

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Diane Schafer Goodstein, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF FRANK SAUNDERS,

APPELLANT

APPELLATE CASE NO. 2016-002005

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	
	)	
STATE OF SOUTH CAROLINA,	)	CASE NO. 2015-CP-18-02318
	)	
PETITIONER,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
FRANK SAUNDERS,	)	
	)	
RESPONDENT.	)	
	)	

September 19 - 20, 2016

St. George, South Carolina

B E F O R E:

The Honorable Diane S. Goodstein; and a Jury.

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(PW) - DENOTES PETITIONER'S WITNESS

(RW) - DENOTES RESPONDENT'S WITNESS

(IC) - DENOTES IN CAMERA

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1 THE COURT: Yes.

2 MR. BOGLE: --- let's assume for the record for this
3 examination she is qualified ---

4 THE COURT: Right.

5 MR. BOGLE: --- as an expert.

6 THE COURT: Right. Right.

7 MR. BOGLE: Dr. Swan ---

8 THE COURT: Any objection to that?

9 MR. FALK: No objection.

10 THE COURT: All right. Very well.

11 **DIRECT EXAMINATION BY MR. BOGLE OF DR. AMY C. SWAN (IC):**

12 Q Okay. You were ordered by the court to conduct the
13 evaluation on Mr. Saunders; is that right?

14 A I was.

15 Q As part of that examination did you decide to have a
16 PPG run on him?

17 A I did.

18 Q Now what is the PPG; what does that stand for?

19 A It stands for penile plethysmograph.

20 Q Okay. And how does it work? Very briefly. How does
21 it work?

22 A Plethys are as the Latin term that means blood flow.
23 So the penile plethysmograph measures the amount of blood
24 flow to the penis which is a measure of arousal to different
25 stimuli that are shown to the individual.

1 There are visual stimuli, and they are not pornographic
2 pictures. They are just pictures of people in clothes. And
3 there is also an audio stimulus that goes along with each
4 set of pictures.

5 Q Okay. And why is it -- now have you used one in every
6 precommitment case you have done?

7 A I have not.

8 Q Okay. You decided to use one here. Why is that?

9 A I decided to use it here because I thought that there
10 was more to know about Mr. Saunders' arousal pattern. He
11 gave me contradictory information. He initially said that
12 he was not interested in adult women and had no arousal to
13 them and then he told me that he was aroused to his wife and
14 they had sex like five to seven times a week.

15 Q Okay.

16 A And I -- it was my belief that he was an exclusive
17 pedophile, and so I was looking for confirmatory evidence to
18 support that hypothesis.

19 Q Why is it important for an expert like you to conduct
20 this assessment in the context of a precommitment
21 evaluation?

22 A It tells us about the individual's sexual interest and
23 the range of possible victims.

24 Q Now prior to doing this you had already talked to the
25 guy and he had discussed with you his sexual interest in

1 children?

2 A He did.

3 Q And there was some question about whether or not that
4 interest extended outside of children; is that correct?

5 A That is correct.

6 Q Okay. So has there been some criticism or controversy
7 in the field among experts such as yourself about the PPG?

8 A Yes, there have. The PPG is not a perfect instrument.
9 About 20 percent of individuals do what we call a flatline;
10 they don't respond to anything. They just don't demonstrate
11 arousal on the PPG.

12 There are a number of potential reasons for that. And
13 the biggest threat to the validity of the PPG is that it can
14 be faked. The person may try to enhance their arousal to
15 normal stimuli or they may be able to suppress their arousal
16 to deviant stimuli.

17 Q Now are you familiar with the quotations I referenced
18 in argument earlier from the DSM-5 about the PPG?

19 A Yes, I am.

20 Q Those references to the PPG were not in the DSM-4 or
21 the DSM-4TR, the predecessor volume, were they?

22 A They were not.

23 Q Okay. Is that publication recognized as authoritative
24 in your field as far as investigating mental abnormalities?

25 A Yes, it is.

1 Q Has the PPG been subjected to any publication or peer
2 review that you are aware of?

3 A Oh, extensive.

4 Q Okay. Does it have quality control methods used in
5 administering it?

6 A They do. The newer PPG's like the Monarch and the
7 Limestone versions have all types of validity indices. And
8 they -- the traces are respiration and galvanic skin
9 response. And that assess -- helps to assess in a similar
10 manner as the polygraph whether someone is demonstrating
11 characteristics such as anxiety that could be associated
12 with faking the machine.

13 Q Okay.

14 A And there are different patterns in those responses
15 that would lead someone to think that they were faking their
16 response to the machine.

17 Q In this particular case was the PPG the sole basis for
18 your opinion that Mr. Saunders is a sexually violent
19 predator?

20 A Absolutely not. And in fact the ATSA Guidelines say
21 that it should not be used solely as a measure to arrive at
22 any particular conclusion.

23 Q Was it part of an overall evaluation you did of Mr.
24 Saunders?

25 A Yes, it was.

1 Q Okay. Is this -- is the PPG subject to the limitations
2 you have talked about and perhaps the criticism by some
3 experts like yourself is the PPG used by people in your
4 business in precommitment cases?

5 A It is. In fact I was trained to use it in 1999 when I
6 was first hired at the Civil Commitment Center in Florida.

7 Q Okay. Thank you, Doctor. Please answer any questions
8 Mr. Falk may have or the court may have.

9 THE COURT: Cross-examination.

10 **CROSS-EXAMINATION BY MR. FALK OF DR. AMY C. SWAN (IC):**

11 Q How long -- do you know how long the testing lasts?

12 A It depends on each individual, but it is a period of a
13 couple of hours, three hours.

14 Q Why did you decide not to use the simple polygraph
15 machine?

16 A I don't use the polygraph because they are typically
17 not admissible in court and I am not able to talk about why
18 I might believe whatever the results indicated.

19 Q Why did you not use an Able machine?

20 A I don't use the Able because it has been somewhat
21 controversial about the validity of it.

22 Q Is there not equal controversy about the validity of
23 the PPG?

24 A I don't think there is as much controversy about the
25 validity of the PPG because it has been around for a long

1 control their arousal to that particular stimulus.

2 Q You had said that the biggest problem with the PPG is
3 that people can fake it?

4 A That is correct.

5 Q Okay. Isn't it also one of the biggest problems with a
6 PPG that stimulus sets are not uniform?

7 A That has been a consistent standardization problem;
8 however, Limestone and Monarch the two biggest manufacturers
9 do have consistent stimuli sets.

10 Q Have they been validated? Are they peer-review
11 validated to show that there is any correlation between the
12 responses and the person's actual interest?

13 A I know that the Monarch has. I am not as clear about
14 whether the Limestone has.

15 Q How long has the Monarch had that?

16 A The Monarch has had standardized stimula -- hum. I --
17 many many years.

18 Q Okay.

19 THE COURT: What are we talking -- which one are we
20 talking about?

21 MR. FALK: This -- I believe -- I believe Ms. ---

22 Q You are certified on the Monarch; is that right?

23 A I am, yes.

24 Q You are not certified on the Limestone?

25 A I am not.

1 Q Dr. Burke -- who did this test, Dr. Burke?

2 A Dr. Burke did it. And he uses the Limestone.

3 Q Okay. Go ahead.

4 A It is my understanding that the Limestone is a little
5 more state of the art, that it has been revised most
6 recently rath- -- as opposed to the Monarch; and I believe
7 that that is why many people have changed to using the
8 Limestone.

9 Q You have testified in Florida in the past; is that
10 correct?

11 A I have.

12 Q Do you recall testifying in a case to end the
13 commitment of Isaac Washington?

14 A I do.

15 Q In that -- in that testimony you were not as
16 enthusiastic for using the PPG as a diagnostic tool; is that
17 safe to say?

18 A That is correct. That was probably in 2000, 2001;
19 somewhere around there.

20 Q 2004?

21 A 2004, yes, that is correct.

22 Q What has changed?

23 A The machine that the Monarch had that was used back in
24 2004 is different than the one that is currently used, and
25 it is very different from the one that Limestone uses now.

1 Q How so?

2 A Well, as computer technology has increased so has the
3 ability of the machines to more clearly delineate arousal
4 from artifact.

5 Q Because in 2004 you testified you had never used a PPG
6 as part of an evaluation; is that correct?

7 A As not part of a precommitment evaluation, at that time
8 I hadn't. I had only used it as part of my work at the
9 Florida Civil Commitment Center.

10 Q And at that time you had never employed anyone else to
11 do the PPG; is that correct?

12 A That is correct.

13 Q And at that time you testified that from your
14 experience as a -- you recall being asked about the
15 standardization question?

16 A Yes.

17 Q And do you recall saying that standardization is very
18 important, that you have to be measuring apples to apples?

19 A That is correct.

20 Q And what assurance do you have that the standardization
21 set is measuring apples to apples in this case?

22 A As I said, the Limestone and the Monarch have
23 standardized sets now. There has been some research on
24 them, and there are a much greater validity than they
25 formally were in the past.

1 In the past pornographic pictures were used that were
2 taken in FBI stings, and that was deemed to be unlawful.
3 And that is at the time period when they began to
4 standardize the stimulus sets.

5 Q But have you seen any of those studies?

6 A Yes, I have binders full of them.

7 Q That show the validity, ---

8 A Yes.

9 Q --- the ---

10 A Yes.

11 Q That show a correlation? What is the level of
12 correlation between the stimulus sets?

13 A I do not know. As far as I know, the only one that has
14 even tried to do that is Monarch and Limestone. And it has
15 been pretty recent. I mean they have had standardized sets
16 for many years, but I don't think the research was there
17 until pretty recently.

18 Q What sets did they use here?

19 A In this particular case Dr. Burke has developed a
20 standardized set himself. I believe it is in -- so he has
21 been instrumental in the research. And he has done quite a
22 bit of research on it.

23 Q Well, that is -- that is the Burke Real Child Voices
24 Set; is that right?

25 A Right.

1 Q But have you seen any testing data to show that that is
2 a valid test?

3 A Not on that particular set, no.

4 Q Okay. Because certainly if you were using a
5 therapeutic fashion you could take the test, you could
6 establish a baseline no matter how -- whatever, and then
7 when you went back later after maybe somebody had gotten
8 some treatment they could go back and be tested and then
9 after that baseline that the patient himself has established
10 regardless of how well they are correlated you could still
11 see a change; is that right?

12 A Well, and that is in fact what they do in treatment.

13 Q But what we are trying to use here is this test as a
14 diagnostic tool to show that my client fits the profile as
15 compared to people who may have used a different test at a
16 different time; so there is no internal correlation; so we
17 have to assume that the stimuli are all repeatable?

18 A I don't think that we are necessarily using it as a
19 diagnostic tool because he already admitted to me that he
20 was sexually aroused to children.

21 Q Then why did you need to give him the test?

22 A I -- as I said, he indicated that he gave me
23 contradictory information about whether he was aroused to
24 adults. And I thought that I would enter more information
25 about that.

1 Q Well, it is either diagnostic or therapeutic; is that
2 correct? I mean you are either making a diagnosis or you
3 are treating him; is that correct?

4 A Well, I did not -- I don't think that I used it to make
5 a diagnostic. Because he showed evidence of arousal
6 patterns apart from pedophilia that I did not include in my
7 diagnostic formulation. And if I was using it for diagnosis
8 I would have included those.

9 Q Okay. Does the PPG test support your diagnosis?

10 A Of pedophilic disorder, yes, it does.

11 Q Okay. But you are saying -- I am not sure I understand
12 how then you are not using it as a diagnostic test.

13 A Well, because he also demonstrated arousal to teenage
14 girl -- males and females in persuasive and coercive
15 situations. And he also demonstrated arousal to adult
16 females in coercive or rape situations. And he demonstrated
17 appropriate arousal to adult males, which he denied to me.

18 Q Actually his highest level of arousal was to adult
19 males; is that correct?

20 A That is correct.

21 Q Now the ATSA guidelines state that when you are using
22 the telemetries for assessing a client's relative sexual
23 arousal and preferences?

24 A That is correct.

25 Q What is the -- what is the relationship when they say

1 relative?

2 A This would -- that would just be his general arousal
3 patterns.

4 Q So he is more aroused to non -- he is more aroused to
5 nonparaphilic stimuli; is that correct?

6 A His greatest arousal was to adult males. He told me
7 that he had never had a relationship with an adult male.
8 But he has in fact been accused of sexually assaulting nine
9 children.

10 Q Yes. But again, as opposed to hooking somebody up to a
11 test, showing them stimuli and then getting a response, it
12 seems to me the way I read these guidelines is that the way
13 you are supposed to use the PPG test is to look at the
14 relative interest; and he is more -- and he is more aroused
15 by nonparaphilic content.

16 A But he hasn't been arrested for nonparaphilic conduct,
17 and he has been arrested for pedophilic conduct. And that
18 is the reason we are here. We are not saying that he
19 doesn't have normal arousal. But we are saying that he has
20 a wide variety of abnormal arousal.

21 Q I guess I am now addressing what the ethical guidelines
22 are for using the PPG. And one is that it is supposed to be
23 used to measure relative arousals; and two, it is supposed
24 to be given after an informed consent.

25 Now did my client know what the ramifications would be

1 if he did not consent to the treatment?

2 A I don't know because I wasn't present for that. Dr.
3 Burke does that.

4 Q Did he supply you with a copy of the consent?

5 A No.

6 Q Did you ask him whether or not it was consented to?

7 A The only thing I got from Dr. Burke was a report.

8 Q Do you agree that according to the ethical guidelines
9 you are not supposed to use a PPG in a nonconsensual
10 setting?

11 A Absolutely.

12 MR. FALK: No further questions. Oh, wait, I do
13 have -- I'm sorry.

14 Your Honor, may I approach?

15 THE COURT: Yes.

16 (WHEREUPON, bench conference was had 3:29 p.m. September 19,
17 2016.)

18 THE COURT: Go right ahead.

19 Q Do you recall doing an evaluation for a Robbie Collins
20 in a Horry County case?

21 A I do.

22 Q And do you recall what his diagnosis was?

23 A I don't.

24 Q If I brought you -- would it be helpful if I gave you
25 one of your reports?

1 A Yes.

2 (WHEREUPON, document provided to the witness for review.)

3 A Yes.

4 Q Have you had an opportunity to refresh your memory?

5 A Yes.

6 Q Did you perform a PPG test in that case?

7 A I did not.

8 Q And when I asked that question, did you have one
9 performed on your behalf?

10 A No, I did not.

11 Q Okay. Why not?

12 A I believe that this was prior to the time that I was
13 informed that I could obtain those types of evaluations.

14 Q So the reason why you gave the PPG test in this case is
15 because it was available?

16 A Not necessarily. I had some questions. There are
17 cases that I have had since I became aware that I could
18 order this particular test that I have not used it on; but
19 in this case I wanted more information.

20 Q And -- all right, which case did you want more
21 information on?

22 A Mr. Saunders.

23 Q What information was that?

24 A Well, there was some contradiction about his arousal
25 patterns.

1 Q And there was no contradiction in Mr. Collins'?

2 A I am not -- I don't remember all of the details of
3 this, but I believe that this was prior to me becoming aware
4 that I could order the test.

5 Q Okay, that is what I am getting to. So you gave the
6 PPG test in this case because now you are aware that you can
7 do it?

8 A Well, part of the reason is that I am aware; and the
9 other part is that I had questions.

10 Q You ---

11 A There are cases that I have been aware that I could use
12 it and I chose not to because I didn't have questions.

13 Q Okay. Do you recall giving an examination in John
14 Henry Dorsey?

15 A I do.

16 Q Do you recall whether or not you gave a PPG test in
17 that one?

18 A I don't.

19 MR. FALK: May I approach?

20 THE COURT: You may.

21 (WHEREUPON, document provided to the witness for review.)

22 A It appears that I did not.

23 Q And is there a reason?

24 A This is the same timeframe as Mr. Collins prior to my
25 knowledge that I could order the test.

1 Q When did you get -- when did you become -- when did you
2 get that knowledge?

3 A I believe that it was probably around January of 2016.

4 Q You were not aware that Dr. Burke provided that service
5 in South Carolina?

6 A Well, I saw that -- I was able to see that the
7 individuals who I was evaluating on the unit for annual
8 reviews had had the test. I was not aware that I could
9 order it.

10 Q Well, what was the restraint?

11 A Well, for example, in Florida we are not permitted to
12 do that as part of our evaluations. We can't just say I
13 want a PPG on this guy.

14 Q Why is that?

15 A It is just not part of the Florida program.

16 Q And that is ---

17 A A private attorney for -- the individual's attorney can
18 get one, but the State cannot compel someone to have a PPG.

19 Q That is in Florida?

20 A That is in Florida.

21 Q Thank you. Do you recall doing an evaluation in Wake
22 Hunt?

23 A Yes, I did.

24 MR. FALK: Again approach?

25 THE COURT: You may.

1 (WHEREUPON, document provided to the witness for review.)

2 A Yes, I did that evaluation.

3 Q And what is the date on that evaluation?

4 A That is July 25th, 2016.

5 Q And did you do a PPG test?

6 A I did not.

7 Q And again is there a specific reason?

8 A I didn't have any question about his arousal patterns.

9 Q What was your -- what was your conclusion about his
10 arousal patterns?

11 A That he had pedophilic disorder.

12 Q And what did you base that opinion on?

13 A His history and what he told me.

14 Q And how -- did my client not tell you similar; did he
15 not have a similar history?

16 A He did.

17 Q But my client got subjected to this test and Mr. Hunt
18 did not?

19 A That is correct.

20 Q I just have two more. I will hand them both up to you
21 both at the same time. Joe Van Brown and James Junior
22 Felder.

23 A Yes. And I did not use the PPG in these cases.

24 Q And your -- the reason?

25 A These were prior to the time when I was informed that I

1 could order the test.

2 Q Okay. And again, you are -- you are a professional in
3 the field; is that right?

4 A Yes, I am.

5 Q And you have a contract with the State of South
6 Carolina that tells you -- that they have hired you to do
7 these cases; is that correct?

8 A That is correct.

9 Q And when did you get that contract?

10 A My first contract was September of 2013. But that was
11 only for annual reviews. I did not start doing the
12 precommitment evaluations until 2015.

13 Q And you started giving these evaluations without
14 knowing what the parameters of your authority was?

15 A Well, there is nothing in the information that I was
16 provided that talked about the parameters of my authority.
17 In fact, I was pretty surprised to find out that I could
18 order the test; because as I said, in Florida we can't
19 compel an individual to take it.

20 Q And do you know why you can't do that in Florida?

21 A I can't give you any reason. I don't know.

22 Q Thank you.

23 MR. FALK: I have no further questions. Oh, just one
24 last ---

25 THE COURT: Oh, okay.

1 MR. FALK: I am sorry again.

2 THE COURT: That is okay.

3 MR. FALK: I have done it to you twice now.

4 Q If all you wanted to do was confirm his responses,
5 again, why did you not use a polygraph?

6 A Because it is not admissible in court.

7 Q Thank you.

8 MR. FALK: No further questions.

9 THE COURT: All right. Redirect.

10 MR. BOGLE: Just one.

11 **REDIRECT BY MR. BOGLE OF DR. AMY C. SWAN (IC):**

12 Q Did you do -- have him sign a full consent to be
13 evaluated before being evaluated by you?

14 A Yes, I did.

15 Q Did you explain that document to him and go through all
16 the different parts?

17 A Yes.

18 Q Okay. And is your expectation that Dr. Burke would
19 have done the same thing; even though he didn't give you a
20 copy he is not going to give the test to someone that
21 doesn't agree to it, is he?

22 A That is correct.

23 MR. FALK: Objection.

24 Q Dr. Burke has no way to force someone to take a test,
25 does he?

1 MR. FALK: Objection. Foundation. I mean he is asking
2 questions that he is not going to -- she is -- asking him to
3 speculate on what Dr. Burke is going to do. That would be
4 speculating whether or not he advised him of the ---

5 Q Well, in your -- in your experience do professionals
6 force tests on people?

7 A No.

8 Q And the PPG, because the nature of it is, you can't
9 really force it on someone that is not willing to put the
10 thing on and do it; right?

11 A That is correct.

12 Q Doesn't the guy put the -- the strap on?

13 A He puts the gauge on himself.

14 Q All right. Thank you.

15 THE COURT: Recross?

16 MR. FALK: No recross.

17 THE COURT: Thank you. You can come on back down.

18 (WHEREUPON, witness leaves stand, 9/19/16, 3:39 p.m.)

19 THE COURT: All right. Anything further? Yes, sir,
20 Mr. Falk?

21 MR. FALK: Just the summary.

22 THE COURT: Yeah.

23 MR. FALK: Again, I have two points; whether or not
24 we are going to go forward, whether or not this is
25 informed consent.

1 I don't believe that there is sufficient proof that
2 there was conformed consent to this case especially
3 knowing the consequences of that of what would happen had
4 he not consented to the case.

5 We had very interesting testimony from the expert
6 from Florida that says that they cannot compel somebody
7 to take this test in Florida. That is certainly
8 troubling. And it seems -- you know, she has testified
9 that she did it in this one case because you couldn't --
10 she wasn't satisfied with his response or conflicting
11 responses.

12 But I am not sure just the fact that she couldn't
13 have used the polygraph in court, I am not sure if that
14 is necessarily -- I know that is a rule in civil -- in
15 criminal court. I am not sure about the validity of a
16 polygraph test in -- onto these purposes. I don't think
17 it is any -- I mean certainly PPG test this is -- this
18 one criminal court. And I think the polygraph is equally
19 admissible in civil court as a PPG test should be.

20 So I am not satisfied with her explanation. I am
21 not satisfied that she didn't try and use the least --
22 the least invasive means to get this information.

23 I am not satisfied that this was consent -- this was
24 a consent. And this is an extremely gruesome test to
25 subject somebody to if there is an easier thing to do.

1 THE COURT: All right. Let me ask this question,
2 Mr. Bogle. The consent when you said she spoke fully.
3 Well, do I have the consent? Was there a separate
4 consent you are aware of that was done at the time of the
5 plethysmograph?

6 MR. BOGLE: When I have ---

7 Do you have the consent he signed for you?

8 DR. SWAN: No.

9 MR. BOGLE: Okay. When I ---

10 DR. SWAN: Let me check.

11 MR. BOGLE: I'll have her check at the one DMH uses.
12 I have a vague recollection that they're -- it is along
13 with -- may even include the reference to the PPG. I
14 know that our lab at MUSC's consent form does
15 specifically reference the PPG.

16 As far as Burke, the times I have had Burke on the
17 stand as my witness one of the things he has testified to
18 as just like her is I explain what the case is about to
19 the guy and I have him sign a consent form.

20 Now have I got one? No. Do I have his in this
21 case? No. That has just been my expectation of him.

22 What I think got caught up here is DMH politics.
23 They got a PPG. They bought and paid for it. No one is
24 trained to use it. In Columbia. Okay.

25 Was it used in the past? Yeah, way back when by

1 people out there.

2 Do a lot of their doctors use it now? No.

3 Including Dr. Gayle.

4 Do some of their doctors do work for them either by
5 contract or who live here like Donna Schwartz-Watts and
6 of course Dr. Swan believe in it? Yes.

7 Dr. Swan arrives here from Florida. She lives down
8 there. She is licensed down here. She is also licensed
9 up here. She is hired to do a bunch of these cases.

10 And suddenly she finds out in reviewing annual
11 reviews that were sent by DMH down the road to Burke she
12 thinks I wonder if I can do this. And so she asks and
13 finds out for the first time that she can. And
14 apparently in some cases she didn't need it. And some
15 cases she did.

16 In this case the PPG revealed arousal to certain
17 things, but she didn't diagnose him with that particular
18 mental abnormality because there were no known victims of
19 that class. She stuck with what she had which was the
20 children victims, and that led to the pedophilia
21 diagnosis.

22 So could she have diagnosed him with other types of
23 paraphilias? Possibly. But she gave him the benefit of
24 the doubt and just went with the stuff that he told her
25 about and was confirmed by the PPG. But that is what we

1 have.

2 THE COURT: Okay.

3 MR. BOGLE: Thank you, Your Honor.

4 THE COURT: All right. Well, at this point I am not
5 prepared to keep it out. Based on her testimony as I
6 perceive it to be I would presume that consistent with
7 what I have heard that there will be a sufficient
8 foundation.

9 Having said that, I am a little bit concerned about
10 the consent part of it and I think that I will be
11 listening for that.

12 So, Mr. Bogle, I guess I am telegraphing I do think
13 you need to have evidence of consent for this -- for the
14 giving of the task. If not, we will need to talk about
15 that.

16 So at this point I would be looking for the
17 foundation and listening to the foundation. And I don't
18 think you -- I would ask that you not mention it
19 specifically in your openings.

20 MR. BOGLE: Yes, ma'am.

21 THE COURT: Stricken -- talk about it in any
22 closings if you wish, if it comes in.

23 All right. Anything further before we bring the
24 jury out?

25 MR. BOGLE: No, Your Honor. Do you want to look at

1 the clock and see where we are as to how much we can get
2 done today?

3 THE COURT: It looks like it is about a quarter
4 till. I think we can get my comments in and your
5 openings in.

6 MR. BOGLE: Thank you.

7 THE COURT: Okay.

8 MR. FALK: Thank you.

9 THE COURT: We very well may not get to testimony.
10 Let me have my jury. Get ready to swear them in,
11 Ms. Becky.

12 (WHEREUPON, pause awaiting jury.)

13 (WHEREUPON, jury enters 9/19/16, 3:46 p.m.)

14 THE COURT: All right. Ladies and gentlemen, you
15 always hate beginning by apologizing; but I do apologize
16 for keeping you in your jury room.

17 I am aware of when you are in your jury room every
18 tick of the clock instead of out here, but there were
19 matters that I needed to attend to and it took me a
20 little longer than I thought.

21 Now, ladies and gentlemen, the case that we are
22 about to try is the case which is titled or captioned in
23 the care and treatment of Frank Saunders.

24 It is called an en re case. In re care and
25 treatment of Frank Saunders. Another way of saying that

1 is in the matter of the care and treatment of Frank
2 Saunders.

3 In this case the State is the petitioner. The State
4 of South Carolina is the petitioner, and Mr. Saunders is
5 the respondent.

6 And I wanted to tell you that in this case the State
7 seeks the civil commitment of Mr. Saunders for long-term
8 controlled care and treatment in a secure facility.

9 This is not a criminal proceeding, ladies and
10 gentlemen, seeking incarceration; but it is a proceeding
11 seeking civil commitment.

12 The State alleges or claims that the respondent, Mr.
13 Saunders, is a sexually violent predator under the law.
14 The respondent denies that he is a sexually violent
15 predator.

16 And the State, the State, has the burden of proof in
17 this case and must meet its burden of proof by what we
18 call beyond a reasonable doubt.

19 Beyond a reasonable doubt, what does that mean?
20 Beyond a reasonable doubt means that it needs to be more
21 than the kind of doubt that would cause a reasonable
22 person to hesitate to act. Because that is what
23 reasonable doubt is. It is the kind of doubt that would
24 cause a reasonable person to hesitate to act.

25 Now, ladies and gentlemen, if you find that the

1 State has not met this burden then the respondent, Mr.
2 Saunders, will be released.

3 If you find that the State has met its burden of
4 proof and you find that the respondent is a sexually
5 violent predator - I am going to go over with you that
6 definition with some particularity when I give you the
7 concluding instructions - but if you find that he is a
8 sexually violent predator he will not be released, he
9 will be committed to a secure treatment facility in
10 Columbia operated by the South Carolina Department of
11 Mental Health.

12 Now, ladies and gentlemen, you and I have different
13 duties to perform. It is my responsibility, my duty, to
14 preside over the trial of this case. And I also have the
15 duty to rule on the admissibility of the evidence which
16 is offered during the process of this trial.

17 I am the judge of the law in this case. And if you
18 came in to court with a preconceived idea about what you
19 think the law is or what it ought to be, it is time for
20 you to have a conversation with your legislator. But for
21 our law to work correctly you must accept and apply the
22 law as I give it to you.

23 I will tell you that with equal emphasis in this
24 trial you are the sole, only, and exclusive judge of the
25 facts. Please do not infer that I have any opinion about

1 the facts in this case from anything that I might say or
2 do during the course of this trial in ruling on the
3 admissibility of evidence or otherwise.

4 You are the sole and the only finders of the facts.
5 I have no opinion regarding the facts. That is a matter
6 solely for you to determine.

7 Now, ladies and gentlemen, as jurors it is your duty
8 and your duty along to determine the effect, value, the
9 weight, the truth of the evidence presented during the
10 course of this trial.

11 And in determining what the true facts are in this
12 case you necessarily must judge the credibility,
13 believabilities of the witnesses who testify and the
14 weight and the value to be given to their testimony. You
15 alone must decide the force of faith and truth of the
16 testimony.

17 Now, ladies and gentlemen, the elements which the
18 State must prove beyond a reasonable doubt are, number
19 one, that the respondent has been convicted of a sexually
20 violent offense; and, number two, that the respondent
21 suffers from a mental abnormality or personality
22 disorder that makes him likely to engage in acts of
23 sexual violence if not confined in a secure facility for
24 long-term control, care, and treatment.

25 I will define these remarks for you in more detail

1 again when I instruct you at the conclusion of the case
2 when I instruct you on the law before you retire and
3 deliberate and then send me your verdict.

4 I want you to understand that you are not partisans.
5 You are not advocates for the State of South Carolina or
6 the respondent. You do not serve as jurors to reward
7 your friends or punish your enemies.

8 You have been selected by both the State and the
9 respondent to be fair and impartial jurors, and it is
10 your duty by your joint deliberations to consider and to
11 determine the truth.

12 Ladies and gentlemen, it is my understanding that
13 this matter is anticipated to be of relatively short
14 duration. And because of that I am going to ask you not
15 to take notes.

16 There is quite a controversy, the debate that is
17 ongoing about the taking over notes. And the concern is
18 that a juror can miss something coming from the witness
19 stand by taking a note.

20 When cases are anticipated to be of a relatively
21 short duration I ask jurors not to take notes but to
22 please listen very carefully and do not let your thoughts
23 wander but give the strictest attention to these matters.

24 Now I told you that I anticipate that this trial is
25 to be of relatively short duration. But, ladies and

1 gentlemen, this trial is of the utmost, the utmost
2 importance to the State, to Mr. Saunders, to our way of
3 life, our system of justice.

4 I simply mention that to you because I didn't want
5 you concerned about my instructions not to take notes. I
6 certainly don't mean this matter. It is of the utmost,
7 utmost importance.

8 Now, ladies and gentlemen, in order to preserve
9 everyone's rights it is necessary that I ask these
10 lawyers whether or not they have any exception or
11 addition to my preliminary remarks.

12 MR. BOGLE: Nothing, Your Honor. Thank you.

13 MR. FALK: Nothing, Your Honor.

14 THE COURT: I ask that you please draw close as we
15 listen to the opening statements.

16 MR. BOGLE: May we approach briefly, first?

17 THE COURT: Sure. Sure. Sure. Sure.

18 (WHEREUPON, bench conference was had.)

19 THE COURT: I talked about swearing y'all in. I am
20 so excited because our own Reese Witherspoon is going to
21 that. I got so excited that I completely -- ladies and
22 gentlemen, what is about to occur is that you are about
23 to be sworn in as the jury in this case.

24 So at this time I ask you to please stand and raise
25 your right hand. Please listen carefully.

1 (WHEREUPON, jurors were duly sworn.)

2 THE COURT: Thank you. Was there anyone who failed
3 to take the oath? I thought I caught everyone say I do.
4 If there was anyone that didn't take it, please stand.

5 I find no one standing.

6 Ladies and gentlemen, we now -- thank you, counsel.
7 Will be opening statements of our attorneys. Mr. Bogle.

8 MR. BOGLE: Thank you, Your Honor. May it please
9 the court, Your Honor.

10 THE COURT: Yes, sir.

11 MR. BOGLE: Mr. Falk, members of the jury.

12 **OPENING BY MS. BOGLE:**

13 My name is Jim Bogle. I am with the Attorney
14 General's Office out of Columbia.

15 People sometimes see us doing these cases and they
16 think why not somebody local like the solicitor or your
17 county attorney or someone like that. And the reason is
18 when the Legislature wrote this law they gave it to our
19 office.

20 So we have two people, me a guy named Cam Morrow.
21 We travel the state trying these cases in the different
22 circuits, the different courthouses.

23 Now every case has a theme I think. And to me the
24 theme of this case is Frank Saunders enjoys fondling
25 children. You will hear more about that later.

1 Let me tell you how we got here. In 1998 the
2 General Assembly passed this law. The judge has referred
3 to it. It is called the Sexually Violent Predator Act.

4 And what that law says, what they said when they
5 passed that law, said they -- said we find that a
6 mentally abnormal and extremely dangerous group of
7 sexually violent predators exists who require involuntary
8 civil commitment in a secure facility for long-term
9 control, care, and treatment; we further find that the
10 likelihood these sexually violent predators will engage
11 in repeated acts of sexual violence if not treated for
12 their mental condition is significant.

13 That is what it is, and that is why we are here.
14 And that is who Mr. Saunders is. That is what we are
15 contending.

16 Now the judge a minute ago told you the burden of
17 proof. In this case, normally in civil court like this,
18 auto wreck case, a medical malpractice case, whoever is
19 bringing the lawsuit would have to prove the case to you
20 by what they call preponderance of the evidence, 51
21 percent.

