you need to put on the
5 record with respect to sentencing?

6 MS. BARWICK: Yes, sir, Your Honor, there is.
7 That conviction in 1996 was on a nineteen-year-old
8 female. Your Honor, this Defendant has been to trial
9 before on a lewd act conviction -- or a lewd act trial.
10 It was a hung jury. He pled to simple assault and
11 battery. That incident involved an eleven-year-old
12 female. And it was just the kind of touching.

13 Your Honor, he was -- he pled guilty to that simple
14 assault and battery on June 28th of 2007. On July 8th of
15 2007, there was another incident in which another
16 thirteen-year-old girl came forward and said that on that
17 July 8th of '07 that he touched her. There is a pending
18 lewd act conviction -- I'm sorry -- a pending lewd act
19 charge from that July 2007 incident that has not been to
20 trial yet. That is still pending.

21 Your Honor, this is the fourth time our judicial
22 system has been notified of this Defendant's
23 inappropriate sexual acts, three of which have been with
24 under-aged females, one of which was a young adult, a
25 nineteen-year-old. Your Honor, this has been a pattern

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1 of abuse on his part and the State would ask that you
2 would give the maximum possible sentence that you can
3 give, as he is a danger to the community and has not
4 learned from past mistakes.

5 Your Honor, I do have sentencing sheets. I did
6 write what the State believes those possible sentence
7 ranges are. The State would ask that Your Honor check
8 behind them because they are under the old law and I just
9 want to make sure that they are appropriate sentence
10 ranges.

11 THE COURT: What's your understanding of the
12 sentence range?

13 MS. BARWICK: As far as the CSC first with a
14 prior, my understanding is it's ten to thirty years. As
15 far as the CSC first with the victim being under eleven,
16 my understanding is zero to thirty years. And this
17 would, of course, be under the old statute. And a lewd
18 act is zero to fifteen.

19 THE COURT: So it's your understanding the
20 maximum possible penalty in this case is seventy-five
21 years?

22 MS. BARWICK: Yes, sir, Your Honor.

23 THE COURT: With a mandatory minimum, if I
24 understand you correctly, of ten years with respect to
25 the criminal sexual conduct?

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1 MS. BARWICK: With a prior, yes, Your Honor.

2 THE COURT: And I will ask you, Mr. Cantrell,
3 is that your understanding of the sentencing range in
4 this case?

5 MR. CANTRELL: Yes, it is, Your Honor.

6 THE COURT: Okay. Good enough. If you will
7 pass the sentencing sheets, Ms. Watson, to me.

8 All right. Mr. Cantrell, I'll be happy to hear from
9 you, sir.

10 MR. CANTRELL: Your Honor, quite honestly, you
11 heard a little bit about Bobby and I think the most
12 significant thing is that he is a hard working man. He's
13 worked, he's continued to work, he's provided for all of
14 these people that were involved in this case and he's a
15 valued employee of Cecil Durham's saw mill here in
16 Pickens County and has been for quite some time. So he
17 has supported a lot of people with his hard work.

18 And, again, I can't speak to the circumstances
19 behind a simple assault and battery plea, except that it
20 was, in fact, a plea. I can't speak to the Peeping Tom
21 except to say it was a Peeping Tom event of seventeen
22 years ago. And it's my understanding that the other case
23 is pending. So there has been no adjudication in that.
24 So I would ask the court to take that into account also
25 and consider that in sentencing. I'd ask you to sentence

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1 him as the Court sees fit.

2 THE COURT: Mr. McCann, do you want to say
3 something?

4 MR. MCCANN: And one of them's not true and one
5 of them's lied. I didn't do it. I never did that.

6 THE COURT: Well, Mr. McCann, what do you think
7 her motivation may have been?

8 MR. MCCANN: I don't know. To me it's wrong
9 because I didn't do that to that child, neither one of
10 them.

11 THE COURT: Again, you don't know what may have
12 motivated her to say that?

13 MR. MCCANN: No, sir. I didn't do that. Larry
14 Pendergraft done it, I believe, and they just put it on
15 me. Because I never touched that child every day.
16 That's stupid.

17 THE COURT: All right. Mr. McCann, ---

18 MR. MCCANN: That's the way I feel, sir.

19 THE COURT: I understand, sir. I understand.
20 You're entitled to your opinion and feelings in that
21 regard.

22 MR. MCCANN: That woman right here ---

23 THE COURT: I hear you. I hear you. The jury
24 heard the same testimony that I heard and the testimony
25 from the minor child was compelling and credible

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1 testimony. I can't imagine what her, what her motivation
2 may have been to say something that wasn't true. Based
3 on the evidence I saw, I agree with the jury's verdict
4 based on the evidence that was presented in this case.

5 All right. Mr. McCann, the sentence of the Court is
6 you be confined to the South Carolina Department of
7 Corrections for a period of twenty-five years on both
8 criminal sexual conduct offenses. Those are concurrent.
9 Credit for any time that you may have served.

10 With respect to the lewd act, that's five years
11 consecutive to the twenty-five year sentences on the
12 criminal sexual conduct convictions. Good luck to you,
13 sir.