22 In these cases when the General Assembly wrote this
23 law they said, no, if you are going to prove this case it
24 has got to be beyond a reasonable doubt. And the judge
25 will explain to you later. She has already given you a

1 touch of it. She will explain to you later exactly what
2 that burden means.

3 I would suggest it means if you are firmly convinced
4 about something then that is beyond a reasonable doubt.
5 Obviously all things aren't beyond any shadow of a doubt.
6 The law doesn't require that. It requires beyond a
7 reasonable doubt.

8 Now we have to prove two things to you. First, has
9 Mr. Saunders been convicted of a sexually violent crime.
10 And the law lists about 16 crimes they define as sexually
11 violent. He has. Five of them. We will put those into
12 evidence later on as the trial goes on.

13 Lewd act on a minor or lewd act on a child is one of
14 them. And also criminal sexual conduct with a minor in
15 the first degree. Multiple counts of these two offenses.
16 First back in 1988 and then later in 2004. For crimes
17 that occurred in '88 and the 2001 to 2003 timeframe.
18 Sexually violent crimes.

19 The second thing we have to prove to you, again,
20 beyond a reasonable doubt is does Frank Saunders suffer
21 from a mental abnormality or a personality disorder or
22 both that makes him likely to commit acts of sexual
23 violence if not confined in a secure facility for what
24 they call long-term control, care, and treatment.

25 Now what that means is he was convicted of these

1 things a long time ago. 2004 I think was the last one.
2 He has got offenses from 1974 against this type of
3 victim, young children. From 1988 young children. 2001
4 to 2003 young children. And final conviction in 2004.

5 Now he served his prison time. He is done with
6 that. And the way this law is written we have one of
7 these trials while you are still in prison if we can. If
8 we don't, for whatever reason, you stay confined in the
9 local county jail until such time as we can take this
10 case to court like we are doing today.

11 So he is at the Dorchester County Jail. He has been
12 there since he finished his prison term a while -- a
13 little while back. That is what the law says.

14 So that is what we have to prove to you. We have
15 got to prove it to you beyond a reasonable doubt.

16 Now you're going to be hearing from Dr. Amy Swan.
17 She is a psychologist who lives in Florida. But she is
18 licensed both there and in South Carolina.

19 And she was hired by the South Carolina Department
20 of Mental Health to do a lot of these evaluations. So
21 she has testified here many times before as well as in
22 other states.

23 Normally in any kind of case witnesses testify about
24 the kind of things they see, they hear, they smell,
25 things like that: I saw the light turn red when the guy

1 ran it. I heard the gunshot. I saw the man waive the
2 knife and the victim. That kind of thing.

3 They can't give opinions. But in certain cases if
4 the judge is satisfied as to the expert training and
5 qualification of a witness they can give opinions. And
6 that is what you will hear tomorrow.

7 Dr. Swan is a trained forensic psychologist. She
8 has done hundreds of these types of cases. She has
9 testified in at least three states that I can think of.
10 And she will testify that she was ordered by the court
11 here in Dorchester County to evaluate Frank Saunders, to
12 see if he had been convicted of those crimes and if he
13 does have the mental abnormality and is of such a level
14 that he can't control it and is likely to reoffend unless
15 he is confined for treatment. That is what she had to
16 do.

17 She diagnosed him with pedophilic disorder which is
18 a sexual interest in prepubescent children. And she
19 found that based upon the total package, everything she
20 looked at about him, this guy can't control that disorder
21 and needs to be confined for treatment now that he is
22 done with prison.

23 So she will be allowed to give an opinion. And I
24 ask you using your same common sense you would for any
25 witness, be it a lay witness or expert witness or

1 anything in between, use your common sense. Apply your
2 own sense of credibility to what she has to say and any
3 other testimony you hear here.

4 You as the jurors are the final judges of the facts.
5 You can assign whatever level of credibility you want to
6 to any witness you hear from. That is solely your job
7 and nobody else's.

8 I would submit to you that when we are all done what
9 the State will have proved to you beyond a reasonable
10 doubt is that Frank Saunders does have this mental
11 abnormality, that he has been convicted multiple times of
12 these types of sexually violent crimes; and, yes, he
13 needs to be confined for treatment to not be a danger in
14 the community.

15 MR. BOGLE: Your Honor, thank you.

16 THE COURT: Thank you, Mr. Bogle.

17 Yes, sir.

18 MR. FALK: May it please the court.

19 THE COURT: Yes, sir.

20 MR. FALK: Ladies and gentlemen of the jury, Mr.
21 Bogle.

22 OPENING BY MR. FALK:

23 All my client wants is a fair trial. And in this
24 case a fair trial is going to be that you all are going
25 to listen to the evidence, listen to the testimony, and

1 wait until the end of the trial before you reach any kind
2 of conclusions about my client.

3 Now there is no question my client has done some
4 horrible things. There is no question about my client
5 has also spent the last 13 years in prison.

6 And I would expect that the State is going to want
7 you -- want to go into as much detail as they can to tell
8 you about all of the horrible things that my client has
9 done in the past. And I am telling you he has done them
10 and there is no -- there is no doubt about it.

11 But the question in order to be fair to my client
12 you have to determine whether or not you are going to
13 agree with the State's witness that he is going to do it
14 again.

15 And I want you to consider the fact that he has been
16 in prison for 13 years. Now some people I am sure go to
17 prison, they can spend 13 years in prison and they can
18 come out to be -- they can go in as kind of junior
19 criminal and they can come out as a Phd criminal. I mean
20 they can learn all kinds of bad stuff in prison and do
21 all kinds of bad stuff while they are in prison and they
22 can become a worse person.

23 There are other kinds of people who can spend 13
24 years in prison and maybe spend some time to think about
25 what has happening in their life and maybe chosen a

1 different path for going forward. .

2 I think you are going to find that my client has
3 spent the last 13 years trying to reflect on what he has
4 done bad in the past, the harm that he has caused to
5 people in the past, and his plan for going forward and
6 the reason why he is confident he is going to be able to
7 go forward, and we are going to talk about during our
8 testimony.

9 The important thing to remember is don't look at who
10 my client was in 2003 when he first went to jail.
11 Because he was a bad person. He had done some bad
12 things, and he has gone to prison.

13 Now all of y'all have decided or at least through
14 the voir dire process you are not going to try to punish
15 my client thinking his sentence wasn't long enough.
16 Because you all have all said -- because you were asked
17 the question whether or not you thought the sentences
18 that sex offenders get are far too lenient, and none of
19 you responded positively to that.

20 My client voluntarily pled guilty. The solicitor in
21 this -- in this district decided that it was a fair deal;
22 and he pled guilty, and he has spent the last 13 years in
23 prison.

24 The question is going to be, is the man today right
25 there, whether he is the same person he was 13 years ago

1 or whether or not he is a different person.

2 I think that by the time you hear Dr. Swan, maybe
3 hear some of the motivations Dr. Swan has in being here
4 today. And plus you're going to hear my client and my
5 client is going to tell you what kind of man he is
6 today and what he has spent the last 13 years in prison
7 doing.

8 And I'm convinced that if you set aside any kind of
9 disgust that you may have for the acts that my client has
10 done in the past if you can set that aside and just look
11 at him now and decide whether or not you think he is
12 going to do it again, if you can set those prejudices
13 aside just -- and just look at the facts right here, do
14 you think he is going to do it again.

15 And I think once you have heard my client you are
16 going to be convinced that he is no longer a threat if he
17 is released.

18 Thank you.

19 THE COURT: Thank you.

20 Mr. Bogle, can you call -- she has left.

21 MR. BOGLE: She is outside.

22 THE COURT: Can we go ahead; may we proceed?

23 MR. BOGLE: Sure. But I -- you will have me
24 breaking up my direct I think.

25 THE COURT: If you could reach -- maybe do the

1 preliminary matters ---

2 MR. BOGLE: Okay.

3 THE COURT: --- and then we will go into -- I would
4 like to proceed just to do the preliminaries.

5 MR. FALK: Because I can't cross in time.

6 THE COURT: Exactly. And we may not get -- we
7 may -- we may just establish credentials at this point.

8 (WHEREUPON, break was had awaiting witness.)

9 MR. BOGLE: The State will call Dr. Amy C. Swan.

10 THE CLERK: State your name for the record.

11 THE WITNESS: Amy C. Swan.

12 (WHEREUPON, the witness was duly sworn.)

13 **DIRECT EXAMINATION BY MR. BOGLE OF DR. AMY C. SWAN:**

14 Q Dr. Swan, good afternoon.

15 A Good afternoon.

16 Q Would you please tell the jury what your occupation
17 is.

18 A I am a forensic psychologist. A forensic
19 psychologist is a psychologist that deals with cases
20 involved in the legal system.

21 Q Okay. When you say -- so how is -- so forensic when
22 used with the word psychologist means -- means what?

23 A Forensic means pertaining to the legal system.

24 Q And how would you describe briefly the study of
25 psychology; what is that?

1 A The study of psychology is the study of mind and
2 behavior.

3 Q Have you had any additional specialized training or
4 experience within the field of forensic assessment of sex
5 offenders beyond your doctorate degree?

6 A I have. It is pretty difficult to get training in
7 sex offenders in the standard graduate program in
8 psychology; and, therefore, we get them in seminars and
9 conferences. And I have had 875 hours since I got my
10 doctoral degree. And 287 of those hours are specifically
11 in assessing the risk that a sex offender would commit
12 another sexual crime.

13 Q Now you have got a PhD in psychology; is that it?

14 A Yes, I have a doctorate. It is Psy-D which is more
15 of a clinical versus a research degree.

16 Q Okay. Are you a member of any organizations related
17 to this field?

18 A I am. I served on the Board of Psychology in
19 Florida for ten years. And I served -- subsequent to
20 that I served as chairman of the Probable Cause
21 Committee. And that is the part of the government that
22 regulates the practice of psychology. So what my
23 function was on the Board and as to probable cause was
24 evaluating complaints about psychologists who do not
25 follow the rules.

1 Q So just to see where you are, you live in Florida;
2 right?

3 A That is correct.

4 Q And you are licensed to practice law in Florida and
5 what other states?

6 A Well, I am not -- not licensed to practice law; but
7 I am licensed to practice ---

8 Q I mean not law. Did I saw law?

9 A Yes.

10 Q Let's back up a second. It is late in the day. All
11 right. Forget the lawyer part. Are you licensed to
12 practice psychology in the State of Florida?

13 A I am.

14 Q Any other states?

15 A South Carolina and Missouri as well.

16 Q Okay. And have you been hired by the Department of
17 Mental Health here in South Carolina to do evaluations of
18 sexually violent predators?

19 A I have been.

20 Q How long have you been doing that for the Department
21 of Mental Health?

22 A Since September of 2013.

23 Q Okay. And does your training and educational
24 background allow you or have you doing evaluations of
25 individuals?

1 A Yes, it does.

2 Q What types?

3 A I can do any type of assessment that I have been
4 trained to do and have experience in doing.

5 Q Okay. Now have you also had experience in working
6 directly with sex offenders?

7 A Yes, I have. I have worked with sex offenders for
8 twenty-eight years.

9 Q About how many sex offenders have you done
10 assessments for, assessed their particular personality or
11 their background?

12 A Approximately 800 in the sexually violent predator
13 realm and approximately 400 other sex offenders for
14 either sentencing evaluations, like they have already
15 been convicted and the judge is getting additional
16 information prior to sentence.

17 I do annual reviews for sex offenders who have been
18 admitted to a sexually violent predator program to
19 determine if they are ready for release yet. And I also
20 do evaluations of those who have been charged with child
21 pornography offenses.

22 Q Now can you describe your background regarding
23 sexually violent predator cases both in Florida as well
24 as here?

25 A Okay. In 1999 -- and are you talking about with sex

1. offender in general or just sexually violent predators?

2 Q Well, let's start with sex offenders in general and
3 take it forward from there.

4 A Okay. I started working with sex offenders in
5 approximately 1989. And I set up a small sex offender
6 program as part of a sexual trauma program.

7 Between 1993 and 1995 I worked at a community mental
8 health center doing evaluations of victims and
9 perpetrators of sexual abuse.

10 Between 1996 and 1997 I worked at Northwest Dade
11 Center in Miami where I worked with incarcerated
12 adolescent sexual offenders.

13 Between 1997 and 1999 I worked for Court Psychology
14 in Broward County which is Fort Lauderdale. And in that
15 capacity I evaluated child victims and perpetrators of
16 sexual abuse.

17 In 1999 I was the first psychologist hired at the
18 Florida Civil Commitment Center to provide treatment to
19 individuals detained under a similar act in Florida.

20 And in the year 2000 I went into private practice
21 and began doing evaluations independently.

22 Q Okay. Now what about -- now what about specifically
23 with regard to the sexually violent predator field, the
24 kind of field that brought you here today?

25 A Yes, I have -- I started working with sexually

1 violent predators in 1999 when I was retained at the
2 Florida Civil Commitment Center.

3 I provided treatment there during that initial year
4 and then I begun -- began doing the evaluations. And as
5 I have said, I have done approximately 800 evaluations of
6 sexual -- of potential sexually violent predators.

7 Q In your career have you ever been hired by defense
8 counsel in a case like involving like this, a sexual
9 violent predator case?

10 A Yes, in Florida I am routinely hired by the defense.
11 I have done approximately a hundred cases.

12 Q Okay. Have you previously been recognized and
13 testified as an expert witness in the field of forensic
14 psychology with regard to sexually violent predator
15 cases?

16 A Yes, I have.

17 Q About how many times in Florida?

18 A About 232 times in Florida and approximately 23
19 times in South Carolina.

20 Q Okay. Thank you.

21 MR. BOGLE: At this time, Your Honor, I would like
22 to move to have Dr. Amy Swan recognized as an expert
23 witness in the field of psychology and forensic
24 psychology.

25 THE COURT: Is there any voir dire?

1 MR. FALK: A couple of questions, Your Honor?

2 THE COURT: Sure.

3 **VOIR DIRE BY MR. FALK OF DR. AMY SWAN:**

4 Q You said that in 2011 you became chairman of the
5 Probable Cause Committee?

6 A That is correct.

7 Q Is that -- that is a State agency?

8 A Well, the Probable Cause Committee is a division of
9 the Board of Psychology. I completed ten years of
10 service on the active board.

11 And then the Probable Cause Committee consists of an
12 active member of the board, a past member of the board
13 which was my capacity, and then a consumer member.

14 Q Are you compensated for that?

15 A No.

16 Q Okay. From 2000 to 2010 you are on the Florida
17 Board of Psychology?

18 A That is correct.

19 Q Was there any compensation you received for that?

20 A No. We had our expenses paid. You know, I think
21 there was like it was a very small amount, maybe \$25 a
22 day for the actual board meeting. But it was pretty
23 inconsequential.

24 Q And then I believe you said that starting in 2000
25 you started a private practice?

1 A I did.

2 Q Is that what the ITM Group is?

3 A No, the ITM Group had the -- had the contract for
4 doing sexually violent predators evaluations. And since
5 they had the contract I was one of their independent
6 contractors.

7 Q I see. And now are those -- are those different;
8 because your resume talks about the Jimmy Rice Act?

9 A It is all the Jimmy Rice Act; but in Florida the
10 state initially had the contract and then they farmed it
11 out to the ITM Group, and then the State took it back.

12 Q I see.

13 A So it was basically doing the same work, just
14 different people were managing the contract.

15 Q So in 2000 to 2004 were you paid by the State or
16 were you paid by ITM?

17 A I was paid by the State for all of the work that I
18 did.

19 Q Okay. And that is -- and so you started doing these
20 in what year?

21 A 2000.

22 Q Okay. And then you also said you have a private
23 practice at this same time?

24 A I do.

25 Q About what percentage of time is spent on your

1 private practice versus your state work?

2 A Well, all of my work is private practice; because I
3 am an independent contractor. I would say approximately
4 90 percent is working with the sexually violent predators
5 and about 10 percent are custody evaluations, dependency
6 evaluations, licensing board evaluations.

7 Q That 90 percent that you said relates to the
8 sexually violent predators, how much -- what percentage
9 of that is paid by the State?

10 A All of it.

11 Q Well, I thought you said you also testified numerous
12 times, a hundred times, for defense counsel on sexually
13 violent predator cases?

14 A I do. But in Florida the State pays for the State
15 witnesses and the defense witnesses.

16 Q I see. I see. Have you ever been paid -- have you
17 ever been retained to -- you said you are licensed in
18 South Carolina and Missouri?

19 A Missouri.

20 Q Okay. And in South Carolina?

21 A That is correct.

22 Q Have you ever testified on behalf of defense counsel
23 in South Carolina?

24 A No, I have never been asked to evaluate anyone for
25 defense counsel in South Carolina.

1 Q And in Missouri?

2 A And in Missouri as well I was never requested.

3 Q Did you testify for the State in Missouri?

4 A I did.

5 Q When was that?

6 A I was licensed in Missouri in about 2011, so I think
7 it was around 2011 to maybe 2015- -- two thousand -- the
8 end of 2014.

9 Q But you were a State employee -- I mean you were
10 doing most of your work for the State between 2000 and
11 2011 then, I guess, because that is when you started
12 going to Missouri and that is when you started coming up
13 here?

14 A I have always been employed by the State in Florida.

15 Q Okay. How many other people do the evaluations in
16 Florida?

17 A I think there is a panel of about 22 members that do
18 these evaluations.

19 Q And how are they selected?

20 A They have -- they have some requirements for the
21 educational and experience and they are evaluated by the
22 multidisciplinary team. And if they have sufficient
23 qualifications then they are placed on the panel.

24 And that is always subject to being reviewed if the
25 work quality doesn't hold up or if there are problems

1 with court testimony, or whatever, your contract could be
2 removed.

3 Q But once you are on the panel how would that -- how
4 are they selected off the panel; is it random or ---

5 A They generally try to use geographical location as
6 the factor so that the people aren't traveling too far to
7 go to the evaluations.

8 Q When was the last time you testified on behalf of
9 the State in a commitment trial? And I know -- you know,
10 I know you are paid by the State regardless. When is the
11 last time you testified on behalf of the State in a
12 commitment trial in Florida?

13 A In Florida it would probably be a month or so ago.

14 Q And how many times this year?

15 A I do not know how many times this year.

16 Q Five?

17 A I don't know. It is almost October. I haven't
18 counted them.

19 Q And I mean testifying at trials like we have here.

20 A Yes.

21 MR. FALK: No further questions, and we will accept
22 her as a expert.

23 THE COURT: So qualified?

24 MR. FALK: So qualified.

25 THE COURT: All right. Ladies and gentlemen, let me

1 tell you what has occurred. Normally under our rules of
2 evidence witnesses are not allowed to testify regarding
3 their opinions and the reasons for those opinions.

4 There is an exception. And that is when by reason
5 of someone's knowledge, education, profession, training,
6 experience, they have become an expert in some field.

7 Typically it is an art or a science. And those
8 folks are allowed to testify regarding their opinions
9 within their area of expertise and the reasons for those
10 opinions.

11 I will give you more opinions about expert testimony
12 when I give you the concluding instruction. However, at
13 this point I would simply tell you expert testimony is
14 given for the purpose of helping you understand the
15 evidence and it is not give for the purpose of
16 controlling your judgment.

17 All right. Mr. Bogle.

18 MR. BOGLE: Thank you, Your Honor.

19 THE COURT: I have got 45 more minutes. I would
20 like you to start if you would be so kind.

21 **DIRECT EXAMINATION BY MR. BOGLE OF DR. AMY SWAN:**

22 Q Dr. Swan, how did you become involved in this case
23 involving Frank Saunders?

24 A I was appointed by the court to evaluate Mr.
25 Saunders.

1 Q And what type of evaluation did you do?

2 A This is a precommitment evaluation.

3 Q What is the standard you are looking for under the
4 law?

5 A In order to determine if someone meets criteria as a
6 sexually violent predator they have to be convicted of a
7 sexual crime that has been listed in the statutes and
8 they must have a mental abnormality or personality
9 disorder that makes them likely to engage in future acts
10 of sexual violence if not confined in a secure facility
11 for long-term control, care, and treatment.

12 Q Would you please describe for the jury your protocol
13 or your method in doing cases of this nature that you
14 applied to Mr. Saunders?

15 A Yes. I typically receive a referral. In this case
16 it was from the Department of Mental Health. And then
17 the -- or the court appointed me because I am contracted
18 with the Department of Mental Health.

19 And then the Attorney General's Office provides me
20 with records, legal records, and different types of
21 recorders that might be useful in my evaluation.

22 Prior to going to see the individual at whatever
23 facility they are at or the forensic evaluation service
24 in Columbia I review those records and assess what I know
25 about the individual and then I conduct an interview with

1 the individual that covers essentially everything that
2 happened from the day he was born until he is sitting in
3 front of me.

4 That includes his family history, his educational
5 history, his occupational history, relationship history,
6 medical history, legal history, substance abuse history,
7 and sexual history.

8 Q Now Doctor, as part of this evaluation process did
9 you meet with and interview Mr. Saunders?

10 A I did. I met with him on February 18th of 2016.

11 Q About how long was that interview; do you remember?

12 A That interview was for two hours and forty minutes.

13 Q Is the man you met with here in the courtroom today?

14 A Yes, he is.

15 Q Would you point him out for the jury.

16 A He is the gentleman in the dark coat sitting next to
17 Mr. Falk.

18 MR. BOGLE: If you would let the record reflect she
19 has identified Mr. Saunders.

20 THE COURT: Very well.

21 Q Now as part of this evaluation did you give him a
22 consent form and explain to him what the evaluation is
23 all about?

24 A I did.

25 Q Okay. Did he sign that consent form?

1 A He did.

2 Q Okay. Now in addition to meeting with him what type
3 of information did you review, background information did
4 you look at? I am talking about documents here that you
5 looked at prior to meeting with and evaluating the guy in
6 person.

7 A I reviewed his arrest warrants, the court documents
8 for his criminal trials, indictments, police reports,
9 records from the South Carolina Department of
10 Corrections, records from the South Carolina Law
11 Enforcement Department, and victim statements.

12 Q Okay. Is this the type of information that is
13 typically and reasonably relied upon by other experts in
14 your field?

15 A It is.

16 Q And did you consider this information that you have
17 just talked about as well as the interview with Mr.
18 Saunders and any other testing you did with him in
19 forming an opinion about him?

20 A Yes, I did.

21 Q Can you explain to the jury how a person's past
22 sexual offense behavior relates to future sexual
23 offensive behavior?

24 A Yes. The best predictor of future behavior is past
25 behavior. So clearly we want to look at someone's past

1 behavior.

2 We have risk assessment instruments that we will
3 discuss later that are based on an individual's history.
4 And what we know is that if an individual commits a
5 sexual crime and then receive some kind of punishment for
6 that crime, either they are placed on probation or even
7 just being arrested is consider some type of punishment,
8 if they offend again after that punishment then their
9 risk increases for another sexual crime. If they offend
10 again after that second punishment then their risk
11 increases again.

12 So the more times that they receive a sanction for a
13 sexual crime and they go out and do it again then their
14 risk increases each time.

15 Q In this particular case when you talked to Mr.
16 Saunders did you get into him -- with him about when he
17 was first ever arrested for a kind of a sexual offense
18 against a child?

19 A Yes, I did. He told me that he was arrested in 1974
20 for sexually assaulting a little girl between the ages of
21 five and seven. And he went to the Juvenile Detention
22 Center at that time because he was 16. And he received a
23 three-month sentence.

24 Q Okay. So that is the first one?

25 A Yes.

1 Q He would have been about 16 at the time?

2 A Yes, he was.

3 Q Okay. What was his next cycle for being arrested?

4 A The next time that he was arrested was on February
5 14th, two -- 1988.

6 Q Okay. And was that also for a sexual crime?

7 A Yes, it was.

8 Q Was it -- did it involve -- was he arrested for more
9 than one victim ---

10 A Yes, he was.

11 Q --- in 1988? How many?

12 A There were three victims involved in that crime, and
13 he was convicted of -- for two of those victims.

14 Q Okay. Now, Doctor, before we go any further; in
15 order to justify your diagnosis and explain it to us is
16 it necessary for you to go into the underlying details
17 behind the crimes?

18 A It is.

19 Q And why is that?

20 A Well, first of all it is important to see if the
21 person has any type of sexual disorder. Some people
22 commit sexual crimes and they don't really have a sexual
23 disorder. So I need to see if they have any kind of
24 sexual disorder that would predispose them to commit
25 future acts of sexual violence.

Q So I need to see if they have a relevant diagnosis.

2 And I need to see if that predisposes them to commit

3 future sexual acts.

4 Q Okay. Now you have talked about the convictions in
5 1988 where he was convicted for two sexual offenses then.

6 What about after that?

7 A Well, he received a sentence for that. And after he
8 completed that sentence between 2001 and 2003 he
9 continued to commit sexual crimes? And there were four
10 victims involved in that particular case.

11 Q Okay. Now in looking at these types of cases if he
12 is charged with a case, say he is indicted by the grand
13 jury and yet for whatever reason that case gets dropped
14 or gets dismissed or he doesn't plead guilty to it -
15 nolle prossed is the word we sometimes use - is it still
16 appropriate and necessary for you in your field to look
17 at the underlying details of the crime even though it was
18 dismissed?

19 A It is. Because the research indicates that even
20 being arrested for a sexual crime even if he is not
21 convicted of it increases his risk.

22 Q Okay. So we have the crimes that occurred, the most
23 recent group, between 2001 and 2003; that is what you
24 said, right?

25 A Yes.

1 Q He was convicted in what, 2004?

2 A Yes.

3 Q Okay. He pled guilty to how many?

4 A There were three convictions in 2004.

5 Q Okay. So are you seeing a pattern here; arrest,
6 sanction, arrest, sanction; what is going on here?

7 A Yes, so he was arrested in 1974, and he received a
8 punishment. So the normal person would say you know I
9 really didn't like being in the general Detention Center
10 for three months, so I won't do that again.

11 But because Mr. Saunders has such a strong drive to
12 sexually assault children even that punishment didn't
13 stop him from going out and doing it again.

14 And so the next time he received a sentence of six
15 years suspended to ninety days of confinement and three
16 years of intensive probation. And he completed that and
17 then he went out and did it again.

18 So what that tells us is that his drive or that his
19 sexual interest in children is so strong that even being
20 punished will not stop him from doing it again.

21 Q Now if I may approach the witness, Your Honor. Dr.
22 Swan, I am going to show you what has been marked as
23 State's Exhibits 1 through 5. It is a series of
24 indictments, sentencing sheets, and the arrest documents
25 on Frank Saunders.

1 Number one, these are certified copies are they not?

2 Do you see the certification sticker from the Clerk's
3 Office?

4 A Yes, I do.

5 Q Okay. Number one is an indictment, Number
6 2004-GS-18-367, with a plea date of October 8, 2004?

7 A Yes, I reviewed this for my -- as I was conducting
8 my evaluation ---

9 Q Okay.

10 A --- and report.

11 Q And what is the crime charge convicted of in that
12 particular indictment?

13 A Criminal sexual conduct with a minor in the first
14 degree. Victim under the age of 11.

15 Q I hand you State's Exhibit Number 2, Indictment
16 Number 2003-GS-18-1300. Is that also a document you
17 reviewed in the course of your research about Mr.
18 Saunders?

19 A Yes, it is.

20 Q And what was the crime convicted of on that
21 particular charge?

22 A Criminal sexual conduct with a minor in the first
23 degree.

24 Q And the date of conviction in the lower right-hand
25 corner?

1 A October 8th, 2004.

2 Q I hand you a certified copy of State's Exhibit
3 Number 3, Indictment Number 2003-GS-18-1299 for
4 Dorchester County. Is that also a document or series of
5 documents you looked at in the course of your
6 investigation of Mr. Saunders?

7 A Yes. This one is for lewd act upon a child; and the
8 sentence date was October 8th, 2004.

9 Q Okay. Next I hand you a certified copy of
10 Indictment Number 88 -- 1988-GS-18-349, State's Exhibit 4
11 from 1988. Is that a document you looked at in the
12 course of your investigation?

13 A Yes, it is.

14 Q Okay. And what was the crime convicted of there?

15 A Lewd act on a child.

16 Q And the date of conviction?

17 A The date of conviction on this one ---

18 Q In the middle of the sheet.

19 A August 16th, 1988.

20 Q And finally, State's Exhibit Number 5, a certified
21 copy, Indictment Number 88-GS-18-350; is that also a
22 document you looked at in the course of your research on
23 Mr. Saunders?

24 A Yes, this is also a conviction for lewd act a child
25 dated August 16th, 1988.

1 Q Okay. Now, Doctor, the crimes on all of these
2 indictments, lewd act on a child on three of them,
3 criminal sexual conduct with a minor in the first degree
4 on the other two, are those crimes considered sexually
5 violent crimes under the law in South Carolina?

6 A Yes, they are.

7 Q Now did you review these documents, the things I
8 handed you a minute ago, State's Exhibits 1 through 5 as
9 part of your evaluation?

10 A Yes, I did.

11 Q Are these the types of documents that are commonly
12 relied upon by experts in your field?

13 A Yes, they are.

14 Q And now I need to ask you starting with the first
15 one or whichever one you would like to -- let's start
16 with Indictment Number 2003-1299.

17 What are the underlying details you found in that
18 particular conviction that you found significant in order
19 to diagnose Mr. Saunders?

20 A Yes. The victim in this case was a three-year-old
21 girl named Minor 3. And the facts were that Minor 3 had been
22 visiting her grandmother who was married to Mr. Saunders.

23 And when she would come home from the visits her
24 mother noticed that her vaginal area was bright red and
25 irritated. And she began asking Minor 3 what had happened.

1 And Minor 3 revealed that Mr. Saunders had touched her
2 sexually.

3 And her mother contacted her sister. And the sister
4 also had children who had been visiting with the
5 grandmother and Mr. Saunders. And so they started asking
6 the sister's children as well if they had been touched by
7 Mr. Saunders.

8 The other children revealed that they had, and the
9 daughters contacted their mother and said did you know
10 that you are living with a registered sex offender.

11 And the mother indicated that Mr. Saunders told her
12 that he had been arrested for having sex with a fifteen-
13 year-old, not young children.

14 So the next victim in the case was Minor 2 And he
15 was a four-year-old boy.

16 Q If I may stop you right now. We are jumping now to
17 Indictment Number 2003-1300?

18 A Yes.

19 Q Okay. So that involves a victim, Minor 2?

20 A Yes.

21 Q Okay. Continue then, please.

22 A Okay. Minor 2 was four year old -- four years old.

23 And when his mother asked him if anyone had ever touched
24 his butt he said, no, but Frank, Mr. Saunders, puts his
25 winky in my mouth.

1 She indicated that she -- Mr. -- that Minor 2 said
2 that Mr. Saunders chewed on his winky and sucked on it
3 and that he had done it three times.

4 Q Okay. Now proceeding to the next victim, Minor 1 ,
5 Indictment 2003-367, one of the ones he pled guilty to in
6 2004, what did you find out on there?

7 A Minor 1 was between the ages of seven and ten years
8 old when the abuse occurred. And when he was initially
9 asked about the abuse he indicated that Mr. Saunders
10 began fondling his penis when his grandmother married Mr.
11 Saunders.

12 And that he said that the first time that it
13 happened it felt really funny and it made him cry because
14 he didn't like it. And he -- Mr. Saunders told him it
15 was a game called the thing. And Mr. Saunders told him
16 that he should not tell anyone else about their game.

17 He indicated that Mr. Saunders touched him about
18 four times a month between 2001 and 2003 and it usually
19 happened in the car while Mr. Saunders was driving him
20 home.

21 About four months later Minor 1 reported that he had
22 not been fully disclosing of what happened with Mr.
23 Saunders. And he said the reason that he had not been
24 was because he didn't want to see his mother upset
25 anymore.

1 He began to tell officers that Mr. Saunders had
2 begun molesting him when he was in the third grade and
3 that Mr. Saunders had anal sex with him approximately ten
4 times and oral sex with him five times and that white
5 stuff came out of his penis when this happened.

6 Q Doctor, as part of your evaluation -- well, what did
7 Mr. Saunders say about these victims, first off regarding
8 victim Minor 3?

9 A Mr. Saunders said that he fondled Minor 3 about eight
10 times. And he denied that he penetrated her. There were
11 some allegations that he favored Minor 3 over the other
12 children and that he had spent large sums of money on her
13 in order to groom her so that she would be more willing
14 to engage in sexual acts with him. He denied that he did
15 that, but he did admit that he spent about \$300 on her
16 birthday presents.

17 With regard to Minor 2 he said that he fondled his
18 front part several times. And when I asked him directly
19 if he put his penis in his mouth he said a few times he
20 did. He said that they engaged in oral sex between five
21 and eight times. And he said that he fondled Minor 2 more
22 often than they had oral sex.

23 Regarding Minor 1 , Mr. Saunders said he fondled him
24 a few times and performed oral sex on him. He denied
25 that he attempted or had anal sex with Minor 1 .

1 And when I asked him why Minor 1 would say that if
2 it was not true, he said that he did not know. That he
3 continued to claim that he had not had anal sex with
4 Minor 1 .

5 He said that -- he denied that the abuse occurred
6 for three years. He said it only occurred for one year.

7 And he admitted that he told his wife that he had
8 been arrested for having sex with a 15-year-old girl.

9 Q But now the crime he pleaded guilty to regarding
10 Minor 1 , Indictment 2004-367, was criminal sexual conduct
11 with a minor in the first degree; correct?

12 A That is correct.

13 Q And to be guilty of that you have got penetration of
14 the victim is involved, correct?

15 A That is correct.

16 Q Okay. And there wasn't a trial; he pleaded guilty
17 to that; is that correct?

18 A That is correct.

19 Q Okay. Now there were prior convictions in 1988 you
20 talked about earlier?

21 A Yes.

22 Q What were the crimes in 1988 that you found?

23 A In 1998 -- 1988 he was convicted of two counts of
24 lewd act on a minor.

25 Q Okay. If I may approach you again. Now Exhibits 1,

1 2, and 3, these are the 2004 convictions for the crimes
2 you have talked about so far; is that right?

3 A That is correct.

4 Q Okay. Now Exhibits Number 4 and 5 these are the
5 1988 convictions; is that right?

6 A That is correct.

7 Q Okay. So go ahead and tell the jury what is it
8 about those crimes and those victims that you found
9 significant in making a diagnosis and evaluating this
10 guy.

11 A Okay. In this particular crime there were three
12 victims who reported that Mr. Saunders sexually assaulted
13 them.

14 Minor 5 indicated that he had placed his
15 hands in her genital area in the Sunday school room at
16 the church and that -- and so what happened was when she
17 reported that, she told her mother and the police came.

18 The mother, Minor 5's mother, reported that
19 there were two other children who had also been sexually
20 assaulted by Mr. Saunders.

21 So the next one was Minor 6 who was 10 years old.
22 And she told the police that Mr. Saunders had fondled her
23 genital areas in the balcony at the church.

24 And then the third victim was Minor 4 who was seven
25 years old. And she told the police that Mr. Saunders had

1 placed his hand under her dress on the upper portion of
2 her thighs and directly between her legs.

3 Q And in these -- in this particular case he was
4 convicted on two of those charges, right?

5 A That is correct.

6 Q The ones involving Minor 5 and Minor 4 ?

7 A That is correct.

8 Q Okay. And the prior one he was convicted on
9 three victims, but was there a fourth victim that was
10 nolle prossed or dismissed?

11 A There was a fourth victim. And he was very young.
12 I believe he was three years old. And he had a speech
13 impediment. So although he reported that he had been
14 touched by Mr. Saunders when he went for the Child
15 Advocacy Center evaluation they really couldn't
16 understand him. So nothing was done about his case.

17 Q Okay. So we have covered '88 convictions, the 2004
18 convictions. You mentioned at the very beginning though
19 there was something prior to all of that that came out in
20 the interview that concerned you. What type of criminal
21 offense was it?

22 A Mr. Saunders reported that he was playing outside
23 and he saw a five to seven-year-old girl and he fondled
24 her and that he was arrested for this and that he was
25 sentenced to three months in the Juvenile Detention

1 Center and he actually completed two months in the
2 Juvenile Detention Center.

3 Q Were there any other crimes he talked to you about
4 or that you found in your examination of the records
5 where he was investigated before but not -- but not -- or
6 charged or not convicted of?

7 A That is correct. There was a crime in -- or an
8 incident in two thousand -- let's see. 2003. Two girls
9 were playing outside with their Easy Bake Oven, and the
10 oven apparently would not work.

11 MR. FALK: Objection, Your Honor. Relevancy.

12 THE COURT: About the -- are you talking about ---

13 MR. BOGLE: Case -- well, we can take it up outside
14 of their presence; but the case law is ---

15 THE COURT: Come here.

16 MR. BOGLE: I'm sorry, Your Honor.

17 THE COURT: That is okay.

18 (WHEREUPON, bench conference was had.)

19 THE COURT: Sustained as to foundation at this
20 point.

21 MR. BOGLE: Thank you, Your Honor.

22 THE COURT: Uh-huh.

23 Q Let's back up a bit, Dr. Swan.

24 A Yes.

25 Q About to ask you about other things.

1 THE COURT: In fact -- come here.

2 (WHEREUPON, bench conference was had.)

3 THE COURT: Did y'all like visiting Folly Beach.
4 All right.

5 Ladies and gentlemen, we have actually reached a
6 good stopping point for this evening just because I tend
7 to give a little more instruction to jurors the first
8 evening.

9 And Dr. Swan, you probably feel like you are caught
10 between the crossfire with me talking -- you are -- if
11 would like to step down you are more than welcome to do.
12 (WHEREUPON, Dr. Swan was instructed by the court and she
13 returned to her seat.)

14 THE COURT: Now, ladies and gentlemen, a couple of
15 things. And I just share this with you because I have a
16 little bit of a sensitivity towards it because I have had
17 a little bit of a problem with it over the last year,
18 which is not to fuss. It is just to tell you where I'm
19 coming from if I sound a little fussy.

20 I have had difficulties with jurors talking about
21 cases either outside the court or with fellow jurors.
22 And I take -- it is my fault. It is not the jurors
23 fault. Because I am not being clear enough.

24 So I just want to be sure I am clear about my
25 instruction. If you all have any questions about what I

1 am going to tell you I want you to raise your hand and
2 say what. Because I want to be really really careful
3 that I am clear with you.

4 Now I am going to tell you this. Here's the general
5 comment or the general discussion. Do not discuss this
6 case. Do not allow anyone to discuss it with you.

7 Sounds pretty straightforward. Well, and I really
8 do mean that. And I mean everybody. I mean your fellow
9 jurors, your family, your friends, your coworkers,
10 anybody that has anything to do with this case, the
11 bailiffs, your dog, your cat. I mean seriously, really I
12 do not want to you to discuss this matter. And, again,
13 I explained to you earlier to the reason why.

14 The other thing, the other point that I really
15 really want to emphasize is do not go to the internet.
16 Do not research terms. Do not research this matter. Do
17 not try to find out anything about anyone who has
18 anything to do with this case.

19 Why? How many times when we were doing the
20 qualifications did I say can you make up your mind based
21 upon what you hear in court while court is in session.
22 Y'all probably got really tired of me saying that. I am
23 continuing to say that.

24 And if you were to go do the internet and if you
25 were to get information from the internet, if you were to

1 Colombo yourself in this case, you would be injecting
2 information not received in court while court is in
3 session.

4 And I don't know why I have had difficulty other
5 than I -- it is me. I am not being clear enough about
6 it. So I really really want to be clear about that.

7 Is there any question in anybody's mind about what I
8 am talking about? Now y'all ought to be concerned how in
9 the world am I supposed to go home, you know, and have my
10 significant other ask me where have you been. Can't tell
11 you. What have you been doing? Can't tell you. Then
12 all of a sudden I have put you in a terrible position.

13 So let's talk about that. You certainly can say,
14 you know, I had my juror summons and I showed up for
15 court; I have been selected to serve on a case.

16 What kind? You know you can hear it. What kind?
17 It is a civil matter as opposed to a criminal matter.
18 But that is all you can say. That is it. That is the
19 extent of it.

20 Now but they are going to say, oh, come on; she will
21 never know. You would be surprised how things get known
22 around. It is amazing how things get known.

23 But I do want you to do this. If whomever is upset,
24 I want you to put it on the judge. Judge Goodstein told
25 me not to talk about it. Don't you let them get upset

1 with you. You put it on me. If anybody is going to be
2 upset, be upset with me.

3 Now when you have been discharged from your service
4 on this jury panel -- and there will be no question in
5 your mind when that time has come because I will talk to
6 you about it. Then you will be at liberty to discuss
7 this case if you wish to.

8 But before that time has come you must not discuss
9 this matter or allow anyone to discuss it. Understanding
10 that there will be some curiosity you cannot talk about
11 this case or allow anyone to discuss it with you.

12 Now, tomorrow morning you have a beautiful
13 opportunity to leave your cell phones at home. You are
14 not going to do that because you all are driving from
15 below the swamp. You are probably going to bring it with
16 you. But do remember to leave it in your automobile. We
17 have really good security here at the courthouse. So it
18 will be fine.

19 If you forget and bring it in with you, please
20 remember to give it to one of our bailiffs who will take
21 good care of it while you are serving on the jury and
22 give it back to you. Probably the lunch break tomorrow
23 when you can take it to your car.

24 You cannot have a cell phone with you or other
25 communication device capable of communicating with the

1 outside world with you while you are serving on the jury.

2 Now anybody going into work at night? Anybody going
3 into work at night? Wonderful. Wonderful. I need you
4 to rest. I don't want anybody going in at night. You
5 have to be rested so that you can be prepared to proceed
6 tomorrow.

7 Ladies and gentlemen, we are going to start in the
8 morning at 9:30. At 9:30. And I just mention to you you
9 might want to go a little bit light on your breakfast in
10 the morning because these ladies usually have a little
11 something something for you in the morning. So I do
12 share that with you as well.

13 Does anybody have any question about my instruction,
14 do not discuss this matter or allow anyone to discuss it
15 with you or the business about not going to the internet
16 or doing any investigation?

17 Wonderful. Y'all make me feel so much better.

18 All right. Have a very very nice evening. And I
19 will see you all in the morning at 9:30.

20 (WHEREUPON, jury exits courtroom.)

21 THE COURT: All right. Anything before we leave,
22 from the petitioner?

23 MR. BOGLE: No, Your Honor. Thank you.

24 THE COURT: Respondent?

25 MR. FALK: No, Your Honor.

1 THE COURT: Very well. You all have a good evening.
2 I will see you in the morning.

3 (WHEREUPON, 9/19/16, 4:58 p.m., adjourn for the evening.)

4 (WHEREUPON, resume day-two of trial 9/20/16, 10:15 a.m.)

5 THE COURT: You are here. We are ready. Let's go.
6 Anything ---

7 MR. BOGLE: Things that happened while I was on the
8 road.

9 THE COURT: On the road again.

10 MR. BOGLE: Consent form the guy signed for Dr.
11 Burke arrived.

12 MR. FALK: I have seen it.

13 MR. BOGLE: We were looking for it -- we were
14 looking for it yesterday. He has got a copy.

15 THE COURT: He has got a copy. Okay. And yes?

16 MR. FALK: Well, I had a thought in that I want to
17 try and make a record about whether this consent was
18 informed. Before the jury comes in maybe we could sort
19 of do like a Jackson versus Denno type of hearing and put
20 my client on or -- I need to proffer some kind of
21 testimony about whether the consent was informed.

22 I don't know whether this is a good time to do it or
23 if you want to wait until after Dr. Swan testifies.

24 THE COURT: Why don't -- why don't we do that.
25 Because we are getting started a little bit late ---

1 MR. FALK: Sure.

2 THE COURT: --- and I want the jury happy. Why
3 don't -- you would offer -- you argued yesterday ---

4 MR. FALK: I am just trying to make a record.

5 THE COURT: I am too. And I am trying to be sure
6 that I have protected you.

7 MR. FALK: Yes.

8 THE COURT: And you would object to the consent form
9 coming in ---

10 MR. FALK: Right.

11 THE COURT: --- on the basis that it was not an
12 informed consent?

13 MR. FALK: That is correct.

14 THE COURT: And it was not an informed consent, as I
15 understand your argument, because he believed if he did
16 not consent that he would be held in contempt of court;
17 is that correct?

18 MR. FALK: That or he would be held in indeterminate
19 custody. I mean he is only going to be held in contempt
20 of court if I bring it -- if I push the issue. Otherwise
21 he sits there --

22 THE COURT: He sits.

23 MR. FALK: Yes.

24 THE COURT: Okay. All right. And so we -- and you
25 would proffer that as counsel?

1 MR. FALK: Yes.

2 THE COURT: Now what we can do is, you know, if you
3 want to call him and have -- and we can do some
4 examination. We can certainly do that.

5 MR. FALK: Okay. And I would also ---

6 THE COURT: And I think that is sufficient to
7 preserve the record.

8 Mr. Bogle, any -- do you want to weigh in on that?

9 MR. BOGLE: Yes, ma'am, just that, you know, he went
10 to Burke. Burke said here is a consent form, read it to
11 him. The guy signed it.

12 I don't think Mr. Saunders had any idea what the
13 consequences would have been had he not signed it. Mr.
14 Falk knows because this has come up in some other cases.

15 And of course Jackson v Denno is a criminal
16 proceeding, and we aren't criminal here. So I am not
17 sure what informed consent is even required as long as
18 the guy -- I mean it is a consent form that is signed --
19 that he signed. Whether or not he had to be informed or
20 consult with his counsel beforehand, I don't think we are
21 there yet.

22 THE COURT: I understand. I am with you completely.
23 He just wants to preserve the -- all he is doing at this
24 point is preserving the issue.

25 MR. BOGLE: I understand.

1 THE COURT: I am not going to keep it out.

2 MR. BOGLE: I understand.

3 THE COURT: And so I -- I guess my question is
4 whether or not you actually have to call him to do that.
5 You probably do. But let's do that when we take a break.

6 MR. FALK: That is fine. That is what I was going
7 to say.

8 THE COURT: Yeah. Because -- because you have made
9 it and you have offered it, and if you want to have it
10 have more bones and muscle that is fine.

11 MR. FALK: Thank you.

12 THE COURT: Yes. All right. But I think it is -- I
13 mean I think it is admissible. You know, because I
14 gather it is his -- it is his informed consent, as I
15 understand it.

16 MR. FALK: It is his signature.

17 THE COURT: It is signature.

18 MR. FALK: Whether it is informed ---

19 THE COURT: I am sorry. I am so sorry. Yes, it is
20 his signature. That's -- in my head that is what I was
21 thinking.

22 MR. FALK: Yes, ma'am.

23 THE COURT: But that isn't what came out of my
24 mouth. I do apologize.

25 Let's have the jury.

1 MR. BOGLE: Another -- before they come in.

2 THE COURT: Oh -- eerk.

3 MR. BOGLE: Eerk. Wait. Wait. Well, we will -- I
4 will wait. I will wait. I will wait.

5 THE COURT: You will wait?

6 MR. BOGLE: What I have can wait.

7 THE COURT: Okay.

8 Come on (motioning to Dr. Swan). I am trying to get
9 Dr. Swan to come on. Oh, you thought I was just
10 exercising.

11 MR. BOGLE: Your Honor, could I have half a second?
12 Be right back.

13 (WHEREUPON, break was had 9/20/16 at 10:19 a.m.)

14 (WHEREUPON, resumed and jury enters courtroom 9/20/16,
15 10:21 a.m.)

16 THE COURT: Good morning, ladies and gentlemen. I am
17 sorry for the delay this morning. I think traffic was
18 like difficult all around. At least the lower part of
19 the state this morning.

20 But we are here and ready to continue. We will now
21 continue with the direct examination of Dr. Swan.

22 Yes, sir, Mr. Bogle.

23 MR. BOGLE: Thank you, Your Honor, may it please the
24 court.

25 THE COURT: Yes.

1 MR. BOGLE: Dr. Swan, before we -- I resume with
2 you -- Your Honor, at this time I would like to introduce
3 into evidence, that hasn't been formally done yet, the
4 five exhibits on behalf of the State.

5 Exhibit 1 would be Indictment Number 2004-367
6 involving victim Minor 1 , a CSC with a minor first degree
7 in Dorchester County.

8 Exhibit 2, Indictment 2003-1300 another CSC with a
9 minor in Dorchester County. This would involve a victim
10 Minor 2.

11 Exhibit 3, Indictment 2003-1299 the Dorchester
12 indictment and conviction for lewd act on a child. This
13 involves victim Minor 3.

14 And from 1988, Indictments 1988-349 for lewd act on
15 a child, the conviction and sentencing sheet. This
16 involving victim Minor 4 .

17 And then finally Exhibit 5, Indictment Number 88-
18 350, lewd act on a child involving victim Minor 5 .,
19 Minor 5

20 We would like to formally introduce these into
21 evidence at this time, Your Honor.

22 MR. FALK: No objection.

23 THE COURT: Very well.

24 (WHEREUPON, State's Exhibit 1 was admitted into
25 evidence.)

1 (WHEREUPON, State's Exhibit 2 was admitted into
2 evidence.)

3 (WHEREUPON, State's Exhibit 3 was admitted into
4 evidence.)

5 (WHEREUPON, State's Exhibit 4 was admitted into
6 evidence.)

7 (WHEREUPON, State's Exhibit 5 was admitted into
8 evidence.)

9 **RESUME DIRECT EXAMINATION BY MR. BOGLE OF DR. AMY SWAN:**

10 Q Now, Dr. Swan, yesterday we had finished talking
11 about these crimes over there. And I think I was at the
12 point of asking you this. But let me preface this by
13 asking you this. You have already testified about a 1974
14 arrest when he was a juvenile. And what was the age of
15 that girl that was assaulted in 1974?

16 A She was five to seven years old.

17 Q Okay. Now in cases of this nature is it your
18 practice to look at investigations of crimes similar to
19 the ones where he was convicted that didn't result in a
20 conviction?

21 A Yes, I do. Less than ten percent of sexual crimes
22 actually results in a conviction, so it is important to
23 look at the crimes that did not result in a conviction to
24 get a full picture of what the individual is doing.

25 Q Okay. And is that a practice that is typically and

1 reasonably relied upon by experts in your field?

2 A Yes.

3 Q Okay. Now is this particular case going back to
4 2003 we have talked about the convictions that arose from
5 that era. Were there also some investigations involving
6 little girls that you found of note?

7 MR. FALK: Objection, Your Honor, just to preserve.

8 THE COURT: I understand. Overruled. You may
9 proceed.

10 MR. BOGLE: Thank you.

11 A Yes, there were.

12 Q Tell us about those, please.

13 A Okay. There was an investigation in August of 2003
14 because two little girls reported that Mr. Saunders lured
15 them into his home telling them that he was able to fix a
16 broken toy. It was an Easy Bake Oven.

17 And they went into the house and Mr. Saunders
18 grabbed one of the little girls to pull her closer. And
19 he grabbed her a couple of times, lifted her dress above
20 her knees. And she believed that he was trying to touch
21 her private part.

22 She was able to get away from him. And she and the
23 other little girl ran out of the house. A neighbor saw
24 that the girls were crying and that they were all shaken
25 up and reported it to Mr. Saunder's wife.

1 And later there was a police report made and the
2 children were evaluated at the Lowcountry Children's
3 Center.

4 Q So how did you find out about this particular
5 incident?

6 A This was included in the records that I received
7 regarding Mr. Saunders.

8 Q Okay.

9 A It was part of the investigation in his 2001 to 2000
10 crimes involving Minor 1 , Minor 2, and Minor 3.

11 Q Okay. So the investigation of these two girls, in
12 the Easy Bake Oven incident we will call it, that led to
13 the investigation that resulted in the convictions which
14 we talked about earlier yesterday; is that right?

15 A Yes, they all came out about the same time.

16 Q Okay. And why is this important to look at these
17 types of things where there is no conviction?

18 A It is important because that gives you the full
19 range of what the individual is doing. Because we
20 typically only know a fraction of what is occurring in a
21 particular case.

22 So it is important that we understand that if there
23 are other victims that helps us to access where the
24 actuarial instrument that I am using underestimates those
25 risks.

1 Q Now, Dr. Swan, was there also -- in cases like this
2 do you look to see whether or not the person being
3 evaluated commits some kind of misconduct while in
4 prison?

5 A I do.

6 Q Why is that important?

7 A Well, it is important because one of the features
8 that I have to assess is whether the individual has the
9 ability to control his sexual behavior.

10 And so if he is doing things -- if he is in a
11 structured environment where he is watched 24 hours a day
12 and he can't control his sexual behavior there then that
13 tells me he is not going to be able to control it in the
14 community when no one is watching him.

15 And in this particular case in May of 2015 - so that
16 is just a little over a year ago - Mr. Saunders was
17 publicly masturbating in prison.

18 MR. FALK: Objection, Your Honor. Again, relevancy.
19 This is -- I think she is referring to a disciplinary --
20 report of a disciplinary infraction, and I think that is
21 a far cry from any type of judicial proceeding and I
22 think the relevancy of something, you know, one
23 disciplinary infraction, fourteen years in prison, I am
24 not sure that that is necessarily relevant. Or if it is
25 relevant I think it is prejudicial far beyond its

1 relativity.

2 THE COURT: I understand. I believe the foundation
3 certainly has been established and would respectfully
4 overrule your objection.

5 MR. BOGLE: Thank you, Your Honor.

6 THE COURT: Uh-huh.

7 Q Dr. Swan, if I could approach you one more time.
8 Before we continue, as part of the documents you got to
9 look at did you get a copy of the petition filed by the
10 State that got this case going?

11 A I did.

12 Q Okay. And among the exhibits to the petition,
13 Exhibit A, would you identify this document here what
14 that is.

15 A This is a sexual predator referral form.

16 Q Is that where the multi disciplinary team votes on
17 whether or not to send the case forward?

18 A That is true.

19 Q Okay. Does it also show what his max-out date from
20 prison was?

21 A Yes, it does. July 6th, 2016.

22 Q Okay. Now you interviewed him, like you said
23 yesterday?

24 A Yes.

25 Q What did he say -- well, as part of these interviews

1 do you inquire of the person about their sexual interest
2 what it is that arouses them or turns them on?

3 A I did.

4 Q And why is that important?

5 A It is important because I want to see if they have
6 any insight into their sexual crimes that might help me
7 to understand if they at least acknowledge that they have
8 committed sexual crimes and whether they have some kind
9 of control over it.

10 Q Okay. What did Mr. Saunders say about his sexual
11 interests?

12 A With regard to his sexual interest he told me that
13 forty percent of his sexual fantasies are about little
14 girls between the ages of five and eight and that fifty
15 percent of his sexual fantasies are about little girls
16 between the ages of nine and twelve.

17 It was important that I ask him if he was aroused to
18 little girls between the ages of zero and four, like
19 infancy and four, because that is one of my subgroups
20 that I ask about. And he denied that he had any arousal
21 to that age group; however, it turns out that that was
22 one of his most strongest arousal patterns.

23 He told me ---

24 MR. FALK: Objection, Your Honor. May I approach?

25 THE COURT: Yes.

1 (WHEREUPON, bench conference was had 9/10/16, 10:30 a.m.)

2 Q Okay. Without going into other things right now, so
3 40 plus 50, that is 90 percent of his sexual fantasies
4 are about girls under 12?

5 A That is correct. And he denied having any fantasies
6 about little boys even though he had boy victims.

7 Q Okay.

8 A And he said that at that time that he was molesting
9 the boys, he had fantasies about them.

10 He also told me that the last time he masturbated to
11 a fantasy of a child was four months prior to my
12 interview. So that would have been at the end of 2015.

13 Q So that recent to your interview then?

14 A Yes.

15 Q Okay.

16 A So that demonstrates that he still has arousal to
17 children. It started when he was 16. It continued to
18 the day I saw him. So that was a pattern of 41 years.

19 Q Now the 41 years starting in 1974?

20 A That is correct.

21 Q Okay. Now what does -- there is something called a
22 PPG. Can you please tell the jury what a P -- what that
23 -- what those initials stand for.

24 A The PPG is the penile plethysmograph. And the word
25 plethys means blood flow. And there are different kind

1 of instruments in the medical field like dopplers and
2 that kind of thing that measure blood flow in particular
3 areas of the -- areas of the body.

4 So the penile plethysmograph measures the blood flow
5 in the penis. And obviously if the penis engorges with
6 blood it expands, and that is the basis of the penile
7 plethysmograph.

8 Q Now in this particular case did you decide to have a
9 PPG run on Mr. Saunders?

10 A I did.

11 Q Okay. Now have you always used PPG's?

12 A No.

13 Q Okay. Had you used them before this on some other
14 evaluations in Department of Mental Health, precommitment
15 evaluations?

16 A Yes.

17 Q Okay. Were you aware that a PPG was available to
18 you?

19 A I became aware around the first of the year that the
20 PPG was available to me. We have a different system in
21 Florida. So when I found out that it was available I
22 decided to utilize it in certain cases when I needed
23 additional information.

24 Q Now has there been -- let's be honest. Has there
25 been some criticism of the PPG among different types of

1 experts?

2 A Yes, there is contro- -- some controversy about
3 using the PPG, primarily because it can be faked and
4 primarily because about 20 percent of men don't respond
5 to the PPG at all. So there is some problem with being
6 able to interpret results.

7 Q Now basically the PPG how does it work? What do you
8 -- what does the guy do?

9 A What happens with the PPG is that the individual is
10 placed in a reclining chair and the technician is in a
11 separate room. And there is a glass window. And the
12 individual puts what we call a strain gauge on the penis,
13 and that measures the difference in the circumference of
14 the penis.

15 So as while the individual is sitting in this chair
16 he is shown pictures of different age groups of people.
17 There are infants, males and females; preschool males and
18 females; grammar school males and females; teen males and
19 females, and adult males and females.

20 In addition to those pictures there are also
21 persuasive and coercive slides. The perway- -- pervasive
22 slides depict more of a seduction type process or a --
23 and the coercive slides depict using forced or a rape
24 type scenario.

25 While the individual is looking at the pictures of

1 the different scenarios there is also audiotapes that
2 they listen too, voices similar in age to the child that
3 they are seeing the picture of on the screen.

4 And if an individual's penis enlarges at least 20
5 percent while they are watching the different scenarios
6 then that is definitive for arousal to that particular
7 age group and either coercive or persuasive scenario.

8 Q Now in this particular case -- let me back up a
9 second. What is the DSM-5; what does that stand for?

10 A This is the diagnostic and statistical manual and
11 its version -- or the 5th Edition. This is what we call
12 the Bible in psychology. This is what psychiatrists and
13 psychologists and other mental health professionals use
14 to diagnose people.

15 And it delineates all the criteria necessary for any
16 particular diagnosis so that we are not just willy nilly
17 diagnosing things, that we all know what we mean when we
18 assign someone a diagnosis.

19 Q Is this a copy of it, ---

20 A Yes, it is.

21 Q --- the DSM-5? Does the DSM-5 now mention the use
22 of the PPG?

23 A Yes, it does.

24 Q In what context does it mention the use of the PPG?

25 A It uses the PPG in the context of assessing sexual

1 arousal to deviant stimuli, typically children.

2 Q Okay. And is the reference to the use of the PPG
3 that is in the DSM-5, the new version, right here?

4 A Yes.

5 Q That replaced the DSM-4 and the DSM-4TR, correct?

6 A It does.

7 Q Did the prior additions mention the PPG in this
8 context?

9 A It mentions it in a different context, but it did
10 mention it.

11 Q Okay. But not in the use of in the same context
12 as ---

13 A That is correct.

14 Q --- as a measurement tool?

15 A That is correct.

16 Q Has the PPG been reviewed as far as peer review?

17 A It has. It came about like probably in the 40's to
18 50's. So it has been around a very long time. Of course
19 it has been refined. And there have been numerous
20 research articles written on it.

21 Q Has the PPG been used in prior sexually violent
22 predator cases in South Carolina?

23 A Yes, it has.

24 Q Okay. What quality controls are there with the
25 person administering the PPG?

1 A With regard to the quality controls there is
2 restoration trace to see if someone is holding their
3 breath to try to fake the PPG. There are galvanic skin
4 responses which mean to measure sweating to see if there
5 is a response that might indicate that something was not
6 exactly right with the PPG.

7 They also watch - that is the technician - watches
8 through the window to see if there are inordinate body
9 movements. Just so that we can be sure that the PPG is
10 accurately assessing the arousal.

11 Q Now in this particular case what was the practice
12 when you wanted to have a PPG run and you are doing this
13 case on behalf of the Department of Mental Health who you
14 have a contract with, where did you have -- what were
15 your instructions as to where to have the PPG run?

16 A To my knowledge the Department of Mental Health uses
17 Dr. William Burke.

18 Q Okay. And he uses the Limestone PPG?

19 A He did.

20 Q He is located in Summerville; is that right?

21 A He is.

22 Q Okay. Have you been provided with a consent form?
23 I hand you this document signed by Mr. Saunders when he
24 went down to Dr. Burke to undergo the PPG.

25 A Yes.

1 Q Is that signed by Mr. Saunders?

2 A Yes, it is.

3 Q Is it a consent form to have the thing run on him?

4 A Yes.

5 Q What is the date it was signed?

6 A March 23rd, 2016, at 9:50 a.m.

7 Q Okay. So going back to the multidisciplinary team's
8 review and his max-out date, which is July, in March he
9 was still in prison; right?

10 THE COURT: Just a second.

11 MR. FALK: I would object that the document there is
12 hearsay.

13 THE COURT: Yes, and your response would be?

14 MR. BOGLE: I am sorry, which one?

15 THE COURT: Hearsay.

16 MR. BOGLE: I didn't know -- this document or the
17 one she has?

18 THE COURT: The one she has; yes?

19 MR. FALK: Yes.

20 THE COURT: The one she had.

21 MR. BOGLE: Yes, Your Honor ---

22 MR. FALK: It is not authentic -- it has not been
23 authenticated.

24 MR. BOGLE: I think in the realm of expert witnesses
25 they can rely on testing done by other experts if it is

1 part of their overall opinion, it is something typically
2 and reasonably relied upon by them in their field. And
3 that is what she has here.

4 Whether it is being offered for the truth of the
5 matter asserted, it is part of an official document
6 provided to her as part of the PPG exam.

7 And I think it falls under the purview of an expert
8 because she is testifying about a test that another
9 person ran, which is typical in this field with expert
10 witnesses.

11 THE COURT: I understand. But I don't think she
12 can -- I don't think that the consent form can come in
13 through her.

14 MR. BOGLE: Okay. Okay.

15 THE COURT: But it is sustained.

16 MR. BOGLE: All right. Thank you.

17 Q Now going back to that max out date, the PPG was run
18 in March of 2016?

19 A That is correct.

20 Q And if his max-out date from prison wasn't until
21 July he was still in prison when the PPG was run; right?

22 A That is correct.

23 Q Okay. Why did you feel it necessary to have a PPG
24 run on this guy?

25 A I thought that it was necessary because Mr. Saunders

1 gave me contradictory information about his sexual
2 arousal. For example, initially he said that he had no
3 interest in adult females, that's why he never had a
4 relationship and why he was 45 the first time he had
5 intercourse with an adult female.

6 And then a few minutes later he said that he was
7 aroused to adult females, that he had sex with his wife
8 five to seven times a week.

9 Then he said that he was not aroused to preschool
10 females at all. And I had questions about that because
11 some of his victims were three and four. And it turns
12 out that, you know, he was indeed aroused to preschool
13 females.

14 He told me that he was only interested in fondling
15 children. And but we know that in his offenses he
16 performed oral sex and anal sex as well.

17 So I just had some questions about what his true
18 arousal pattern was and I didn't think that he was being
19 honest with me about that.

20 Q Was the PPG the only thing you relied upon in making
21 this evaluation of Mr. Saunders?

22 A No, it was not. It is one piece of a comprehensive
23 evaluation.

24 Q Okay. And as a result of the PPG having run what
25 did you learn from that instrument regarding what aroused

1 this guy sexually?

2 A Okay. I learned that his -- the greatest level of
3 appropriate arousal, that means ---

4 MR. FALK: Objection, Your Honor. May we approach?

5 THE COURT: Sure.

6 (WHEREUPON, bench conference was had 9/20/16, 10:42 a.m.)

7 Q Go ahead, Dr. Swan. Now what did you learn?

8 A I learned that his greatest level of appropriate
9 arousal - that means normal, consenting, adult partners -
10 was to adult males. And that was information for me
11 because he denied having any arousal to adult males.

12 I also found that he had significant arousal to
13 preschool males persuasive, preschool males coercive or
14 rape scenario, preschool females persuasive; and his
15 greatest level of arousal was the preschool female
16 coercive or raping a preschool female.

17 He was aroused to grammar school female persuasive,
18 grammar school female coercive, grammar school male
19 persuasive, grammar school male coercive, teen female
20 coercive, preschool -- I have already got that. And
21 adult female coercive.

22 So essentially he is aroused to every age group,
23 which would indicate that his potential victim pool would
24 be larger than we would know just based on his offense
25 history.

1 Q So there was a difference between what he told you
2 and what you learned from the PPG?

3 A That is correct.

4 Q And you find that significant in the overall
5 evaluation of Mr. Saunders?

6 A Yes, I did.

7 Q Okay. Now aside from the PPG, moving on from that,
8 did you also perform an assessment what we call an
9 actuarial assessment on Mr. Saunders?

10 A Yes, I did.

11 Q Now what does the work actuarial mean in this
12 context; what am I saying here?

13 A Actuarials are statistical tools that we use that
14 are similar to insurance tables. And what we mean by
15 that is that as I explained earlier if someone is
16 sanctioned for a sexual offense and they keep on doing it
17 then each time they do it their risk increases.

18 And this is similar to like automobile insurance.
19 We know that 25 -- males under the age of 25 are more
20 likely to have an auto accident so their insurance rates
21 are more. And each time they have an accident those
22 rates go up or those risk percentages go up.

23 So each time Mr. Saunders reoffended after he had
24 that initial sanction then his risk for another sexual
25 offense increases.

1 Q So what is the name of the actuarial thing you
2 scored him on, instrument or whatever; what is it called?

3 A It is called a Static 99R or the Static 99 Revised.

4 Q Is it based on studies of convicted sex offenders,
5 guys who have done it and done it again in multiple
6 countries?