14 MS. BARWICK: Thank you, Your Honor.

15 THE COURT: All right. Thank y'all.

16

17 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

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I, the undersigned Danette P. Hanks, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the 23rd day of April, 2012.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

July 31, 2012



Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of PICKENS)

IN THE COURT OF COMMON PLEAS

Bobbie Albert McCann #350650)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2015-CP-39- 080CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2015 JAN 16 AM 9 29

APPLICATION FOR
POST-CONVICTION RELIEFINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be written (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or an additional page. Applicant shall make clear to which questions any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis for prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information, which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention SCDC; Lieber Cor Inst., PO Box 205, Ridgville, SC 29472
2. Name and location of Court which imposed sentence Pickens Co. Court of General Sessions; The Hon. Robin Stilwell, Judge; and a jury
3. Name(s) of co-defendant(s) (if any) _____
4. The indictments number or numbers (if known) upon which and the offences for which sentence was imposed:
(a) 2012-GS-39-0497; Committing A Lewd Act Upon A Child

(b) 2012-GS-39-0498, CSC w/minor, first degree

(c) 2012-GS-39-0499; same as "0498"

5. The date upon which sentence was imposed and the terms of the sentence:

(a) April 23, 2012 - twenty-five (25) years (0498) concurrent with

(b) twenty-five (25) years (0499) and five (5) year consecutive

(c) sentence for committing a lewd act upon a child

6. Check whether a finding of guilty plea was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ☒ _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence? _____

Yes

8. If you answer "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. convictions and sentences affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. October 8, 2014

ii. _____

iii. _____

(d) if known, citations of written opinion entered pursuant to such results:

i. Unpublished Opinion No. 2014-UP-355 (ct. App.)

ii. _____

iii. _____

9. If you answered "no" to (7), state reasons for not appealing.

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Ineffective Assistance of Trial Counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each ground set out in (10):

(a) See attached pages 3A-5A

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No(b) Any petition in State or Federal Courts for habeas corpus or post-convictions relief? No(c) Any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8) No(d) Any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

10. (a) Ineffective Assistance of Trial Counsel: Petitioner's rights to the effective assistance of counsel, a fair trial, and Due Process as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 3 and 14, of the South Carolina Constitution, were violated by trial counsel's deficient performance, both prior to and during trial, by the following acts or omissions, including but not limited to the following:

11. (a) (1) Trial counsel was ineffective for failure to object to "expert opinion" that in ninety percent of cases of child sexual abuse, the person who is committing the acts is somebody who's known and loved and trusted by the child and that in "about seventy percent [of adult survivors of childhood sexual abuse] have never told anyone."

Trial counsel's failure to object to this "expert" testimony allowed the witness to impermissibly bolster the testimony of a very questionable child witness.

11. (a) (2) Trial counsel was ineffective for failing to raise the defense of "third-party guilt."

Trial counsel's failure to raise the defense of "third-party guilt" denied the Petitioner his Sixth and Fourteenth Amendment rights to present a complete defense. Actually, was denied a fair and impartial trial because he was not allowed to present the defense of "third-party guilt," due to counsel's deficient performance.

11. (a) (3) Trial counsel was ineffective for failing to subpoena three witnesses and this deficient performance deprived the Petitioner his Sixth Amendment right to present a defense.

Specifically, trial counsel failed to subpoena and call as a witness, Ms. Margaret Durnil, grandmother of the alleged victim, concerning repeated demands for money and other items from Petitioner, thus, depriving the Petitioner of

a "vendetta" defense.

Specifically, trial counsel failed to subpoena and call as a witness, Ms. Margaret Durnil, the grandmother of the alleged victim, concerning repeated demands for money and other items from Petitioner, thus, depriving the Petitioner of presenting a "vendetta" defense.

With Petitioner's attention focused on Ms. Margaret Durnil and having purchased a mini-van for [Margaret] and giving a car to Toni Durnil and assisting her [Toni] with the kids, Toni wanted more money. Petitioner informed Toni that he was taking care of her mother first, Toni became angry, informing Petitioner that "since you're on the sex offender registry - I will get you, I'll separate you and mama, and you'll be miserable, in prison."

Petitioner asserts that with Ms. Margaret Durnil's testimony he could have established that the victim's story was concocted by Toni Durnil because Petitioner would not provide money and other items that she wanted, she [Toni] began a "vendetta" against him to separate him from her mother.

Also, Ms. Margaret Durnil could have testified to the fact that it was impossible for the Petitioner to have had the alleged victim, alone late at night and especially alone in the bedroom as the bedroom door was kept locked.

Witness #2: Donnie (can not recall last name) but neighbor to [Margaret] would have testified to the fact that it was impossible for the Petitioner to have been alone with the alleged victim late at night, and that Petitioner did not assault alleged victim, that it was a story cooked up by Toni.

Witness #3: Daniell (daughter of witness #2) would have basically testified to similar facts.

11.(a)(4) Trial counsel was ineffective for failing to file motion requesting expert witness funds under South Carolina law to consult with and retain independent child sexual abuse expert/forensic medical examiner to assist in preparing defense and to testify on the behalf of the Petitioner.