7 A Yes, it is. Initially there are about 30,000 people
8 in the initial studies. And it does include I think
9 about eight different countries. Because sex offenders
10 are pretty similar among different countries.

11 Q Okay. And is the Static 99R a scoring tool or an
12 assessment tool that is commonly used by experts in your
13 profession?

14 A Yes, it is.

15 Q Is it one of the most widely used estimates of
16 sexual offending risk that we have?

17 A It is. And the reason that we use a tool like this
18 is that we know that judgment just -- for example, a
19 psychologist saying I think he is high risk is not as
20 accurate as basing it on research and getting the actual
21 information about how risky the individual is. So this
22 is another important piece of a comprehensive evaluation.

23 Q When you scored Mr. Saunders on the Static 99R what
24 score did he get?

25 A He got a score of six. Any -- the range is minus

1 three to twelve. So anything that is six and above is
2 considered high risk.

3 Q Okay. So you say high risk. Can you relate that to
4 percentages?

5 A Yes.

6 Q Percentage to chance of reoffending or something
7 like that?

8 A Yes, Mr. Saunders scored in the 92nd percentile.
9 And what that means is that out of every 100 sex
10 offenders his risk is higher than 92.4 of them. And that
11 means that only four percent of sex offenders were higher
12 risk than Mr. Saunders.

13 Q Okay. So is his risk a certain multiple number of
14 times higher than the average sex offender?

15 A Yes. If you take the average sex offender with
16 average risk they typically score a two on the Static 99.
17 His score was a six. And statistically that is 3.77
18 times more risky than the average sex offender.

19 Q Now what are risk factors, just the general term
20 risk factors, in cases like this?

21 A Risk factors are factors that we know from research
22 that can either increase or decrease an individual's
23 risk.

24 Q Okay. And are there two types of risk factors; what
25 are they?

1 A There are two types. Static risk factors are the
2 ones that don't change. So the static risk factors in
3 this case would be sexual preference for prepubescent or
4 pubescent children.

5 That is the one that is the most significant
6 predictor of a sex offender committing another sexual
7 crime is sexual interest in children as demonstrated on
8 the PPG. So that is the static risk factor.

9 And the Static 99 all of those items on that
10 instrument are considered static risk factors. And there
11 are ten different factors. So we include those.

12 Q Okay. What are dynamic risk factors? That is the
13 other type. What does it mean by dynamic?

14 A Dynamic risk factors are factors that change. These
15 are the factors that we target in treatment to help
16 diminish a sex offender's risk.

17 And, for example, sexual interest in prepubescent
18 children, that never changes. If this guy is aroused to
19 children at 16 he is still going to be aroused to
20 children when he is 76 or whatever. Because it is a
21 lifelong, chronic, arousal pattern.

22 We cannot cure it. But with treatment we can help
23 them to learn strategies so that they can control it.

24 Now the dynamic risk factors are the ones that we
25 target to help them learn the strategies so that they can

1 control those non-changeable risk factors.

2 Q What type of dynamic or potentially changeable risk
3 factors did Mr. Saunders have that you found?

4 A He had offense supportive attitudes. And by that,
5 he had attitudes that what he was doing to those children
6 did not harm them in any way. And he seemed to view them
7 as appropriate relationship partners.

8 In the 1988 crime he asked the little girl if she
9 would like to come home with him and be alone with him,
10 as if she was a consenting adult.

11 Clearly a seven-year-old girl cannot consent to
12 going home with an adult male and being alone with him.
13 But he didn't seem to think that there was anything wrong
14 with that. So that is one example of an offense
15 supportive attitude.

16 Q What other dynamic risk factors did you find?

17 A The next was lack of emotionally intimate
18 relationship with adults. Because we know that
19 individuals who don't have appropriate relationships with
20 adults often have deviant sexual interests; for example,
21 a sexual interest in children.

22 Mr. Saunders admitted to me that he never had an
23 interest in adult females, because he was interested in
24 children. And he -- the first time he had intercourse
25 with an adult woman was when he was 45.

1 So he never lived with a partner until he was 45.
2 And the cutoff that we use is two years. We want to see
3 that someone has at least lived with a cohabiting person
4 for two years to demonstrate that they have some kind of
5 relationship.

6 But he has never done that. His longest
7 relationship was when he was married for one year, and
8 during that time he was offending the grandchildren.

9 Q Now going back -- before I go into these a little
10 bit more, going back to your earlier statements
11 yesterday, things he told you, you have already talked
12 today about him the 40 percent of his fantasies are for
13 this age group and 50 percent for this age group. What
14 did he say about just the idea of fondling children?

15 Q Mr. Saunders told me that he really enjoyed fondling
16 children. Clearly that is a minimization because he had
17 oral and anal sex with these children, and that is far
18 more invasive than just fondling them.

19 Q Now going back then to the dynamic risk factors, you
20 have talked about the offense supportive attitude he had
21 and also about the lack of an emotionally intimate
22 relationship with adults that you like to look for. Was
23 there anything else as far as dynamic risk factors?

24 A Mr. Saunders demonstrated poor problem solving
25 skills. And what I mean by that is if for example if you

1 engage in some activity and there is a consequence for it
2 and you keep doing it it shows that you have ineffective
3 problem solving skills.

4 For example, he did -- he appeared to avoid
5 addressing his problem. Even though he went to prison he
6 didn't get treatment.

7 He arrived at ineffective solutions to his problems.
8 And he clearly lacked the ability to see cause and
9 effect, if I do this I am going to go to prison.

10 And he failed to learn from experience, because he
11 kept doing the same thing over and over again.

12 Q Did from the records you looked at did Mr. Saunders
13 have any kind of sex offender treatment while he was in
14 prison?

15 A He did not. And in fact he told me he had never
16 even heard of sex offender treatment before.

17 Q Did he tell you about any other kind of treatment he
18 tried to get?

19 A Well, he never had any kind of treatment.

20 Q Okay.

21 A He said that when I asked him about his risk for
22 committing new sex offenses he said that he was studying
23 the Bible and taking some Bible courses in prison and it
24 was his view that that would prevent him from
25 reoffending.

1 However, there is no research that indicates that
2 Bible studies will prevent a sex offender from
3 reoffending.

4 Q So in your field, your realm of expertise, is there
5 any research out there that looks into whether or not a
6 religious experience or Bible study or something like
7 that can prevent a person from sexually reoffending?

8 A There is no research that indicates that that is the
9 case.

10 Q Okay. Okay. Did the lack of sex offender treatment
11 factor into your conclusion about Mr. Saunders?

12 A It did. It means that between the time that he was
13 arrested for those last crimes and the current time
14 nothing has changed; there has been nothing that has
15 intervened to lessen his risk. So he still presents the
16 same risk now as when he molested the children in 2003.

17 Q And was there any evidence of sex offender treatment
18 from him or in the -- when you talked to him ---

19 A Yes, sir.

20 Q --- or in the records you looked at from the prison
21 term back in 1988?

22 A No.

23 Q Or from the time he spent when he got sanctioned
24 back in 1974 as a juvenile?

25 A I didn't have any records on that. But he told me

1 that he had never had sex offender treatment.

2 Q Okay. Did you talk to him about the idea of getting
3 sex offender treatment?

4 A I did. And he said that he thought that the Bible -
5 - well, what he said was that he thought that he should
6 have it just to be on the safe side.

7 Q Okay. Now based on your interview and your
8 examination of Mr. Saunders and based upon the test that
9 you had done and the actuarial scoring, all the things
10 you have been talking about for the last couple of days,
11 do you have an opinion or a conclusion to a reasonable
12 degree of psychological certainty as to whether or not
13 Frank Saunders has a mental abnormality or a personality
14 disorder?

15 A I did. I diagnosed him with pedophilic disorder,
16 sexually aroused to both. That means males and females.
17 And nonexclusive type. Nonexclusive type because he has
18 arousal to adult males as in addition to arousal of
19 children. If he was exclusive type he would only be
20 aroused to children.

21 Q Okay. And, again, to a reasonable degree of
22 psychological certainty does that diagnosis, that
23 pedophilic disorder, does that affect his emotional and
24 volitional capacity so that Mr. Saunders is predisposed
25 to commit sexually violent offenses?

1 A It does. And we know that because he received a
2 sanction and then he reoffended twice after he received a
3 sanction.

4 Q So when I am using the word volitional capacity in
5 that context what am I -- what am I saying?

6 A What he -- what you are saying is that he lacks the
7 ability to control his sexual behavior.

8 Q Again, do you have an opinion, again, to a
9 reasonable degree of psychological certainly does Mr.
10 Saunders have the propensity to be dangerous and commit
11 future sexually violent offenses?

12 A Yes, it is my opinion that he does.

13 Q Do you have an opinion, again to a reasonable degree
14 of psychological certainly, as to whether or not this
15 propensity to commit future sexually violent offenses is
16 of such a degree it poses a menace to the health and
17 safety of others?

18 A Absolutely it does. And we have nine children who
19 have been violated.

20 Q Do you also have an opinion, again to a reasonable
21 degree of psychological certainly, as to whether Frank
22 Saunders has serious difficulty in controlling his
23 behavior?

24 A Absolutely he does.

25 Q Okay. Do you have an opinion, again to a reasonable

1 degree of psychological certainly, as to whether or not
2 this pedophilic disorder that he has, everything we have
3 talked about these last two days, makes him likely to
4 engage in acts of sexual violence unless he is confined
5 for treatment in a secure facility of what we call long-
6 term control, care, and treatment?

7 A I do.

8 Q Okay. Is that where he needs to be?

9 A That is absolutely where he needs to be.

10 Q Is outpatient sex offender treatment the route for
11 this guy?

12 A Well, is not appropriate for a Mr. Saunders because
13 he has such a prolific pattern of offending. Moreover,
14 the treatment that you get in outpatient sex offender
15 treatment is not nearly as intense as you would get at
16 the sexually violent predator treatment program.

17 Q Okay. And also do you have an opinion, again to a
18 reasonable degree of psychological certainly, as to
19 whether or not Frank Saunders meet the legal criteria to
20 be found to be a sexually violent predator by this jury
21 at this time?

22 A Yes, he does.

23 Q Okay. If he is released who would be at risk or a
24 danger to Mr. Saunders?

25 A Children from about the age of three up to adult

1 women because PPG indicated that he had sexual arousal to
2 coercive sex with adult females. So he has a wide, wide
3 pattern of potential victims.

4 Q Do you know of anything -- now is he facing any kind
5 of probation or community supervision when he gets -- if
6 he is -- if the jury lets him loose?

7 A He has community supervision until June 30th of
8 2018. That would be a year and a half. But that would
9 not be nearly sufficient to -- for him to receive
10 treatment while he is on probation to attenuate his
11 strong sexual drive for children.

12 Q Okay. Do you know of anything that could require
13 him to get the treatment he needs other than this
14 commitment process we are doing this week?

15 A Not to my knowledge.

16 Q Okay. Thank you, Dr. Swan. Please answer any
17 questions counsel may have or the court may have.

18 THE COURT: Cross-examination, Mr. Falk.

19 MR. FALK: Can I have a moment, Your Honor?

20 THE COURT: Of course.

21 All right. Ladies -- do you want to take a short
22 break?

23 MR. FALK: Yes, Your Honor.

24 THE COURT: We are going to take about a five-minute
25 break, ladies and gentlemen. Please step to your jury

1 room. Do not discuss this matter or allow anyone to
2 discuss it with you. We will take about five minutes.

3 (WHEREUPON, break was had 9/20/16, 11:00 a.m.)

4 (WHEREUPON, resume 9/20/16, 11:11 a.m.)

5 THE COURT: All right. Ladies and gentlemen, at
6 this time we will continue with the petitioner's case and
7 the cross-examination of Dr. Swan.

8 Mr. Falk.

9 MR. FALK: May it please the court.

10 THE COURT: Yes, sir.

11 **CROSS-EXAMINATION BY MR. FALK OF DR. AMY SWAN:**

12 Q Dr. Swan, on your direct testimony you said that he
13 could not get outpatient treatment because it wouldn't be
14 nearly as intense of treatment as he would receive at the
15 SVP program; is that correct?

16 A That is correct.

17 MR. BOGLE: May I approach, Your Honor?

18 THE COURT: You may.

19 (WHEREUPON, bench conference was had.)

20 THE COURT: Ladies and gentlemen, I need -- there is
21 a matter that I must take up outside of your presence.
22 Please step to your jury room. Please do not discuss
23 this matter or allow anyone to discuss it with you.

24 (WHEREUPON, jury exits the courtroom.)

25 THE COURT: Okay. Yes, sir, Mr. Falk. Go ahead.

1 MR. FALK: Your Honor, I believe on direct
2 examination Dr. Swan said that the kind of treatment he
3 could get on the outside would not be as effective
4 because it would not nearly be - excuse me - as intensive
5 of a treatment as he would get in the sexually violent
6 predator treatment program. She made that part of her
7 opinion.

8 I think I'm -- that opens -- in spite of the motion
9 in limine before, I think that opens the door to my
10 exploration as to the basis for that opinion because
11 either she knows what kind of treatment he is going to
12 get or she doesn't know what kind of treatment he is
13 going to get.

14 And if she doesn't know what kind of treatment then
15 she can't say that it is going to be better than he would
16 get on the inside.

17 I mean if she -- they can't have it both ways. She
18 said it is not going to be as good as what he could get
19 outside. Granted he will be under community supervision
20 for 18 months.

21 And it is her opinion that that would not be good
22 enough but it could only be the kind of treatment she'd
23 get in the program because it would be more intensive.
24 And I think the jury needs to know what she is talking
25 about.

1 MR. BOGLE: In response, Your Honor, I am looking at
2 the broader picture where she is looking at whether or
3 not he needs to be locked up for treatment versus
4 outpatient treatment in the context of his risk to the
5 community.

6 His risk to the community and his lack of ability to
7 control himself is of such a magnitude that the treatment
8 has to be confined for treatment as opposed to
9 outpatient.

10 If outpatient - and she testified further - if let
11 go who would be at risk. And she talked about the age
12 groups that could be victimized by this guy or would be a
13 risk if he is let go.

14 So I think the treatment was asked in that context.
15 He needs -- outpatient wouldn't work not because of the
16 intensiveness. Of course it is more intensive.
17 Inpatient has got to be more intensive. But the problem
18 is he would be more of a risk. So I see the testimony
19 being presented in that context.

20 THE COURT: All right. Let me ask you this
21 question. What is this jury at the end of the day asked
22 to do? What is the jury asked to do?

23 MR. FALK: The jury at the end of the day is asked
24 to determine whether or not he suffers from a mental
25 disease or defect that makes it likely to reoffend if not

1 confined for long-term care and treatment.

2 So I mean just simply the fact that she is going to
3 diagnose him as having pedophilia is not enough because
4 it is the likelihood to reoffend if not confined.

5 It would be our position at 18 months of community
6 supervision with outpatient treatment is as valid as a
7 protection to society as going into the program. Or at
8 least that would be our contention that that is for the
9 jury to determine.

10 MR. BOGLE: And of course in that context we are
11 looking at matters that are not really going to be a part
12 of the record.

13 Like speaking in general terms, community
14 supervision can order a guy to go to outpatient
15 treatment. If he doesn't go they can revoke him for a
16 certain period of time up to the remaining amount on his
17 sentence. In this case in about a year and a half. But
18 there is no control over him while he is out in the
19 community.

20 The jury is being asked today -- he has been
21 convicted of the right kind of crimes; there is no
22 dispute there. He is a pedophile; there is probably no
23 dispute there.

24 The question is is he is going to do it again. And
25 this guy has got a pattern. For one, '74. Thirteen

1 years later he does it again. Does it again. And now he
2 is about to get out of prison after 13 years, and the
3 question is has he learned anything.

4 And as recently as four months prior to seeing her,
5 which is not that long ago, he is doing things in prison
6 where he is sexually aroused to small children.

7 So it is an issue of danger; is this guy a danger to
8 the community. And the bottom line is that is what they
9 have got to figure out.

10 And as far as treatment, you know, in general term I
11 am told that -- that community supervision can order
12 treatment. But they can't enforce it until you don't go.
13 And you are loose in the community the whole time.

14 MR. FALK: Your Honor, if I could.

15 THE COURT: Yeah.

16 MR. FALK: If we look -- if you will look at Kansas
17 verses Hendricks.

18 THE COURT: And if you have it you need to pass it
19 up for me.

20 MR. FALK: I can -- I could get you the site. I
21 think I have got it. But I am just saying that is a
22 Supreme Court decision. That is ---

23 THE COURT: Yes.

24 MR. FALK: That was a four, four, one, decision with
25 Justice Stevens' concurrence. And with regard to

1 questions of whether or not the SVP programs in general
2 are *expos facto* that -- it was focusing on the fact of
3 need for treatment; that it is not confinement but it is
4 that it is confinement and it is therapeutic confinement
5 is what is the basis that justifies the SVP program.

6 So if you take away the fact that he needs to go for
7 treatment and if it is just that he is a risk to society
8 and needs to be locked up forever I think now you have
9 gone to clearly what has become a penile section -- a
10 penile sanction as opposed to something that is defended
11 by the mental health laws.

12 If I could, I think I have got the case.

13 MR. BOGLE: I think what *Kansas v. Hendricks* did was
14 the -- the case was upheld in the initial case and then
15 *Kansas v. Hendricks* refined it by imposing the
16 requirement that the person had difficulty controlling
17 his behavior. I can't remember the name of the first
18 case that upheld the law.

19 MR. FALK: Grant. Grant. Isn't it ---

20 MR. BOGLE: No, it was something else.

21 (WHEREUPON, pause for Mr. Bogle to review documents.)

22 MR. BOGLE: Yeah, *Kansas v. Hendricks* upheld the law
23 for the very first time at the U.S. Supreme Court level;
24 and that was in 1997.

25 And *Kansas v. Crane* in 2002 brought in the lack of

1 control element. That is the order in which they had.

2 But I apologize for not knowing that right off.

3 THE COURT: Let me just tell you here is the piece
4 that I am considering, it is the piece of it that would
5 be this: Can the jury make a determination the State has
6 failed to meet its burden of proof when the State has
7 proven beyond a reasonable doubt that the respondent is
8 someone who has a record for a violent sex offense and
9 they have a mental abnormality or personality disorder
10 and that they are at risk to reoffend.

11 MR. BOGLE: Well, by risk to reoffend, serious
12 difficulty controlling their behavior which ---

13 THE COURT: Or -- or somebody who would have
14 serious -- but believe that that can be controlled on
15 outpatient treatment as opposed to inpatient treatment.

16 In other words, what I am struggling with is is the
17 jury given the opportunity to decide whether or not the
18 treatment is one that is to be confined or non-confined
19 as opposed to whether or not the individual meets the
20 definition and the treatment is a consequence.

21 MR. BOGLE: Well, to me the definition includes the
22 treatment. Okay. That the mental abnormality is of such
23 a degree that he has got to be confined for long-term
24 control, care, and treatment.

25 So confinement goes with the mental abnormality.

1 And to get there you show the lack of control.

2 THE COURT: What do you mean when you say goes with?

3 It is ---

4 MR. BOGLE: Well ---

5 THE COURT: --- a separate element or not?

6 MR. BOGLE: --- it is part -- it is part of the
7 definition.

8 THE COURT: Okay.

9 MR. BOGLE: The definition of mental abnormality as
10 I understand it is to be of such a degree that requires
11 confinement for long-term ---

12 THE COURT: Gotcha.

13 MR. BOGLE: --- control, care, and treatment.

14 THE COURT: Then tell me this. Then why isn't Mr.
15 Falk exactly correct that this jury is entitled to
16 consider whether or not treatment on an outpatient basis
17 is -- is -- can be done?

18 MR. BOGLE: Well, they can consider it; but can this
19 witness be required to go into the details. And we argue
20 that the details -- she is not involved in treatment ---

21 THE COURT: Well, she doesn't.

22 MR. BOGLE: --- of these people.

23 THE COURT: If she -- she can decide awh, awh, awh,
24 awh.

25 MR. BOGLE: But she is also -- but also it would be

1 speculated at best. Because we don't know what kind of
2 treatment he is going to need until he gets there..

3 THE COURT: I gotcha.

4 MR. BOGLE: Some guys need it really really bad.
5 Some guys don't.

6 THE COURT: Gotcha. Okay. I am with you. All
7 right. You are -- I am going to let him ---

8 MR. FALK: Well, my point is is that she opened the
9 door ---

10 THE COURT: You get ---

11 MR. FALK: --- and she's ---

12 THE COURT: Hello. You are in. I don't even think
13 she had to open the door. You are there.

14 MR. FALK: Thank you.

15 THE COURT: So you can ask the question.

16 MR. FALK: Thank you, Your Honor. I'm sorry, I
17 didn't under- -- I thought you were looking for my
18 response.

19 THE COURT: No, I wanted to look at you and say you
20 won.

21 MR. FALK: My father says when the judge is smiling,
22 shut up. Sometime I never remember that.

23 THE COURT: I would smile at all my lawyers. All of
24 my lawyers. Yes. You know, what; I get very motherly.
25 So, aah, they are so wonderful. I pray.

1 And those objections that you mentioned, you will
2 just have to make them as they come.

3 MR. BOGLE: Yes. Thank you, Your Honor.

4 (WHEREUPON, jury enters courtroom 9/20/16, 11:27 a.m.)

5 THE COURT: All right. Ladies and gentlemen, at
6 this time we will continue with the petitioner's case and
7 the cross-examination of Dr. Swan.

8 Yes, sir. Mr. Falk, you may continue. Thank you.

9 Q Dr. Swan, you had testified earlier that he could
10 not get inpatient treatment in spite of the fact that he
11 is going to have community supervision for 18 months
12 because the treatment would not be as intense. Was that
13 not your testimony?

14 A I think you misstated it. I said that he could not
15 receive outpatient treatment ---

16 Q I'm sorry, I will ---

17 A --- because it was not intense enough. That is what
18 I said.

19 Q What type of treatment would he receive in -- at the
20 Sexually Violent Treatment Predator Program in South
21 Carolina; do you have any firsthand knowledge?

22 A I do.

23 Q Can -- okay.

24 A The treatment program is what we call a modified
25 Rockwood version. They have 17 modules that they

1 complete about different aspects of sex offending that
2 every individual who comes into the program complete.

3 However, completion of those 17 modules is not
4 sufficient to say that the individual has completed
5 treatment.

6 In addition to those they have a case manager who
7 works with the person on a very close level and they give
8 them assignments based on their offense history and the
9 treatment interfering factors that they are demonstrating
10 on the unit in order that they will address those factors
11 so that they can remain offense free when they are on the
12 outside.

13 The difference is that in outpatient treatment you
14 go one and a half hours a week. There is no one watching
15 to make sure you do your homework. There is no one
16 watching what you are doing in the meantime.

17 Whereas at the Civil Commitment Center you are
18 monitored 24 hours a day. You have staff available at
19 all times to discuss issues with you that might arise
20 while you are doing your homework or while you are
21 interacting with others on the unit. And it is a very
22 comprehensive treatment program.

23 The primary benefit is that individuals who cannot
24 control their sexual behavior on the outside are
25 monitored and everything they do is grist for the mill in

1 treatment to change their life so that they can control
2 those deviant sexual fantasies.

3 Q How many hours a week would they be in actual
4 treatment sessions if they were in custody?

5 A The groups -- the process group which is where they
6 actually deal with the sex -- sexual offenses is two
7 hours a week. But they have, as I said, assignments.
8 And they work on those assignments in between.

9 Moreover they have some other groups such as
10 substance abuse or interpersonal relationships,
11 dialectical behavior therapy for people who have
12 personality disorders, to help them change those parts of
13 their life that may also be a factor in the sex offender.

14 Q So you had testified earlier that outpatient would
15 be one-and-a-half hours a week and inpatient it is two
16 hours -- if he was in the program it is two hours a week?

17 A Two hours a week of actual group. But on the
18 outside the person doesn't have anything that encumbers
19 them as far as what they do.

20 On the inside every single thing they do is
21 monitored and addressed in treatment, because the milieu
22 in inpatient treatment is like a modified view of the
23 world. So if he has trouble accepting feedback from his
24 peers when he is doing something wrong then that is
25 likely a factor in how he committed his sexual offenses.

1 So that is brought to group and discussed. So the
2 treatment is 24 hours a day and is not just two hours a
3 week while they are in group.

4 Q If somebody is sitting in a room being monitored --
5 I mean if somebody is in a -- in a room at the Sexually
6 Violent Treatment Program reading a book is he being --
7 is that a part of his treatment?

8 A Well, the types of books that they are permitted to
9 read are monitored. They are not allowed anything
10 inappropriate, and they are encouraged to read books that
11 will facilitate their treatment.

12 Q But if you went -- if he went to an outpatient
13 program and he met with a group for an hour and a half a
14 week, just 30 minutes less than he would be meeting with
15 a group while he was at the program, and if he was given
16 homework assignments and required to complete the
17 homework assignments as a condition of his community
18 supervision there is a monitoring there because he has to
19 complete the assignment otherwise it would jeopardize his
20 community supervision?

21 A Not to the same degree that it does in inpatient
22 treatment. I haven't seen anyone ever kicked out of
23 outpatient treatment for not doing their homework.

24 Q How much study have you done on that?

25 A I have been working with treatment programs for 17

1 years.

2 Q Any in South Carolina?

3 A Well, the Civil Commitment Center.

4 Q Right, so I mean there could be treatment programs
5 up in Greenville, up in Spartanburg, somebody is in a
6 halfway house working at -- with an outpatient treatment
7 and you would really have no basis of knowing what
8 intensity that would be?

9 A I would not. But there is no treatment that as --
10 as intense as you get in a Civil Commitment Center. And
11 that is across the United States in the 21 states that
12 have this law.

13 Q And how long does the treatment have to last?

14 A Treatment lasts for a period of years. I think
15 sometimes six, seven, eight years.

16 Q You said that he is monitored constantly in this
17 treatment?

18 A That is correct.

19 Q If he is at ---

20 A That is correct.

21 Q Does that mean there are guards?

22 A There are guards, yes.

23 Q Can he leave -- what kind of -- where is the
24 sleeping; what does that look like?

25 A He is in a room. Some of the rooms have two guys in

1 the same room, and some have one.

2 Q Does it have a door on it?

3 A It does.

4 Q Does it lock from the outside?

5 A Yes, it does.

6 Q Do you know what kind of liberty he is given during
7 the day?

8 A Well, their liberties are based on their privilege
9 level. Whether they are red -- red level they have no
10 privileges. In green level those are the average
11 privileges. And blue level are when their behavior is
12 superb and they get additional privileges.

13 Q His family come? Can they, you know, check him out
14 of the facility and go to Western Sizzler for dinner or
15 something?

16 A No. No one can leave the Center once they get
17 there.

18 Q Okay. So he could be there for six or seven -- six
19 to eight years?

20 A He could.

21 Q Thank you.

22 A Depending on how well he applies himself to
23 treatment. There are people that have been released
24 after less time because they really did what they were
25 supposed to do and they got out earlier.

1 Q Thank you. Let me go back to your -- you -- where
2 were you when you spoke with him when -- the evaluation?

3 A Oh, the Forensic Evaluation Center in Columbia.

4 Q Okay. When you evaluated him did you take any
5 notes?

6 A I did.

7 Q Are they done contemporaneously?

8 A Yes, they are.

9 Q Do you have them with you?

10 A I do.

11 Q Is that tape recorded?

12 A No.

13 Q And what is the time period between -- how does it
14 go; so you get assigned to one of these cases; is that
15 correct?

16 A That is correct.

17 Q Okay. And then what is the next thing that happens?

18 A I review the information that I am sent by the
19 Attorney General's Office and then I schedule an
20 appointment.

21 Q You reviewed the information. Is that the MDT, the
22 multidisciplinary ---

23 A Yes. Yes.

24 Q Okay. And so you review all of that first?

25 A Yes.

1 Q Okay. And then you go meet with him?

2 A Yes.

3 Q And at what time do you then make your decision?

4 A I usually make my decision while I am writing my
5 report because that is the time when I assimilate all of
6 the information and put it together and arrive at a
7 decision about whether a person really if he has any type
8 of mental abnormality or personality disorder and if that
9 mental abnormality or personality disorder predisposes
10 him to commit future acts of sexual violence.

11 Q So I mean when did you prepare the report in this
12 case?

13 A I turned the report in on April 2, 2016.

14 Q So is that the day you made your decision?

15 A Well, it was probably that is the day the final
16 draft goes in. It was probably a couple of days before
17 that. And then I proofread it and that type of thing.

18 Q Okay. It is safe to say that a lot of your report
19 is based on what he tells you; is that correct?

20 A That is correct.

21 Q Especially what he told you about his sexual
22 fantasies; is that correct?

23 A That is correct.

24 Q If there was a misunderstanding between you and him
25 would that affect the validity of your report?

1 A It could.

2 Q For example, if he thought that you were asking him
3 what were his sexual fantasies -- sexual fantasies in
4 2004 and he was telling you about his attractions but
5 those were not his current fantasies would that be --
6 would that affect the validity of your report?

7 A Well, in the 54-page interview form it says -- and I
8 will read this to you: What percent of your current
9 sexual fantasies are about females between the ages of
10 zero and four, females between the ages of five and
11 eight, females between the ages of nine and twelve, and
12 so on.

13 So it says very clearly current sexual fantasies.

14 Q Did he read that report or did you ask him that
15 question?

16 A I asked him that question.

17 Q Okay. Would you mind if I see that?

18 A Not at all.

19 (WHEREUPON, document provided to counselor.)

20 Q Is then is there something on that report that talks
21 about when you asked him a question about masturbation in
22 the last four months is that also on this report?

23 A Yes, it is.

24 Q Where is that?

25 A Right below there.

1 Q Where is it about that?

2 A Well, let me see if I can ...

3 (WHEREUPON, document provided to the witness.)

4 A I believe this is that right here (pointing). None
5 in prison for twelve years. Four months ago distracts
6 himself with action movies.

7 Q That says that he -- what you have said there is he
8 distracts himself by thinking of something else when --
9 that -- that did not say that he masturbated to that
10 fantasy.

11 A He told me that he last masturbated to a fantasy of
12 a child four months ago. That's -- that would be four
13 months prior to the 18th of February.

14 Q Again could I see your note?

15 A Sure.

16 (WHEREUPON, document provided to counselor.)

17 A There is another question on that. Let me see if I
18 can find that other question for you.

19 Q Okay.

20 (WHEREUPON, document provided to the witness.)

21 A I think that is the only reference.

22 Q Would you then mind reading what question you read
23 to him and word for word what his response was?

24 A I said what are your current sexual fantasies. And
25 all of this is -- runs together. I ask about the first

1 time they masturbated, what he fantasized about,
2 frequency as a juvenile, frequency now, sexual fantasies
3 about past victims, and sexual fantasies about children.

4 Q Okay.

5 A And then I ask when they last masturbated about a
6 child.

7 Q And what was his response?

8 A Four months ago. And he distracts himself with
9 action movies.

10 Q I am sorry, one more ---

11 MR. FALK: May I approach one last time, Your Honor?

12 THE COURT: Yes.

13 Q There is a question --

14 MR. FALK: May I ask from here?

15 THE COURT: Yes.

16 Q There is a question -- Number 11 it says
17 masturbation, and then there is a colon?

18 A Right.

19 Q And right to the right of that it says none in
20 prison for twelve years, four -- and then it says four
21 months distracts himself with action movies?

22 A Yes.

23 Q Now is that -- and it is your testimony that that is
24 his response to the last time he masturbated?

25 A That is correct. See this says, last time

1 masturbated the fantasies of a child. None in prison for
2 twelve years, then four months ago and he distracts
3 himself with movies. All of that is part of that.

4 Q Well, the word "then" is not there; it just says
5 four months, distracts himself, action movies ---

6 A Well, I write as brief as possible because there are
7 54 pages of notes and he is talking rapidly.

8 Q But the question above it says what are your current
9 sexual fantasies; I ---

10 A Yes, and then I wrote in: Last time masturbated to
11 fantasies of child.

12 Q As an answer or as a question?

13 A No, as a question. And here is the answer.

14 Q Okay. During this time period were you doing other
15 examinations?

16 A I think I had one later in the day.

17 Q Between February 18th, 2016, and April 2nd, 2016,
18 were you doing other examinations?

19 A Yes.

20 Q Okay. You had -- is it safe to say that you had a
21 large workload at that time?

22 A Yes.

23 Q Because did you ask for a continuance in this case
24 in preparing your report?

25 A I did.

1 Q And as a basis for your continuance did you say that
2 at the time you had seven examinations?

3 A That is correct.

4 Q And you also were preparing to -- or maybe you
5 testified in two trials?

6 A That is correct.

7 Q Okay. And at that time were those examinations were
8 those commitment examinations and annual reviews or just
9 commitment examinations?

10 A I believe that they were commitment evaluations,
11 because my annual reviews I do far more than seven.

12 Q Okay. So having seven annual reviews going on at
13 the time is there a possibility that you were mistaken as
14 to what his response was or what he meant by his
15 response?

16 A I did not have seven annual reviews going on at the
17 same time; I was in the room alone with Mr. Saunders, and
18 that was his answer to my question.

19 Q Yes, I can appreciate that; but I mean I am talking
20 about the fact that you interviewed him February 18th and
21 then six weeks later you prepared the report.