In the present case, it was a credibility contest, and there was no ~~substantial~~ ^{circumstantial} evidence of abuse nor physical evidence and the case hinged entirely on whom to believe - an expert's interpretation of relevant physical evidence or "lack of it" is the sort of "neutral, disinterested" testimony that may ^{well} tip the scales and sway the fact-finder.

Trial counsel's deficient performance deprived the Petitioner of the ability to present a defense in violation of Petitioner's Sixth Amendment and Fourteenth Amendment Due Process rights.

- iii. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- (c) the disposition thereof:
- i. _____
- ii. _____
- iii. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- (e) if known, citations of written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application, which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) first opportunity to raise IAC - post-conviction
- (b) relief application
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
yes
- (e) preparation, presentation or consideration of any petition, motion or applications with respect to this conviction, which you filed? yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. David Cantrell - address not available/unknown
 - ii. Robert M. Dudek - Chief Appellate Defender
 - iii. SCCD - Division of Appellate Defense
- (b) the proceeding at which each attorney represented you:
 - i. trial and sentencing
 - ii. direct appeal
 - iii. _____

19. State concisely the relief you seek in filing this application:

Conviction and sentences reversed and
remanded for a new trial.

20. Are you now under sentence from any other court that you have not challenged?

~~Convictions and sentences reversed and remanded~~
~~for a new trial~~ No

STATE OF SOUTH CAROLINA)
 County of Dorchester)

Revised 3/2003

VERIFICATION

2015 JAN 16 AM 9
 CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

I, Bobbie Albert McCann #350650, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it include every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X Bobbie A McCann

SWORN to and subscribed before me this _____
 Day of _____

 Notary Public (L.S.)

My Commission Expires: _____

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Bobbie Albert McCann #350650, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefore. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

X Bobbie A M^c Cann
Applicant

SWORN to and subscribed before me this _____
Day of _____,

Notary Public (L.S.)

My Commission Expires: _____

2015 JAN 16 AM 9 29
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Bobbie Albert McCann #350650
Lieber corr. Inst. Stono B-43
P.O. Box 205
Ridgeville, S.C. 29472
December , 2014

Clerk of Court
Pickens County
P.O. Box 215
Pickens, SC 29671

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2015 JAN 16 AM 9 29

Dear Clerk,

Enclosed please find the original and one copy of
pro se Application for Post-Conviction Relief.

Please file the original with your office and clock/
date stamp and return to me in the enclosed self add-
ressed stamped envelope.

Thank you for your assistance in this matter.

Sincerely,
X Bobbie A McCann
Bobbie A. McCann

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2015-CP-39-0080
COUNTY OF PICKENS	)	
	)	
Bobbie Albert McCann,	)	
S.C.D.C. No. 350650,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed January 16, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Pickens County Grand Jury indicted the Applicant at the February 2012 term of General Sessions for lewd act upon a child (2012-GS-39-0497) and two counts of first-degree criminal sexual conduct (CSC) with a minor (2012-GS-39-0498,¹ -0499). David Cantrell, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On April 24, 2012, the Honorable Robin B. Stilwell sentenced the Applicant to concurrent sentences of 25 years for each of the first-degree CSC with a minor charges and a consecutive sentence of 5 years for lewd act upon a child.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek,

¹ This charge was first-degree because the Applicant had a prior conviction.

Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. McCann, Op. No. 2014-UP-355 (S.C. Ct. App. filed October 8, 2014). The Remittitur was sent on October 27, 2014.

Attached herewith and incorporated herein by reference are the records of the Pickens County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief, the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of trial counsel:
 - a. Failure to object to expert opinion "that in ninety percent of cases of child sexual abuse the person who is committing the acts is somebody who's known and loved and trusted by the child and that in 'about seventy percent [of adult survivors of childhood sexual abuse] have never told anyone.'"
 - b. Failure to raise the defense of third-party guilt.
 - c. Failure to subpoena three witnesses (Margaret Durnil, Donnie, and Danielle).
 - d. Failure to file motion requesting expert witness funds to "consult with and retain independent child sexual abuse expert/forensic medical examiner."

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial

process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an

evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

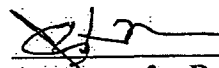
ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:



Attorneys for Respondent

May 29, 2015

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

2015-CP-39-0080

BOBBIE ALBERT MCCANN, 350650)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

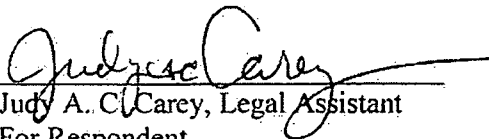
STATE OF SOUTH CAROLINA,)

Respondent.)

7. I am an employee of the Respondent in the above-captioned action.
8. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
9. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Bobbie Albert McCann, 350650
Lieber Correctional Institution
Post Office Box 205
Ridgeville SC 29472**

DATED this 29th day of May, 2015.


Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	
Bobby A. McCann,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 15-CP-0080
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on December 14, 2015, before The Honorable Perry H. Gravely in Courtroom 4 of the Pickens County Courthouse, Greenville County Courthouse, 214 East Main Street, Pickens, South Carolina; attended by counsel as follows:

APPEARANCES:

R. Mills Arial, Esq.
Appearing for Applicant

Karen Ratigan, Assistant Attorney General
Appearing for State of South Carolina

Deborah Garrison
Circuit Court Reporter – 13th Judicial Circuit
P O Box 27145
Greenville, South Carolina 29616
dgarrison@sccourts.org

Bobbie A. McCann v State of South Carolina
Case No. 15-CP-39-0080
Hearing of December 14, 2016
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Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 KAREN RATIGAN: Your Honor, this
2 is Bobbie A. McCann. Mr. McCann was
3 represented on these charges by Mr. Cantrell.
4 The case was brought to trial and Mr. McCann
5 was found guilty on April 24th, 2012. Judge
6 Stilwell sentenced him to concurrent
7 sentences of twenty-five (25) years for each
8 count of first degree CSC with a minor and
9 then a consecutive sentence of five (5) years
10 for lewd act on a child.

11 The case was appealed. The Court of
12 Appeals affirmed his convictions and
13 sentences in October of 2014.

14 This application was timely filed
15 and the State is ready to proceed.

16 THE COURT: All right. Mr. Arial?

17 MR. ARIAL: Yes, Your Honor. We
18 are ready to proceed. I call Mr. McCann to
19 the stand.

20 (WITNESS TAKES STAND)

21 BOBBIE ALBERT MCCANN, having been
22 sworn to tell the truth, and nothing but the
23 truth, testified as follows:

24 DIRECT EXAMINATION

25 BY BOB ARIAL:

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 Q. Mr. McCann, how you doing today?

2 A. I'm doing all right.

3 Q. Good. You were represented by Mr.
4 Cantrell in regard to the charges that Ms.
5 Ratigan put on the record. Is that correct?

6 A. Yes.

7 Q. How long were you represented by
8 him?

9 A. I really don't remember how long
10 it's been.

11 Q. Let me make it a little bit easier
12 on you. You were arrested on these charges,
13 correct?

14 A. Yes, sir.

15 Q. Then did you get out on bond?

16 A. Bond, yes.

17 Q. How long after you were arrested did
18 Mr. Cantrell -- was he appointed to represent
19 you?

20 A. No, at first I got one across the
21 hall. Then when he failed me, that's when I
22 got him.

23 Q. Did you retain him or get him by
24 appointment?

25 A. He was appointed to me.

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 Q. So when he was appointed, did y'all
2 meet and discuss your case?

3 A. Yes.

4 Q. How many times did y'all meet over
5 the time that you were represented by him?

6 A. Four, five, six times, I reckon.

7 Q. Okay -- four, five, six times?

8 A. Yeah.

9 Q. During those times, did y'all
10 discuss the evidence that was against you?

11 A. Yes.

12 Q. All right. You discussed what the
13 victim was going to say?

14 A. (Affirmative nod).

15 Q. What the ---

16 A. What did you say?

17 Q. You discussed what the victim was
18 going to testify about, is that correct?

19 A. Yes, sir.

20 Q. You talked about an expert witness
21 that was going to be a part of the case, too;
22 correct?

23 A. Yes, sir.

24 Q. Did he explain to you what the State
25 had to prove to convict you of these charges?

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 A. I don't remember. It's been a
2 while. I don't remember if he did or didn't.

3 Q. But you understood what the evidence
4 was against you, and what they were going to
5 put up against you at trial?

6 A. I did. Yeah.

7 Q. Were you ever given a plea offer and
8 said, 'hey, this is what we want you to plead
9 to', or 'what we're willing to recommend' or
10 anything like that?

11 A. No, sir.

12 Q. So they never offered you a plea?

13 A. No, sir.

14 Q. So it was either you were going to
15 go to trial or you were going to have to
16 plead straight up on these charges; right?

17 A. Yeah.

18 Q. All right. So you decided that you
19 wanted to go to trial.

20 A. Trial, yeah.

21 Q. And you did that because you said
22 that you were not guilty?

23 A. (Affirmative nod).

24 Q. Is that right?

25 A. Yes, sir. Not guilty.

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 Q. Did you tell him that you were not
2 guilty of these charges?

3 A. I told him the first time that I
4 talked to him.

5 Q. Okay. What was your -- what was
6 your discussion with him as to how he could
7 handle this case, to represent you?

8 A. It's been awhile. I told him about
9 them saying all them things that I never did
10 to the child. Never did do them things.

11 Q. Your basis was, 'I didn't do this
12 stuff.'

13 A. Never did do nothing.

14 Q. But you -- you got -- when it got
15 down to it, did you have an alibi or were you
16 at a different location at the time or you
17 hadn't met the child; anything like that?

18 A. I carried -- I mean, every time I
19 went to the store, she begged me -- I got
20 witnesses that she cries for me. The child
21 is crying for me every time that I go out,
22 she wants to go with me. I go to the store
23 one time, I carried her to the store. She
24 went with me. The people in the store they
25 know me, they know I don't do these things.

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 They been around me all the time, they know I
2 wouldn't do these things.