22 A That's correct. That is pretty typical.

23 Q So in that intervening time you also were preparing
24 and you had interviewed at least seven other people plus
25 all of the annual reviews; is that correct?

1 A That is correct.

2 Q So is there any possibility that you could have
3 gotten some of these people confused?

4 A Absolutely not. Because I wrote down on this form
5 exactly what he said in the interview.

6 Q Okay.

7 A So there was no confusion with other people. It was
8 on the form.

9 Q Did he say anything in the interview about his
10 parents?

11 A He did.

12 Q Is that on the form?

13 A Yes, it is. It says that he has never seen his
14 father since 1963 and that he had a stepfather named
15 James who came into his life at 17.

16 Q Does it say when they passed away; did you reflect
17 that on there?

18 A Yes. The second step-father died one month after
19 Hurricane Hugo on 10/23/89. He does not know if his --
20 anything about this biological father.

21 Q Does it say when his mother passed away?

22 A It does not. He -- oh, yes, it did. 12/23/98 of
23 multi-organ failure.

24 Q Okay. Do you review your notes when you review
25 these reports?

1 A Absolutely.

2 Q And you repaired -- you prepared a report in this
3 case?

4 A I did.

5 Q Do you have a copy of that with you?

6 A I do.

7 Q Could you look at Page 2 of the report.

8 A Yes.

9 Q Could you look at -- could you maybe read the last
10 I guess four sentences starting with the very last of
11 the -- well, let me just --

12 MR. FALK: If I could approach?

13 THE COURT: Yes.

14 Q Right there (pointing).

15 A He said ---

16 Q On yours. That is fine.

17 A Okay. He said that he argued with his mother over
18 his gambling and this was the only time that his
19 relationship with his mother was not good.

20 He indicated that he last saw her a few days before
21 she died. She died of heart problems one month after
22 Hurricane Hugo.

23 Q So that is different from your notes, is it not?

24 A No, it is not. Yes, it is different than my notes.

25 It definitely is. His mother died on 12/23/98, and his

1 step-father died on 10/23/89.

2 Q So it is possible that you can get something
3 confused from going from your notes to your report?

4 A It is.

5 Q Thank you.

6 A But that was very -- that previous question was very
7 clear.

8 Q Well, it was very clear he was talking about his
9 mother here too, right?

10 A That is correct.

11 Q I mean you were asking him questions about his
12 mother and then you certainly -- you would expect him to
13 know when his mother died, would you not?

14 A That is correct.

15 Q You testified earlier that past conduct is a good
16 predictor of future conduct. That was your testimony, is
17 that not correct?

18 A That is correct.

19 Q Okay. Unless -- you would -- you would accept that
20 if -- unless there is an intervening event; is that
21 correct?

22 A That's correct.

23 Q Okay. For example, an intervening event could be
24 completion of sex offender treatment?

25 A That is correct.

1 Q Okay. And he told you what he had been doing for
2 the last 13 years, did he not?

3 A He did.

4 Q His Bible studies?

5 A Yes.

6 Q Did you do any firsthand review to look at the
7 classes he took?

8 A I did not. I am pretty familiar with the Amayas
9 (ph) program that he talked about. Of course he is
10 limited in what he can do in a prison setting in that the
11 program. But I am pretty familiar with that program.

12 But, again, certainly we want someone to do Bible
13 studies if that makes them a better person because that
14 is going to help them in all areas of their life. There
15 is just no research that indicates it is a factor in
16 reducing risk for sexual re-offense.

17 Q Can you cite any research where it says that it is
18 not a factor?

19 A There is some research actually. In fact there is
20 some research, and I believe the author of that research
21 study is Nunez. And it says that people that are very
22 devoted to do their faith and it is a continuing pattern
23 for a long period of time are at a higher risk for
24 committing another sexual offense.

25 Q So you are saying it is impossible for him to have

1 rehabilitated himself by a commitment to Christ and
2 studying the Bible?

3 A Well, I don't ever want to rule that out. But his
4 responses in my interview indicated that he did not have
5 any knowledge of what lead him to offend and how he would
6 stop offending.

7 Q An appreciation of knowing what he is doing is a sin
8 and -- that is not enough?

9 A Not typically. He reoffended knowing he was going
10 to go -- he could go to prison; and that didn't stop him.

11 Q What was his first prison sentence?

12 A He received three months in the Juvenile Detention
13 Center.

14 Q The second one?

15 A The second one he received ninety days with three
16 years of intensive probation.

17 Q Do you know where he served 90 days?

18 A I don't.

19 Q Do you have any reason to believe it wasn't in the
20 county jail?

21 A Typically sentences of that length are in the county
22 jail.

23 Q Would you equate 90 days in the county jail with 13
24 years at a correctional facility?

25 A No, but the research indicates that any kind of

1 sanction such as incarceration is considered a sanction
2 and the person it should be a wake-up call to the person
3 that they could not -- should not continue to do this.

4 Q But you can't equate -- you can't say that spending
5 90 days in the county jail is the same as spending 13
6 years in prison?

7 A I am not saying it is. But I am saying that he has
8 received previous sanctions and he did not learn anything
9 from them.

10 Q But you are not saying that you couldn't learn
11 something being in prison for ---

12 MR. BOGLE: Objection. Asked and answered, Your
13 Honor.

14 MR. FALK: I don't think she has answered it yet.

15 THE COURT: Cross-examination. I will allow it.

16 MR. BOGLE: Thank you.

17 A I am not saying that he can't learn. I am saying
18 that I don't believe that Mr. Saunders did learn.

19 Q Thank you. You had talked about a life-long offense
20 pattern; is that correct?

21 THE COURT: I -- could you hear that? A life-long
22 what?

23 MR. FALK: I'm sorry. I was -- I am sorry.

24 Q You had talked earlier about a life-long offense
25 pattern.

1 THE COURT: Oh, okay.

2 A Yes.

3 Q And what was your testimony on that?

4 A That he said that he noticed his first arousal to
5 children when he was sixteen and he acted on that with
6 the five- to seven-year-old girl and that he had
7 masturbated to the fantasy of a child four months ago,
8 four months prior to the interview. And that was a span
9 of 41 years.

10 Q Okay. But you had talked about -- I heard the term
11 76 years. What was that? You had said something they
12 continue to offend?

13 A Oh, if -- if someone is aroused to children at the
14 age of 16 they will still be aroused when they are 60, 70
15 because it is a long-term chronic disorder; it does not
16 go away.

17 Q Are you familiar with the Static 99 coding rules?

18 A I am.

19 Q And do you have them with you?

20 A I do.

21 Q Could you look at the scoring rules for -- I want to
22 make sure we are looking at the same thing.

23 A Yes.

24 Q So if you could pull out the scoring rules for Item
25 Number 10.

1 A Item Number 10 is any male victims.

2 MR. FALK: Your Honor, may I approach?

3 THE COURT: You may.

4 Q A lot of this stuff floats around and I am not sure
5 what is current. This, is this ---

6 (WHEREUPON, document provided to witness.)

7 A Yes, these are the current coding rules that we are
8 working under. Although new ones are coming out in about
9 two weeks.

10 Q Okay. Then could you flip through to that and look
11 at the coding rules for Number 10. It is probably pretty
12 eared because I had it opened to that.

13 A It still says Item Number 10, any male victims.
14 There are ten items, and that is the last one.

15 Q I'm sorry, Item Number 1.

16 A Yes.

17 Q So is that the same one that you have?

18 A Yes.

19 Q Can you just check that your book is the same,
20 because I have got to grab that back from you.

21 A Well, these are the 2003 coding ---

22 Q Okay. All right.

23 A So you are welcome to have yours back.

24 Q There is a graph ---

25 A There is.

- 1 Q An age distribution graph?
- 2 A That is true.
- 3 Q Can you pull that out ---
- 4 A Yes.
- 5 Q --- of yours?
- 6 A Yes, I have it.
- 7 Q Okay. And is it safe to say that is graphing three
- 8 lines?
- 9 A Yes.
- 10 Q Three different types of offenders?
- 11 A Yes.
- 12 Q And one of them is incest offend- -- let's --
- 13 with -- with respect to child victims one of them is
- 14 incest offenders and one of them is extra CM which I
- 15 would guess means non ---
- 16 A Extra familial child molesters.
- 17 Q Stranger victims?
- 18 A Well, not necessarily strangers ---
- 19 Q You are right. You are right. Not family.
- 20 A --- but just outside the family.
- 21 Q Okay. And can you tell me where that line hits the
- 22 zero axis?
- 23 A It is at 60.
- 24 Q Okay. Thank you. So does that mean that
- 25 distribution of recidivism of sexual offenders for

1 somebody who has non-familial zeros out at 60?

2 A What that means -- as you will see, this study was
3 done in 2010. There have been at least two major
4 research studies on aging and sexual offenders.

5 And while most sex offenders decline at the age of
6 60, child molesters don't necessarily follow that
7 pattern. They maintain their sexual interests later into
8 adulthood. And there is no automatic risk declining
9 affect for child molesters at the age of 60 as there is
10 for a rapist.

11 Q But those studies that you are quoting are not
12 reflected in the current coding rules?

13 A No, they are not. And that is why we are getting
14 new ones in two weeks because so many studies have been
15 done.

16 Q Have you seen those studies? Have you -- is there
17 going to be a similar graph in the current one?

18 A There will.

19 Q Have you seen that?

20 A In fact -- well, I haven't seen it yet; but I do --
21 I am on a list serve, and it is going to be available in
22 two weeks.

23 Q Let me talk a little bit about the PPG test.

24 A Okay.

25 Q One moment. Any of those studies that you just

1. referred to do you have copies of them with you today?
- 2 A I have them in my car. So I don't have them here.
- 3 Q Okay.
- 4 A Wait a minute. I may have them.
- 5 Q Okay.
- 6 A Hold on. No, I don't have my age book with me.
- 7 Q Thank you.
- 8 A The reason I didn't bring it is because he is 57 and
- 9 he is not yet 60.
- 10 Q Sure. I would like to ask you some questions about
- 11 the PPG.
- 12 A Okay.
- 13 Q Are you familiar with the Association for the
- 14 Treatment of Sexual Abusers?
- 15 A Yes, I am.
- 16 Q And can you tell me something about that
- 17 organization?
- 18 A It is a large international organization devoted to
- 19 the study of sex offenders. We have people virtually
- 20 from all countries. And they set standards for sex
- 21 offender's treatment and sex offender's evaluation.
- 22 Q The standards that they set do they publish
- 23 standards?
- 24 A Yes, they do.
- 25 Q Do they publish it in something called me ATSA

- 1 Practical Guidelines?
- 2 A They do.
- 3 Q Do you have a copy of them with you?
- 4 A I don't have it with me, no.
- 5 MR. FALK: May I approach?
- 6 A Sure.
- 7 THE COURT: You may.
- 8 (WHEREUPON, document provided to the witness.)
- 9 A Thank you.
- 10 Q Would you look over that to make sure that we are
- 11 talking about the same ATSA Guidelines.
- 12 A Yes, we are. Yes, that is it.
- 13 Q Okay. If I could grab them back from you.
- 14 A Okay.
- 15 Q These guidelines talk about phallometry, PPG
- 16 testing; do they not?
- 17 A They do.
- 18 Q They also talk about polygraph testing, do they not?
- 19 A They do.
- 20 Q And Abel testing, do they not?
- 21 A That is correct.
- 22 Q And is it safe to say that all three of them are --
- 23 is there a similarity between those three types of tests?
- 24 A They are all physiological types of arousal.
- 25 Q So they are all three tests that would measure

1 somebody's response in spite of what they say; is that a
2 safe way to say it?

3 A That is correct.

4 Q Maybe we can say that is an objective testing
5 method?

6 A Yes.

7 Q As opposed to subjective, what the person ---

8 A Yes.

9 Q Okay. And all three of those methods are approved
10 by the ATSA, are they not?

11 A Yes, within the guidelines.

12 Q Within the guidelines. Now when we are talking
13 about the guidelines do they establish ethical standards
14 for administering the PPG test?

15 A They do.

16 Q And I am going to hand you the same guidelines back.
17 And if you could really read Guideline Number 7.01.

18 A Member obtains specific informed consent from
19 clients prior to using phallometric viewing time and/or
20 polygraph methods.

21 Q Thank you. What does that mean to you as a
22 professional?

23 A That the individual has to know what the test will
24 do, what the results will be used for.

25 Q What the results will be used for?

1 A That is correct.

2 Q And should it also not be what the consequences of
3 not taking the test would be?

4 A Well, I don't think that -- I think if I were giving
5 the consent for something, that would be included in my
6 information process about, you know, this is what I am
7 going to use the test for.

8 Q Are you aware ---

9 A I don't know what Dr. Burke does, but I am assuming
10 it is a similar process.

11 Q But you have no firsthand knowledge of that?

12 A I do not.

13 Q And prior to coming here today did you know what the
14 consequences would be in South Carolina of not agreeing
15 to take the test?

16 MR. BOGLE: Objection, Your Honor. A matter of law
17 to take up if I may.

18 THE COURT: Sure.

19 MR. BOGLE: I apologize. But just

20 THE COURT: Absolutely.

21 Ladies and gentlemen I'm going to ask you to please
22 step to your jury room. Do not discuss this matter. Do
23 not allow anyone to discuss it with you. We will be with
24 you shortly. We won't be long.

25 (WHEREUPON, jury exits courtroom 9/20/16, 12:04 p.m.)

1 MR. BOGLE: Okay. The nature of my objection here
2 is to relevance and speculation and assuming facts not in
3 evidence. I think where Mr. Falk is going to go is asking
4 her about what happens if you refuse to cooperate with an
5 evaluation which you might be held in contempt by a
6 circuit court, you might have to sit in prison or the
7 jail if you maxed out, until such time as you begin to
8 cooperate.

9 Well, in this case as she can testify from reading
10 Dr. Burke's consent form, as far as informed consent and
11 what those guidelines say, that is what the guy was told.

12 THE COURT: I am with you.

13 MR. BOGLE: Now as far as what would happen
14 afterward, she would have no way of knowing unless she
15 heard it from me ---

16 THE COURT: I agree.

17 MR. BOGLE: And it is a matter of speculation. And
18 frankly it is also interesting this guy was still in
19 prison when the PPG was ran.

20 THE COURT: Got it.

21 MR. BOGLE: He was three months from getting out.

22 THE COURT: I am with you. It is speculation. And
23 what would happen is not up to her anyway. It is
24 complete and utter -- is complete and utter speculation,
25 what would happen if he didn't agree.

1 MR. FALK: I don't -- I just want her to answer the
2 question. If she says, no, I don't know, I don't have
3 any firsthand knowledge of that; then I am fine.

4 THE COURT: I gotcha. It is not an appropriate
5 question. I am going to sustain the objection.

6 MR. BOGLE: Thank you, Your Honor.

7 MR. FALK: All right. Just so I know where we are,
8 so my question is ---

9 THE COURT: Your question is do you know what would
10 happen if he had not consented. And the answer is, no,
11 she -- it is speculation.

12 MR. FALK: Well, was that her -- I mean is that what
13 her answer was?

14 THE COURT: That was your question.

15 MR. FALK: I know. So ---

16 THE COURT: So I am not going to let her answer.
17 You may never know what her answer is.

18 MR. FALK: Okay. Okay. That is what I wanted to
19 make sure.

20 THE COURT: Unless you need it proffered for some
21 reason. And you are welcome to have it proffered if you
22 need to proffer it, you know, for appellant purposes. Do
23 you want to proffer?

24 MR. BOGLE: Yes, Your Honor.

25 THE COURT: You have got it. And out of the

1 presence of the jury you may respond.

2 Do you know?

3 DR. SWAN: Only from what Mr. Bogle told me. I have
4 no idea.

5 **PROFFER BY MR. FALK OF DR. AMY SWAN:**

6 Q And so prior to this hearing you had no idea?

7 A No.

8 Q Thank you.

9 THE COURT: Very well. You were paying attention to
10 Mr. Bogle. Aah. He will be delighted. All right.

11 Jury, please, ma'am.

12 (WHEREUPON, jury enters courtroom 9/20/16, 12:09 p.m.)

13 THE COURT: All right. Mr. Falk, you may continue.

14 **RESUME CROSS-EXAMINATION BY MR. FALK OF DR. AMY SWAN:**

15 Q Let me just put the PPG questions aside, and I am
16 going to come back around to them. But in your report
17 you had asked him whether he current -- if you could just
18 look at Page 5 of your report.

19 A Yes.

20 Q If you could read the last part of that paragraph,
21 again, starting with he said and running through I guess
22 to the end of the whole paragraph. The very last
23 paragraph on the page it says he said that he
24 currently ...?

25 A Masturbates once a week and the most he has

1 masturbated in one day is once. He stated that when he
2 first came to prison he had sexual fantasies about his
3 past victims but that was the last time.

4 He said that he decided he needed to change so he
5 stopped masturbating to fantasies of children. He
6 indicated that the last time was in October of 2003.
7 However a minute or so before he said that the last time
8 that he masturbated to a fantasy of a child was four
9 months ago.

10 Q Did you ask him to explain that inconsistency?

11 A I don't know that I asked him to explain it.

12 Q Could you look at I guess the second full paragraph
13 on the next page.

14 MR. BOGLE: Are you on Page 6?

15 MR. FALK: Yeah, I am on -- yes, I am on Page 6, the
16 second full paragraph. One, two, three, fourth, fifth
17 line and then the sentence starting with Mr. Sanders.

18 Q Denied any history. Could I ---

19 A Mr. -- Mr. Saunders denied any history of homosexual
20 relationships, adding that the Bible says it is a sin.

21 Q Next sentence.

22 A However this did not seem to apply to male children.

23 Q That was another inconsistency?

24 A Well, he told me that he was not aroused to adult
25 males and that he had never had a relationship. My

1 comment was however that did not apply to male children.

2 He didn't say that. That ---

3 Q No, I understand that.

4 A Oh, okay.

5 Q But I mean my point is he says that homosexuality is
6 a sin?

7 A That is right.

8 Q And that is not his thing?

9 A That is correct.

10 Q Okay. And then you are noting in your report that
11 he has -- he has had some homosexual encounters in the
12 past?

13 A No, I didn't say that.

14 Q Well, then what is the basis for that however that
15 did not seem to apply to male children; what ---

16 A It said that he molested male children. But that
17 doesn't necessarily mean that he is engaged in homosexual
18 encounters with adult men.

19 Q I see. Okay. Thank you.

20 And part of that -- in part of the report he told
21 you that he was not attracted to adult females, and then
22 he told you that he had a marital relationship with a
23 female for a year with an active adult sex life; is that
24 correct?

25 A That is correct.

1 Q Would you see that as an inconsistency?

2 A Well, he provided several inconsistent pieces of
3 information about his sexual history. And there wasn't
4 any in any other part of the evaluation. That was pretty
5 consistent.

6 Q But did you ever ask him to explain these
7 inconsistencies ---

8 MR. BOGLE: Judge, she should be allowed to
9 finish ---

10 MR. FALK: I'm sorry.

11 MR. BOGLE: --- her answer.

12 THE COURT: Certainly.

13 A Well, when he provides one piece of information and
14 then another shortly thereafter, I note it and proceed to
15 the next question.

16 Q So it is not your practice to find out why there is
17 an inconsistency?

18 A Well, it depends on what the inconsistency is. His
19 all had to do with his sexual history and what he was
20 aroused to.

21 Q But could the inconsistency not be based on a
22 misunderstanding of the question?

23 A I guess that it could be. The questions are pretty
24 straightforward.

25 Q Before you started the -- his evaluation did you

1 look to see about his mental acuity?

2 A If it was in the information that I had -- let me
3 just see. I believe that he was either average or above
4 average intelligence. Yes, his IQ is 115 which falls in
5 the above average range.

6 Q Did you look at his school records?

7 A I don't think I was able to get school records. It
8 was so long ago. I always request the school records.

9 Q Doesn't your report refer to the fact that he
10 repeated the second, fourth, and twelfth grades?

11 A That is true. And let me just check and see if he
12 told me that or if I got that from a record.

13 (WHEREUPON, pause for witness review of record.)

14 A He told me that he repeated the second, fourth,
15 and -- the second and fourth grades.

16 Q And he took his senior year twice?

17 A Took the senior year twice. That is correct.

18 Q Is that consistent with somebody with an IQ of 115?

19 A Well, there are many reasons that people have to
20 repeat grades. Some they are not motivated. Some they
21 may have learning disability but the IQ is intact.

22 Q So did you explore the possibility whether or not my
23 client had a learning disability?

24 A That is pretty much beyond the scope of my
25 assessment. I obviously note any IQ that is listed so I

1 know if I have to like frame the questions in a different
2 manner for someone who is either lower intelligence or
3 if, you know, they are gifted perhaps I don't have to
4 explain quite as much.

5 Q So you are saying whether or not he has a mental
6 disability has no place in this whole evaluation process?

7 A I didn't say that at all.

8 Q Okay.

9 A I said there are many reasons why someone with an IQ
10 that is sufficient would repeat grades.

11 Q And one of them could be a learning disability?

12 A Some of them could. But I ask questions about that,
13 like whether they have ever had attention deficit
14 disorder, whether they have ever been placed in special
15 education classes; and he denied all of those questions.

16 MR. FALK: One moment, Your Honor.

17 THE COURT: All right.

18 Q If you could look at Page 3 of your report.

19 A Yes.

20 Q Under the heading educational history.

21 A Yes.

22 Q Could you look at the last sentence in the -- look
23 at the last -- the second sentence on the page in that
24 paragraph where it says he indicated.

25 A He indicated that he was placed in regular classes

1 until the seventh grade and then he was placed in special
2 education for English.

3 Q So he was in a special-ed class?

4 A One class for English. That is not a global deficit
5 that I -- would lead me to conclude that there were other
6 things that I needed to consider.

7 Q But it could be whether or not he is dyslexic or
8 have problems understanding or have problems reading,
9 would that not be under a deficiency in English?

10 A Well, it might in fact be. But in my interview with
11 him it was clear that he understand what I said and that
12 he knew what was going on.

13 Q Let me come back around now. I am going to now
14 resume talking about the PPG test.

15 A Okay.

16 Q You administered the test and -- you did not
17 administer it; you read the results of the test?

18 A I read the results of the tests.

19 Q Do you have that raw data with you?

20 A I do. Here it is. Yes.

21 Q He -- and it shows on there that he indicated his
22 greatest level of arousal was to adult males?

23 A That is correct.

24 Q So anything else is secondary to an arousal to adult
25 males; is that safe to say?

1 A That is true.

2 Q Okay.

3 A Based on this test.

4 Q Sure.

5 A Obviously you want to consider how -- what he has
6 acted on. And he told me he had never had a relationship
7 with an adult male.

8 Q So are you saying that if you have a PPG test that
9 says you are related -- that your maximum arousal is to
10 adult males that it could somehow be that you weren't
11 aroused to adult males?

12 A Well, I am just saying that you may not necessarily
13 act on the arousal.

14 Q Okay.

15 A If he thinks that homosexuality is a sin even though
16 he is attracted to it he may not act on it.

17 Q Sure. What kind of data did he -- did Dr. Burke
18 supply? Did he give you Z scores, percentage of ---

19 A Z scores area under the curve and the maximum and
20 minimum arousal in millimeters.

21 Q Did he do a deviance test or a deviance score?

22 A He typically does. I am just on the third page of
23 that. Let me just find it real quick. Yes, he did.

24 Q What does that show?

25 A It says that the standard deviation for the adult

1 male persuasive which is subtracted from his gradient
2 deviant arousal is preschool female coercive.

3 The difference between the two is within one
4 standard presentation, one standard deviation. And that
5 means he has equal preference for a female rape scenario
6 with a preschooler and an adult male in a consensual
7 situation.

8 Q Does it show if they did a part of the testing
9 showing what his minimum circumference response threshold
10 was?

11 A They did.

12 Q Does that show how that compares with some of the
13 other?

14 A It does.

15 Q How does that -- and how does that compare with
16 adult male?

17 A Well, the adult male persuasive - let me find that
18 on here - was 19.6 millimeters of stretch. The minimum
19 would be 4.7 millimeters.

20 So we had 19.16 to adult male persuasive. To
21 grammar school female coercive he had 22.08. So even
22 though it is more for the female grammar school,
23 statistically they are in the same standard deviation.

24 Q But why would the report ---

25 A Statistically.

1 Q Then why would the report say his maximum response
2 is to adult males?

3 A It said his maximum response to appropriate stimuli
4 was the adult male.

5 Q Okay.

6 A His maximum response to the inappropriate stimuli
7 was the preschool female coercive.

8 Q That is not what your report says though?

9 A What does my report say?

10 Q Mr. Saunders' greatest level of arousal was to adult
11 male persuasive.

12 A Well, it is the appropriate arousal.

13 Q Well, that is a significant difference in meaning to
14 that sentence; is it not?

15 A It could, yes.

16 Q Thank you.

17 There was no PPG done in 2003 prior to commitment
18 for 13 years, was there; were you made aware of ---

19 A Not to my knowledge.

20 Q Okay.

21 MR. FALK: If I may approach for a moment.

22 A Sure.

23 MR. FALK: Your Honor, if I may approach?

24 THE COURT: You certainly may.

25 Q Again, that is the ATSA ethical standards?

1 A Yes, it is.

2 Q And 7.06?

3 A Yes.

4 Q What does that say?

5 (WHEREUPON, document provided to witness.)

6 A Member's appropriate limit -- appropriately limit

7 phallometry - that is the technical name for a PPG - to

8 the following purposes: accessing the client's relative

9 sexual arousal and preferences regarding age and gender.

10 Q Thank you.

11 A And that is exactly what this PPG did.

12 Q How long have you been performing sex offender

13 evaluations, precommitment evaluations?

14 A Precommitment for 17 years.

15 Q Okay. Is it true that around 2015 you were

16 sanctioned by the ATSA?

17 A I received an ethical violation from the Association

18 for the Treatment of Sexual Offenders. That is correct.

19 Q All right. And if I can ask you a question and I

20 will let you clarify your answer. But what was the

21 context -- what kind of evaluation was it?

22 A It was an annual review.

23 Q Okay. And how many violations were noted?

24 A One that I am aware of.

25 Q Okay. So it was one instance?

1 A One instance. One case.

2 Q Okay. And what was the nature of the violation?

3 A The nature of the violation was I used an interview
4 called the relapse prevention interview and I placed too
5 much weight on it in my testimony as far as how it
6 applied to the individual that I evaluated. And that is
7 what I received my consequence for.

8 Q And what was the consequence?

9 A The consequence was that I should stop using the
10 interview and I would submit two reports for review. I
11 did that. The reports were determined to be just fine.
12 And I am still a member of ATSA in good standing.

13 Q What was the consequence for the person who was --
14 that you were providing the annual review for?

15 A Well, the consequence was -- well, I don't know that
16 there wasn't any consequence because there were two
17 doctors and we both said that he continued to meet
18 criteria.

19 Q But it was your -- but you used that to support your
20 opinion that he continued to meet the criteria?

21 A I did.

22 Q All right. Thank you.

23 MR. FALK: Your Honor, I am going to sort of change
24 subjects here. Would this be a good time?

25 THE COURT: Yes, ---

1 MR. FALK: Thank you.

2 THE COURT: --- it would be a good time.

3 Ladies and gentlemen, we have reached a stopping
4 point and we are going to take our lunch. We are going
5 to take an hour and five minutes for lunch.

6 I am going to ask you to be back please in your jury
7 room ready to continue with this matter at 1:30. You
8 remember the culinary opportunities available to you in
9 St. George.

10 Please be mindful not to discuss this matter and not
11 let anyone to discuss it with you. No investigation.
12 Please remember that.

13 Leave your cell phone somewhere other than the
14 courthouse. If you forget, please turn them over to our
15 bailiffs for the afternoon.

16 And have a very good lunch. See you out -- see you
17 all back at 1:30.

18 (WHEREUPON, jury exits courtroom 9/20/16, 12:27 p.m.)

19 THE COURT: All right. Anything before we go to
20 lunch?

21 MR. BOGLE: No.

22 MR. FALK: No, Your Honor.

23 THE COURT: All right.

24 MR. BOGLE: Not that I can think of. 1:30?

25 THE COURT: All right. Have a good lunch.

1 And remember not to talk about your testimony with
2 anyone, please. See you all at 1:30.

3 (WHEREUPON, adjourn for lunch 9/20/16, 12:28 p.m.)

4 (WHEREUPON, resume 9/20/16, 1:35 p.m. following lunch.)

5 THE COURT: Thank you so much. Please be seated.
6 Anything before I bring the jury out?

7 MR. BOGLE: No, Your Honor. Thank you.

8 THE COURT: And of course we are going to wait on
9 our respondent and then we will have them come out.

10 THE COURT: Is there anything else?

11 MR. FALK: There is one thing I wanted to make
12 clear.

13 THE COURT: Sure. Not a problem. Let's wait.
14 Let's wait for him. And of course we are going to wait.
15 (WHEREUPON, respondent is seated in courtroom.)

16 THE COURT: Okay. I am listening.

17 MR. FALK: Your Honor, when I made a motion in
18 limine yesterday about the PPG I understood your ruling
19 from the bench is that you didn't necessarily accept my
20 substantive due process argument but that you had some
21 concerns about the consent on whether or not it was made
22 consensually and that whether or not it is, you know, a
23 reasonable search and seizure; so that when I renewed my
24 motion to the PPG up on the bench I only talked about
25 consent, but of course I wanted to renew all of the

1 issues that I raised in my motion in limine as grounds.
2 I just wanted to protect the record on that.

3 THE COURT: I know you do.

4 MR. FALK: Are you comfortable with that?

5 THE COURT: I am.

6 MR. FALK: Thank you.

7 THE COURT: Absolutely. Gosh, I think we have all
8 tried to do that for the record. Okay.

9 MR. BOGLE: I have been handed, Judge, a verdict
10 form and what looks like a jury charge. Is this your
11 entire jury charge or part of it or what?

12 THE COURT: It is a beginning.

13 MR. BOGLE: Okay.

14 THE COURT: And we can certainly have some
15 conversation about it. It was just to give you guys a
16 little bit of a heads up ---

17 MR. BOGLE: Right.

18 THE COURT: --- so you could have something to talk
19 about.

20 MR. BOGLE: Okay. I wanted to have a conversation.
21 This is not the right time now, but before you do it
22 because there is one thing I wanted to add that got left
23 out so.

24 THE COURT: Not a problem.

25 MR. BOGLE: Okay. Thank you.

1 THE COURT: That is the reason I give it to you
2 so -- what I do is I have an informal charge conference.
3 And because as you know in order to object to a charge I
4 have to do it after it is given.

5 But in my -- it has become my practice to just meet
6 with the lawyers and get the benefit of their opinion,
7 let them look at it.

8 And, you know, you would be surprised at how much I
9 learn and how many times I will add or not add. But it
10 has just it has become my practice. And the sooner I can
11 give it to lawyers then the more trouble I make for
12 myself.

13 MR. BOGLE: Thank you, Your Honor.

14 THE COURT: So we had it ready. Mr. Smythe had it
15 ready. And, again, it is our first pass at it. And we
16 are delighted to have you look at it and have your input.

17 MR. BOGLE: Thank you, Your Honor.

18 THE COURT: And that is to get you ready for our
19 charge conference -- our informal charge conference.

20 MR. BOGLE: Yes, ma'am.

21 THE COURT: All right. Come on down.

22 (WHEREUPON, witness returns to stand.)

23 (WHEREUPON, break awaiting jury.)

24 (WHEREUPON, jury enters 9/20/16, 1:38 p.m.)

25 THE COURT: Thank you. All right. Ladies and

1 gentlemen, at this time we will continue with the
2 petitioner's case and the cross-examination of Dr. Swan.

3 Mr. Falk.

4 MR. FALK: Thank you.

5 **RESUME CROSS-EXAMINATION BY MR. FALK OF DR. AMY SWAN:**

6 Q Dr. Swan, I just wanted to take you back again to
7 the PPG test and some of your prior testimony.

8 A Yes.

9 Q I believe that you had said that there were some
10 critics of the use of the PPG?

11 A Yes.

12 Q And some of the criticism about the use of the PPG
13 about whether or not it is appropriate as a tool for as
14 in a diagnostic function versus a therapeutic function,
15 can ---

16 A That is true. There is also some criticism as far
17 as whether it should be used in a criminal case.

18 Q Okay. And what I mean by diagnostic, that would be
19 whether or not you can put somebody on the machine and
20 based on his responses get a result that is going to help
21 you diagnose whether or not he suffers from a disorder?

22 A Well, I don't think there is any questions about
23 that because that is the purpose of the PPG. I think it
24 is more of the use of that diagnostic information like
25 for example no opinion that you arrived at should be

1 based solely on the results of a PPG.

2 Q Is one of the other uses of the PPG whether or not
3 to show in more of a therapeutic session to show whether
4 or not counseling is having an impact?

5 A Absolutely. And that is probably the most common
6 usage.

7 Q Okay. The therapeutic usage?

8 A Yes.

9 Q Okay. And you were -- you were one of the critics
10 of the PPG; is that correct?

11 A Absolutely.

12 Q And do you recall testifying in Florida in the case
13 of -- I am sorry, Isaac -- en re the commitment of Isaac
14 Washington?