3 Same thing when I go to work, she cries
4 for me when I go to work.

5 Q. We are here today and I want to
6 summarize exactly what you're saying that Mr.
7 Cantrell did that was ineffective in your
8 case?

9 A. Yeah, he come out there and told me
10 that we got this and you don't need no
11 witnesses.

12 Q. That you didn't need witnesses?

13 A. Right.

14 Q. So who did you have prepared to
15 testify on your behalf?

16 A. That girl and her mama, she was my
17 fiancée and she was with me and three other
18 girls were with me and a guy -- I don't know
19 his name.

20 Q. So what were they going to testify
21 to?

22 A. She would testify that I did not do
23 it, because the child told 'em that I didn't
24 do it.

25 Q. Did you tell Mr. Cantrell that you

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 had witnesses that would testify that the
2 child admitted that you did not do it?

3 A. Yes.

4 Q. Who were these witnesses?

5 A. I can't draw on the names. I went
6 to church with one of them. And the other
7 one is my friend that I go see, her daddy --
8 she was there. I really don't know the
9 names.

10 Q. Well, here's the thing. We've
11 discussed and I've asked you for those names
12 and those people's addresses to get them
13 here.

14 A. Yeah.

15 Q. Have you been able to contact them,
16 to get them here today to be able to testify
17 to this?

18 A. I don't know no names, don't know no
19 addresses, don't know their numbers.

20 Q. So the only thing that you're able
21 to say is that you were told by these people
22 who were, I guess, part of a conversation
23 with the victim saying you didn't do this
24 crime?

25 A. Yeah. I was around but her mama

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 told me, sat there and told me "that child's
2 told everybody that you did not do things to
3 her."

4 Q. Okay.

5 A. And, well, she was there too. She
6 knows -- she was around me 24/7, she'd never
7 leave me, her mama would never leave me.

8 Q. Did you tell this to Mr. Cantrell so
9 that he could bring this up during the trial,
10 so that he could call these people, or
11 anything like that?

12 A. No, sir.

13 Q. You don't have any contact
14 information to be able to call these people,
15 or anything like that?

16 A. No, sir, I didn't -- I wasn't able
17 to get them on the stand.

18 Q. I mean -- well, that's two different
19 things. You didn't tell him about those
20 witnesses. Why didn't you do that?

21 A. Tell him about the witnesses?

22 Q. (Affirmative nod).

23 A. I told him that I got witnesses. He
24 subpoena those people, or whatever you call
25 it.

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Direct Examination

1 Q He subpoenaed those people?

2 A. (Affirmative nod).

3 Q. Did they come?

4 A. Yeah. Oh, yeah.

5 Q. So they were there?

6 A. Yeah.

7 Q. Who were those people?

8 A. My daughter said that there were
9 three ladies. I don't know their names. One
10 of them was my girl, her name was Margaret --

11 Q. Okay, well, I'll ask him about that
12 since you don't know their names.

13 A. You ask him. He might know the
14 names of them.

15 Q. Did you tell him that the mother
16 knew also that the victim said that you
17 didn't do it?

18 A. No.

19 Q. Did you tell him that?

20 A. Did I tell him that? Yeah, I told
21 him everything. She was there with him when
22 I told him, the mama was there.

23 Q. The grandmamma is the one that
24 you're talking about, that said that the
25 little girl said that you didn't do it?

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Cross Examination

1 A. The little girl ---

2 Q. That you didn't ---

3 A. I didn't do that to the little girl.

4 Q. Correct. But he was part of the
5 conversation, Mr. Cantrell was, between you
6 and the grandmother where she admitted that?

7 A. Yeah, in his office.

8 Q. Okay. What other items are you
9 saying that he did that were ineffective or
10 that he shouldn't have -- or should have done
11 differently, other than call those witnesses?

12 A. He didn't really talk none to my
13 witnesses. He talked to her witnesses, he
14 didn't talk to my witnesses.

15 Q. The witnesses are the main issue
16 that you've got? The only issue?

17 A. The only issue I had of proving that
18 I am not guilty of that child, guilty of
19 doing that to that child.

20 Q. Okay. Thank you.

21 BOB ARIAL: I have no further
22 questions.

23 THE COURT: Ms. Ratigan?

24 CROSS EXAMINATION

25 BY KAREN RATIGAN:

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Cross Examination

1 Q. Mr. McCann, at the time you were
2 getting ready for trial, did you know these
3 ladies' names?

4 A. I knew them. Had been went to
5 church but I didn't know their names. I
6 never talked to them, really. I been with
7 the husband's part but I'd never been around
8 them.

9 Q. Did you tell your lawyer at the time
10 that 'I don't know this lady's name but I
11 know her daddy. Her daddy is Mr. Smith. Go
12 talk to Mr. Smith.' Did you give him that
13 information?

14 A. No.

15 Q. Okay. And these ladies would have
16 been able to testify that the victim changed
17 her story?

18 A. No. She just outright told them --
19 she was sitting there all the time. I was
20 standing outside, her mama -- her granny, her
21 grandma, she was there and she went up there
22 and told the ladies that Larry ---

23 Q. But, but -- but wasn't there
24 evidence at trial that the victim changed her
25 story. That evidence came out at trial,

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of Bobbie McCann - Redirect Examination

1 didn't it?