15 A Yes.

16 Q On whose behalf were you testifying in that case?

17 A I was just testifying for the State.

18 Q Okay. And so what was -- was the respondent in that
19 case trying to use the PPG?

20 A He was, yes. And the -- what occurred was that he
21 had no arousal and that was being presented as if he was
22 no longer a risk to commit a sexual crime.

23 Q And when you had talked before about some of the
24 biggest problems with the PPG I think your testimony was
25 that some people can fake it; is that correct?

1 A Some people can fake it. And some people don't show
2 arousal at all.

3 Q Is that the -- do you recall in your testimony in
4 Isaac Washington was that the main concern you had?

5 A I don't recall my testimony since it was 13 years
6 ago. But I believe it was being presented as evidence
7 that he was no longer at risk.

8 Q Do you recall some of the testimony at that time
9 talking about the uniformity of the stimulus sets that
10 are used?

11 A The standardization, yes, back in 2003 there was a
12 significant problem with the standardization. Since that
13 time the Monarch Company and -- has develop a
14 standardized set. And I have -- believe that Limestone
15 has as well.

16 Q But this was done on a Limestone machine; is that
17 correct? Mr. Saunder's PP- ---

18 A Mr. Saunders' was done on Limestone, yes.

19 Q And what -- and what is your knowledge about the
20 standardization of the sets used in this examination?

21 A It is my understanding that they have a standardized
22 set that they use on the Limestone and that ---

23 Q This is a set that was developed by Dr. Burke; is it
24 not?

25 A Yes; the Burke Musoff (ph) set, I believe. Yes.

1 Q Because it was part of your testimony in Isaac
2 Washington that there is a problem with using like the
3 Monarch test without using the Monarch stimulus set?

4 A Yes.

5 Q Okay. And what is the problem if there is no
6 uniformity in the stimulus sets?

7 A Well, you don't know that you are comparing apples
8 to apples and oranges to oranges.

9 Q Sure. And can -- and did they provide you when Mr.
10 Burke gave you his opinion in this case did he provide
11 you with any kind of proof to show that the stimulus sets
12 had been standardized or to show that they had been --
13 let me just think of the best way to say this, to show
14 that I guess that they had been proven that if you have a
15 response to this stimuli it means you suffer from this
16 paraphilia?

17 A Well, the Burke sets have been standardized.

18 Q Standardized meaning that it is the same pictures
19 each time; is that correct?

20 A Yes.

21 Q But as -- have they been proven to be accurate? Has
22 there been any -- has there been any correlation studies
23 using the Burke test to show that if I am shown a picture
24 of -- would it be safe to say that you might see a
25 picture of an eight-year-old girl in a baby suit as part

1 of the testing; I mean as an example?

2 A That is possible.

3 Q Okay.

4 A Yes.

5 Q Has there been any test to show that using that type
6 of picture, the one that Mr. -- Dr. Burke uses, has been
7 shown to correlate to any type of paraphilic arousal?

8 A It is my understanding that there has been research
9 done by Dr. Burke on that stimulus set and that it has
10 been standardized.

11 Q So it is not really peer-reviewed though; I mean it
12 is he is the one pushing the test and he is saying it
13 works?

14 A That is correct. I haven't seen any peer reviews of
15 his stimulus set. But I do know that research has been
16 conducted on it.

17 Q And since you know the research has been conducted
18 you don't know what the results of the research was is --
19 do you?

20 A Well, I can't cite them for you. I have three
21 binders like this full of PPG research. I am sure that I
22 could find it in here.

23 Q But we are not talking not just PPG research, we are
24 talking about whether or not the stimuli sets that Dr.
25 Burke used ---

1 A Yes.

2 Q --- are accurate or valid, there has been a validity
3 survey done?

4 A A validity study. That is correct.

5 Q And at this point you can't cite to one?

6 A I can't cite it, no.

7 Q Okay. Thank you. But it is your testimony that the
8 standardization is-- was the problem that you had in 2004
9 when you were testifying in the Washington case?

10 A That is correct.

11 Q Okay. And would the lack of standardization be a
12 bigger problem when you are using a PPG as a diagnostic
13 function versus using it as a therapeutic? I mean if I
14 showed you ---

15 A Yes.

16 Q Yeah ---

17 A Yes, absolutely. Because the consequences are
18 greater.

19 Q And also it is not that I am measuring the same
20 person's response to the same picture but if you are
21 using it as a diagnostic function you are really wanting
22 to know if that guy is going to respond the same way as
23 that guy would ---

24 A That is correct.

25 Q --- to the same picture?

- 1 A That is correct.
- 2 Q So that is why standardization is more important?
- 3 A That is correct.
- 4 Q Thank you. And you did a -- and you did the Static
- 5 99 in this?
- 6 A I did.
- 7 Q Okay. Can you tell me how you decide -- now maybe
- 8 if you could explain. You do the Static 99 and then you
- 9 get a number.
- 10 A Yes.
- 11 Q And you got a number of six in this case?
- 12 A Yes.
- 13 Q And then you make a comparison to a different groups
- 14 of people who scored the same amount, right; I mean the
- 15 same number?
- 16 A Yes.
- 17 Q Okay. And it is important to compare -- as before,
- 18 you were talking about it is important to compare apples
- 19 to apples and oranges to oranges; is that correct?
- 20 A That is correct.
- 21 Q Okay. So the group that you are comparing it to is
- 22 an important -- I mean you want to compare it to the
- 23 right group that is similar to my client?
- 24 A That is correct.
- 25 Q Okay. And when you did the 99 you used the group

1 preselected for high risk?

2 A That is correct.

3 Q And why is that?

4 A I used that group based on my training with Leslie
5 Helmus who is the most recent person to do the norms and
6 standardization of the Static 99. I spent a weekend with
7 her in Canada.

8 And she indicated that the high risk, high need
9 group would be appropriate for those who have factors
10 extraneous to the Static 99 such as dynamic risk factors.

11 MR. FALK: One moment, please.

12 THE COURT: All right.

13 Q Do you have any of the -- so when you are talking
14 about the groups those are then surveys done of a typical
15 type of offender or group of offenders; is that correct,
16 they have pools of people that you are comparing them
17 to?

18 A Well, what happens when they do the factor analysis
19 on the statistical analysis, different groups fall out.
20 Different loadings in which the data is weighted. And so
21 they group those into different names like high risk,
22 high need, or routine.

23 MR. FALK: One moment, please.

24 THE COURT: All right.

25 Q In the groups that are used for the comparison, are

1 any of those considered a population of offenders from
2 the United States?

3 A Yes.

4 Q Which one is that?

5 A Well, they are all mixed in. They have individuals
6 from -- hold on. I will tell you the different
7 countries. Okay. Eight samples of sex offenders from
8 Canada, the United States, England, Austria, and Sweden.

9 Q Is that -- that's -- that is the normal risk group
10 though, is it not?

11 A The same risk group is the different -- is for all
12 of the samples. You know, when we were doing it before
13 based on these coding rules there were different groups.
14 There were actually four groups. Now we have dropped
15 down to two based on the 2015 research. But the
16 countries that contribute the data are the same, and the
17 United States does contribute samples.

18 Q But ---

19 A In fact one of the samples was from the Florida
20 Civil Commitment Center.

21 Q I am looking at the coding rules, and it shows the
22 high risk, high need, you have this Bergstrum 2008 group?

23 A Do you have the most recent update, or are you
24 looking at the coding rules? Because there is a 2015
25 update.

1 Q Could I see that?

2 A Uh-huh. It starts right here (pointing).

3 (WHEREUPON, pause for review.)

4 Q As I look at the high risk, high needs group ---

5 A Yes.

6 Q --- and they talk about the Bergstrum from 2008,
7 that is a group from Denmark?

8 A That is.

9 Q And then they talked about the Bonta and Yessine
10 group; that in a Canadian group?

11 A Yes, it is. And then they talk about the Haag,
12 H-A-A-G, Group; and that is another group of Canadians?

13 A That is correct.

14 Q Then they talk about Knight and Thorton 2007?

15 A That is correct.

16 Q And that is Massachusetts?

17 A That is. That is United States.

18 Q People who -- I am aware of that. Those are people
19 who are already committed to a sex offender treatment
20 program; is that not ---

21 A That is correct.

22 Q Okay. My client has not been committed to a sex
23 offender treatment program, has he?

24 A The Static 99 utilizes individuals who have been in
25 treatment as well as people who have not been in

1 treatment. It is about half and half. And that makes
2 the sample more heterogeneous so that we can drive better
3 conclusions from it.

4 Q But I am still -- if we are making a comparison of
5 apples to apples and oranges to oranges the only group
6 that you -- that is of American offenders, which would be
7 the closest kind of group to my client as far as his past
8 experience, those are people -- the old ones that are in
9 the high risk, high need group are people from
10 Massachusetts who have already been committed to the
11 program; that is -- that is of the groups and the high
12 risk, high need -- or the high need -- the high need
13 group; the one that you compared my client to as opposed
14 to a group of routine offenders or whatever the standard
15 group of offenders?

16 A Yes, Canadian samples and the Massachusetts sample.
17 That -- when you have that many people in the sample that
18 type of the difference would be pretty insignificant.

19 If there are only three people in the sample it
20 would make a difference; but in a large sample such as is
21 used for the Static 99, that would not be significant
22 factor.

23 Q Well, there's lots of people used for the -- for the
24 Static 99. You have got groups of routing offenders;
25 that is one group?

1 A That is correct.

2 Q And there's a lot of people in that group?

3 A Right.

4 Q Now you are making a comparison to a high needs
5 group?

6 A That is correct.

7 Q And there's a lot of people in that group too?

8 A That is correct.

9 Q Although they are all from another country or they
10 are people from the State of Massachusetts who have
11 already been committed to the program, already who have
12 been presumably before a jury in Massachusetts, and found
13 to be a sexually violent predator?

14 A That is correct.

15 Q So it seems as though that when you are making
16 your -- your -- before you even looked at the Static 99
17 you have already made a decision that you think my client
18 is a sexually violent predator because you compared him
19 to people -- the only apple to apples comparison you
20 used were people from Massachusetts who have already been
21 through a civil commitment proceeding and been found to
22 be a predator?

23 A That is not true. They were either assessed at the
24 Massachusetts Treatment Center or received treatment
25 there. The sexually dangerous persons were committed

1 there.

2 The ones who were assessed there were not
3 necessarily. And they were from foreign services, the
4 Board of Probation, Parole, and MTC authorized absence
5 program and FBI records. So not all of them were
6 committed to a treatment program.

7 Q But you have no data as to how many had been?

8 A I do not know.

9 Q All right. And you are not employed by the State of
10 South Carolina; you have -- you are a contractor for the
11 State of South ---

12 A I am an independent contractor. That is correct.

13 Q Okay. And you have a contract with the State of
14 South Carolina to do precommitment cases; is that
15 correct?

16 A Precommitment and annual reviews.

17 Q Do you know how many precommitment cases were
18 covered by your contract?

19 A I -- my contract said 15 per year for this current
20 contract?

21 Q Okay. Do you know how many precommitment cases you
22 have reached opinions on?

23 A I believe it is right at 15. Maybe 16.

24 Q I am not saying this year. I am just saying in
25 total for the State of South Carolina.

1 A I do not know.

2 Q Would it surprise you that you have had 22?

3 A No.

4 Q Okay. What is the best way to do this. I -- I am
5 not sure if you are going to be able to remember all of
6 these cases by the case name.

7 MR. FALK: I apologize, Your Honor.

8 THE COURT: No problem.

9 Q Do you remember doing an evaluation for a Micah
10 Bilton?

11 A I do.

12 Q And do you recall whether or not you recommended his
13 commitment?

14 A I believe I did.

15 Q Do you recall doing a case recommending a commitment
16 for a Joe Van Brown?

17 A I do.

18 Q I guess that was a two-part question. You recall
19 the evaluation and you recall the commitment?

20 A Yes, I do.

21 Q Okay. Michael Caldwell?

22 A Michael Caldwell. I remember the name. I don't
23 remember the case.

24 Q Can you recall any precommitment cases where you
25 have found that the person did not qualify?

- 1 A Yes. ~
- 2 Q Which one is that?
- 3 A Well, there have been three.
- 4 Q Where are those?
- 5 A Well, obviously ---
- 6 Q What counties -- do you recall what counties?
- 7 A I don't. I don't.
- 8 Q Robbie Collins.
- 9 A I remember that case, and I recommended commitment
- 10 for him.
- 11 Q John Henry Dorsey?
- 12 A Same thing.
- 13 Q Michael Felder?
- 14 A I don't remember that case. I recognize the name.
- 15 I don't remember the case.
- 16 Q Jimmy Phil-yah (ph)?
- 17 A I remember that one, yes. I did recommend
- 18 commitment for him.
- 19 Q Wake Hunt?
- 20 A Yes, I recommended commitment for him.
- 21 Q Kominski?
- 22 A Yes, I recommended commitment for him.
- 23 Q Kenneth Martin?
- 24 A I remember the name. I don't remember that case.
- 25 Q Timothy Reeves?

1 A I don't recall that name at all. I don't believe
2 that I did that one.

3 Q And Schaeffer?

4 A I remember Schaeffer, yes.

5 Q If I showed you the front page of Michael Caldwell
6 do you think that would help you remember his one -- his
7 evaluation?

8 A Well, I would have to see the crimes. Because that
9 would help me remember what case it was.

10 MR. FALK: Well, I am just showing --

11 Q If I showed you this?

12 THE COURT: You can show her the Manhattan phone
13 book if you think it might refresh somebody's memory.
14 (WHEREUPON, document provided to the witness.)

15 A You know, I remember -- obviously I did this. I
16 don't remember this particular case.

17 Q Well, does the front page show whether or not you
18 made a recommendation?

19 A It does. It says that I recommended commitment for
20 him.

21 Q Okay. That was Caldwell. You remember
22 committing -- recommending commission for Collins,
23 Dorsey, and Felder; or you did not remember Felder?

24 A I know the name. I don't remember what my
25 recommendation was on him.

1 Q Here. This is actually one I think I showed you
2 yesterday.

3 A Oh, okay.

4 (WHEREUPON, document provided to the witness.)

5 A Yes, I remember -- oh, yes, I remember this one.

6 Q That was another commitment case?

7 A Yes, it was.

8 Q And I don't believe Martin was in that group from
9 yesterday. This is Kenneth Martin?

10 (WHEREUPON, document provided to the witness.)

11 A Yes.

12 MR. BOGLE: Can I have Felder back when you are
13 finished?

14 MR. FALK: What is that?

15 MR. BOGLE: Felder back on your next trip?

16 MR. FALK: Oh, yeah, yeah, yeah.

17 Q The reason why you might not remember Mr. Reeves is
18 I said his name is Timothy, but it is Frederick Reeves.
19 See if that doesn't ring a bell. But there you go.

20 (WHEREUPON, document provided to the witness.)

21 A Yes.

22 Q So I think that is that whole list that I gave you
23 between Bilton, Brown, Cauldwell, Collins, Dorsey,
24 Felder, Filyah, Hunt, Komenski, Barton, Reeves, and
25 Schaeffer?

1 A Correct.

2 Q And those were all commitment cases?

3 A Yes.

4 Q And you didn't recommend that -- in none of those
5 cases did you recommend that somebody was not -- did not
6 need to be committed?

7 A Not in those cases.

8 Q And there is only three of the ones that you have
9 done that you can recall where you have recommended no
10 commitment?

11 A Three that I remember this year. There may have
12 been one that I recommended -- that I said last year.

13 Q I just don't know if it is my bad luck or my
14 client's bad luck, but those -- I named you all the cases
15 of which I have been involved with ---

16 A Right.

17 Q --- and all of which that you have said that my
18 client needed commitment?

19 A That is correct.

20 Q Okay. Now you are compensated by the State of South
21 Carolina to do these?

22 A I am.

23 Q And what is the compensation?

24 A \$4,000 per evaluation. And that includes the trial
25 and the travel.

1 Q So that is \$60,000 a year if you are doing 15 a
2 year?

3 A That is correct.

4 Q And then how many annual reviews do you do a year?

5 A I do a hundred annual reviews per year.

6 Q And what is the compensation for that?

7 A I get \$1,900 for each of those.

8 Q So even if that is 2,000 that is another \$50,000 a
9 year?

10 A That is correct.

11 Q So now where else are you working at this time?

12 A I work in Florida.

13 Q Because you said that you have been doing Jimmy Rice
14 commitments - and that is what you have called them -
15 since 2004; is that correct?

16 A 2000.

17 Q 2000?

18 A Yes.

19 Q And about how many of those do you do a year?

20 A That differs. We have a different system in
21 Florida, so the ones that I am assigned by the State
22 would probably be about 24. The ones that I am retained
23 independently by state attorneys, that varies.

24 Q I'm sorry, what is the difference there; between
25 state attorneys, do you mean like Mr. Bogle is a state

1 attorney?

2 A Yes.

3 Q Okay. And then who -- and then the State is somehow
4 separate?

5 A Yes, in Florida we are not under the Department of
6 Mental Health. We have a sexually violent predator
7 program that distributes, collects the referrals from the
8 Department of Correction and then distribute the reports.

9 But the state attorneys always have the option of
10 getting their own expert, and so they often retain of the
11 people that are on the panel independently.

12 Q I see. Okay. So going -- so let's say in 2015 how
13 many did you do in the State of Florida?

14 A I don't know.

15 Q Can you make an estimate?

16 A I don't have a clue. I do a lot of work in Florida,
17 so I don't have a clue of how many I did. I haven't
18 counted them.

19 Q Does your work in Florida exceed the amount of work
20 you do in South Carolina?

21 A I would say that it is probably -- probably equal.

22 Q Okay. And has that been steady for the last --
23 since 2000, the workload?

24 A Well, it fluctuates depending on who is in power
25 politically. There were -- we had some a couple of years

1 where we weren't seeing as many referrals just because of
2 the nature of it is a government agency. But it has been
3 pretty steady over the years.

4 I think that probably from 2008 to the present time
5 we have seen dramatically less than we did in the first
6 eight years of the program.

7 Q Okay. And your CV indicates that you have a private
8 practice in Fort Lauderdale?

9 A I do.

10 Q And your CV indicates that you -- practice of
11 clinical and forensic psychology including but not
12 limited to clinical psychological evaluations. What
13 would that be?

14 A I do evaluations for individuals, for example, in --
15 if they are involved in a child abuse case to see whether
16 they are dangerous to their child and if they need to be
17 under some kind of supervision.

18 Q Okay. Because part of your private practice is to
19 do sexually violent predator assessments; is that
20 correct?

21 A It is.

22 Q Okay. So I just want to know what part of your
23 private practice is not devoted to sexually violent
24 predators.

25 A Well, I do custody evaluations. I do child abuse

1 evaluation. I do domestic violence evaluations. I do
2 civil cases.

3 Q What -- dependency evaluations?

4 A That would be child abuse.

5 Q Munchhausen by proxy evaluations?

6 A That is correct.

7 Q That is child abuse I guess also?

8 A Yes.

9 Q Okay. So that is all in a DSS format? That is all
10 -- well, we have DSS. I am not sure what y'all call it.

11 A Yes.

12 Q Okay.

13 Q About how much of your practice is devoted to that
14 type of work? And what I mean by "that type of work"
15 would be paid whether by the State of Florida or by a
16 private attorney for work that is not devoted to sexually
17 violent predators.

18 A Probably about 10 percent.

19 Q Now in 2013 the -- are you familiar with an article
20 that ran in -- I am not sure what the Sun Sentinel
21 Newspaper is. Is that the Miami pa- -- no, that is not
22 the Miami.

23 A That is the Fort Lauderdale paper.

24 Q Fort Lauderdale paper?

25 A Yes.

1 Q Do you recall an article where they talked about how
2 much money the State of Florida has paid you for doing
3 these Jimmy Rice evaluations?

4 A They did.

5 Q Can you tell us since from 2000 to 2013 how much you
6 were paid by the State of Florida?

7 A Yes, it was 2.2 million dollars which figures out to
8 be a hundred and -- about \$145,000 a year which is a
9 pretty average salary for a psychologist.

10 Q But if that average would also include the \$100,000
11 you would have gotten from the State of South Carolina
12 for -- since this year plus it would include the other
13 ten percent of your practice for other private work; so I
14 mean you are not representing that your 149,000 is for
15 being a full-time employee of the State of Florida, are
16 you?

17 MR. BOGLE: Objection as to relevancy. I think we
18 are getting pretty far afield right now.

19 MR. FALK: I think I can talk about -- I think I am
20 fair to cross-examination her regarding bias and
21 financial incentive to provide an evaluation.

22 (WHEREUPON, bench conference was had 9/20/16, 2:12 p.m.)

23 Q Part of your evaluation you noted whether or not he
24 had any disciplinary infractions while in custody?

25 A That's correct.

1 Q Okay. And he was in custody for 13 years?

2 A That's correct.

3 Q And he had one disciplinary infraction in 13 years?

4 A I had two. Possession of contraband and the public
5 masturbation.

6 Q And what was the contraband?

7 A I do not know what the contraband was. It was on
8 December 15th, 2011.

9 Q So that could have been a pack of cigarettes?

10 A It could be anything. Yes.

11 Q There is no reason to think the contraband was
12 related to any type of sexual paraphilia, is there?

13 A No, absolutely not.

14 Q So there was no possession of contraband with child
15 pornography?

16 A No.

17 Q And there was also no write-ups for any type of
18 contact, sexual contact, between he and another male
19 prisoner?

20 A That is correct.

21 Q But it was your evaluation whether or not you are
22 saying now that it is his primary motivation or just his
23 primary whatever motivation that is is primarily aroused
24 by age appropriate males?

25 A Well, I didn't say that was his motivation; I said

1 that is ---

2 Q Arousal level, peak arousal?

3 A That is what the PPG indicated.

4 Q Okay. But yet there was none of that type of
5 conduct?

6 A No.

7 Q And you have -- we have already gone over you have
8 done several of these evaluations. You have found people
9 with a lot more prison misconduct, have you not?

10 A Absolutely.

11 Q So is it fair to say that one or two over a 13-year
12 period is a relatively good record?

13 A Yes, it is.

14 Q And it is your testimony that he has 18 months of
15 community supervision?

16 A That's correct.

17 Q And there will be a consequence if he fails to -- if
18 he violates the community supervision?

19 A If he violates it he could end up going back to
20 prison for the rest of the community supervision.

21 Q And he would be monitored by Probation and Parole
22 during this period?

23 A That's correct.

24 Q Okay. I have no further questions.

25 THE COURT: All right. Redirect.

1 MR. BOGLE: Very briefly, Your Honor.

2 THE COURT: Yes.

3 **REDIRECT EXAMINATION BY MR. BOGLE OF DR. AMY SWAN:**

4 Q Dr. Swan, because of your contract with the
5 Department of Mental Health you are paid by the case?

6 A That is correct.

7 Q And I believe you testified that amount of money
8 covers everything?

9 A Yes.

10 Q So travel to Columbia to interview the guy, that is
11 covered?

12 A Yes.

13 Q Traveling up here to spent two days in trial or
14 however long it takes, that is covered?

15 A That is covered.

16 Q That all comes out of the same one fee for each
17 case?

18 A Yes.

19 Q Okay.

20 A And my travel expenses are typically about \$1,500 to
21 \$2,000 per case.

22 Q And does anything -- is the Department of Mental
23 Health is the amount that they pay you to do each case
24 contingent on whether or not you say the guy is a
25 predator or is not a predator?

1 A No, I get the same amount no matter what my opinion.

2 Q And have you also pursuant to the annual reviews
3 found that some of the guys who have been committed to
4 the Sexually Violent Predator Treatment Unit have
5 completed enough treatment to be safe to be at large and
6 not likely to commit acts of sexual violence and as a
7 result you have recommended their release?

8 A That is correct. I believe there are about six of
9 those at this point.

10 Q Now, Doctor, there was all this question about Mr.
11 Saunders's mental acuity. When a guy that you are
12 looking at under these circumstances has ever served in
13 the military is it your practice to ask us to get a court
14 order to get the military records?

15 A Yes.

16 Q And in this case was that the case with Mr.
17 Saunders?

18 A No.

19 Q Well, let me ---

20 A Oh, well, wait a minute. I believe I did get
21 military records. Let me just check.

22 (WHEREUPON, pause for witness to review documents.)

23 A Yes.

24 Q Okay. And in this particular case --

25 MR. BOGLE: May I approach the witness, Your Honor?

1 THE COURT: You may.

2 Q Let me hand you a certified copy, the DD-214.

3 A Yes.

4 Q Do you recognize that document as part of your
5 military records?

6 A I do.

7 Q And how does it show -- does it show how long he was
8 in the military, when he started and when he finished?

9 A It shows that he was in the military -- let's see.
10 The date entered was ---

11 Q The year.

12 A The year 1980. And May of 1980. And he separated
13 in May of 1983.

14 Q Okay. So three years in the military?

15 A Yes.

16 Q Honorable discharge, down at the bottom; ---

17 A Yes.

18 Q --- is that right?

19 A Uh-huh.

20 Q Okay. And one of the things he did was this
21 educational thing right (pointing). What does it say
22 there?

23 A It says multi channel communications equipment
24 operator course.

25 Q And how long was that course?

- 1 A Eleven weeks.
- 2 Q So this guy what does that tell you as far as the
3 guy's mental acuity?
- 4 A Well, it tells me that he has at least average
5 intelligence. And that was supported by the IQ testing
6 in the Department of Corrections which showed that he was
7 above average.
- 8 Q And here are the military records that show he was a
9 trained radio operator with the United States Army?
- 10 A Yes. And I would not suspect that someone could do
11 that if they were sub-average intelligence.
- 12 Q Okay. Could you have -- could have done this case
13 and reached the same conclusion without PPG?
- 14 A Absolutely. My conclusion would have been exactly
15 the same.
- 16 Q So why the PPG?
- 17 A He provided contradictory information to me, and I
18 wanted to sort of get to the bottom of that. It was also
19 helpful because even though I didn't diagnose him with
20 any sexual disorder related to some of the other things,
21 he was sexually aroused by it certainly indicates that he
22 has a victim pool that could be potentially larger than
23 just children.
- 24 Q Thank you, Doctor.
- 25 MR. BOGLE: Nothing further.

1 THE COURT: Okay. Very well right. Recross?

2 MR. FALK: No, Your Honor.

3 THE COURT: Very well. All right. Is this witness
4 free to leave?

5 MR. BOGLE: We would request she be released, Your
6 Honor.

7 THE COURT: Any objection?

8 MR. FALK: No objection.

9 THE COURT: Very well. You are free to go.
10 Call your next witness, please, sir.

11 MR. BOGLE: Nothing further, Your Honor. At this
12 time the State of South Carolina would rest.

13 THE COURT: Very well. Ladies and gentlemen, you
14 have now heard from the petitioner in the petitioner's
15 case in chief.

16 That signified to me that there are matters that I
17 must take up outside of your presence. I am going to ask
18 you to step to your jury room. Do not discuss this
19 matter. Do not allow anyone to discuss it with you. We
20 are going to be with you shortly, though. Don't go far.
21 (WHEREUPON, jurors exits courtroom 9/20/16 2:21 p.m.)

22 THE COURT: Motions.

23 MR. FALK: For the record. Your Honor, it would be
24 our position that the PPG test should not have been
25 admitted and any testimony should not have been admitted.

1 And if you take the PPG test out of here that is the only
2 strong evidence that the State has provided of any
3 current mental disease or defect.

4 I think there has been testimony that some of her
5 other testimony -- I think there -- I think in cross-
6 examination we developed some testimony that there would
7 have been confusion about what was being said about
8 sexual fantasies. And if you throw out that he has any
9 current sexual fantasies regarding children and if you
10 don't take the PPG test then I think you have to -- you
11 have got a picture of somebody in 2003 prior to when he
12 went into custody.

13 And I believe it is the Taft case where the issue
14 before the court has got to be what his current mental
15 disease or defect would be. And the PPG is the only
16 thing that provides any type of current mental disease or
17 defect. And otherwise we don't think the State has
18 carried the burden of proof.

19 THE COURT: Thank you so much. I would respectfully
20 deny your motion. I think that there is evidence from
21 this which this jury could certainly make the
22 determination commiserate with the statutory provisions.

23 And even if you were to set aside the PPG, that I
24 did not set aside, and convinced that it ought not be set
25 aside, but had it been, there certainly still is evidence

1 of a current and ongoing issues. Now -- that would
2 involve mental abnormality or personality defects.

3 Now are you ready?

4 MR. FALK: Yes, ma'am.

5 THE COURT: Do y'all need to take a short break
6 before you begin?

7 MR. FALK: Just two minutes.

8 THE COURT: Yeah. Yeah. Absolutely.

9 (WHEREUPON, break was had 9/20/16, 2:24 p.m.)

10 (WHEREUPON, resume and jury enters 9/20/16 2:29 p.m.)

11 THE COURT: All right. Ladies and gentlemen.
12 Before we took our recess the petitioner rested. And at
13 this time we will hear from the respondent.

14 Mr. Falk, call your first witness.

15 MR. FALK: At this time we will call Mr. Frank
16 Saunders to the stand.

17 THE COURT: Yes, sir, if you will come around and be
18 sworn.

19 THE CLERK: Please raise your right hand. State
20 your full name for the record.

21 THE WITNESS: Franklin D. R. Saunders, Jr.

22 (WHEREUPON, the witness was duly sworn.)

23 THE COURT: All right. Your witness.

24 **DIRECT EXAMINATION BY MR. FALK OF FRANK SAUNDERS:**

25 Q Mr. Saunders, ---

1 A Yes, sir.

2 Q --- Where were you last night?

3 A I was at the Detention Center.

4 Q Here in Dorchester County?

5 A Yes, sir.

6 Q And before that where were you?

7 A Tiger River.

8 Q Okay. Since 2003 have you been in custody that

9 entire time?

10 A Yes, sir.

11 Q Okay. When you were arrested you were -- did you go

12 into -- did you make bail when you were originally

13 arrested?

14 A No, sir, ---

15 Q So ---

16 A --- I did not have no money.

17 Q So how long have you been in custody?

18 A It has been over twenty years, nine months.

19 Q Thank you. Do you recall being interviewed by Dr.

20 Swan?

21 A Just a few months ago.

22 Q And where -- where did that take place?

23 A Columbia.

24 Q What was the setting like?

25 A We went to the room where she told me the questions

1 she was going to ask me pertaining to the case.

2 Q You just told me a second ago you were kind of
3 nervous. Are you nervous now?

4 A Yes, sir.

5 Q Were you nervous when you talked to Dr. Swan?

6 Q The same way.

7 Q Okay. She had asked you about what your sexual
8 fantasies were?

9 A Yes, sir.

10 Q Do you recall that question?

11 A Yes, sir.

12 Q And she -- and it is her testimony -- you were here
13 when she testified obviously?

14 A Yes, sir.

15 Q And you heard her say that forty percent of your
16 sexual fantasies were females between five at eight and
17 fifty percent females between nine and twelve; is that
18 correct?

19 A That is correct.

20 Q What did you mean? Did you -- were you talking --
21 did you understand her to say that was your current
22 fantasy?

23 A I was using past tense.

24 Q Why were you doing that?

25 A That's from when I got locked up.

1 Q And did you think she was talking about sort of how
2 you got here?

3 A Yes, sir.

4 Q Do you remember talking to her about -- did she ask
5 you questions about masturbation?

6 A Yes, sir.

7 Q You were here. Was -- did you tell her that the
8 last time you had masturbated to a child was four months
9 ago prior to that in ...?

10 A Yes, sir.

11 Q Was that your testimony?

12 A Yes, sir.

13 Q So it was your testimony that that was the last time
14 you had a fantasy about a child?

15 A The last time.

16 Q Was four months when?

17 A From the time I seen her.

18 Q Okay. You had talked about sexual fantasies about
19 children, and that was -- were all at the very beginning?

20 A Yes, sir.

21 Q Okay. Did you tell her that you were not attracted
22 to females?

23 A At the time I was not attracted ---

24 Q What do you mean ---

25 A --- until I got -- met ---

- 1 Q What do you mean ---
- 2 A --- until I got mar- --
- 3 Q What do you mean ---
- 4 A Until I got married.
- 5 Q Okay. When did your mother die?
- 6 A 1998. December 23rd.
- 7 Q When did your father die?
- 8 A September -- excuse me, October 23rd, 1989. One
- 9 month after Hugo.
- 10 Q Okay. Do you recall taking the PPG test?
- 11 A Yes, sir.
- 12 Q What did Dr. -- were you -- did you sign a consent
- 13 form?
- 14 A Yes, sir.
- 15 Q Was there any explanation that went along with that?
- 16 A Just what there was writing on the form.
- 17 Q Did he read it to you?
- 18 A He read it to me. I put my name and signed it.
- 19 Q What did you think would happen if you didn't agree
- 20 to the test?
- 21 A At the time I did not know the consequences. I just
- 22 went with it.
- 23 Q Okay.
- 24 A Just go through with everything.
- 25 Q All right. So you have been in prison 13 years?

1 A This coming October will be 13.

2 Q What did you do the whole time?

3 A I got into Bible studies.

4 Q When do you recall the first time you start doing

5 that?

6 A The first one was Crossroads.

7 Q When did you take that?

8 A I started when I was in the St. George County

9 Detention Center.

10 Q Okay. So that was right after your arrest?

11 A Yes, sir.

12 Q Then do you recall studies from Gospel Express?

13 A Yes, sir.

14 Q Can you tell me what was that program like.

15 A That was they have certain books that they put out

16 to do studies and to convert (ph) the sins of the people

17 in general. And so when I took that it opened my eyes

18 from the sins.

19 Q What do you mean by that?

20 A Just in Bible circumstance on fornication, murders,

21 theft, and it lists a number of others.

22 Q What kind of religious background did you have prior

23 to this?

24 A I'm -- I am Baptist.

25 Q Okay. Did you go to church regularly prior?

1 A Only twice in my life.

2 Q So you started taking Gospel Express in 2004, and
3 then did that go on into 2005?

4 A When it ended and it was a certificate, that is the
5 last one I had.

6 Q When you are talking about certificate you are
7 talking about one of the documents here?

8 A Yes, sir.

9 Q And these documents are the ones that you handed me?

10 A Yes, sir.

11 Q Okay. So what other kinds of -- when you are doing
12 Gospel Express about how many books did you read?

13 A Approximately 12 to 18.

14 Q Okay. And so was there like a homework assignment?

15 A In general.

16 Q And was this -- how did -- did you mail off for the
17 answers and ...?

18 A Then I mailed it. The answers come to them and they
19 grade it and they return it back to me.

20 Q Okay. So how much time on a weekly basis do you
21 think you spent on this back in 2005?

22 A Some take about a month. Some took maybe a few
23 weeks.

24 Q Okay. So how much of your day was devoted to this
25 type of Bible study?

1 A Almost daily.

2 Q Then what is Rock of Ages?

3 A Rock of Ages is a ministry. They put their own
4 ministry out. They put some small booklets out. And
5 they help complete them.

6 And it goes through the Old Testament -- excuse me,
7 I have to correct that. New testament. And once I
8 completed that I get a reward which was a Bible. And I
9 am in the Old Testament now.

10 Q Uh-huh. So what are the -- Victorious Living, do
11 you remember taking that course?

12 A Yes, sir.

13 Q What is it about?

14 A That was a short course. The same way. They give
15 me answers (sic). I send the answers back to them to be
16 graded.

17 Q You took some of those other headings; Repentance,
18 Regeneration?

19 A Yes, sir.

20 Q What is the Repentance one about?

21 A Repentance means any things you did.

22 Q And so did you disclose what your sins were as part
23 of doing that section?

24 A Yes, sir.

25 Q Then while you are doing Rock of Ages do you also

1 recall working with East Cooper Baptist, the Mt. Pleasant
2 church?

3 A Yes.

4 Q What is that -- what program was that?

5 A That was from a church itself in Mt. Pleasant. I
6 was taking their Bible study Tuesday nights at Lieber.

7 Q So that was -- so that is study with other people?

8 A Yes, they ---

9 Q And they send ---

10 A --- set it up.

11 Q --- somebody there?

12 A There was -- about 20 to 30, maybe more, people
13 there.

14 Q Those would be the inmates?

15 A Inmates, yes.

16 Q And then there were people from the church there?

17 A Yes, sir.

18 Q And what were -- what are those classes like?

19 A Classes would be like they bring literature in to be
20 studied. And one might be on the book of John. And
21 there might be another one something else. Stuff like
22 that they bring in for us to study.

23 Q And again, how much -- so this -- when you did East
24 Cooper Baptist is that -- do you recall that is around
25 2007?

1 A That is about when I in it.

2 Q So after the two weeks would you -- after the two
3 hours on Tuesday night what else would you do that week;
4 did you do other Bible studies?

5 A They give me a Bible study from their church. That
6 took less than seven days.

7 Q Were you also at that time doing a program, survey
8 of the Bible through Crossroads Bible Institute?

9 A Yes, sir.

10 Q Were you -- had you completed all of the Rock of
11 Ages sessions, or were still doing those?

12 A I'm still in the process.

13 Q You are still in process?

14 A Yes, sir.

15 Q You mean today?

16 A Today.

17 Q Okay. What is the Sources of Light Ministries?

18 A It is another ministry that put out literature to be
19 graded.

20 Q And when were -- were you taking that in 2007?

21 A Yes, sir.

22 Q What is the Gospel Echoes Team?

23 A That is another religious materials from their
24 organization.

25 Q From what?

1 A Organization.

2 Q From their organization. And then is this reading?

3 A Reading material, answering the questions. Send it
4 in. They grade it. Come back with new book for me to do
5 the next one.

6 Q In 2008 do you recall the Truth Chaser's Club, A
7 Country Called Heaven?

8 A Yes, sir.

9 Q And that is along -- and what is Truth Chaser's, the
10 same type of program?

11 A Yes, sir.

12 Q Is that correspondence as well?

13 A A small little booklet, about 20 questions. Send it
14 in. Within about three weeks I get another booklet.

15 Q And then is there a prison evangelism outreach
16 program?

17 A Yes, it is.

18 Q Is there a Bar-re-an (ph) Prison Ministries basic
19 Bible study course?

20 A Yes, sir.

21 Q Are they all along the same lines?

22 A They do all the same line. Each one might have a
23 different format per teaching.

24 Q You were doing these in 2008 and 2009?

25 A Somewhere along in that time.

1 Q Okay. Can you -- have you -- how much -- is there a
2 time since 2004 that you haven't been devoting your time
3 to Bible study?

4 A The only first one is one of them was Crossroads.
5 That is the only one when I was jail.

6 Q But ---

7 A The rest is in prison.

8 Q But was there -- did you take a couple months off, a
9 couple of years off, while you were in prison on your
10 Bible study?

11 A No, sir.

12 Q 2010, were you doing classes through the American
13 Bible Academy?

14 A Yes, sir.

15 Q Again with Prison Evangelism Outreach?

16 A Yes, sir.

17 Q The Central Church Prison Ministries?

18 A Yes, sir.

19 Q How would you find these programs?

20 A Through other inmates and then through the Chapel.

21 Q I think we talked about Crossroads Bible Institute?

22 A Yes, sir.

23 Q What is Lamp of Light?

24 A That one was another Bible.

25 Q Okay.

- 1 A Questions and stuff like that.
- 2 Q What is ef-fi-sis (ph)?
- 3 A Sir?
- 4 Q Excuse me. Let me find this one. I may -- I know
- 5 that Dr. Swan talked about that she was familiar with
- 6 A-ras-mis (ph).
- 7 A Do you mean A-may-as?
- 8 Q Amayas. What is Amayas?
- 9 A That is Amayas Correspondence School. I picked that
- 10 up in Lieber through the Chapel.
- 11 Q Okay. Oh, that is -- Amayas Correspondence School.
- 12 Does that have about 96 units that you completed?
- 13 A Yes, sir. Which one of them I failed.
- 14 Q One of them you failed?
- 15 A Yes, sir.
- 16 Q And then sometime in 2014 were you moved to
- 17 Allendale?
- 18 A Yes, sir.
- 19 Q And between -- and I am just trying not to go over
- 20 this too much. But I mean between 2010 and 2014 you were
- 21 still taking classes through Lamp of Light, Gospel
- 22 Ministries, Source of Light Ministries?
- 23 A In that timeframe.
- 24 Q Yeah.
- 25 A Some I completed at Allendale.

1 Q And so then you are still doing Rock of Ages; is
2 that right?

3 A Yes, sir.

4 Q And when you got to Allendale were you ever in the
5 Character dorm?

6 A Allendale?

7 Q Yeah.

8 A I was in the Character dorm 2011.

9 Q Okay.

10 A I started in 2012.

11 Q Okay. You completed Jumpstart?

12 A I completed one year.

13 Q Okay. Then when did you move out of -- when did
14 they take you from Allendale to Tiger River?

15 A 2014, March 6th.

16 Q Because November of 2014 is when you completed your
17 first Jumpstart unit; is that right?

18 A Yes, sir.

19 Q Okay.

20 A November 6th.

21 Q And so you couldn't complete it because they moved
22 you to Tiger River?

23 A I completed it at Tiger River.

24 Q Oh, okay. All of this Bible study you have done,
25 what has it taught you about the effect that your crimes

1 had on your victims?

2 A It taught me that is a big sin, no matter how small
3 or big.

4 Q Does it teach about any type of lasting effects it
5 may have on your victims?

6 A It didn't give the detail on that, sir.

7 Q But what do you think ---

8 A But it showed it's sin.

9 Q No, I know -- yeah, I know. But having had a chance
10 to go through all of this -- right now today what do you
11 think -- what impact has your crimes had on your victims?

12 A Plenty.

13 Q Can you explain that?

14 A An everlasting effect is what I mean plenty.

15 Q Do you think they are still suffering today?

16 A In my -- I feel I would say yes.

17 Q Okay. Sitting here today what do you think -- did
18 your victims encourage you to act?

19 A No, sir.

20 Q Why do you say that?

21 A It was on my, my act. Even the Bible speaks of
22 that.

23 Q What is your -- if this jury releases you what is
24 your plan for tomorrow?

25 A For tomorrow ---

1 Q No, I am meaning, you know, next week.

2 A If I get released tomorrow I -- be go to a halfway
3 house for six months, get a job. Which I have a list.
4 To start a job and stay devoted to that and stay devoted
5 in the Bible.

6 Q Do you -- have you picked out a halfway house?

7 A Yes, sir.

8 Q Which one is that?

9 A It is Security -- Devine Care in Spartanburg.

10 Q Okay. And you have talked with people from Divine
11 Care in Spartanburg?

12 A Just them through the chapel.

13 Q And ---

14 A Chapel; Logan, he is the one that referred me to it.

15 Q And you understand that you would be a registered
16 sex offender?

17 A Yes, he already knew.

18 Q Okay. So that is not going to be a problem; so
19 your ---

20 A No, sir.

21 Q Okay. And what are your plans for work?

22 A One of the jobs I was going to go to is a forklift
23 operator. Which I can do.

24 Q Uh-huh.

25 A I have seven months experience from that.

1 Q And how old are you today?

2 A Fifty-eight.

3 Q Okay.

4 A This past June.

5 Q And you have got -- it is your understanding that
6 you have eight months of community supervision --
7 eighteen months, a year-and-a-half?

8 A Between eighteen months to two years.

9 Q Okay. And what is your understanding of what
10 community supervision is going to do?

11 A They monitor me on a regular basis week to week.

12 Q (If they told you you needed to take sex offender
13 classes what would you do or sex offender treatment what
14 would you do?

15 A I would take them.

16 Q You had told Dr. Swan that you would take classes;
17 is that right?

18 A Yes, sir.

19 Q And why do you want to take classes?

20 A To be on the safe side.

21 Q Okay. Do you have any plan for sort of stopping you
22 from having a relapse?

23 A Not at this time.

24 Q Well, you had said that when you have some thoughts
25 you try and think of something else?

1 A Yes, sir.

2 Q What did you mean by that?

3 A What I mean by that is to have activities to keep my
4 mind away from that.

5 Q You had some disciplinary infractions while you in
6 custody?

7 A Twice.

8 Q Okay. One was a contraband case?

9 A The contraband was over taking some eggs out of the
10 kitchen.

11 Q Raw eggs, cooked eggs; I mean was ---

12 A Raw eggs.

13 Q What were you going to do with them?

14 A A person asked me to carry them out.

15 Q Okay. And what was the other?

16 A There is a CO that wrote me up for, saying I jacked
17 on her.

18 Q And what -- did that happen?

19 A No, sir.

20 Q Why don't you explain that a little bit.

21 A The reason why I know it was a false accusation I
22 had 12 to 18 people all around the back away and I was
23 out there heating my coffee up. Hands were visible. And
24 she accused me of it.

25 Q Did you have any witnesses?

- 1 A Yes, sir.
- 2 Q Okay.
- 3 A There were 12 to 18 people.
- 4 Q But you still ---
- 5 A And I took -- I took three of them to the
- 6 disciplinary action.
- 7 Q But you still got written up?
- 8 A Yes, sir.
- 9 Q Where was that?
- 10 A Tiger River.
- 11 Q Okay. And who wrote you up?
- 12 A It was Corporal Rogers.
- 13 Q Is that a male or a female?
- 14 A Female.
- 15 Q Do you know if she is still there?
- 16 A She quit two weeks after I went to that lockup.
- 17 Q Okay. What can you tell this jury to give them some
- 18 comfort that you are not going to commit another --
- 19 excuse me, let me back up.
- 20 You were in cus- -- you were arrested one time when
- 21 you were 17; ---
- 22 A I was ---
- 23 Q Sixteen, seventeen; in there?
- 24 A I was 15.
- 25 Q Fifteen.

- 1 A Just before I turned 16.
- 2 Q And you were in county jail for two months?
- 3 A In -- up here in Columbia.
- 4 Q What?
- 5 A I was in Columbia.
- 6 Q Okay. But in a jail?
- 7 A Uh-huh.
- 8 Q Or a juvenile detention center. Were there all kids
- 9 in there with you?
- 10 A Yes, sir.
- 11 Q Okay. And then you got arrested later and you had a
- 12 90-day sentence?
- 13 A Both -- both the first and second.
- 14 Q And where was that?
- 15 A Which one, sir?
- 16 Q And where did you serve the second 90-day sentence?
- 17 A In St. George.
- 18 Q Detention Center?
- 19 A Yes, sir.
- 20 Q Okay. How is the St. George Detention Center
- 21 different than like you said you have been to Lieber?
- 22 A Explain between it.
- 23 Q You were in -- so how many different detention
- 24 centers were you in?
- 25 A Just St. George, Lieb- -- Lieber ---

1 Q Lieber is a prison; is that right?

2 A Prison.

3 Q Okay.

4 A Lieber, Lee Correctional Institution, Richland,
5 Allendale, and the Tiger River or SCDC.

6 Q What is the environment like at SCDC whether it is
7 SCDC or Tiger River?

8 A All depends how you make out of it.

9 Q How did you do?

10 A Went through it with no trouble.

11 Q So you didn't get into any fights?

12 A No, sir. If I'd see fights I would try to go to the
13 room. Because I know the consequences of what they are
14 going to do.

15 Q What would they be?

16 A Lock down.

17 Q Do you want to go back?

18 A No, sir.

19 Q Was it harder to spend time at Lieber than it was at
20 the Detention Center?

21 A It was a lot easier because they have more freedom
22 to move around with controlled movement.

23 Q Okay.

24 MR. FALK: I have no further questions.

25 THE COURT: All right. Cross-examination.

1 MR. BOGLE: Thank you, Your Honor. May it please
2 the court.

3 THE COURT: Yes, sir.

4 **CROSS-EXAMINATION BY MR. BOGLE OF FRANK SAUNDERS:**

5 Q Good afternoon, Mr. Saunders.

6 A All right.

7 Q Let's talk about the PPG for a minute. You were
8 taken to see this Dr. Burke, right?

9 A Yes, sir.

10 Q Was that at his office in Columbia or his office
11 in ---

12 A It was -- it was in Columbia. I didn't know if that
13 was his office or not.

14 Q Okay. And he handed you - if I may approach - this
15 consent form where he read you the consent form and had
16 you sign it; right?

17 A Yes, this is the form.

18 Q Okay. Where your name is printed right there, is
19 that your writing or his?

20 A My writing.

21 Q Okay.

22 A And this is my signature right beneath it.

23 Q Right beneath it. And the date is -- what is the
24 date on it?

25 A 3/23/2016.

1 Q Okay. And in that form as he explained the text to
2 you he said that you would in private be strapping this
3 gage on your penis, right?

4 A Yes, sir.

5 Q And then they would show you a series of visual
6 things and play voices for you as well?

7 A Yes, he did.

8 Q And that none of the pictures would be nude
9 pictures, right?

10 A Yes, sir.

11 Q And that none of the pictures of children would be
12 nude pictures, right?

13 A Yes, sir.

14 Q And a couple of pictures of adults would be adult
15 pictures and they would measure your response, right?

16 A That is correct.

17 Q And you would be in private there -- in a private
18 room or private area where they couldn't see your private
19 parts, right?

20 A Yes, sir.

21 Q Okay. And you have signed a consent to have -- says
22 I have read this and I grant permission to undergo this
23 penile plethysmograph exam; is that right?

24 A That is true.

25 Q Okay. Now when you were growing up as a kid did

1 your family go to church much? Some?

2 A Up until about eight years old.

3 Q Okay. Okay. So you were probably either in church
4 or in Sunday school either hearing the minister do the
5 sermons or in Sunday school hearing them talk about sin
6 and stuff like that, right?

7 A Yes, sir.

8 Q So it is safe to say that by 1974 you knew what sin
9 was and what a sin wasn't, right?

10 A After eight that's when I was not in church.

11 Q Not in church but you still knew what the concept
12 was, ---

13 A Yeah.

14 Q --- what sinning was, doing something bad under God;
15 right?

16 A Yes, sir.

17 Q So in 1974 when you offended against those two girls
18 and got lockup up in juvi you knew that was a sin?

19 A Yes, sir.

20 Q And then in 1988 when you offended against those two
21 girls and got locked up for 90 days in the local jail you
22 knew that was a sin?

23 A Yes, sir.

24 Q And in 2001 and 2003 when you offend against the
25 other people which lead to your convictions here in this

1 courthouse in 2004 you knew those were sins, right?

2 A Yes, sir.

3 Q Okay. Do you have any -- and I understand from all
4 the testimony we have heard that while you have been
5 deeply involved in the Bible Study courses in prison you
6 have not been to any kind of sex offender treatment
7 offered in the prison system, have you?

8 A They have not presented me with not one.

9 Q Okay. But you didn't seek it out either, right?

10 A No, sir.

11 Q Okay.

12 MR. BOGLE: That is all, Your Honor. Thank you.

13 THE COURT: All right. Redirect?

14 MR. FALK: No redirect.

15 THE COURT: All right. You can go back, back to
16 your table, sir.

17 Next witness, sir.

18 MR. FALK: We will close.

19 THE COURT: Very well.

20 MR. FALK: That is the last witness.

21 THE COURT: Very well.

22 MR. FALK: So we will rest.

23 THE COURT: Will there be any reply?

24 MR. BOGLE: No, Your Honor. Thank you.

25 THE COURT: All right. Ladies and gentlemen, you

1 have now heard the witness and received the evidence that
2 you will in the case. What remains for us are the
3 arguments of counsel and my charge or instruction on the
4 law.

5 There are matters I must take up outside of your
6 presence. And we will also use this as our, our
7 afternoon break. So if you will please step to your jury
8 room.

9 Remember you have not heard the arguments of
10 counsel. You have not heard my instruction on the law.
11 You are not prepared to deliberate. So please be mindful
12 do not discuss this matter or allow anyone to discuss it
13 with you. Please step to your jury room.

14 (WHEREUPON, jury exits courtroom 9/20/16, 2:58 p.m.)

15 THE COURT: Motions?

16 MR. FALK: I will renew my motion for a directed
17 verdict.

18 THE COURT: Thank you so much. And for the same
19 basis I would respectfully deny your motion.

20 Counsel, I wanted to have an informal charge
21 conference. If y'all would just step with me please to
22 chambers to give us a chance to go over that.

23 (WHEREUPON, recess was had for informal charge conference
24 9/20/16, 3:05 p.m.)

25 (WHEREUPON, jurors enter and resume 9/20/16, 3:37 p.m.)

1 THE COURT: All right. Ladies and gentlemen, let me
2 tell you how we are going to be proceeding. In just a
3 moment you will hear from the attorneys and their closing
4 arguments.

5 You will first hear from Mr. Bogle, and then you
6 will hear from Mr. Falk, and then you are going to hear a
7 response and a reply argument from Mr. Bogle. And that
8 will conclude closing argument.

9 And there will be a very short break which is going
10 to be self explanatory. And then I am going to deliver
11 to you the instruction on the law.

12 There will be another very short break at that
13 point. And then, ladies and gentlemen, you will receive
14 this case for your deliberations.

15 So, ladies and gentlemen, I ask at this time that
16 you please draw close as we listen to the closing
17 arguments.

18 Mr. Bogle.

19 MR. BOGLE: Thank you, Your Honor. May it please
20 the court.

21 THE COURT: Yes, sir.

22 MR. BOGLE: Mr. Falk.

23 **CLOSING BY MR. BOGLE:**

24 At the beginning of the hearing or the trial on this
25 case I talked about some of the findings the General

1 Assembly made when they wrote this law. They also said
2 this, they said that because the existing civil
3 commitment process, like in Probate Court for example, is
4 inadequate to address the special needs of sexually
5 violent predators and the risk they present to society
6 the General Assembly has determined that a separate
7 involuntary civil commitment process for long-term
8 control, care and treatment of sexually violent predators
9 is necessary. And that is where we are today.

10 Now when you go back in the jury room remember what
11 we have got to prove. Number one, has he been convicted
12 of a sexually violent crime. Yeah, five. They are right
13 here.

14 You will have in the jury room these exhibits. And
15 look at them. Look through them. There is no secret as
16 to how they are written.

17 Well, they tell you a lot of information. They tell
18 you who he is. They tell you what he pled guilty to, was
19 it a plea, was it a trial. And the box is checked for
20 plea.

21 It also tells you the date of the crime, date of
22 offense. Up here at the top on the newer sentencing
23 sheets (pointing). Tell you when it happened.

24 And attached to that sentencing sheet where the
25 judge writes down what the sentence is is also the

1 indictment, what he was charged with, what did he
2 actually get up and plead guilty to and say I did this in
3 open court.

4 And attached to that is the arrest warrant that let
5 to him being picked up to begin with. So you have these
6 in 1988. And you have these from 2004 for crimes that
7 occurred as early as 2001.

8 I talked about there being a theme to the case when
9 I first started, the theme being that he enjoys fondling
10 children. And that is there. That is there.

11 What concerns me is it goes even further.
12 Apparently 90 percent of the fantasies he has about sex,
13 okay, have to do with little girls twelve and under.

14 Now that is a big deal. Now he tried to say well in
15 his testimony that well that is what I told Dr. Gayle how
16 it was like way back then. But, you know, her response
17 is I asked him what are your current fantasies, current
18 as in right now. And just four months before meeting him
19 he had masturbated to a sexual fantasy of a young child.

20 Now I should stop here and say I should have warned
21 you at the beginning this is not your average case in the
22 Court of Common Pleas. Okay, it is not a car wreck. It
23 is not a medical malpractice case.

24 Because it is a medical case involving a mental
25 condition we have had to go into a lot of intimate

1 details about sexual fantasies and stuff like that.
2 Because I think you need to learn two things. Number
3 one, what makes this guy tick. And number two, what did
4 Dr. Swan base her opinion on. What did she have concrete
5 in front of her to diagnose him with the mental
6 abnormality he has and to make the prediction that he is
7 so much of a risk he can't be let go for outpatient
8 treatment?

9 Thirteen years comes to mind. And I might be off a
10 year or two here. But do the numbers. What do we have?
11 1974 the offense when he was a juvenile sexually
12 molesting two young girls ages five to seven. Add
13 thirteen years. 1988 two offenses involving the two
14 young girls, Minor 4 and Minor 5. Thirteen years
15 forward, 2001, we have the offenses beginning on the
16 child that he later pled guilty to in 2004.

17 Thirteen years forward is now, okay. Is now. So
18 the decision now is is this of such a degree that it
19 poses a menace to the health and society is he going to
20 do it again.

21 No one can predict anything for the future. No one
22 can make an absolute true prediction. Okay.

23 And the law doesn't ask for that. The law asks for
24 something that satisfies you beyond a reasonable doubt.
25 And that is what we have done here.

1 We have the 90 percent of the sexual fantasies. We
2 have the thing he did as much as four months before
3 meeting with her.

4 He has been to a lot of Bible studies apparently
5 while in prison. And that is a wonderful thing. It
6 really is. But we are talking about medical research
7 into what makes a person sexually offend. And as good as
8 it may be that he is doing that, the research according
9 to Dr. Swan indicates that that is not going to help for
10 this type of thing, you need specialized sex offender
11 treatment that he didn't have at SCDC at all.

12 There has been no testimony by him that he is going
13 to seek it or I have got an appointment made or I am
14 about to make an appointment somewhere. He said he would
15 go; but that is it.

16 He has no plan to stop his relapses. I think that
17 was the testimony that he said, other than all we know is
18 about action movies that he watched while he was in
19 prison.

20 Dr. Swan is an expert witness as declared by the
21 court. And what that means, like I told you at the
22 beginning, she -- there are certain people that have the
23 expertise and training in a certain field that they can
24 give an opinion on something or a conclusion.

25 And based upon her training, her expertise, they

1 went beyond just evaluating guys on if they should go in.
2 She has worked with sex offenders and the treatment of
3 sex offenders for an awful long time both in Florida and
4 here; so she was allowed to give you her opinion.

5 And her opinions is going to be that based on what
6 she had seen, the type crimes, the fact that he does it,
7 gets sanctioned and does it again.

8 Now maybe he only got 90 days for the 1988 crimes.
9 But I am sure those crimes probably carried a lot higher
10 potential penalty, and yet he goes out and offends again
11 despite offending and being punished for it in 1974.

12 And despite sitting in a jail as a result of the
13 1988 conviction, what happens 13 years later? He is
14 doing it again. Multiple victims some that were nolle --
15 dismissed, some that were not reported, not prosecuted;
16 but multiple victims that she had to study all of this to
17 make her conclusion about Mr. Saunders. And that is
18 where we are.

19 He is convicted of five of the right kind of crimes.
20 He has got the mental abnormality. He is a pedophile.
21 He has a sexual interest in prepubescent children. That
22 will never go away. It can be controlled. It can be
23 monitored. But with the proper treatment.

24 And unfortunately for him but fortunately for us the
25 State has a unit, an inpatient unit. It is a secure

1 facility for this type of treatment which Dr. Swan
2 described. And that is where he would go. And he would
3 get that type of treatment in a secure environment
4 because he is too much of a risk to be let go.

5 That's what the case is, the things we have to
6 prove; the crime, the mental abnormality, and the
7 difficulty of controlling himself manifested by repeated
8 offenses over and over again.

9 It has been 13 years since the last one. And it was
10 13 years before the one before that. And another 13
11 before that. I would suggest that in the 13 years that
12 have happened since then there is nothing that suggests
13 that he is safe to be at large.

14 So what I am saying to you is I think the State has
15 proven beyond a reasonable doubt that this man is a
16 sexually violent predator. And I would ask you to return
17 a verdict saying that.

18 Now the way closing arguments go in civil cases is
19 my job is to open with my complete argument. Which I
20 have done. Mr. Falk will follow me.

21 If he brings up something new, you will hear from me
22 again. But only then. So basically this will probably
23 be the last time I hear from you -- or you hear from me,
24 rather.

25 I would like to thank you for your service and doing

1 the right thing by the State and by the county and by Mr.
2 Saunders.

3 Your Honor.

4 THE COURT: Thank you so much, Mr. Bogle.

5 Mr. Falk.

6 MR. FALK: May it please the court.

7 THE COURT: Yes, sir.

8 MR. FALK: Mr. Bogle. Ladies and gentlemen of the
9 jury.

10 **CLOSING BY MS. FALK:**

11 When I try these cases I always want my client to
12 take the stand. I want y'all to have an opportunity to
13 look at him. I want y'all to have an opportunity to hear
14 him, to hear his responses to my questions. Because I
15 think that is the only way that you can tell whether or
16 not he is a different person than he was in 2003, 2004,
17 when he was arrested.

18 I think -- I am hopeful that you can see that he
19 was -- he is very honest. There is no guile in him. He
20 is not going to try and mislead you. He is going -- he
21 told you his honest answers. And it is going to really
22 be up to you to decide whether or not he is the same
23 person he was in 2003.

24 One thing that we obviously know that is different
25 about him from 2003 is that he is 58 years old today.

1 Well, not that it is his birthday but he -- that is
2 currently 58 years old.

3 We also heard from Dr. Swan that there's 18 more
4 months of community supervision. So it is not going to
5 be that he is absolutely out on the loose but he is -- he
6 is going to be subject to community supervision for 18
7 months.

8 And he has already made plans for a halfway house.
9 And he certainly can get additional sex offender
10 treatment if his probation officer thinks that that is
11 required or is necessary or is suggested. I mean my
12 client certainly said that, you know, he would take the
13 treatment.

14 The only other thing that I think is important and I
15 want y'all to remember about the fact that is -- is 58.
16 And 18 months is -- Dr. Swan there is some kind of
17 conflicting testimony from her as to how long that risk
18 goes on.

19 She testified that under the current scoring rules
20 that once somebody who is a sex offender of children -
21 and it was non-familial children, because apparently sex
22 offenders who have incest victims sort of have a
23 different pattern - so sex offenders of children
24 currently the way the scoring rules are - and I guess
25 that recognizes what the best information is of the

1 time - that that risk drops off to about zero. That was
2 her testimony.

3 She indicated that she thought that that was going
4 to change. And she indicated she thought that there is
5 testimony that there is reports that say it can go on;
6 but currently what we know is that it drops off to about
7 zero at the age 60.

8 If you do the math, 58 years, 18 months; he is 60.

9 She did put some reliance on the PPG test. And
10 certainly that has a very visceral thing about it. I
11 mean, you know, this notion of being hooked up to some
12 machinery and that machinery is going to sort of be able
13 to get some indication of your private thoughts as to how
14 you respond to different pictures, I mean I can
15 understand why she -- why she in this case likes the PPG
16 test. But also she has at times been a big credit of the
17 PPG test.

18 In 2004 she testified on behalf of the State and she
19 was trying -- in that case trying to argue that the
20 defendant should not be able to use the PPG test because
21 it wasn't reliable. She said at that time that the
22 problem with the PPG test is that there was no
23 standardization, there were problems with the
24 standardization of the stimulus sets.

25 And I tried to go through with -- through my

1 questioning with her what they really meant, is that --
2 you know, we have to measure.

3 When you are looking at that test you have to decide
4 whether or not that one picture whether or not, you know,
5 Person-A is going to respond the same way to Person-B who
6 has the same kind of mental condition. You know, that
7 the same people would respond to the same type of
8 stimuli.

9 As opposed to whether or not you can measure, take
10 the test and while you going through treatment you can
11 sort of measure your growth.

12 Because you already have a base line. You already
13 know what -- how you responded to before the treatment
14 started. You are getting treatment and you have the test
15 again. You see the changes. You see how that is a
16 different -- there is -- you know, there is a baseline.

17 But there is not a baseline for when you are using
18 it as a diagnostic function. And she just has to hope
19 that these -- these stimulus sets that she -- that Dr.
20 Burke used were sufficiently validated and were
21 sufficiently standardized.

22 Although she couldn't cite to any type of
23 peer-reviewed study that showed that the stimulus sets
24 were valid. She says, well, Dr. Burke says they are
25 valid.

1 But Dr. Burke is the one who developed them and Dr.
2 Burke is the one that is using them as, you know, as part
3 of his treatment program.

4 So of course he is going to say they are valid. But
5 I mean for a scientist to come in here that she should be
6 able to say, yeah, other people say that they are valid.

7 But she puts some faith in it. And certainly in
8 this case she put some faith in it.

9 Even though there are question about the
10 standardization and it was a problem for her in the past,
11 it is not a problem for her today.

12 I am not sure where the flip flop comes from, but I
13 can -- I am not sure that the difference was that in 2004
14 when she was testifying about the PPG it was because
15 somebody was trying to use it for a release. She was
16 testifying on behalf of the State in trying to get
17 somebody committed. Now when she is testifying about the
18 PPG it is because the State wants to use it and so she is
19 supporting it now.

20 The question is what do we need to do with my client
21 today; is he the same person that he was 13 years ago.

22 Dr. Swan said that, you know, past behavior is an
23 indicator of future behavior unless there is an -- and
24 then she certainly acknowledged that there can be an
25 intervening event that can change that, that can sort of

1 break that pattern.

2 And I suggested to her that he spent 13 years in
3 prison. And that is certainly not something that
4 everybody does. That is certainly a change in lifestyle
5 for 13 years. And my client spent almost all of his time
6 during those 13 years taking one Bible study class after
7 another.

8 He didn't just take one class. I think he probably
9 mentioned eight, nine, ten different classes that he
10 took. And he also said that there wasn't a time between
11 2004 and his release that he wasn't taking a Bible class.

12 Whether that is good enough, I don't know. My
13 client took the stand and he told you that he understands
14 what the vic- -- what the pain he has caused those -- his
15 victims. He understands that those -- his victims will
16 always have that pain.

17 And I am not sure that he always understood that,
18 but certainly after sort of the reflection that comes
19 from his Bible studies he understands what he has done to
20 these people.

21 Dr. Swan testified that an average -- that a -- I am
22 not sure if she said typically or could be or what. But
23 she certainly said the term six to eight years that it
24 could take for somebody to get out of that program once
25 he is admitted to the program.

1 And this is sexually violent predator treatment
2 program. This is a secure facility that Mr. Bogle was
3 talking about. Six to eight more years. He has already
4 spent 13 years in custody. Six to eight more years in a
5 secure facility.

6 Dr. Swan testified that a secure facility means that
7 you are -- you are behind a door that is locked from the
8 outside.

9 So you are pretty much in a cell 24 hours a day.
10 And there is no -- this is not like, you know, you get a
11 furlough on a weekend and you can go. He is going to be
12 in that facility, possibly as Dr. Swan said, for six to
13 eight more years.

14 So at that time he is, you know, 64, 68 years old --
15 well, I guess 64, 66 years old. But she also said that
16 the only thing that is going to work here is that he has
17 this treatment in a secure facility because it is much
18 more intensive.

19 But she also said that what he was going to get, he
20 was going to be meeting with groups and he's going to get
21 about two hours worth of instruction a week and then
22 there was going to be some homework and there was going
23 to be some follow-up and he's going to be monitored
24 this whole time but he is going to get two hours of
25 homework -- two hours of instruction a week and then

1 homework assignments.

2 And she acknowledged that from her understanding
3 outpatient had one-and-a-half hours typically a week of
4 instruction and also homework.

5 She also said that if he -- while these 18 months
6 while he is on community supervision if he violated the
7 terms of the community supervision he is going back to
8 prison.

9 What you really have to do, unfortunately in this
10 case, you have got to compare just -- there's only two
11 testimonies. You can compare Dr. Swan's testimony to my
12 client's testimony.

13 Now Dr. Swan is an expert. She is qualified as an
14 expert. The only real expert who can testify as to, you
15 know, what my client is thinking at this time, what my
16 client -- where -- who my client is at this time of
17 course is my client.

18 Dr. Swan can only make comparisons based on numbers
19 as to how he fits as -- like as an actuarial table. I
20 think she described it as like, you know, an insurance
21 policy that he is just one number, he fits under the bell
22 curve and that is how he fits.

23 So now we have to consider whether or not Dr. Swan's
24 testimony, which is all the State is relying on, was fair
25 all the way through.

1 You may have some concerns with Dr. Swan's
2 testimony, and you may have concern about how well she
3 was communicating with my client at the time.

4 My client indicated that he was stressed at the time
5 that she was asking him those question. And I am sure
6 that you can appreciate that is a stressful situation.

7 He was in prison. They took him to another facility
8 and she'd talk to him for about two hours.

9 What I had trouble with with Dr. Swan is any time
10 there was an inconsistency, he said one thing and then
11 something else came up and he said something else, she
12 would write that. She is going to flag him that he is
13 being -- there is an inconsistency there, I have got him;
14 he said something this time and then he said it
15 differently next time; there is an inconsistency, well,
16 let's give him a check box there.

17 But she would never try and say why was there this
18 inconsistency, did he understand my question. She
19 wouldn't do that.

20 Because that is not what she is trying to do. She
21 is trying to get this guy committed. She is not trying
22 to make sure that he fully understood the questions.

23 She says that she is sure that her questions were
24 always very clear and that she always took very good
25 notes.

1 We do know that she did take good notes as
2 certainly as far, you know, his family history; she wrote
3 down in her report that, you know, his mother died two
4 months after Hurricane Hugo, and she admitted that she
5 had made a mistake there.

6 She also in her initial report she wrote down that
7 his primary response -- one moment. She wrote down in
8 her respon- -- in her report that -- and she acknowledged
9 this on the stand. She wrote that Mr. Saunder's greatest
10 level of arousal was to adult male persuasive consensual
11 conduct.

12 And I asked her about that. And certainly I think
13 that that means that that is his greatest level of
14 arousal. And she said no, no, no, that is not what it
15 means.

16 That -- that -- and then she tried to qualify it
17 saying that that is his only - I'm not sure - legal type
18 of arousal or non-paraphilic type of arousal.

19 And I am not sure when she decided to change that
20 testimony, if that was a mistaken in her report or if she
21 was sort of maybe coloring her testimony.

22 We do know that the State of South Carolina has paid
23 her about \$100,000 a year to do this. And this is on top
24 of about the \$145,000 a year she gets from the State of
25 Florida to do these reports.

1 You can consider for yourself whether or not she is
2 motivated to give reports that are favorable to the
3 people who are paying her for these reports each time.

4 One thing I think is interesting to note is that if
5 he is primarily related to -- if he is -- primary sexual
6 arousal, greatest of sexual arousal was due to adult
7 males, there was no disciplinary infractions when he
8 spent 13 years at SCDC for that type of conduct.

9 And that certainly I think is an indication that we
10 have that he has his responses under control to what
11 maybe he is thinking at a time. He is not always acting
12 out on something that he is thinking about.

13 At the end of the day I know this is a difficult
14 decision because it is going to -- you are going to get
15 this case late in the day and it is going to be very easy
16 to try and leave.

17 But you have to consider the only thing that you are
18 deciding today is whether or not it is safe for him to go
19 home or whether or not it is safe for him to be released
20 or whether or not it is -- or whether or not he needs to
21 go someplace else.

22 Now as I said at the beginning, you all have already
23 said that your concern is not that his sentences for sex
24 offenders are too lenient. The only thing we are talking
25 about now is whether or not he needs to go somewhere

1 else.

2 We are not trying to punish him. So any kind of
3 disgust that you may have for some of the acts that he
4 has done in the past, that is really not your job to do
5 today and you have got to put that aside.

6 What you have to decide is whether or not he needs
7 to go somewhere in a secure facility possibly for six to
8 eight years.

9 We don't know how long. Maybe longer. Maybe less.
10 But whether or not he needs to in effect be in another
11 cell room for a period of time so that he gets two hours
12 worth of instruction a week and be monitored during the
13 meantime.

14 I think that there is evidence here that it is safe
15 for him to be released. First of all, he is going to go
16 to a half way house. He is going to be monitored by
17 Probation and Parole. He can get sex offender treatment,
18 but it is only going to be an hour-and-a-half a week as
19 opposed to two hours a week. If he is -- if he does mess
20 up, he is going back to prison.

21 I think Dr. Swan when I asked her about whether or
22 not somebody could -- whether based on the Bible or
23 whatever or, you know, studying your faith and maybe a
24 Christian reconsideration, I said she could not rule it
25 out; she did not think it was the case in this -- in this

1 case; but she could not rule out that somebody could
2 change their way or rehabilitate themselves through
3 biblical, biblical study. I believe that is what her
4 testimony was.

5 But also at the end of the day her testimony was
6 that currently it is the -- that when you are at 60
7 motivation really drops off to almost zero. That is
8 what -- that is what the current standards are.

9 That is what she testified the current standards are
10 into the current coding box that when you are 60 it drops
11 off.

12 He is 58 years old right now. He is going to have
13 18 more months of community supervision. He is going --
14 it is not going to be like he is let loose. Somebody is
15 going to be watching him.

16 And I think he has already testified to his
17 commitment that he is a different man. He understands
18 what he has done is wrong, and he is hoping that you all
19 are going to let him go home.

20 I hope that you give some careful consideration to
21 this; you can set aside some of your concerns about his
22 past conduct, and that, you know, any kind of disgust
23 that you may have about his past conduct.

24 All we have to do is look forward whether or not he
25 has proven, he has done anything to prove today, that he

1 is safe to be release.

2 And we can look at his spiritual growth, and we can
3 look at just his physical growth. Because, as I said, he
4 is 58. In 18 months he will be 60.

5 Thank you.

6 MR. BOGLE: Nothing in reply. Thank you, Your
7 Honor.

8 THE COURT: Very well.

9 **CHARGE BY THE COURT**

10 Ladies and gentlemen, just stand up where you are.
11 Seriously. Before I deliver the charge I just want
12 people to get oxygen moving a little bit. Because I am
13 going to deliver the charge and I do need you to be able
14 to pay attention. So I just wanted you to be able to do
15 that.

16 Does anybody need to take a comfort break? If so,
17 let me know. Otherwise, when you all are ready to be
18 seated, be seated.

19 (WHEREUPON, jurors were seated 9/20/16, 3:59 p.m.)

20 THE COURT: All right. Ladies and gentlemen, you
21 have now heard the evidence and you have heard the
22 arguments of counsel. What remains for us would be the
23 instruction and then you are going to receive this matter
24 for your deliberations.

25 Ladies and gentlemen, the petitioner or the State of

1 South Carolina has brought this case under the Sexually
2 Violent Predator Act of our code of laws in South
3 Carolina.

4 Our General Assembly has determined that those
5 persons who are found to be sexually violent predators
6 under the law will require involuntary civil commitments
7 in a secure facility for long-term control, care, and
8 treatment.

9 Additionally the General Assembly has determined
10 that the traditional civil commitment process is
11 inadequate - is not adequate - to address the special
12 needs of sexually violent predators; has therefore
13 determined that a separate involuntary civil commitment
14 process for the long-term control, care, and treatment of
15 sexually violent predators is necessary.

16 Ladies and gentlemen, the intent of the Legislature
17 in passing this law does not in any way control your
18 decision in this case. You and you alone will decide and
19 must decide whether or not the respondent, Mr. Frank
20 Saunders, is in fact a sexually violent predator under
21 the law.

22 You will make that decision on the basis of the
23 evidence which you have heard and the -- and on the basis
24 of exhibits which have been admitted into evidence and on
25 the law which I am instructing you now.

CHARGE BY THE COURT

1 Ladies and gentlemen, the involuntary commitment of
2 the respondent for control, care, and treatment is not a
3 criminal proceeding seeking incarceration for purposes of
4 punishment.

5 Ladies and gentlemen, the petitioner of the State of
6 South Carolina alleges or claims that the respondent, Mr.
7 Frank Saunders, is a sexually violent predator.

8 And the burden of proof, as I will explain to you in
9 just a moment, is on the State, is on the State to prove
10 by evidence sufficient to satisfy each of you beyond a
11 reasonable doubt that Mr. Saunders is a sexually violent
12 predator.

13 If the State is able to meet that burden of proof
14 the State is entitled to a finding by you that the
15 respondent, that Mr. Saunders, is a sexually violent
16 predator.

17 If the State is unable, if the State is not able, to
18 meet that burden of proof the respondent, Mr. Saunders,
19 is entitled to a finding that he is not a sexually
20 violent predator.

21 In most civil cases tried in the Court of Common
22 Pleas the petitioner only has the burden of proving its
23 claim or her claim or his claim by what we call the
24 greater weight or the preponderance of the evidence.

25 However, in this type of case under this particular

1 statute, the petitioner's burden, the State's burden,
2 must be more powerful than that. It must be beyond a
3 reasonable doubt.

4 What then is a reasonable doubt under the law? A
5 reasonable doubt is the kind of doubt that would make a
6 reasonable person hesitate to act.

7 Proof beyond a reasonable doubt is proof that leaves
8 you firmly convinced of the respondent -- convinced that
9 the respondent is a sexually violent predator.

10 There are very few things in this world that we know
11 with absolute certainty. And in cases such as this the
12 law does not require proof that overcomes every possible
13 doubt.

14 If based on your consideration of the evidence you
15 are firmly convinced that the respondent, Mr. Saunders,
16 is a sexually violent predator then you must check -- and
17 we will go over the verdict form in a moment. You must
18 check that place on the verdict form.

19 If on the other hand you think there is a real
20 possibility that he is not a sexually violent predator,
21 you must give him, Mr. Saunders, the benefit of the doubt
22 and find a verdict for the respondent.

23 It will be the place that says he is not a sexually
24 violent predator. We will go over that in just a little
25 bit.

CHARGE BY THE COURT

1 Reasonable doubt may arise from evidence which is in
2 the case or from the lack or absence of evidence in the
3 case. It is up to you, ladies and gentlemen, to
4 determine whether or not a reasonable doubt exists in
5 this case.

6 Now the evidence that you are to consider consists
7 of the testimony of the witnesses and any exhibits which
8 have been offered and made exhibits during this trial.
9 That is the evidence in this case.

10 Ladies and gentlemen, as we talked earlier, I am not
11 allowed to have an opinion in this case. You are the
12 sole, the only finders of the fact. I am not allowed to
13 comment on the facts, the evidence.

14 Ladies and gentlemen, that is a matter solely within
15 your purview. You are the only, the sole, judge of the
16 facts in this case.

17 If at any point in time I did anything or made any
18 comment that you perceived to be some sort of comment on
19 the facts, I am going to ask you to please please
20 disregard that.

21 If in the course of these instructions given to you
22 now it appears to you that I am commenting on the facts
23 in any regard, I am going to ask you to disregard that.

24 Or if you think that I have an opinion regarding
25 these matters based upon the instructions given to you

1 now or any comment made during the course of this trial,
2 I will ask you to disregard it.

3 Ladies and gentlemen, I don't have an opinion
4 regarding these facts. That's a matter solely for you to
5 determine.

6 Ladies and gentlemen, you have heard from the
7 attorneys in this case. And I would simply share with
8 you and tell you that what the attorneys say is not
9 evidence. It is important. You gave them your undivided
10 attention, and for that I am so grateful; but the
11 evidence in this case came from the sworn witnesses in
12 this case and from any exhibits admitted into evidence in
13 this case. You will have those exhibits with you during
14 your collaboration.

15 Now, ladies and gentlemen, in making the findings of
16 fact in this case necessarily you are going to have to
17 determine the credibility of the witnesses who have
18 testified.

19 And how do you do that? You did not drop your good
20 common sense at the courthouse door. You do that to the
21 exercise of your good judgment, the application of your
22 common sense, your sense of logic and reason, and your
23 experiences in life.

24 You know, every day in your lives you judge
25 credibility. You make decisions -- we make decisions,

CHARGE BY THE COURT

1 all of us make decisions, every day with regards to
2 whether people are believable, persuasive, or convincing
3 or not. And you do the same thing as a juror.

4 In determining believability you may consider what
5 was the manner and the appearance of the witness who
6 testified, was he or she straightforward or hesitant in
7 answering, was the testimony of a witness consistent or
8 inconsistent, how did the witness come to know the things
9 about which he or she testified to, what was the ability
10 to know those facts, is there some reason that a witness
11 would want to give testimony which would help or hurt one
12 side or the other. In other words was the witness biased
13 or prejudiced.

14 In determining the question of credibility or
15 believability you may believe one witness as against
16 another witness. You may believe a part of the testimony
17 of a witness and reject the remaining part of the
18 testimony of the same witness.

19 You may believe the testimony of a witness in its
20 entirety; and you may reject the testimony of a witness
21 in its entirety.

22 Ladies and gentlemen, these considerations, however,
23 you do not exercise arbitrarily, but if in your good
24 judgment there is a sound reason in the record of this
25 case for so doing.

1 Ladies and gentlemen, your objected -- your
2 objective is to determine the true facts in this matter.

3 Now, ladies and gentlemen, in this case you have
4 heard testimony of one deemed to be an expert. And I
5 would tell you, ladies and gentlemen, an expert witness
6 is someone who by virtue of their knowledge, training,
7 experience, education, profession, have becomes an expert
8 in some field, typically an art or science; and those
9 witnesses deemed to be expert witnesses are allowed to
10 give to you their opinions and the reasons for those
11 opinions.

12 Ladies and gentlemen, expert testimony is to be
13 given no greater weight than any other testimony simply
14 because the witness is an expert.

15 And it is certainly not given -- expert testimony
16 certainly is not given for the purpose of controlling
17 your judgment. It is given for the purpose of helping
18 you understand the evidence. And a witness should not
19 receive more weight in their testimony simply because
20 they are an expert.

21 You should consider expert testimony in the same
22 manner as you would any of the testimony and you give it
23 the weight you think it deserves.

24 Ladies and gentlemen, expert testimony and the value
25 of it does not depend upon the skill and knowledge

CHARGE BY THE COURT

1 professed by the expert but rather upon the skill and
2 knowledge that the expert actually possesses.

3 It is for you to judge whether an expert does
4 possess such knowledge. In this regard you may consider
5 the expert's training, knowledge, experience, ability to
6 communicate ideas, the logic of the expert's opinion; the
7 support, a factual support, for the opinion; and all of
8 the other factors that you use to judge and weigh the
9 testimony of any other witness.

10 No mere opinion of an expert can be accepted as in
11 and of itself truthful or reliable. It first must be
12 weighed by you and convince your judgment beyond a
13 reasonable doubt and with the same force and effect as
14 any other fact proved in this case before you can rely on
15 it.

16 Therefore, ladies and gentlemen, you give such
17 expert testimony the weight if any that you deem it is
18 entitled.

19 Now, ladies and gentlemen, I want to talk to you a
20 little bit about my role. Ladies and gentlemen, I am the
21 judge of the law in this case. And it is your duty as
22 jurors to take and to apply the law as I am stating it
23 now to you.

24 If you had a preconceived idea about what you think
25 the law is or what it ought to be and it should disagree,

1 it should differ from what I tell you the law is, you
2 must abandon your preconceived idea.

3 Maybe you will want to meet with your legislator
4 one day and say I have got a suggestion for a change
5 in the law. But for our system to work correctly you
6 must accept and apply the law exactly as I state it to
7 you.

8 The way our system works is I cannot comment on,
9 intimate, or have any opinion in any regard - and I have
10 no opinion - regarding the facts. You are the judge of
11 the facts.

12 But you can't disagree with me about what the law
13 is. That is how we work together. You will make the
14 findings of fact as you find them. You will take the law
15 as I give it to you. And you will apply it to those
16 facts as you have found them to be. That is how you will
17 render your verdict.

18 Now, ladies and gentlemen, I am going to talk about
19 the elements that the State must prove in this case
20 beyond a reasonable doubt.

21 And before the State, the petitioner, is entitled to
22 a verdict at your hands each of you must be convinced
23 beyond a reasonable doubt that the State has proven each
24 of the elements of its claim beyond a reasonable doubt.

25 Those elements which the State must prove beyond a

CHARGE BY THE COURT

1 reasonable doubt are, number one, that the respondent,
2 Mr. Saunders, has been convicted of a sexually violent
3 offense.

4 I charge you that the offense of criminal sexual
5 conduct with a minor in the first-degree and lewd act on
6 a child are each sexually violent offenses under the law.

7 And, number two, the State must prove beyond a
8 reasonable doubt that the respondent, Mr. Saunders,
9 suffers from a mental abnormality that makes him likely
10 to engage in acts of sexual violence if not confined in a
11 secure facility for long-term control, care, and
12 treatment.

13 Inherent in these two elements the State must prove
14 is the requirement that the respondent, Mr. Saunders',
15 mental abnormality causes him serious difficulty in
16 controlling his behavior. This fact likewise must be
17 established beyond a reasonable doubt.

18 In order for you to better understand the two
19 elements I am going to define -- define for you some of
20 the terms. I am going to first define for you mental
21 abnormality and then likely to engage in acts of sexual
22 violence.

23 Mental abnormality means a mental condition
24 affecting a person's emotional or volitional capacity
25 that predisposes the person to commit sexually violent

1 offenses. This mental abnormality must cause the
2 respondent, Mr. Saunders, serious difficulty in
3 controlling his behavior.

4 And, number two, likely to engage in acts of sexual
5 violence means the person's propensity to commit acts of
6 sexual violence is of such a degree as to pose a menace
7 to the health and safety of others.

8 And, again, I remind you the burden of proof is on
9 the State, the petitioner, to prove to your satisfaction
10 beyond a reasonable doubt all of the elements in this
11 case.

12 Ladies and gentlemen, you are not partisans or
13 advocates for the State of South Carolina or for Mr.
14 Saunders, the respondent. You do not serve as jurors to
15 reward friends or punish enemies. You have been selected
16 by both the petitioner and the respondent as fair and
17 impartial jurors.

18 It is your duty then by your joint deliberations to
19 determine the truth in this case giving to this
20 respondent the benefit of every reasonable doubt.

21 Then to the facts you determine to be true you take
22 and apply the law which has been given to you by this
23 court and thus arrive at a verdict which does speak the
24 truth of this case.

25 Ladies and gentlemen, the word verdict which comes

CHARGE BY THE COURT

1 from the Latin phrase vera dicto means to speak the
2 truth. To speak the truth.

3 Now in just a moment I am going to go over the
4 verdict form with you. Ladies and gentlemen, the verdict
5 form has the caption on the top of it. And it reads as
6 follows:

7 In the matter of the care and treatment of Frank
8 Saunders, respondent, with regards to whether respondent
9 is a sexually violent predator we the jury unanimously -
10 this is not the rule of the majority or any one of you;
11 this must be the determination of each and every one of
12 you - we the jury unanimously find that the respondent
13 Frank Saunders. And you have two possibilities.

14 And I have put these two possibilities on paper.
15 And there is no hidden meaning in which the order in
16 which these matters have been put on this paper. One of
17 them has got to be first and one of them has got to be
18 second, ladies and gentlemen. And so I am going -- I
19 have written them one way. I will read them back the
20 other way.

21 One possible determination, possibly verdict, is
22 that the respondent, Mr. Saunders, is not a sexually
23 violent predator.

24 If that is the unanimous determination of this jury
25 you will check that one. You can put a checkmark; you

1 can put an x-mark; you can circle it; you can do all
2 three. It just needs to be very clear which of these two
3 is the determination of the verdict of the jury.

4 The other possibility is that we the jury
5 unanimously find that the respondent, Frank Saunders, is
6 a sexually violent predator. If this is determined to be
7 the unanimous determination, verdict of this jury, you
8 can check it; you can put an x-mark; you can circle it,
9 as long as it is very clear which of these two is the
10 verdict, the unanimous verdict of this jury.

11 When you have finished your deliberations and you
12 have filled out the verdict form -- Mr. Paulsen, you know
13 who you are. You will sign it. You will date the
14 verdict form.

15 Just for your informational purposes, today is the
16 20th of September 2016. Just for your reference.

17 Now when you have done that you will knock on the
18 door. You will return to the courtroom. You will pass
19 the verdict form to one of our bailiffs or to our clerk
20 who will in turn pass that to me. Do not publish the
21 verdict.

22 Now, ladies and gentlemen, a couple of other things
23 I need to say to you. In a moment I am going to ask you
24 to step to your jury room with an instruction not to
25 begin your deliberation, not to -- do not discuss the

CHARGE BY THE COURT

1 matter or allow anyone to discuss it with you.

2 And I want to tell you why. These lawyers help me
3 know if I have given you all of the law that you may need
4 for your deliberations and have I stated it correctly.

5 And I am just going to turn to them and I am going
6 to ask them that. And they help me know if I have given
7 you all the law that you may need and have I stated it
8 correctly.

9 Now in the event that I need to bring you back out
10 because I have failed to give you an instruction that you
11 may need I am going to ask you in advance please don't
12 consider that instruction with any emphasis.

13 Just know they helped me know it and I need to
14 deliver that instruction to you. Because you may need
15 it.

16 In the event that I may need to bring you back out
17 because I am in error and I have said something wrong or
18 it has come out wrong or whatever, I am going to ask you
19 in advance please allow me to correct my error in your
20 minds.

21 In other words, ladies and gentlemen, I have one
22 chance to get this right, to give you all of the law that
23 you may need for your deliberations and to state it for
24 you correctly.

25 Now in the event I do not need to bring you back out

1 you will be brought the verdict form, the exhibits, and
2 an instruction to begin your deliberation.

3 We have been doing this a long time, and so if my
4 bailiff fails to tell you to begin your deliberations -
5 and she is not going to do that - but if that should
6 happen, you will not have the verdict form; you will not
7 have these exhibits unless it is time for you to begin
8 your deliberations. So when you get that it will be
9 time.

10 Now I do need you to keep in mind that all 12 of
11 you -- that should be a hint, I will have them stay with
12 me this next time when my jurors leave.

13 But all 12 of you must be together for you to
14 deliberate. So if you need to take a break, a little
15 comfort break or whatever, just stop your deliberations.
16 Take your little comfort break or whatever. And then you
17 can start your deliberations back again as soon as all 12
18 of you are together again.

19 No -- there is -- nothing is formal; just all 12 of
20 you have got to be together for you to deliberate. So
21 please keep that in mind as well.

22 Now I will conclude, ladies and gentlemen, with
23 this. Again, please keep in mind that the word verdict
24 come from the Latin phrase vera dicto which means to
25 speak the truth which is now your task.

CHARGE BY THE COURT

1 Please step to your jury room. And do not discuss
2 this matter. Do not allow anyone to discuss it with you.
3 Except for Ms. Buckler and Ms. Matthews, stay with me.

4 Ms. Buckler -- you are Ms. Buckler -- you are Ms.
5 Matthews. And Ms. Buckler. Got you. Stay right here
6 with me. You know if I had done that the other way I
7 would have messed up.

8 Now ...

9 (WHEREUPON, jurors, except alternates, exit courtroom
10 9/20/16, 4:13 p.m.)

11 Now I am going to ask you for 15 minutes time. And
12 I want to tell you why. Ladies and gentlemen of our jury
13 will begin their deliberations and sometimes something
14 can happen. It is fairly rare at this point. But it has
15 happened. And in that first 15 minutes if I lose one of
16 my jurors I can stop the deliberation, seat one of you
17 and start the deliberations anew and save the trial.

18 So I am going to impose on you for 15 minutes more.
19 And once the jury starts its deliberation and -- but once
20 it begins y'all are welcome keep the time.

21 And I am going to ask Ms. Catherine to just take you
22 all in a different space for that 15 minutes. And in the
23 event that I need to bring the jury back out then I will
24 bring you all back out too and then separate you again.

25 So if we can start the 15 minutes if y'all would do

1 that for me I would be so grateful. Thank you.

2 (WHEREUPON, alternate jurors exited the courtroom

3 9/20/16, 4:13 p.m.)

4 THE COURT: Exceptions, additions?

5 MR. BOGLE: None from the State, Your Honor. Thank
6 you.

7 MR. FALK: I am not sure I heard this and so I will
8 accept if you convin- -- but did you get to the sentence:
9 No mere opinion of an expert can be accepted as is and of
10 itself truthful and reliable?

11 THE COURT: I did. Let me go back and take a look
12 at it.

13 MR. FALK: I mean it is in there. I just --

14 THE COURT: Yep.

15 MR. FALK: I don't recall hearing it, and I just
16 want to make sure.

17 (WHEREUPON, court reporter played back requested portion
18 of Court's instruction.)

19 THE COURT: Great.

20 MR. FALK: I apologize, Your Honor. I just didn't
21 recall hearing that.

22 THE COURT: Counsel, I need you to look at the
23 verdict form and look at what is going back to this jury.
24 And be sure that you concur that what is going back there
25 is what is supposed to be going back there.

26

VERDICT

1 (WHEREUPON, exhibits and verdict form were reviewed by
2 counselors prior to going to jury.)

3 THE COURT: Great. Got it. All right. And then we
4 will be in recess.

5 (WHEREUPON, recess awaiting verdict, 9/20/16, 4:36 p.m.)

6 (WHEREUPON, jury enters courtroom 9/19/16, 5:06 p.m.)

7 VERDICT:

8 THE COURT: All right. It is my understanding that
9 the jury has reached its verdict. Is that correct? If
10 you will pass it please to Ms. Caroline, and she will
11 pass it to me. Thank you.

12 (WHEREUPON, verdict presented to the clerk.)

13 (WHEREUPON, verdict presented to the Court.)

14 THE COURT: I find that the verdict is in due order.
15 Please publish.

16 (WHEREUPON, the clerk confers with the Court as to which
17 format to publish.)

18 THE CLERK: The State of South Carolina, County
19 of Dorchester, in the matter of the care and the
20 treatment of Frank Saunders, respondent, Case Number
21 2015-CP-18-02318.

22 In the matter of the care and treatment of Frank
23 Saunders, respondent, with regard to whether respondent
24 is a sexually violent predator, we the jury unanimously
25 find that the respondent Frank Sanders (sic) is a

1 sexually violent predator. Signed by the jury
2 foreperson, September 20th, 2016.

3 Ladies and gentlemen, of the jury if this is your
4 verdict and was your verdict in the jury room please
5 raise your right hand.

6 THE COURT: And let me observe for the record that
7 all of our jurors have their hands raised.

8 THE CLERK: Thank you.

9 THE COURT: Anything further from the petitioner?

10 MR. BOGLE: No, Your Honor. Thank you.

11 MR. FALK: None, at this time.

12 THE COURT: Anything further from the respondent?

13 MR. FALK: No, Your Honor.

14 THE COURT: Very well. Ladies and gentlemen, I want
15 to thank you so much for your service on this jury. And
16 although today is Tuesday and we have several days to go
17 I think we have enough jurors for the rest of the week.
18 So since -- unless you want me to throw you back in and
19 you want to serve again. Because we will be selecting
20 another jury tomorrow for our next case for trial. For
21 those of you that if you would like to be on a panel we
22 are of course delighted to have you do that, but I am
23 going to release those of you who wish to be released
24 because you have given so much of your time all day
25 yesterday and all day today as well.

1 And we would be delighted to get for you those of
2 you who are dashing off to work tomorrow and you need
3 something now we will have something that we can give you
4 that you can take to your employer.

5 I used to tell jurors that the check was in the
6 mail. And then Ms. Graham said don't you tell them --
7 you can't tell them that. The check is not in the mail.

8 But with our case management system it does make the
9 processing of juror's remuneration a little faster.
10 However, let me just share with you that it is a very
11 very small token - a very small token - of all that you
12 have given to us, and that is your dear and precious
13 time. In fact it is such a small token our trip to
14 Tahiti will get you to Jedburg.

15 Now I do want to remind you that you are now not
16 eligible to serve on a jury in a court of record for the
17 balance of the year 2016.

18 I know you are upset. But there is hope for you in
19 Magistrates Court and Municipal Court. And I will remind
20 you of the exemption that we talked about yesterday that
21 you have an exemption now for 2017 and 2018 should you
22 chose to exercise that exemption in the court of record.

23 Ladies and gentlemen, I hope you have found your
24 service to be interesting. I can assure you it has been
25 critical to our system of justice. We couldn't operate

1 without you.

2 You all have certainly given me so much of your
3 time. If any of you have any questions or comments or
4 suggestions I am happy to meet with you in your jury
5 room.

6 And if you want to do that if you will just remain
7 and let Ms. Catherine know that you want to meet with me.
8 I am happy to do that and answer any questions that you
9 have. Delighted to do that.

10 Anybody that wants to go back into the panel?

11 (WHEREUPON, two jurors responded affirmatively.)

12 THE COURT: Wonderful. Well, and tell me your juror
13 number.

14 JUROR: Ninety-seven.

15 THE COURT: I will see you tomorrow at two o'clock.

16 Yes, sir. Your number?

17 JUROR: Fifty-one.

18 THE COURT: See you tomorrow at two o'clock. We are
19 going to select our jury -- our next jury tomorrow at two
20 o'clock. So delighted to have you do that. Just
21 delighted to have you do that.

22 And for those -- anybody need something for your
23 employer for tomorrow? Can you wait -- do you need it
24 for tomorrow? Ms. Catherine, if you will just see her --
25 okay, y'all just let her know.

STATE VS. FRANK SAUNDERS

1 And I just thank you all for your time, for your
2 attention to these matters. And if you will go with Ms.
3 Catherine you are at this time free to go.

4 And I will see the two of you tomorrow afternoon
5 too. Thank you so much.

6 (WHEREUPON, jury exits courtroom.)

7 THE COURT: Anything further ---

8 MR. BOGLE: No, Your Honor. Thank you.

9 THE COURT: --- at this time?

10 (WHEREUPON, Court's Exhibit Number 1, jury note, marked
11 for identification.)

12 (WHEREUPON, trial concludes.)

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SEP 20 2016

SC Court of Appeals

CERTIFIED COPY

9-20-2016

Clerk of Court

Dorchester County

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DORCHESTER)
)
 IN THE MATTER OF THE CARE)
 AND TREATMENT OF)
 FRANK SAUNDERS,)
 RESPONDENT.)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT

CASE NO. 2015-CP-18-02318

ORDER OF COMMITMENT

The trial of this case was held in the Dorchester County Court of Common Pleas the week of September 19, 2016. A jury of citizens from Dorchester County heard this case pursuant to a request for a jury trial filed by the State. Senior Assistant Attorney General James G. Bogle, Jr. represented the State of South Carolina. James K. Falk, Esquire, represented the Respondent. The jury having heard the presentation of the evidence made the following findings of fact pursuant to S. C. Code Ann. Sections 44-48-90 and 44-48-100:

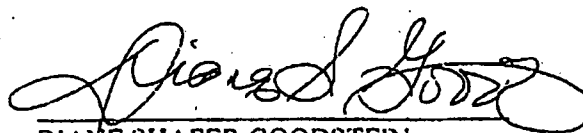
The State has proven beyond a reasonable doubt that Respondent, Frank Saunders, is a sexually violent predator as that term is defined in S. C. Code Ann. Section 44-48-30.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT

(a) Respondent Frank Saunders is committed to the Department of Mental Health for his long-term control, care and treatment;

(b) Respondent Frank Saunders is to continue to be detained at the Dorchester County Detention Center, and then transported to the secure facility of the South Carolina Department of Mental Health, at 4460 Broad River Road, Columbia, SC 29210. The Detention Center is to transport Respondent on such scheduled date as it coordinates with the Department of Mental Health.

AND IT IS SO ORDERED.



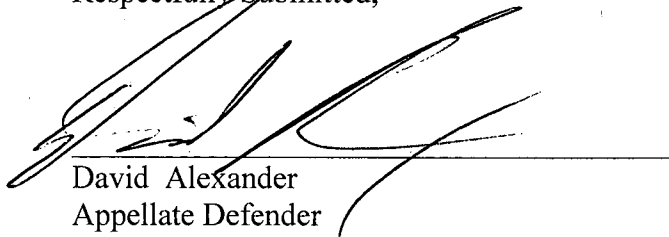
DIANE SHAFER GOODSTEIN
 First Judicial Circuit
 Court of Common Pleas

Sept. 20, 2016
 St. George, South Carolina

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



David Alexander
Appellate Defender

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

ATTORNEY FOR APPELLANT

This 2nd day of October, 2017.

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SC Court of Appeals