2 A. I don't remember.

3 Q. You don't remember that?

4 A. No, ma'am.

5 KAREN RATIGAN: That's all that I
6 have, Your Honor.

7 THE COURT: Redirect?

8 BOB ARIAL: No further questions,
9 Your Honor.

10 THE COURT: All right, let me know
11 sure. There was also -- looking at the
12 application, there was an issue about expert
13 opinion. I guess the Court of Appeals
14 mentioned that in the Opinion and I just want
15 to make sure that ---

16 BOB ARIAL: I've discussed that
17 him.

18 REDIRECT EXAMINATION

19 BY BOB ARIAL:

20 Q. Are you saying any longer that the
21 expert witness issue is a problem?

22 A. (No verbal response).

23 Q. I mean, if it is, just tell the
24 judge what you think the issues are with
25 that.

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of David Cantrell - Direct Examination

1 A. I don't understand what y'all are
2 talking about.

3 THE COURT: This is your
4 application. Again, the expert witness issue
5 was addressed by the Court of Appeals. Their
6 decision was that -- the appeal was -- I just
7 wanted to make sure that there was nothing
8 that you wanted to go along with on that.

9 BOB ARIAL: No, sir, Your Honor.
10 The expert witness issue was -- I think that
11 was the only one that I had and I think the
12 expert witness issue was addressed prior to
13 that.

14 THE COURT: Okay. Thank you.
15 Anything else from the Applicant?

16 BOB ARIAL: No, Your Honor, that's
17 our case.

18 THE COURT: Ms. Ratigan?

19 KAREN RATIGAN: Yes, Your Honor.
20 The State would call Mr. Cantrell.

21 (WITNESS TAKES STAND)

22 DAVID CANTRELL, having been sworn to
23 tell the truth, and nothing but the truth,
24 testified as follows:

25 DIRECT EXAMINATION

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of David Cantrell - Direct Examination

1 BY KAREN RATIGAN:

2 Q. Mr. Cantrell, do you recall
3 representing Mr. McCann on these charges?

4 A. Yes, I do.

5 Q. Were you appointed or retained on
6 this matter?

7 A. I was appointed.

8 Q. Did you file the usual *Brady* and
9 Rule 5 discovery Motions?

10 A. Yes.

11 Q. To the best of your knowledge, did
12 you receive full discovery from the State?

13 A. Yes.

14 Q. Did you review those materials with
15 your client?

16 A. Yes, I did.

17 Q. Did you review with him his version
18 of events?

19 A. Yes.

20 Q. Did he ever give you names or
21 contact information of potential witnesses?

22 A. Yes, he did.

23 Q. And do you recall who these
24 individuals were?

25 A. I'd have to look in my notes but,

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of David Cantrell - Direct Examination

1 yes, I do have names.

2 Q. What would the purpose of these
3 witnesses have been?

4 A. I think the majority, if not all of
5 them, were people that lived or possibly were
6 family or friends that came to the
7 defendant's residence in the trailer park in
8 Easley, which I believe was the same trailer
9 park that the alleged victim lived in.

10 Q. Did you talk to any of these
11 potential witnesses?

12 A. Yes, I did.

13 Q. Did any of them give you information
14 that would have been helpful in forming a
15 defense?

16 A. To the best of my recollection there
17 was little, if any, useful information. I
18 don't believe that there was any. I don't
19 remember anything specifically that would
20 have been harmful and there was nothing that
21 would have been beneficial.

22 Q. Do you recall whether there was any
23 evidence at trial, introduced, of the
24 victim's recantation?

25 A. I believe that there was some

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of David Cantrell - Cross Examination

1 discussion of that in the victim's
2 mother's testimony. I don't have -- I can't
3 say specifically.

4 KAREN RATIGAN: That's all that I
5 have, Your Honor.

6 THE COURT: Mr. Arial?

7 CROSS EXAMINATION

8 BY BOB ARIAL:

9 Q. Mr. Cantrell, just a few questions
10 in regards to your representation of Mr.
11 McCann. The testimony that you heard, Mr.
12 McCann said that these people were going to
13 provide information to help his case. Are
14 you saying that there was no information that
15 you had that would have said, 'okay, he
16 didn't commit the crimes that he is charged
17 with'?

18 A. To the best of my recollection there
19 was not.

20 Q. Do you remember -- and I'm not
21 trying to hold you -- I know you've got your
22 file here -- who these people were?

23 A. I think that they were residents in
24 the mobile home park, there was his fiancée
25 at the time, I think her name was Margaret,

Bobbie A. McCann v State of South Carolina

Case No. 15-CP-39-0080

Hearing of December 14, 2016

Testimony of David Cantrell - Cross Examination

1 who was the grandmother of the victim.

2 Q. Okay.

3 A. And I want to say that at one point
4 there may have been discussions of the
5 victim's father or someone involved with the
6 father being a witness.

7 Q. I guess my question is, and what he
8 has said is that there was a meeting between
9 you and the grandmother, I guess, involving
10 her saying or testifying that the victim said
11 that it was not him who committed these
12 crimes. Do you remember that?

13 A. I have some recollection of there
14 being some discussion of that with her. She
15 was -- quite frankly, I believe that she came
16 on every appointment that Bobbie had in my
17 office -- Margaret, the grandmother.

18 Q. Okay.

19 A. And there was some discussion of
20 that. I don't remember the specifics.

21 Q. I guess -- going back, and I know
22 you have done a lot of cases. But if the
23 grandmother had admitted or said that the
24 victim said that he did not -- or said that
25 it was not Mr. McCann, how would you have

Bobbie A. McCann v State of South Carolina
Case No. 15-CP-39-0080
Hearing of December 14, 2016
Testimony of David Cantrell - Cross Examination

1 used that information?

2 A. I believe a lot of things went into
3 that discussion. I don't specifically
4 remember how anxious or how -- whether
5 Margaret did or did not wish to testify, or
6 her recollection of those statements, or what
7 they were. I just don't remember those
8 specifics. I know that there was a great
9 deal, I think at that point, of animosity
10 between her and her daughter and grand-
11 daughter. Her testimony would have -- any
12 benefits of her testimony, I think, would
13 have been outweighed by some of the issues
14 that would have come up, or the animosity,
15 those types of issue. Quite honestly, she
16 was involved in virtually every discussion
17 that I had with Bobbie and she was there at
18 trial, to the best of my recollection.

19 Though Bobbie made the discussion, again
20 if I am not mistaken and I cannot remember
21 exactly, she was involved in the discussion
22 and decision of whether to present any
23 evidence at the trial. It just turned out to
24 be question of credibility of the alleged
25 victim. I believe that the decision was very

Bobbie A. McCann v State of South Carolina
Case No. 15-CP-39-0080
Hearing of December 14, 2016
Ruling of The Court

1 one of the basis was the expert witness
2 issue. Even if it still being asserted, I
3 believe that was properly taken care of by
4 the Court of Appeals on review.

5 I believe that the Applicant's has
6 failed to meet his burden because of the
7 speculation about some possible witnesses
8 that may have said some things that may have
9 had some issues on things that might have
10 been admissible-type evidence. I believe
11 that without more than that, that the
12 Applicant has not met his burden. I deny the
13 application.

14 KAREN RATIGAN: Thank you, Your
15 Honor.

16 (HEARING CONCLUDED)
17
18
19
20
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22
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24

2016 JAN 19 AM 11 52

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) CLERK OF COURT
) C.A. No. 2015-CP-39-0080
 COUNTY OF PICKENS) PICKENS COUNTY
) SOUTH CAROLINA

Bobbie Albert McCann,
 S.C.D.C. No. 350650,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 16, 2015. The Respondent made its return on May 29, 2015. An evidentiary hearing was held on December 14, 2015 at the Pickens County Courthouse. The Applicant was present and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, David Cantrell, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the February 2012 term of the Pickens County Grand Jury for lewd act upon a child (2012-GS-39-0497) and two counts of first-degree criminal sexual conduct (CSC) with a minor (2012-GS-

DHK

39-0498,¹ -0499). He was represented by David Cantrell, Esquire.

After the State called the case to trial, the Applicant was found guilty. On April 24, 2012, the Honorable Robin B. Stilwell sentenced the Applicant to concurrent sentences of 25 years for each charge of first-degree CSC with a minor and a consecutive sentence of 5 years for lewd act upon a child.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. McCann, Op. No. 2014-UP-355 (S.C. Ct. App. filed October 8, 2014). The remittitur was sent on October 27, 2014.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failure to object to expert opinion "that in ninety percent of cases of child sexual abuse the person who is committing the acts is somebody who's known and loved and trusted by the child and that in 'about seventy percent [of adult survivors of childhood sexual abuse] have never told anyone.'"
 - b. Failure to raise the defense of third-party guilt.
 - c. Failure to subpoena three witnesses (Margaret Durnil, Donnie, and Danielle).
 - d. Failure to file motion requesting expert witness funds to "consult with and retain independent child sexual abuse expert/forensic medical examiner."

The Applicant proceeded solely upon the issue of failure to call three witnesses at trial.

This Court notes the Applicant specifically withdrew all issues related to an expert witness.

¹ This Court notes this charge was in the first-degree because the Applicant had a prior conviction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he had numerous discussions with trial counsel about his case and the evidence and that he told trial counsel he wanted to go to trial because he was not guilty. The Applicant stated he told trial counsel about some witnesses who could testify the victim recanted. The Applicant admitted, however, that he knew only one person by name (Margaret Durnil, the

PAC

victim's grandmother) and did not give any contact information to trial counsel.

Trial counsel testified he reviewed the discovery materials with the Applicant, as well as his version of events. Trial counsel testified he was given names of people who had visited the residence for use as potential witnesses. Trial counsel testified he spoke to these individuals and there was very little useful information to help with the defense case.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have subpoenaed witnesses for trial. Initially, this Court finds credible trial counsel's testimony that he spoke to several potential witnesses and that they had would add little value to the defense case. Regardless, Petitioner could only provide the name of one alleged witnesses at the PCR hearing and none of the alleged witnesses testified. As such, any discussion regarding what they would have testified about at trial is purely speculative. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original).

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

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CLERK OF COURT
ACKENS COUNTY
SOUTH CAROLINAAll Other Allegations

to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

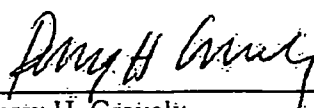
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 11th day of January, 2016.


 Perry H. Gravely
 Presiding Judge
 Thirteenth Judicial Circuit

Greenville, South Carolina.

WITNESSES

Keith Culbreath

Pickens County Sheriff's Office

7/24/2007

ARREST WARRANT NUMBER
DIRECT PRESENTMENT
DOB: 09-18-1962
SS# 259-96-3130

ACTION OF GRAND JURY

TRUE BILL

Date

FEB 21 2012

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date: APRIL 24th 2012

DOCKET NO. 2012-GS-39-0497
JLB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

FEB 21 2012 TERM 2012

THE STATE

vs.

BOBBIE ALBERT MCCANN

Indictment for

2468

LEWD ACT UPON A CHILD

VIOLATION § 16-15-140

VAB

STATE OF SOUTH CAROLINA)
)
COUNTY OF PICKENS)

INDICTMENT FOR
LEWD ACT UPON A CHILD

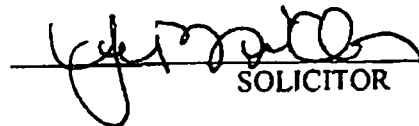
At a Court of General Sessions, convened on
County present upon their oath:

FEB 21 2012

the Grand Jurors of Pickens

That BOBBIE ALBERT MCCANN did in Pickens County, on or about the dates of December 1, 2007 through December 31, 2009, being over the age of fourteen years, willfully and lewdly commit or attempt a lewd and lascivious act upon or with the body, or its parts, of E.D., a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of himself or such 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.


SOLICITOR

WITNESSES

Keith Culbreath

Pickens County Sheriff's Office

7/24/2007

ARREST WARRANT NUMBER

DIRECT PRESENTMENT

DOB: 09-18-1962

SS# 259-96-3130

ACTION OF GRAND JURY

FILED

CLERK

FEB 21 2012

Foreperson of Grand Jury

James A. Haggler

VERDICT

Timothy A. Brown

Foreperson of Petit Jury

Date: APRIL 24th, 2012

DOCKET NO. 2012-GS-39-
JLB

0498

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

FEB 21 2012

TERM 2012

THE STATE

VS.

BOBBIE ALBERT MCCANN

Indictment for

3022

CRIMINAL SEXUAL CONDUCT W/ A MINOR 1ST
(PC)

VIOLATION § 16-03-655(A)(2)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)

INDICTMENT FOR
 CRIMINAL SEXUAL CONDUCT W/ A MINOR 1ST (PC)

At a Court of General Sessions, convened on

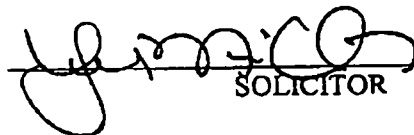
FEB 21 2012

the Grand Jurors of Pickens

County present upon their oath:

That BOBBIE ALBERT MCCANN did in Pickens County, on or about the dates of December 1, 2007 through December 31, 2009, willfully and unlawfully commit a sexual battery on E.D. who was less than sixteen years of age, to-wit: cunnilingus, and the Defendant has previously been convicted of, pled guilty or nolo contendere to, or adjudicated delinquent for an offense listed in South Carolina Code of Laws section 23-3-430(c), or has been ordered to be included in the sex offender registry pursuant to South Carolina code of Laws section 23-3-430(D), to wit: the defendant has previously been convicted of aggravated voyeurism and/or the Defendant has previously been ordered to register as a sex offender. This is in violation of section 16-3-655(A) (2) of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 SOLICITOR

WITNESSES

Nita Garner Burgess

Pickens County Sheriff's Office

1/25/2010

**ARREST WARRANT NUMBER
DIRECT PRESENTMENT**

DOB: 09-18-1962

SS# 259-96-3130

ACTION OF GRAND JURY

TRUE BILL

Date:

FEB 21 2012

Foreperson of Grand Jury

VERDICT

Timothy D. Shaw
Foreperson of Petit Jury

Date: APRIL 24th 2012

DOCKET NO. 2012-GS-39-

JLB

0499

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

FEB 21 2012 TERM 2012

THE STATE

vs.

BOBBIE ALBERT MCCANN

Indictment for

0385

**CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE**

VIOLATION § 16-03-0655(A)(1)

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

**INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE**

At a Court of General Sessions, convened on **FEB 21 2012** the Grand Jurors of Pickens
County present upon their oath:

That BOBBIE ALBERT MCCANN did in Pickens County, on or about the dates of December 1, 2007 through December 31, 2009, willfully and unlawfully commit a sexual battery on E.D., who was less than eleven years of age, to wit: digital penetration of E.D.'s vagina. This is in violation of §16-3-655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR