

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

R. Scott Sprouse, Circuit Court Judge

MAXWELL E. SIPES,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000231

APPENDIX

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1 Q. Right. But my answer to the question was you never
2 got physical custody of Taylor while the time you were
3 divorced from Tina Goodwin?

4 A. No, I didn't.

5 Q. And you never got physical custody of Minor while you
6 were divorced from Tina Goodwin?

7 A. No, I didn't.

8 Q. And you talked about these times, with Mr. Stoddard,
9 when you were living in Central and Tina and Minor were
10 always getting into it and everything like that. Do you
11 remember telling him about those instances about Tina
12 hitting her in the back and punching her with fists in the
13 head and all that?

14 A. Did I ever tell Stoddard?

15 Q. Did you testify to that earlier here today, that Tina
16 Goodwin has punched and hit her daughter?

17 A. Yes.

18 Q. While you were living in Central?

19 A. No.

20 Q. While you were living in Anderson?

21 A. It was in Anderson.

22 Q. Did you ever call the cops on your wife?

23 A. I called the cops when she pulled a knife on me and
24 put it to my throat.

25 Q. She wasn't charged though?

1 A. Because of me. I didn't charge her. The cops wanted
2 to charge her. I dropped it.

3 Q. Well, it's interesting that you'll protect yourself,
4 but you won't protect **Minor** You won't call the cops when
5 Tina is beating on her, but you will call them when she's
6 beating on you. Is that true?

7 A. There was one incident where she hit her in the back
8 and I broke it up.

9 Q. But you didn't call the cops, did you?

10 A. No, I didn't.

11 Q. But we call the cops when ---

12 A. I thought she was pretty safe with me being there
13 with her. I'm the other adult parent.

14 Q. Tina's running around with knives and everything like
15 that and your children are safe?

16 A. (No verbal response.)

17 Q. If they're so safe, why do you need the law? Why
18 couldn't you just break up the fight between you and Tina?

19 A. With a knife to my throat?

20 Q. Uh-huh (affirmative).

21 A. And chasing me after I got loose and chasing me with
22 it?

23 Q. Uh-huh (affirmative).

24 A. And she did cut me.

25 Q. Uh-huh (affirmative). And you think your children

1 are safe in that home?

2 A. (No verbal response.)

3 Q. Do you think that your children are safe in a home
4 with a mother who is pulling a knife on you, yes or no?

5 A. No.

6 Q. Do you think then that you can protect her if she
7 starts punching on the daughter?

8 A. At that time I thought I could because she had --
9 this was right when she first moved there when she pulled
10 a knife on me and she was going to leave. Okay? And then
11 she come back and apologized and said she was sorry and it
12 wouldn't happen anymore. And then later on that incident
13 happened about the punching, you know, with Minor.

14 Q. Okay. But you didn't feel the need to call the law
15 when that happened with Minor

16 A. No.

17 Q. Because you could protect her?

18 A. Yes, I felt like I could.

19 Q. All right. Nothing further.

20 THE COURT: Re-examine?

21 MR. STODDARD: Yes, sir.

22 REDIRECT EXAMINATION

23 BY MR. STODDARD:

24 Q. You said your visitation with your daughters became
25 supervised where you had to have them in the home of your

1 mother or your grandmother starting in November?

2 A. November of '01.

3 Q. And y'all reconciled in January?

4 A. A couple of months later.

5 Q. And prior to that, there was no restriction on
6 visitation?

7 A. No.

8 Q. Did any conversation -- what transpired between you
9 and Tina prior to this visitation becoming supervised?

10 A. Excuse me?

11 Q. What -- did anything -- what was your relationship
12 with Tina prior, immediately prior, to it becoming
13 supervised? Were y'all having any discussion about
14 y'all's relationship?

15 A. Well, she had actually talked to me about wanting to
16 get back with me. And she was still married. And I said
17 I didn't want to get back, you know. I said I didn't want
18 to get back with you. You're married with your husband.
19 I said, that's not right.

20 Q. How many times did she discuss that prior to the
21 supervision coming?

22 A. A couple of times. And then after that she had me up
23 there for raising the child support.

24 Q. Now, did some kind of allegation -- was some kind of
25 allegation made against you to ---

1 A. Yes.

2 Q. I think it's DFACS down there; it's D.S.S. up here?

3 A. Yes.

4 Q. What was the nature of that allegation?

5 A. [Minor] and Taylor come down for a visit. And the
6 allegation was that they said that [Minor] and Taylor had
7 seen me and my girlfriend upstairs with no clothes on,
8 which was false.

9 Q. And that was -- did Tina bring that up in that
10 hearing?

11 A. Yes.

12 Q. Now, did she have a lawyer, Tina?

13 A. No. Well, hold on. She had a lawyer in court, yes,
14 to raise child support.

15 Q. And did you have a lawyer?

16 A. Yes.

17 Q. And so D.S.S. didn't ask for it to be supervised; it
18 was Tina?

19 A. Well, it was her lawyer. I mean, I don't know
20 whoever else was there.

21 Q. Did y'all call witnesses and present evidence, or did
22 you just agree to allow ---

23 A. I just agreed, you know.

24 Q. Was it at that time DFACS investigating that
25 allegation to your knowledge?

1 A. To my knowledge.

2 Q. Yes.

3 A. I know they did at one time, yes.

4 Q. When you went to that hearing, was the investigation
5 ongoing or was it closed?

6 A. No.

7 Q. Okay. Did DFACS ever ask you to go through any
8 treatment or bring any charges against you or do anything
9 as a result?

10 A. No.

11 Q. And in November or December, about three months
12 later, Tina got back with you and the two of you
13 reconciled?

14 A. Yes.

15 Q. And she brought the children into your home even
16 though she knew -- was she aware of that allegation, by
17 the way, that was made to DFACS?

18 A. Who, Tina?

19 Q. Yeah.

20 A. Yes.

21 Q. I mean, that was the basis for her asking for
22 supervised?

23 A. Yes.

24 MR. STODDARD: Beg the Court's indulgence. I
25 may be through, Judge. I just want to see.

1 Q. Oh. I probably don't want to even go there, but it
2 did come up. When you were in school with your eighteen
3 hours, did you have to study at night?

4 A. Do I have to study at night? Yes.

5 Q. And by the way, can you be on that program, that re
6 ---

7 A. T.R.A.?

8 Q. --- retraining program and work?

9 A. No.

10 Q. Do you feel like for the future as far as long-term
11 being able to support whoever you need to support, do you
12 think this training is the best for the future?

13 A. Yes, because there's construction going on in the
14 United States today.

15 Q. Oh, yes. You mentioned going to Spanish classes. By
16 the way, do you speak Spanish?

17 A. Some.

18 Q. So you and your wife can communicate some in her
19 language?

20 A. Yes.

21 Q. And just to make sure we get the time line correct,
22 when did Nicole go to Carolina Behavioral Health?
23 Approximately what month? Do you remember? The place in
24 Greer.

25 A. Around May or June, something like that.

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1 Q. Of 2002? No. Three. I'm sorry.

2 A. Uh-huh (affirmative).

3 Q. I've got no further questions.

4 THE COURT: Recross?

5 MS. HERVEY: Just one.

6 RECROSS EXAMINATION

7 BY MS. HERVEY:

8 Q. Did you ever make a statement that -- you said that
9 you kind of stayed in terms of working in mills in South
10 Carolina because you couldn't leave the state?

11 A. Since these charges come on me, I can't leave the
12 state and work anywhere else.

13 Q. I see.

14 RE-REDIRECT EXAMINATION

15 BY MR. STODDARD:

16 Q. And that's a condition of your bond on this case ---

17 A. Yes, it is.

18 Q. --- that's been pending? No further questions.

19 THE COURT: Any re-re-re ---

20 MS. HERVEY: No, no. I'm sorry, Your Honor.

21 THE COURT: Thank you. No problem.

22 All right. You may step down.

23 Counsel, approach.

24 (WHEREUPON, a bench conference was held off the
25 record.)

1 THE COURT: Mr. Foreman, ladies and gentlemen of
2 the jury, I need some time to talk with the attorneys
3 about how we wish to proceed. So I'm going to have to ask
4 you to retire to the jury room for a few moments. And
5 again, do not undertake a discussion of the case among
6 yourselves.

7 (WHEREUPON, the jury exited the open court at
8 approximately 11:33 a.m.)

9 THE COURT: Do y'all want to just take a few
10 minutes to ---

11 MS. HERVEY: If we could.

12 THE COURT: All right. We'll stand at ease
13 until you tell me you're ready to start.

14 MS. HERVEY: Just take five or ten minutes.

15 THE COURT: That will be fine. All right.
16 We're at ease.

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

18 THE COURT: All right. So what we'll do is
19 you'll rest on the record in front of the jury and you'll
20 announce you don't have any reply.

21 MR. STODDARD: I may put that in.

22 THE COURT: Well, make up your mind because
23 we'll have to do it.

24 MR. STODDARD: Yeah, I haven't rested yet. I do
25 want to put that in.

1 THE COURT: Well, that's what I'm saying.

2 MR. STODDARD: I started to do it, but I didn't
3 want to interrupt you when you were leaving and say, could
4 I do this, Judge, you know, but I didn't.

5 THE COURT: I mean, I'll ask you after you've
6 rested and everything else. In fact, before I hear any
7 motions, I'll ask if you have anything else. And that's
8 -- that is the invitation to check your exhibits to be
9 sure they're in and not just for identification. All
10 right.

11 Very well. Ask the jury to join us.

12 (WHEREUPON, the jury entered the open court at
13 approximately 11:48 a.m.)

14 THE COURT: All right. Let the record reflect
15 the jury and alternates are in the jury box.

16 Mr. Stoddard, you may proceed.

17 MR. STODDARD: Your Honor, at this time I would
18 move that State's Exhibit 3 be admitted into evidence.

19 THE COURT: Is it State's or Defense?

20 MR. STODDARD: I mean Defense Exhibit. I'm
21 sorry. That's from my old prosecutor days.

22 MS. HERVEY: Can I just ask him a quick
23 question?

24 THE COURT: Certainly.

25 (Off record discussion.)

1 MR. STODDARD: I'd move exhibit number 3 into
2 evidence, Your Honor.

3 THE COURT: All right. Any objection?

4 MS. HERVEY: Your Honor, I mean, he asked him a
5 question about that document. I don't think it
6 substantiated what that document relied -- applies to you,
7 and I don't think the proper foundation has been ---

8 THE COURT: Let me see. Is that the one about
9 the notice of services?

10 MR. STODDARD: Yes, sir.

11 THE COURT: This is an affidavit of service of
12 pleadings. I do think he did ask him about when it start
13 -- when an action started. I'm going to overrule the
14 objection and admit it into evidence over the objection of
15 the State.

16 (WHEREUPON, Defendant's Exhibit Number 3 was admitted
17 into evidence.)

18 THE COURT: Anything else?

19 MR. STODDARD: The Defense rests.

20 THE COURT: Any reply?

21 MS. HERVEY: No reply.

22 THE COURT: All right. Mr. Foreman, ladies and
23 gentlemen of the jury, that concludes the testimony and
24 evidence in the case. However, we still have the argument
25 by counsel and then the charge on the law by the Court.

1 And to be candid with you, I need a little bit of time to
2 go over the law in this case before I present it to you.
3 So I'm going to need to meet with the attorneys for longer
4 than I anticipated. So I'm going to suggest that you go
5 to lunch now and come back and one thirty. We'll be back
6 earlier so I can do that. But at one thirty, we will then
7 -- what we say -- give you the case, the final argument by
8 counsel and the charge on the law. Then it will be for
9 your determination.

10 However, that is a very critical stage of the case,
11 both the argument and charge on the law. So please do not
12 undertake a discussion of this case among yourselves or
13 obviously permit anybody to discuss it with you.

14 But if you'll go to lunch now and come back at one
15 thirty, we'll conclude the case at that time.

16 Everyone else remain seated while the jury
17 retires from the courtroom.

18 (WHEREUPON, the jury exited the open court at
19 approximately 11:52 a.m.)

20 THE COURT: All right. Anything from the State?

21 MS. HERVEY: Nothing from the State.

22 THE COURT: From the Defense?

23 MR. STODDARD: No, sir.

24 THE COURT: I would ask you to be back at one.

25 Of course, if you can't get back at one, we'll wait on

1 you. But I think you understand I want to get as much as
2 I can as to what's going to be charged to the jury before
3 we start arguments.

4 All right. Very good. See you at one or soon
5 thereafter.

6 (WHEREUPON, court stood at recess for a lunch break.)

7 THE COURT: Is the State ready to proceed?

8 MS. HERVEY: Yes, sir.

9 THE COURT: Is the Defense ready to proceed?

10 MR. STODDARD: Yes, sir.

11 THE COURT: All right. During the break for
12 lunch, I had a chance to discuss my charges with the
13 attorneys. It is my understanding that the State will not
14 seek lesser-included offenses and that the Defense will
15 not request lesser-included offenses.

16 MR. STODDARD: That's correct.

17 MS. HERVEY: That's correct.

18 THE COURT: In other words it will go to the
19 jury solely on criminal sexual conduct in the first
20 degree; is that correct?

21 MS. HERVEY: Yes, Your Honor.

22 THE COURT: Is that correct?

23 MR. STODDARD: Yes, sir.

24 THE COURT: All right. Also the request of the
25 Defendant for, "A verdict must not be based on sympathy or

1 passion," I will cover that in my charge.

2 MR. STODDARD: Yes, sir.

3 THE COURT: I've also shown the verdict form for
4 the -- the possible verdicts are either guilty of criminal
5 sexual conduct in the first degree or not guilty. Any
6 exceptions to that from the State?

7 MS. HERVEY: None from the State.

8 THE COURT: From the Defense?

9 MR. STODDARD: Nothing from the Defense.

10 THE COURT: All right. And the State will not
11 open, and the Defense will argue and then the State will
12 close. That's by agreement of the parties?

13 MS. HERVEY: Yes, Your Honor.

14 THE COURT: Is that right?

15 MR. STODDARD: Yes, sir. That's right.

16 THE COURT: Anything else from the State?

17 MS. HERVEY: Nothing from the State.

18 THE COURT: Anything from the Defense?

19 MR. STODDARD: Nothing from the Defense.

20 THE COURT: All right. Ask the jury to join us,
21 please.

22 (WHEREUPON, the jury entered the open court at
23 approximately 1:28 p.m.)

24 THE COURT: All right. Let the record reflect
25 that the jury and alternates are in the jury box.

1 Mr. Foreman, ladies and gentlemen of the jury, I have
2 had my conferences with the attorneys, and so we are now
3 ready for the final portion of the trial which will be the
4 final argument by counsel. And then after the argument by
5 counsel, I will give you the charge on the law applicable
6 to this case. In this case, the Defendant will argue
7 first, and then the State will close.

8 I recognize Mr. Stoddard for his argument.

9 MR. STODDARD: Thank you, Your Honor.

10 Ladies and gentlemen of the jury, I will preface my
11 closing argument with these remarks. I will be recalling
12 certain testimony. I have two ears; you have twenty-four
13 ears. If I misstate -- when you go back there you
14 collectively, I'm convinced, will remember testimony
15 better than I.

16 While I'm trying a case I try to take notes.
17 Sometimes people are talking in my ear. And if I misstate
18 something, please do not hold it against Mr. Sipes. Don't
19 hold it against me either. It's not intentional.

20 This is a case where based on the evidence the
21 circumstances are what I would describe very conducive to
22 a false allegation of sex abuse. Very dangerous
23 situation.

24 You heard testimony that there's a probability that
25 you have a mother with borderline personality disorder

1 raising a child with borderline personality disorder.
2 Some of the characteristics of borderline personality
3 disorder -- and I'm probably not going to hit them all --
4 are strong reaction, sometimes angry reaction, to the
5 perceived rejection of someone you care for. A loved one.
6 Perceived rejection and you can react violently. Taking
7 on symptoms or things that happen to others and taking
8 them upon yourself.

9 Manipulation. If you recall the State's expert Dr.
10 or Ms. DeFelice described people with borderline
11 personality as manipulative. They manipulate the others
12 in the family.

13 Now, I know -- and the State is going to say this --
14 we don't know that either person has borderline
15 personality disorder. It had not been diagnosed for **Minor**
16 although borderline traits were diagnosed at The Carolina
17 Center. She was there over a month, was seen by
18 psychiatrists. And that was in the discharge summary,
19 that she has borderline personality traits. And they
20 can't do a full diagnosis until she's over eighteen. I
21 did not prove that the mother has borderline personality
22 disorder -- and I will talk a little bit about the burden
23 of proof.

24 Again, I don't have the burden of proof in this case.
25 I can't do a -- or send the mother for a full examination.

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1 But Cindy Stichnoth stated that there's a strong suspicion
2 or probability -- I'm not sure how strongly she put it --
3 that the mother has borderline personality disorder based
4 on a number of factors she identified in the psychiatric
5 record.

6 Set aside borderline personality disorder for a
7 minute and just get into the world of common sense and
8 what the evidence shows and ask yourself from what you
9 heard, is this a case where the mother is capable of
10 manipulating a daughter into making a false allegation.
11 Some of the things, much of this from **Minor** herself in
12 therapy, that you heard is I will kill you. Mother
13 threatened to kill me if you say anything that would cause
14 you to lose custody.

15 When the mother would communicate with **Minor**,
16 **Minor** bad behavior was elevated. She was disturbed
17 when she would talk to the mother. There's a history of
18 abusing the daughter that was replete in the medical -- in
19 the counseling notes. Many references to that. If you
20 recall when I asked **Minor** didn't you tell the forensic
21 interviewer that Mama beat you, she admitted, yeah, I told
22 him that. She admits that Mama beat her.

23 Withholding affection. This was identified in the
24 record that the mother withholds affection of herself and
25 withholds the affection of the family members if you don't

1 do what she wants. And they found that -- Minor
2 complained about it or told stories that identified that.
3 And then the mother actually did that at the hospital if
4 you recall. She asked that the grandmother be taken off
5 the contact list. Minor didn't ask for that; the mother
6 asked for that. They took grandmother off the call list
7 because Minor was talking to the grandmother and sharing
8 things. And Mama didn't like that, so she wanted her off
9 the list. That's manipulation.

10 Using information in a way that's manipulative.
11 Minor complained in therapy that Minor misrepresented
12 when my father relinquished his parental rights. And I
13 know the State disputes whether that really happened or
14 not, but that's what Minor perceived as that Mother told
15 me a falsehood about that.

16 Telling Minor that Dad likes to have sex in your
17 bedroom. Now, think about that for a minute. Why would
18 you share that with a daughter? Are you trying to protect
19 your daughter in any way? Be careful of Dad because of
20 his -- what are you doing?

21 And even in this case when Mr. Sipes filed for
22 custody, making comments to Minor about -- for example, we
23 split up because he was cheating on me. Is there any
24 evidence he was cheating? But that's what she told Minor.
25 That's why we left. And then Dad wants custody of your

1 siblings, but not you, even though he asks for all of them
2 in his pleadings. And the only reason -- it was only when
3 he went to a temporary hearing and learned of these
4 charges that he -- he didn't say I don't want custody of
5 her. But when you have this kind of allegation involving
6 therapy and this thing's being investigated, you concede
7 that point at a temporary hearing. You're not saying I
8 don't want custody; you just have to wait till this --
9 till we see how these charges come out.

10 Other reasons to -- evidence of manipulation. The
11 testimony of Mr. Rumney [sic] toward the end of the case
12 where he describes, first of all, Tina as a liar, a very
13 bad liar. But notice he said she kept stirring things up
14 among the family members and even did things to try to
15 break the bond between Mr. Sipes and his son, he said. He
16 [sic] tried to interfere with that.

17 Now, I put two witnesses on the stand from before Mr.
18 Sipes' relationship with Tina Sipes and after, his current
19 wife and his former wife. I felt like when I first
20 learned of these charges I would like to talk to these
21 people, especially the former wife. You know, if you're
22 this bad person that's been described here -- you know,
23 former wives, when they live with somebody that's kind of
24 a bad person, they don't usually protect them. They will
25 tell you like it is. A former wife that thinks highly of

1 her former husband, as she does Mr. Sipes, says something
2 about Mr. Sipes. It says something about his character.
3 And I know he's behind in child support now because he's
4 having to go into a different vocation. And she still has
5 respect for Mr. Sipes. But not Tina Sipes. She said that
6 she -- well, especially Mr. Rumney [sic] who said she has
7 a bad character at least for truthfulness.

8 There's ample evidence in the psychiatric records
9 that we got that there is a big problem between mother and
10 daughter and all sorts of things percolating and been
11 percolating for years. And I would point out, we don't
12 have all the psychiatric records. You know, the State put
13 up an expert to testify that all things that are
14 consistent with sex abuse occurring in this case, but she
15 doesn't have -- and I don't have -- the current
16 counselor's notes. She said, that's what I would normally
17 use as a source.

18 They went to The Carolina Center. And we had a lot
19 of records that we got in at the last minute from The
20 Carolina Center. But she went on to another facility in
21 Columbia. There was testimony about that. And we don't
22 have anything from Columbia. And, again, I don't have the
23 burden of proof in this case; the State has the burden of
24 proof. The absence of evidence on certain issues can
25 create reasonable doubt.

1 Now, I expect that possibly you will hear something
2 like this from the State, that I am beating up on the
3 mother. That this is some ploy on my part to focus
4 attention on the mother as sort of a ploy. And it's not a
5 ploy.

6 I can understand -- and it may even seem unfair to
7 Minor at some point. But I'd like to point something
8 out. This stuff didn't happen in a vacuum. These
9 allegations didn't arise in a vacuum. If you want to look
10 at the allegations in a vacuum and not look at what was
11 going on around, then on the face the allegations appear
12 to be true. When somebody says something like this, you
13 want to believe it. But you have to look at what was
14 going on in the world around Minor And that's what I'm
15 saying. What was going on in the world around her is
16 conducive to a false allegation like this.

17 You have to look at the time line in this case. The
18 sequence of events is very important. If the sequence
19 happened another way, there may be less doubt in this
20 case. But let me give you the sequence. I'm going to
21 start with what we heard toward the end of the case, a
22 D.S.S. allegation against Mr. Sipes -- it's actually
23 DFACS, the Georgia D.S.S -- allegation November of 2001
24 when he was divorced from Tina. They'd been divorced a
25 while.

1 In November of 2001 somehow there was an allegation
2 of some kind of sexual impropriety or misconduct on his
3 part that -- and Tina came in and had his visitation
4 supervised. Not by any hearing or any judge or in a case
5 like this where evidence is presented. He just went down
6 there and said, I will accept this. I would suggest to
7 you though that's an allegation that Tina herself didn't
8 even believe because three months later she's back with
9 him and brings her children to live. Think about that.
10 Somebody makes a report to D.S.S. alleging sexual
11 impropriety, starts a D.S.S. investigation, goes to court
12 in front of a judge and gets his visitation supervised.
13 But she comes back -- the mother, knowing all of this --
14 and the reason I say the mother knowing all this, we don't
15 know who makes these reports. They're confidential. But
16 the mother gets back with him three months later.

17 Oh, by the way, that allegation came up when she was
18 trying to coax him into getting back together with her and
19 he was resisting those efforts. And then that allegation
20 comes up. Everything was going fine till then. Again,
21 that's more evidence of manipulation, more evidence that
22 the mother is capable of getting someone to go into court
23 and lie to do her bidding.

24 Let me give you another example of manipulation by
25 the mother. We got into some child support checks and

1 sort of that. And I know the evidence might have seemed
2 to go a little far out. I wanted to get that out for this
3 reason though. I would suggest to you that I presented
4 evidence that Tina Sipes went to court on two -- well,
5 this is what she essentially did. She falsified documents
6 and presented false evidence to gain government benefits
7 and to go into court twice to have something done against
8 Mr. Sipes. And it was a small thing because it was child
9 support, but she said this on the stand. She said, I
10 needed to get checks from Max Sipes to me to use as a
11 receipt to get the Medicaid benefits.

12 And she told you from the stand -- I would submit to
13 you she lied to you. She told you from the stand, oh,
14 that was okay. D.S.S. knew that we were living together.
15 But as long as they saw that he was paying child support,
16 I'm entitled to those benefits. I would suggest to you
17 that that's in no way correct. There's no way that you
18 have to go to D.S.S. to prove you're receiving child
19 support, but it's okay with them that you're living with
20 the father. That doesn't mix.

21 Now, she said, I needed a check to take to D.S.S. to
22 show as a receipt so I could get these benefits. She used
23 this same check to go into Family Court in Georgia once
24 and up here at the same time and told the judge, this is a
25 child support check he's supposed to have written me in

1 July. And it bounced. And I haven't received any child
2 support since. Except she was living with him and
3 continued to live with him in September.

4 Do you see what I'm saying? She's capable of
5 presenting false evidence in courts of law to get medical
6 benefits. And, again, I know it sounds like -- why are we
7 talking about Tina? Why are we talking about Tina
8 Goodwin? But these allegations did not arise in a vacuum.

9 Now, we have the issue of the prolapsed colon. And I
10 think that is a tremendous big deal in this case. In
11 fact, when you hear there's an allegation of forced
12 sodomy, prolapsed colon, you immediately jump to the
13 conclusion it happened.

14 I need to talk about the experts for a minute because
15 I think you're probably going to hear this. And by the
16 way, if it sounds like I'm talking a long time, I have to
17 anticipate what you're going to hear from the other side.
18 I don't get to come back and respond.

19 I think you might hear something to this effect
20 because I heard some -- in cross examination that brought
21 this out. Dr. Payne is a surgeon. He's more qualified.
22 Dr. Lund is not a surgeon, less qualified. I would submit
23 to you that's not valid. Dr. Lund diagnoses, identifies,
24 evaluates, finds the cause of colon problems. That's what
25 he described that he does. Part of it is to find the

1 cause of it. He is perfectly qualified to comment on what
2 would cause rectal prolapse.

3 Dr. Payne, I was very impressed with him. Very fine
4 doctor. And I am just a layman, and I may be overstepping
5 my bounds. But one of the things he said made very little
6 sense to me. I mean, he said that this is inconsistent
7 with constipation and consistent with forced sodomy. The
8 reason he says that though, it sounded to me, was I had
9 another patient with forced sodomy with the same
10 characteristics which is normal muscle tone. I think you
11 may hear he's seen rectal prolapses from forced sodomy;
12 Dr. Lund has not. Dr. Payne has only seen two. If I
13 heard correctly, he's only seen two cases of -- that's a
14 sample size of two. That's a big leap to make, that
15 because I've seen one like this, this one almost has to be
16 forced sodomy.

17 Now, Dr. Lund came in and said, I could find nothing
18 in the medical literature to correlate normal rectal tone
19 -- normal rectal muscle tone -- excuse me -- with forced
20 sodomy. First of all he said, I'm not sure that he can
21 even make that comment, that it was normal rectal muscle
22 tone because in the records I reviewed there's some test
23 that I can't name that you have to do a quantitative
24 analysis. He said a physical exam which your senses can
25 tell you qualitatively that there's normal muscle tone.

1 But to really say there's normal muscle tone, you've got
2 to do this more sophisticated test. I don't see it in the
3 medical records.

4 The State is going to suggest, well, he might have
5 done the test and he just didn't get that record. Again,
6 the Defendant doesn't have the burden of proof. The State
7 has the burden of proof that this wasn't from
8 constipation, not the Defense. He was looking at -- that
9 aside, there's nothing in the medical literature to
10 suggest that what Dr. Payne is saying is true, that this
11 is more likely to be from -- or the Judge is going to
12 charge you that when an expert speaks on causation of an
13 injury, he's got to be able to say to a reasonable degree
14 of medical certainty that this is what caused it. There
15 is no way that Dr. Payne can make that statement, that
16 this -- to a reasonable degree of medical certainty that
17 this prolapse was from forced sodomy because there's
18 nothing in the medical literature to say that.

19 Not only did Dr. Lund say that, he went and got a
20 second opinion from someone very distinguished. And you
21 heard those credentials. He said, yeah, there's nothing
22 in the literature to support that. So I would suggest to
23 you that looking at this rectal prolapse, you can't say it
24 came from forced sodomy.

25 **Minor** has characteristics common to people who get a

1 rectal prolapse from constipation. Dr. Payne has said
2 that. Dr. Payne said she has a history of drug use, she
3 has a mental illness. Both of those go along with rectal
4 prolapse from constipation. Dr. Lund said this often goes
5 undetected which makes sense. You know, how many people
6 get much medical treatment, especially adolescents and
7 teenagers, for chronic constipation? It's not something
8 you can talk about. It's not some thing you want to bring
9 out. So she has characteristics that suggest that that's
10 where her prolapse came from.

11 I'll point something else out that I noticed. Cindy
12 Stichnoth was asked how many times have you seen a rectal
13 prolapse from forced sodomy, and she said once. The
14 question was to suggest, I think, that she doesn't have
15 much experience with that. But keep in mind, Dr. Payne
16 has only seen her twice. Dr. Lund has never seen her.
17 What I'm suggesting to you from that is it's rare that you
18 get a rectal prolapse from forced sodomy. Both doctors
19 said you don't get it at all from consensual sodomy. I
20 know it sounds like sodomy would be a likely way to get
21 prolapse, but it doesn't seem likely. Constipation,
22 though, is a way to get it.

23 Now, there's other evidence to suggest constipation.
24 You have evidence in the Carolina records that **Minor** used
25 a lot of laxatives. **Minor** used suppositories. There's

1 even a medical record where the mother checked that she
2 had a past history of constipation. Now, this record was
3 in April of 2004. And the State highlighted that. And
4 I'm not sure if they highlighted it to suggest that, well,
5 she got that constipation after her surgery. That may be
6 an argument, but that is not what the mother said. The
7 mother said, oh, I didn't realize that she didn't have
8 constipation. I now know it was binging and purging. Of
9 course, Cindy Stichnoth also stated that binging and
10 purging also goes along with constipation.

11 The point is this. That Dr. Payne -- another part of
12 -- another reason for his opinion was aside from the
13 characteristics he said was consistent with forced sodomy,
14 he said, and there was no history of constipation. I
15 ruled it out. But he never looked at the medical history.

16 There's a G.I. test years ago, lower G.I., upper and
17 lower G.I., that -- did you see what that was about? No,
18 I did not look at that. Have you got the pediatric
19 records? No, I didn't look at that. Not that there would
20 necessarily be any constipation in pediatric records.
21 Where did he -- it seems that he got this from the mother.
22 And I'll tell you why that is. He said that he had this
23 family conference with **Minor** and that's when she
24 disclosed this to them.

25 Now, keep in mind he saw her -- was it four years ago

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1 now? And you do the math because I can't do it while I'm
2 talking. He has all these patients. He didn't bring his
3 records with him, and he remembers this conference. But
4 **Minor** does not remember it that way. **Minor** does not
5 remember it that way. **Minor** said, I never told this to
6 the doctor. I never talked to the doctor about it. She
7 said it back then, when she was interviewed by law
8 enforcement, and she said it here on the stand. I never
9 told the doctor. So the doctor is remembering that
10 incorrectly. He met with the mother. And together they
11 came up with it's sodomy. We don't know how it came
12 about. But you can imagine.

13 Now, keep in mind the time line. The parties
14 separated in September. Mr. Sipes served custody papers
15 October the 26th. The mother said on November 12th -- I
16 remember it was November 12th -- she first disclosed sexual
17 abuse. But it was fondling on the couch in the living
18 room when she was eleven years old. The same scenario you
19 heard that Tina learned a neighbor went through right
20 before they broke up. That's what she told me. We have a
21 rectal prolapse.

22 Dr. Payne said that the emergency room visit was
23 around the end of November. I do not know when he had
24 this conference with the mother. But we have this
25 conference, and we come up with she's been sodomized. Do

1 you see how the mother could manipulate the situation and
2 then later convince Minor in some -- I don't know how
3 that happens. Cindy Stichnoth described it as not
4 collusion, but the daughter knows I'm supposed to say this
5 to get the affection of the mother. Very, very dangerous
6 situation here for a false allegation.

7 There are some facts that are inconsistent with guilt
8 in this case. For example, Minor made statements in the
9 forensic interview and I think here in court that I wanted
10 out of the house. I did these things, I cut myself, to
11 get out of the house so I could get away from him. But
12 when she was in the institution, her complaints were
13 against the mother. When she said, I didn't want to go
14 home, it was against that mother. That's what Cindy
15 Stichnoth said she found in the record.

16 And by the way, if you think she's a hired gun
17 because I hired her as a consultant -- hopefully you
18 don't. Hopefully you saw for yourself. But she said
19 things that hurt Mr. Sipes. She found things in the
20 record that helped him, that hurt him. And she found --
21 well, she found things that were inconsistent. And that's
22 what she said. She looked to see how many times she
23 complained about Mr. Sipes and against the mother, and she
24 said it was almost always against the mother. And when
25 the mother would call, she would get agitated.

1 So that's one thing. Why was she complaining about
2 the mother if the reason to get out of the house was the
3 father? There is -- the record at the hospital says that
4 she began cutting herself three years ago which would take
5 it back to the year 2000, before the parties ever
6 reconciled. And I realize there's an allegation of the
7 fondling when she was eleven years old, that isolated
8 evidence. Maybe that's what caused it. But doesn't it
9 seem more likely that **Minor** was having problems from all
10 that we heard about the mother going all the way back to
11 2000.

12 And she reported she started cutting herself in 2000.
13 The mother cuts herself. When I identified the reasons --
14 well, I identified the reasons you might suspect the
15 mother's manipulative but not borderline. But that's one
16 of the reason that we think that's she's got borderline
17 traits herself. The mother cut -- was a -- is a cutter or
18 has been in the past.

19 Then there's one other thing that's inconsistent in
20 this record. Well, before I go to that, let me -- I am
21 about done, probably quicker than I thought I would be. I
22 just want to make sure there's not something else.

23 Oh, yeah, there is another thing I want to point out.
24 And another reason I called the exwife and the current
25 wife -- but notice this. I'll let you decide the

1 credibility of those witnesses and what kind of person you
2 think Max Sipes is. But I would suggest to you that the
3 evidence shows a pretty good stable guy with his first
4 wife, a pretty good stable guy right now. Sandwiched in
5 between there he has this relationship with Tina and is
6 caught up in all this. Because even **Minor** made
7 allegations against him that he -- but it doesn't paint
8 the picture of a guy that's violent, that's mean, that
9 would do anything like this.

10 But another inconsistent fact. I mentioned the
11 complaints against the mother in the institution, the fact
12 that she started cutting earlier. In the time line, you
13 know, I mentioned he served her October 26th with the
14 custody papers.

15 Oh, I got to stop for a minute. I got to mention
16 another thing about the custody. But there was some
17 testimony elicited that I think was designed for this
18 point. That the mother really had nothing to worry about
19 custody in this case. And you heard this about she had
20 custody back then and that -- at least it seemed like to
21 me that's where we were going. Because she had custody
22 the first time, what makes you think you're going to get
23 custody the second time? This was yesterday, not today.
24 I'm going to suggest to you there was a lot of reason for
25 the mother to be worried in this case if she got served

1 with custody papers. When you have a child like this
2 institutionalized, any lawyer is going to want to find out
3 what's going on with this child, and they're going to want
4 to get their hands on that information. And you heard
5 plenty of information that should make the mother worried.
6 I mean, it speaks for itself.

7 I'll tell you another reason though. If they're
8 going to suggest, well, she didn't have anything to worry
9 about so she wouldn't have reacted this way. When people
10 make a false allegation in connection with a custody case,
11 it's not always because they -- first of all, they're lay
12 people and they don't know if they need to be worried or
13 not. When you get served those papers, you get mad, you
14 get scared. I don't think she was working at the time.
15 How is she going to hire a lawyer? This is a way to get
16 something done without hiring a lawyer. But people often
17 have doubt and anger, and I'll show you you're messing
18 with the wrong person. I'm going to bring things down on
19 you. You're not going to see the kids anymore. It's not
20 so much that I'm worried about you getting custody. It's
21 like, I'm going to bury you. That's the kind of scenario
22 you have in these cases.

23 Now, another inconsistent fact. I interrupted myself
24 a minute, but ... In the sequence of events prior to him
25 filing for custody she went to -- she was seeing a

1 counselor in Georgia that said -- started counseling
2 October 13th. **Minor** initially made complaints about the
3 father that he didn't call me or come see me at the
4 Carolina Center. That now that Mom and Dad aren't talking
5 anymore, he calls and speaks to my siblings, but not to
6 me. Now, one of the experts said, oh, that's
7 accommodation. Could be. But does that sound consistent
8 with a girl that's cutting herself, acting out, doing all
9 these things to get away from Dad?

10 I told you at the beginning of the case I can't prove
11 Max Sipes is innocent. It cannot be done. I wish it
12 could. But you can look at the circumstances and all that
13 and see if there's reasonable doubt.

14 Now, there's going to be something that happens, I
15 would think, in this case that you're going to find. I
16 would expect this. That you're going to feel a lot of
17 sympathy for **Minor**. And you should. I do and I
18 represent Mr. Sipes.

19 And you're going to have this concern if this
20 happened and we find him not guilty, what's that going to
21 do? And the Judge is going to give you -- he's going to
22 instruct you on the law and he's going to tell you
23 something that really will take that off of you. He's
24 going to tell you to set aside bias, passion and sympathy.
25 Set that aside. Your verdict cannot be based on those

1 things, so you have to set that aside. Don't worry about
2 that. I know it sounds cold. Base it on the evidence.

3 Now to the burden of proof. This isn't about do we
4 think it happened. That's not enough. It's not about for
5 you to go back in there and try to figure out what's the
6 most likely, he did it or he didn't do it. That's not
7 what it's about either. It's about whether there's
8 reasonable -- if there is reasonable doubt, there's only
9 one thing you can do. And that's not guilty.

10 Reasonable doubt is the kind of doubt that would
11 cause a reasonable person to hesitate. I hope that
12 throughout this trial you've been presented evidence or
13 questions of what I would submit to you, respectfully
14 submit to you, that looking at all the evidence at the end
15 of the day, a reasonable person would hesitate.

16 Another definition of -- another way to look at
17 reasonable doubt is, is it possible that he didn't do it?
18 Obviously it's possible in that case. That's not guilty.
19 So I would respectfully submit to you that when you
20 deliberate that you find that the correct verdict in this
21 case is not guilty.

22 Thank you.

23 THE COURT: Madam Solicitor?

24 MS. HERVEY: May it please the Court, Your
25 Honor. If I could have a moment to get situated.

1 This is obviously the State's version of closing
2 argument and my opportunity to come to you and talk to you
3 about the evidence and what you've heard over the past
4 several days. I do want to just take the opportunity to
5 truly thank you for your service here this week. I think
6 a lot of times when people say, I'm called for jury duty,
7 they don't truly appreciate both how difficult it is and
8 how important it is until they've really sat on a jury.
9 We think it's this thing that we get called to do from
10 time to time just because lawyers can't agree on what
11 happened. But I think having served this week, you kind
12 of really do have an appreciation now for how important
13 your service is. Because there are these events that take
14 place where people truly do disagree on what happened and
15 where it takes twelve people who don't have any friends to
16 reward or any enemies to punish who can objectively look
17 at the evidence and listen to the witnesses and hopefully
18 reach a decision at the end of this case.

19 I know the trial took a little bit longer than we
20 anticipated. Luckily Judge Macaulay's wife is fine today,
21 and some of the doctors' testimony that we had to work
22 around. And I'm just going to ask and probably take this
23 opportunity to go back through the State's evidence. Just
24 because it did occur so long ago, it's not as fresh in
25 your mind as what you heard today.

1 What I do want you to do is really focus on the
2 question that you're going to have to answer when you go
3 back into that jury room. Did Maxwell Sipes forcibly
4 sodomize his adopted daughter **Minor** That's it. You
5 don't have to pin a ribbon on the best parent. You don't
6 have to decide who should or should not currently have
7 custody, should have had custody in the past. Those kind
8 of things. You don't have to decide any of that. Is it
9 some parts relevant? Perhaps. But really the question
10 you have to ask yourself is did he do this thing. Did he
11 sodomize her? That's it. And I'm just going to put that
12 out there as we begin to kind of focus you in on really
13 what you have to answer.

14 I'm going to talk to you a little bit about Dr. Payne
15 and a little bit about **Minor** and those kind of things.
16 And Mr. Stoddard was right when he said he and I aren't
17 witnesses. We're not the jury. We're not the fact-
18 finders. That's not our role. And we do make mistakes.
19 We do get things wrong. That's why Judge Macaulay won't
20 let you take notes, because you have the obligation to
21 rely on your own recollection.

22 And the court reporter can play back testimony if you
23 need it. There are ways to go back and hear some of those
24 things if you need to on an issue you may or may not
25 disagree with. But it really does come down to your

1 recollection of events.

2 Before I start going through the testimony, I just
3 want to create a little time line. And this is to the
4 best of my recollection. But ...

5 (Pause.)

6 MS. HERVEY: And let me just take you through
7 this chronology a little bit just so you understand.

8 [REDACTED] Minor was born to a biological father she
9 basically doesn't have any relationship with. Whether he
10 immediately signs away rights or he waits for a while,
11 it's -- everybody agrees he doesn't have anything to do
12 with her. Never pays child support, never visits her,
13 never takes care of her. None of those things. So either
14 legally or just through practice advocates all
15 responsibility to the child.

16 1992, Minor is about five years old. Tina and Max
17 marry for the first time. He's been married before.
18 They're together. And around that time Minor is adopted
19 by Max. They stay together from about '92 to '97 -- I'm
20 sorry -- '92 to '99. That's when they divorce or they
21 separate for the first time. At that point Tina had
22 custody of the girls, Taylor, who has now been born to
23 Max, and Minor who he adopted. He moved back to Anderson
24 for work. Sometime around that time she gets custody of
25 the girls. They occasionally go back and forth to their

1 dad.

2 '02, Max and Tina reunite. About the same time Minor
3 is having some G.I. tests done. They move in together and
4 the twins are conceived. We don't really have any
5 specific dates for these events, but we know in January or
6 February of '02 these things are happening.

7 6/03, Minor is hospitalized at Carolina Behavioral
8 Health Center.

9 9/03, Max and Tina separate. She moves out, takes
10 herself back to Georgia, pays for the U-Haul.

11 11/03, Tina tells you sometime in that month Tina
12 discloses to her what is happening.

13 In 12/03 Minor has the colo-rectal surgery.

14 These are -- there's some other dates that are
15 important, and we may talk about those. But I think it's
16 important to just put them in that chronology so that you
17 can appreciate them when you go through the testimony.

18 The first witness that the State called was Dr.
19 Payne, a colo-rectal surgeon. That's his specialty. An
20 unfortunate one, especially with that name, Dr. Payne.
21 But that is what he does on a daily basis. That is his
22 area of expertise. It's been that way since he's been a
23 doctor. That is what he focuses on, colo-rectal surgery.

24 He treated Minor. Because the one doctor who
25 testified who actually examined her performed tests

1 necessary on her to perform the surgery and those kind of
2 things. Now, they say, well, we couldn't find it. We
3 couldn't find where he may have performed these tests.
4 But it's curious they never asked him. He said I
5 performed this surgery. And lo and behold, she's gone
6 four years without any problems, so he must have done
7 something right.

8 He's board certified. He spoke with her. He
9 performed the surgery on her. And he was responsible for
10 her follow-up care. In his opinion, she was forcibly
11 sodomized.

12 Now, Mr. Stoddard spent a great deal of time saying,
13 oh, he can't say that. No, no, he can't, because our
14 expert can't say it. And if our expert can't say it, then
15 he can't say it. And he'd only seen two cases and he
16 really doesn't know that.

17 But look at what he does know. This man knows an
18 extraordinary amount about the rectum. He knows an
19 extraordinary amount about rectal prolapse. He treats
20 predominantly that complaint, rectal prolapse. That's
21 pretty much the surgery that he's performing all the time.
22 He's the one familiar with the rectum and muscle tone and
23 those type of issues. And he spoke with a better
24 authority of it.

25 And in some ways it is a battle of the experts, but

1 you have to look at -- and this is what Mr. Stoddard never
2 really gets around to. Dr. Payne is a colo-rectal surgeon
3 from Georgia, north of Atlanta. He treated her four years
4 ago approximately. Did he get a trip to the Caribbean
5 because he finally found a forcible sodomy case? I mean,
6 what's really his incentive to lie? He wasn't paid for
7 his testimony. He came here on his own voluntary basis.
8 You think he hung around for a few years and said, oh, you
9 know what, I think I want a trip to Anderson, and I think
10 if I can say forcible sodomy I think I might get one.
11 Because you can undermine what he said. You can try and
12 pick it apart, bring in your own expert and try to muddy
13 the waters, but you have to come up with a reason for him
14 to lie, for him to stretch the truth. And it's not a free
15 trip to the Caribbean, and it's not a toaster, and it's
16 not because he was paid to say it.

17 So what must then be his motive? What is it? That's
18 what we look at when we evaluate whether or not people are
19 telling us the truth. Are we a paid expert, paid to walk
20 across the street and pull in some statistics? Or are we
21 the guy who actually examined her who back then before the
22 charges are brought says, I know it when I see it? And
23 it's rare and it's unfortunate, but it's there.

24 And you know, the other thing that I thought was
25 quite telling between him and Dr. Lund and Dr. Payne is

1 Dr. Lund talked about, well, I know it must not be sodomy
2 because we don't see it in homosexual men. You know, that
3 just demonstrates that he's really out of his league. Dr.
4 Lund, I'm sure, is an excellent, in his own words, gut
5 mechanic. If you've got acid reflux or esophageal reflux
6 or colon polyps, that's the guy to go see in Anderson. If
7 you've been forcibly sodomized by your step-father and you
8 need surgery for your rectal prolapse because it's so bad
9 that medication won't cut it, Dr. Payne is the guy you
10 need to go see. Because he's the one that can explain in
11 very common sense terms that the reason we don't see it in
12 homosexual men is because it's consensual, that they relax
13 the muscle, that they engage in this behavior on their own
14 volition. And because of that, there isn't the trauma.

15 Dr. Lund really hasn't thought this through because
16 he couldn't find it in the book. He couldn't find the
17 answer. Dr. Payne, his opinion, she's forcibly sodomized.

18 Here's the other thing that you've kind of got to
19 ask. The only possible -- everybody agrees and really
20 nobody disagrees that **Minor** had a rectal prolapse. A
21 rectal prolapse. Her rectum was coming out of her. It
22 had become detached from her body and surgically had to be
23 pinned back in place. This is rare and it's extraordinary
24 and it's significant. They can't deny it, so they've got
25 to explain it.

1 So what do they come up with? They come up with the
2 fact that, well, she's constipated because four months
3 after the surgery her mom checked on the sheet that she
4 had been constipated. But she also checked runny eyes,
5 runny nose, bed-wetting, headaches, chest pain. Pretty
6 much half the list was checked. But Dr. Payne told you
7 this isn't a bout of constipation here or there. This
8 isn't that kind of thing. This is chronic, long-term,
9 severe constipation.

10 Mr. Stoddard goes, well, she was on those drugs.
11 Drugs can do it. But she's not on the drugs until '03.
12 She doesn't have a history of it over her lifetime.
13 That's what Dr. Payne talked about. He says, constipation
14 that goes on for years. Well, she's got mental illness.
15 But Dr. Payne said specifically, it's not just any mental
16 illness. We see it in kids who are retarded and autistic.
17 And nobody has ever diagnosed **Minor** with that.

18 But here's the other one that Dr. Payne reasoned that
19 it's not constipation. If you have a rectal prolapse and
20 it develops from constipation, because for whatever reason
21 you're constipated and we do this surgery and we repair
22 you, unless we deal with what's causing the constipation,
23 you're going to have surgery again. But he said she's
24 gotten no follow-up care. She doesn't have any issues
25 past the surgery. Evidently not only repaired the rectum,

1 it miraculously cures her constipation.

2 Does she go off the drugs? How does it all go away?
3 Just poof, it all goes away. It comes and goes just like
4 that. Because Dr. Payne says if you're on these
5 medications, we've got other medications that can treat
6 you so you won't have constipation. Because you're
7 healing. You're going to have to suffer. You're going to
8 have pain. You're going to have all these things. We've
9 got to address those.

10 Rectal prolapse is a symptom; it's not a disease.
11 You take care of the symptom, the disease is still there,
12 the symptom is coming back. A check mark on constipation.

13 And Mr. Stoddard says, well, where are those records?
14 You're right. Where are those records? Who saw those
15 doctors? Who did she go see? If you want your expert to
16 come in here and testify to that, I'd give him those
17 records. Because Dr. Payne said he was aware of the test
18 that was performed. They were not related to constipation
19 and they were not related to the rectal prolapse. He told
20 you that the two things that they performed, the lower
21 G.I. and the barium enema, weren't looking for that, had
22 nothing to do with that and were associated with acid
23 reflux.

24 Now, this is what I think is most telling about the
25 rectal prolapse and the surgery. When it occurs. When it

1 occurs. He's just got some bad timing. And it's
2 unfortunate that she develops this rectal prolapse right
3 around the time she conjures up this story of forcible
4 sodomy because it's constipation and she's had it for
5 years. I mean, gosh, I wish it would have shown up in '02
6 or '01 or when she was thirteen or when she was twelve or
7 when she was eleven. It's just awfully coincadink
8 (phonic) in time that after suffering months of forcible
9 sodomy, she develops this rectal prolapse.

10 And where's the constipation for the month that she's
11 in the hospital? Because these are people watching her
12 day in and day out. They're watching her diet. They're
13 aware of what she's eating. They're aware of when she's
14 going to the bathroom. They think she's possibly bulimic.

15 Funny that for a month that constipation clears up.
16 Wow. Gone. Or did Tina Goodwin, in providing this
17 follow-up care for her daughter, check constipation the
18 say way she did runny nose and bed wetting and all those
19 other laundry list of things that every child goes through
20 in their life? And is it really not the chronic
21 constipation that is necessary? Is one check mark really
22 enough?

23 Mr. Stoddard said that you may be tending to feel
24 some effect toward Minor [REDACTED]. And that may be true.
25 She has a very unfortunate lot in life whether this

1 happened to her or not. She has lived a very hard life.
2 She's gone through a lot and she's been through a lot.
3 The biological father abandoned her. Her mother, whether
4 the evil-doer that they say or not, is at times very
5 inappropriate with her without a doubt. The one man she
6 thinks is finally there to save her, her adopted father,
7 leaves. She has no contact with him. Then she does go
8 back with him and he leaves again and he doesn't want her.

9 But what you have to ask yourself is while they would
10 like you to believe that this was all conjured in a grand
11 custody dispute that happened back in '03. Where is Minor
12 now? She's out of the home. Married with child. Even if
13 she did have the incentive to lie back then, what is her
14 incentive to lie now?

15 You all had the opportunity to view Minor get
16 on this stand. You had the opportunity to view her
17 language, behavior, emotion, affect. When every other
18 witness took the stand, they sat in front of the
19 microphone, they looked at you and they made eye contact.
20 Minor was very back in that corner afraid, embarrassed and
21 ashamed. Think of how rarely any one of us discusses our
22 normal, marital, traditional sex life with even our
23 closest friends. And imagine walking into a courtroom
24 with the man who sodomized you and telling this tale.
25 Imagine the courage and the bravery it takes just to do

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1 that, the number of victims who never report anything for
2 the sheer fear of doing that, of confronting their abuser,
3 and ask yourself what incentive she has now. She's moved
4 on with her life.

5 What does the Defense use to question Minor
6 testimony? Well, Minor you weren't crying down at that
7 child advocacy center when you told that story to the
8 forensic interviewer. You're crying a lot more now. This
9 is just really all an act, isn't it, Minor You know,
10 that's the very purpose of child advocacy centers. We
11 don't put them in a room with the perpetrator and say,
12 hey, what did he do to you. Tell us. Come on. And we're
13 going to get twelve people who don't know just to watch.
14 Come on. Tell us.

15 The whole purpose of child advocacy centers, a
16 friendly environment, mutual interviewers. All of that,
17 all of that is to provide an environment where they will
18 disclose it, they will feel safe and they think they can
19 get the story out. We don't put them on the stand the
20 first time up for that very reason. That's not a reason
21 not to believe Minor.

22 Remember what she told you. She's in this house.
23 She's not having a good relationship with either of her
24 parents. Her mom is pregnant. They take her room away.
25 They take her dresser away. She's got a closet to live

1 out of. She's putting a lot of stress on herself. Her
2 mother is pregnant. She's sleeping downstairs with the
3 sister. Oh, and Mr. Sipes said, well, she only slept
4 downstairs for a week. Yeah, women who are pregnant with
5 twins, they're fine right up until that last week. And
6 that's when they have trouble getting around. Not, you
7 know, six months, seven months, eight months pregnant with
8 twins. Carrying two babies around. No, it's that last
9 week when you really get pushed over the edge of mobility.
10 Pregnant women, for the most part, can't sleep. They're
11 up and down a lot. Stairs are not something -- most of
12 them can't even really get off the couch without a little
13 bit of help.

14 Her mom is downstairs pregnant, and her sister is
15 downstairs. She's upstairs alone. He comes in. He
16 crawls in her bed. He puts his hand over her mouth. He
17 puts a pillow over her head. And he doesn't just have sex
18 with her, he doesn't just molest her or finger her the way
19 he did before; he sodomizes her. He has forcible anal
20 intercourse with her. That's what she told you happened
21 in a very compelling, consistent way. And she's told the
22 same story since '03. You saw her language, her behavior,
23 her emotion. Do you really think she's just an Oscar
24 award-winning actress? Do you really think that this
25 hospitalization in '03 was a school on how to tell lies

1 about fake sex abuse? That she got some good intel and
2 now she knows how to pull it off? Is she really just that
3 good of an actor to dupe all these experts? To get this
4 colorectal guy on her side?

5 Dr. DeFelice, by the way, not Ms. DeFelice as Mr.
6 Stoddard would like you to believe. But Dr. DeFelice, a
7 woman who has a Ph.D, by the way, and that's why we call
8 her Dr. DeFelice, a woman who runs the state center for
9 assessment and resource center for children's advocacy and
10 who teaches nationally on false allegations and how to
11 identify them. That's who the State called when her
12 counselor wasn't available. The expert on false
13 allegations.

14 And what does she tell you? **Minor** is consistent,
15 congruent, displaying all of those things, that she's
16 going through, the very normal thing that we see all
17 victims of sexual abuse doing. It's ironic that the
18 expert that they originally retained to say it was a
19 custody allegation doesn't testify until they found out
20 that she also saw her at the hospital. Evidently
21 initially she wasn't of any value to them. The woman who
22 was supposed to come in here and say it was a custody
23 dispute really doesn't talk about custody disputes. She
24 said, yes, you see them.

25 But she and Dr. DeFelice agree that when they are

1 faked allegations for custody disputes, the children are
2 inappropriate with their language, behavior and emotions.
3 They tell the story all at once. They adopt language
4 that's not their own. They can't keep up the charade.
5 They can't maintain consistency. And these are all things
6 that we look for to say that it's not it.

7 And by the way, they've never had a false allegation
8 case that involved a rectal prolapse. I mean, it had to
9 be pretty clairvoyant of **Minor** pretty psychic almost, to
10 sit there and go with the story where he fingered me when
11 I was eleven. But you know, I've been constipated and I
12 did get that rectal prolapse. And that might give me
13 sodomy, so maybe I can go for more. And, oh, I can get
14 Dr. DeFelice and Dr. Payne and everybody else, I can fool
15 all them. I'm that good an actress.

16 The thing that Dr. DeFelice talks about is
17 congruence. Sure, all of these things, poor body image,
18 cutting, acting out, truancy, stealing, lying, all of them
19 examined in a vacuum can be explained away by alternative
20 theories. There's lots of teenagers who experience them
21 who have never been sexually abused whatsoever. But it's
22 the totality of them, how they interrelate, that we see
23 them -- this package of them particularly in kids of
24 sexual abuse. It's that congruence between the language,
25 the behavior, the emotion, the symptoms. That's what we

1 look for. We don't pick and choose the way they'd like
2 you to believe. It's the totality, the recipe, that they
3 see.

4 Mr. Stoddard said, well, her mother has borderline
5 personality traits and **Minor** might have some borderline
6 personality traits. And their custody child expert said,
7 well, you know, if they have that, then maybe this and
8 maybe that. But you know, she didn't say that in the
9 cases of false allegations of custody, we see this. And
10 that's what I found. That's what I saw. That's what I
11 witnessed. It was all a possibility, probability, could
12 have been, should have been, maybe, but I don't know.

13 Dr. DeFelice's ultimate conclusion in her expert
14 opinion, she's consistent with a victim of sexual abuse.
15 Yes, they can all be explained away, but it's their
16 congruence that makes her compelling.

17 And the thing that I think is most telling is they'd
18 like you to believe that Tina Goodwin is this evil-doer of
19 a mother that's been suicidal and borderline personality
20 disorder and she's done all these evil things and oh, my
21 goodness. And **Minor** is just a victim of all that. It's
22 horrible for her to be in that situation, and all those
23 kinds of thing, and she's just a victim who is being
24 manipulated by her mother time and time and time again.

25 All of her problems don't start till her mom goes

1 back with Max. Where's all of it back here? Where is all
2 of the constipation in the past? Where's the truancy and
3 the lying, the stealing, the acting out, the not wanting
4 to be home? Where is all of that before Max re-enters the
5 picture? Because if she's truly just the victim of her
6 mother, she's been with her since day one. But we don't
7 see anything till they get back together.

8 The important thing that Mr. Stoddard told you at the
9 beginning of his statement is that we aren't witnesses and
10 that we didn't see anything. Our questions aren't
11 evidence. They're not. I can ask you a question; you can
12 say it was no. And that means as far as you know, there's
13 no evidence to support that. His comments that Ms.
14 Goodwin had engaged in Medicaid fraud and presented all
15 these false documents has never been substantiated by any
16 testimony from that statement. He asked her and she says
17 no. She explains the check. She explains that she told
18 them about the child support she was getting from Max. I
19 really don't know how child support is going to get her
20 Medicaid anyway. Look at what the actual evidence is.
21 Look at what the mother tells you. Look at what you have
22 to rely on her for. All she does is give you this
23 chronology.

24 So let's talk about the custody dispute because
25 that's really the big elephant in the room that everybody

1 would like you to pay attention to instead of Minor All
2 of this, rectal prolapse included, is all manipulated and
3 feigned so that Tina gets custody of the twins in October
4 of 2003. That's what you have to believe to believe the
5 Defense. It was all made up and all conjured for that
6 sole purpose. The way you do that is to look at the
7 credibility of the witnesses.

8 The thing that I found compelling about Minor is she
9 didn't hide from her mistakes. She told you that she had
10 a problem with lying, stealing and she got in trouble,
11 that she wasn't the best daughter.

12 According to Maxwell Sipes, he's the father of the
13 year. Never been abusive verbally, physically. No. He's
14 a good guy. Always been a good guy. He's a good father.
15 He's a strict disciplinarian. He tried to protect those
16 children. I have never met a parent who wouldn't admit,
17 you know, I've made mistakes. That I may not be the best
18 parent. I've done things that I shouldn't have done. But
19 not Maxwell Sipes. Nope. Everything is Tina's fault. He
20 played no role whatsoever in Minor problems. None.
21 None at all.

22 Look at the lifestyle that these kids lived, and
23 let's all agree on one thing. Neither Max Sipes nor Tina
24 Goodwin deserves the award for parent of the year. They
25 were both bad parents. We'll acknowledge that. Both of

1 them are. Neither one of them deserves any kind of award
2 for parenting. He leaves. He has supervised visitation,
3 he says because he was found naked in some room. He said,
4 well, I just agreed to it to make it easier. I've never
5 met a father who capitulated to supervised visitation,
6 especially at this point there's not an ongoing custody
7 dispute. It's not like, oh, I've got to agree to that to
8 get my kids back. He hasn't had custody of them for a few
9 years.

10 Supervised visitation. Now, despite this for
11 whatever reason and very unfortunate for **Minor** Max and
12 Tina get back together. Tina, for reasons of supervised
13 visitation, never should have gone back to Max. Max, if
14 he truly believes Tina is the evil-doer mother of the
15 century, should never have gone back to Tina. And they
16 definitely shouldn't have had two more kids together.

17 But you're right. They really need this grand story
18 of forcible sodomy to get custody of the kids. And Mr.
19 Stoddard said, oh, well, you know, she's got some issues.
20 She may have lost the children. Yeah, but Max leaves them
21 with her in '99. She leaves with them on her own in
22 September of '03. They go back to Georgia. He's paying
23 child support the whole time. He hasn't had a consistent
24 relationship with them; she has. Do they really need this
25 to get back?

1 Mr. Stoddard would like you to believe, oh, it's all
2 about revenge, and it's all about this and it's all about
3 that. Well, why didn't you see it back in '99 when they
4 separated? She didn't need it then and she doesn't need
5 it now.

6 This whole grand charade that it's a custody dispute,
7 their own custody expert couldn't get them that far. The
8 only thing she could say is the mother might be borderline
9 personality disorder and **Minor** had some problems.

10 The Defendant put his character at issue. He did.
11 Got on the stand. And he brought two people to testify.
12 And Mr. Stoddard said, well, you know, his exwife will say
13 something good about him and that says a lot. And you
14 know, normally it does. But it's interesting that the two
15 people that he asked about his character both get money
16 from him. His current wife has no job of her own and no
17 unemployment, is completely financially dependent upon
18 him. His exwife, while not financially dependent upon
19 him, is disabled, is not working, and that is her main
20 means of bringing in extra income for her son. What's
21 ironic is that they couldn't find anybody he wasn't
22 currently paying to testify about his character. And
23 what's even more ironic is those same questions weren't
24 posed to his grandmother.

25 What you've heard over the past few days in terms of

1 forcible sodomy and rectal prolapse, I'm sure has been
2 shocking and appalling to all of you. And ask yourself
3 whether any of you, simply because you couldn't find
4 anybody to take care of her, would put your eight-year-old
5 daughter in the back of the room. That's the person
6 endorsing his character. She's got all this support. You
7 know, if Max goes somewhere, mama, brother, sisters,
8 everybody will take care of -- you know, she'll be fine.
9 But they can't find them to watch her for one day while
10 her stepfather goes on trial for forcible sodomy. She's
11 got to sit back there. She's got to listen to that.

12 And they can't find anybody recent other than his
13 wife. They've got to go back fifteen years to stand up
14 for his character. Even his own expert, Cindy Stichnoth,
15 right, the objective one, she contradicts Max's own
16 testimony. She tells you that Max and Tina never visit
17 **Minor** while she's in the hospital. She said they come for
18 two family therapy sessions and that's it. The only one
19 who does visit her is her maternal grandmother. Most
20 parents I know, if your kid's in the hospital, you're up
21 there every day. Especially if it's for a month, you
22 could at least go once a week.

23 Mr. Stoddard says, well, you've really got to ask
24 yourself is he really this evil monster. But I submit to
25 you that you really have to look at his track record.

1 This is a man who marries, has kids, moves on, pays child
2 support when he can, leaves when the going gets tough,
3 moves on to the next woman, has more kids with her, can't
4 really afford the ones he's already got. That gets bad,
5 moves on, finds another woman, finds more kids and then
6 tries to support them. This is a person who women and
7 children are very disposable to. And while he may can
8 tell you that he is a loving father, his conduct describes
9 a remarkably different record. Markedly different record.

10 Dads are supposed to protect their daughters.
11 They're supposed to cherish their daughters. That's the
12 first relationship she has with a man. He signed up for
13 that responsibility. He adopted **Minor**. He gave
14 her his last name. For the most part, everyone in **Minor**
15 life has failed her. Her mother continuously putting her
16 at risk. Her father for not protecting her from the evil
17 mother she says -- he says she has.

18 But you know, they want to say that the story all
19 came out with a rectal prolapse and when they got this
20 grand idea from Dr. Payne. But what their own expert told
21 you is that back in June when she's hospitalized that she
22 tells this story. She blames her biological dad, but she
23 does tell. Does anybody follow up? Does anybody look
24 into it? Does anybody call D.S.S. or D.M.H.? Does
25 anybody call any of the agencies that could really

1 investigate whether this is happening to her? Nope, not a
2 one. So what does **Minor** learn about telling? Nobody will
3 believe me. Nobody will help me. Then I'm headed back to
4 that household.

5 She doesn't get the idea from Dr. Payne in December,
6 nor does she get it from her friend. Cindy Stichnoth said
7 her friend was talking about sexual abuse and that **Minor**
8 posed the question, 'Does he do you up the butt?' What is
9 **Minor** doing? She's testing the waters. It's a tentative
10 disclosure.

11 Think about being in a room with thirteen girls.
12 It's one thing to admit that your father has sex with you,
13 and that's a pretty big leap to take. My father comes in
14 my room at night and has sex with me. It's a whole nother
15 (phonic) thing to say that he has anal sex with you. A
16 deviant, perverse, not really widely accepted practice.
17 This girl is getting sympathy. Are they going to be
18 repulsed by her? Is she going to be treated the same way?
19 This is a tentative disclosure long before Dr. Payne comes
20 into the picture. And that's what's most telling. It's
21 also long before, by the way, the custody dispute because
22 back then they're together.

23 The Defendant is charged with criminal sexual conduct
24 in the first degree, that he committed a sexual battery,
25 in this case anal intercourse, on his daughter **Minor**

1 while her parents were back together in '02 and '03 and
2 that he used aggravated force to accomplish the act.
3 That's what you're going to be asked. Do you believe
4 **Minor**? Did, while her mom was pregnant and not available
5 to him and he really didn't have any other outlet, come
6 into her room at night, put his mouth -- his hand over her
7 mouth, put a pillow over her head and forcibly sodomize
8 her, so much so that he causes this lasting injury that
9 required surgery?

10 Because, as Dr. Payne tells you, consensual sodomy
11 doesn't result in that trauma. There has to be force.
12 That there's going to be pain, there's going to be
13 bleeding, there's going to be discomfort. That he used
14 aggravated force to accomplish that act. It's not like
15 vaginal sex where he can make it happen without really any
16 force. That you have a closed, tight, scared muscle that
17 you have got to pry open. And that he ejaculated in her,
18 on her. That he would leave sometimes without doing it.
19 That he would tell her, shut up, don't make any noise.
20 And that no one is going to believe you because you're a
21 troubled teen.

22 Because what did Dr. DeFelice tell you? That these
23 girls are susceptible to this. He knows he can get away
24 with it. He got away with it when she was eleven. She
25 didn't tell. She won't tell now. And you know what? Now

1 she's in trouble. I'm going to be able to get away with
2 it now.

3 This is one of the most cowardly, cowardly crimes
4 committed in this community. Cowardly. He's behind her.
5 He doesn't want to look at her. Covering her face. A
6 child, his own child, his adopted child. That's what you
7 have to ask yourself. Not is he a violent person because
8 this crime really isn't about violence. It's about
9 selfishness and greed and preying on the weak. That's
10 what this crime is about. That is the testimony you
11 heard.

12 **Minor** story is consistent over a large period of
13 time, consistent with what the doctors find, consistent
14 with what the experts review. And she's got no motive to
15 walk in here this week and tell you this lie. None.
16 Nothing to gain. Her and Dr. Payne, neither one of them,
17 get a trip to the Caribbean to come in here and tell you
18 that this is what happened to her. This is what happened
19 to her.

20 And you may be reluctant to convict somebody of this
21 crime because of the sheer nature of it. And you may be
22 reluctant to discuss these issues because they're not
23 something that you're comfortable with. But that's not
24 reasonable doubt.

25 Reasonable doubt is a doubt that would cause you to

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1 hesitate to act. It would cause a reasonable person to
2 hesitate to act. And it must be based on reason. And
3 when you look at it and you find this case, is the pieces
4 of the puzzle only go together one way. And the only way
5 the Defense's theories hold water is if you take the
6 pieces of the puzzle apart and look them one another and
7 then question on that.

8 Mr. Stoddard is right. This didn't happen in a
9 vacuum. This happened all at once, and all the signs
10 point to one, one, one verdict of guilt of committing
11 criminal sexual conduct, forcible sodomy, aggravated
12 force, on his adopted daughter back in March. And the
13 people who have motive to lie are the people called by the
14 Defense. The people who have nothing to gain are the
15 people called by the State.

16 And the one person who has everything to lose is
17 Minor [REDACTED]. And she's the bravest one that testified
18 before you here today. She's got everything to lose by
19 telling you her story and nothing to gain. This happened
20 to her.

21 Hold him accountable. Find him guilty.

22 THE COURT: Mr. Foreman, ladies and gentlemen of
23 the jury, you've been there a little bit over an hour and
24 a half. Would you like to take a short break? My charge
25 will probably be about 15 minutes. Just consult with your

1 ...

2 MR. FOREMAN: They look okay, Your Honor.

3 THE COURT: Very good.

4 Mr. Foreman, ladies and gentlemen of the jury, as
5 jurors in this case, you have certain functions and
6 responsibilities to perform which are entirely separate
7 and distinct from those of mine as the trial judge. I am
8 prohibited by the constitution of our state from charging
9 you on the facts of the case. I am also prohibited from
10 discussing the facts of the case with you or in any way
11 intimating what my feelings, if any, are about the facts
12 of this case.

13 It is your responsibility, and yours alone, to pass
14 upon all issues of fact presented in the case. I would,
15 therefore, charge you that if during the course of the
16 trial or during my charge you have been given or left with
17 the impression or feeling that I do have a personal
18 feeling about the facts of the case, I would specifically
19 instruct you to disregard that feeling or impression.

20 Moreover, you are the sole judges of what the
21 testimony was and not the argument of counsel. It is also
22 your duty, and yours alone, to weigh the testimony and
23 evidence in the case and pass upon the credibility or
24 believability of the witnesses.

25 In this connection, you have the right to believe all

1 that a witness tells you or disbelieve all that a witness
2 tells you. You have the right to believe a part of what a
3 witness tells you and to disbelieve a part of what a
4 witness tells you. You have the right to take into
5 consideration any bias or prejudice or interest you feel a
6 witness might have in the case.

7 I say this merely to emphasize that the weight you
8 see fit to give to the testimony, to the credibility of
9 the witnesses as well as all issues of fact are for your
10 sole determination. As judges of the facts, you are the
11 sole judges of the credibility, that is the believability,
12 of the witnesses who have testified in this case. In
13 passing upon their credibility, you may take into
14 consideration many things such as the appearance and
15 manner of the witness on the stand, sometimes referred to
16 as the demeanor of the witness. Was the witness
17 forthright or hesitant? Was the witness' testimony
18 consistent or did it contain discrepancies? What was the
19 ability of the witness to know the facts about which he or
20 she testified? Did the witness have a cause or a reason
21 to be biased or prejudiced in favor of the testimony he or
22 she gave? Was the testimony of the witness corroborated
23 or made stronger by other testimony and evidence, or was
24 it made weaker or impeached by such other testimony and
25 evidence?

1 As jurors you have the right to believe a small
2 portion of a witness' testimony and disregard the larger
3 or vice versa. You may believe all of a witness'
4 testimony or none. You may believe the testimony of a
5 single witness against that of many witnesses or the other
6 way around. Most certainly, you do not determine the
7 matter of credibility or believability by counting up the
8 number of witnesses who may have testified on behalf of
9 the parties.

10 Now, the rules of evidence ordinarily do not permit
11 witnesses to testify as to opinions or conclusions. An
12 exception to this rule exists for witnesses we call expert
13 witnesses. A witness who, by education and experience,
14 has become an expert in some art, science or profession
15 may give an opinion as to the subject the witness claims
16 to be an expert in and may also give the reasons for the
17 opinion.

18 You should consider any expert opinion given by a
19 witness and, like any other evidence, give it the weight
20 you think it deserves. If you decide that an expert
21 witness' opinion is not based on sufficient education and
22 experience or if you decide that the reasons given in
23 support of their opinion are not sound or that the opinion
24 is outweighed by other evidence, you may disregard the
25 opinion entirely.

1 An expert 'witness' testimony is to be given no
2 greater weight than that of the other witnesses simply
3 because the witness is an expert. And you do not have to
4 accept an expert's opinion even though it is uncontra-
5 dicted.

6 When one relies on expert medical testimony to show a
7 causal connection between an alleged harm and a subsequent
8 injury, the expert must state with reasonable certainty
9 that in his or her professional opinion the injury most
10 probably resulted from the harm alleged. However, it is
11 not necessary that the expert actually use the words 'most
12 probably.' It is enough that the testimony impressed upon
13 you that the opinion represents the expert's professional
14 judgment as to the most likely one among the possible
15 causes of the injury.

16 Throughout this entire process, you have but one
17 single objective, and that is to seek the truth regardless
18 of what witness the testimony may have come.

19 Now, by the same constitution and law which make you
20 the finders of the facts and the evidence, as I have
21 discussed with you, I am, as the judge, made the sole and
22 only instructor in the law. You must accept as correct
23 the law which I charge and apply to it the evidence as you
24 find it and reach your verdict. If I should make an error
25 in the law as I instruct it to you, there's another time

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1 and place where that error can be considered and, if
2 necessary, corrected. But for the purposes of this case
3 today, you must accept the law as I charge it to be the
4 correct law.

5 Now, the Defendant has pled not guilty to the
6 indictment. And that plea puts the burden on the State to
7 prove the Defendant guilty. A person charged with
8 committing a criminal offense in South Carolina is never
9 required to prove himself innocent. I charge you that it
10 is an important rule of law that the Defendant in a
11 criminal trial, no matter what the seriousness of the
12 charge may be, will always be presumed to be innocent of
13 the crime for which the indictment was issued unless the
14 guilt has been proven by evidence satisfying you of that
15 guilt beyond a reasonable doubt.

16 This presumption of innocence does not end when you
17 begin your deliberations, but it accompanies the Defendant
18 throughout the trial until you reach a verdict of guilt
19 based upon the evidence satisfying you of that guilt
20 beyond a reasonable doubt. The presumption of innocence
21 is like a robe of righteousness placed upon the shoulders
22 of the Defendant which remains with the Defendant until it
23 has been stripped from the Defendant by evidence
24 satisfying you of the Defendant's guilt beyond a
25 reasonable doubt.

1 The presumption of innocence is not a mere legal
2 theory. It is not just a legal phrase. It is a
3 substantial right to which every defendant is entitled
4 unless you, the jury, are satisfied from the evidence of
5 the Defendant's guilt beyond a reasonable doubt.

6 As I've said, a reasonable doubt is the kind of doubt
7 that would cause a reasonable person to hesitate to act.

8 Now, there are two types of evidence generally
9 presented during a trial, direct evidence and circum-
10 stantial evidence. Direct evidence is the testimony of a
11 person who claims to have actual knowledge of a fact, such
12 as an eyewitness. It is evidence which immediately
13 establishes the main fact to be proved.

14 Circumstantial evidence is proof of a chain of facts
15 and circumstances indicating the existence of a fact. It
16 is evidence which immediately establishes collateral facts
17 from which the main fact may be inferred. Circumstantial
18 evidence is based on inference and not on personal
19 knowledge or observation. It is truth that does not
20 actually establish the fact in question, but that asserts
21 or describes something else from which you may either
22 reasonably infer the truth of the fact or at least
23 reasonably infer an increase in the probability that the
24 fact is true. For circumstantial evidence to be suffi-
25 cient to warrant the findings of fact, the circumstances

1 must lead to the fact with reasonable certainty. The
2 facts and circumstances should be considered in light of
3 ordinary experience and common sense. The existence of a
4 fact cannot be based on speculation, surmise or con-
5 jecture.

6 The law makes absolutely no distinction between the
7 weight or value to be given to either direct or circum-
8 stantial evidence, nor is a greater weight of certainty
9 required of circumstantial evidence than of direct evi-
10 dence. For example, criminal intent is a state of mind
11 that operates jointly with an act or omission in the act
12 or commission of a crime. Criminal intent is a mental
13 state. Criminal liability is normally based upon the
14 concurrence of two factors, an evil-meaning hand and an
15 evil-doing hand. Proof of intent necessarily rests on
16 inference from conduct.

17 In indictment number 2005-GS-04-382, the Defendant,
18 Maxwell Eugene Sipes, is charged with criminal sexual
19 conduct in the first degree. I remind you that the fact
20 the Defendant was arrested, charged and indicted in this
21 case is not evidence in this case and cannot be considered
22 by you as evidence of guilt in this case, nor does it
23 create any presumption or inference of guilt. The indict-
24 ment is simply the formal written instrument which con-
25 tains the charge made against the Defendant. It is the

1 formal documents by which the case is brought into this
2 court.

3 Now, the Defendant, Maxwell Eugene Sipes, as I said,
4 is charged with criminal sexual conduct in the first
5 degree pursuant to section § 3-652 of the Code of Laws of
6 South Carolina which provides in part, "A person is guilty
7 of criminal sexual conduct in the first degree if the
8 actor engages in sexual battery with the victim and if any
9 one or more of the following circumstances are proved.
10 The actor uses an aggravated force to accomplish sexual
11 battery, or the victim submits to sexual battery by the
12 actor under circumstances where the condition -- excuse me
13 -- under circumstances where the victim is also the victim
14 of forcible confinement, kidnaping, robbery, extortion,
15 burglary, house-breaking or any other similar offense or
16 act."

17 The first element which the State must prove beyond a
18 reasonable doubt is that the Defendant engaged in a sexual
19 battery with the victim. A sexual battery is sexual
20 intercourse, cunnilingus, fellatio, anal intercourse or
21 any intrusion, however slight, of any part of a person's
22 body or of any object into the genital or anal openings of
23 another person's body except when the intrusion is
24 accomplished for medically recognized treatment or
25 diagnostic purposes.

1 If you find the State has not proved -- excuse me.
2 If you find the State has not shown beyond a reasonable
3 doubt that a sexual battery occurred, you would stop
4 deliberating and your verdict would have to be not guilty.
5 If you find that a sexual battery did occur, you must then
6 decide whether the State has proved beyond a reasonable
7 doubt that either the Defendant used aggravated force to
8 accomplish the sexual battery or the alleged victim
9 submitted to the sexual battery under the circumstances
10 where the victim was also the victim of forcible
11 confinement, kidnaping, robbery, extortion, burglary,
12 house-breaking or any other similar offense or act.

13 Aggravated force means the use of physical force or
14 physical violence of a high and aggravated nature to
15 overcome the victim. This includes the threat of using a
16 deadly weapon. Whether a sexual battery amounts to first-
17 degree sexual conduct is dependent upon the degree of
18 force used. A sexual battery constitutes first-degree
19 criminal sexual conduct only if it is accomplished through
20 the use of force and if force constitutes aggravated
21 force. The aggravation necessarily is not related to the
22 general circumstances surrounding the alleged attack.
23 Instead the statutory definition of aggravated force
24 requires that the aggravation necessary for first-degree
25 criminal sexual conduct be associated with the degree of

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1 force used to complete the sexual battery.

2 In prosecutions for allegations for sexual miscon-
3 duct, the testimony of an alleged victim need not be
4 corroborated. If you find that the State has failed to
5 prove beyond a reasonable doubt all of the elements of the
6 offense of criminal sexual conduct in the first degree,
7 you must find the Defendant not guilty. On the other
8 hand, if you have no reasonable doubt that the State has
9 proven all of the elements of criminal sexual conduct in
10 the first degree, then you must find the Defendant guilty.

11 You have been selected as fair and impartial jurors
12 sworn to impartially try and determine the facts of this
13 case. And when you comply with your oath to do so, then
14 no one will have a right to criticize your verdict and you
15 will have successfully discharged your duties as jurors.

16 You should not be influenced by opinions or
17 expressions of opinions, if any, which you may have heard
18 on the outside. But you are to decide this case according
19 to the testimony you have heard from the lips of the sworn
20 witnesses along with other evidence that may have been
21 introduced.

22 You must not consider as evidence any statement
23 counsel made during the trial. However, if counsel for
24 the parties have stipulated to any fact or any fact has
25 been admitted by counsel, you will consider or regard that

1 fact as being conclusively proved as to the party or the
2 parties making the stipulation or the admission.

3 As to those questions to which an objection was
4 sustained, you must not speculate as to what the answer
5 might have been or as to the reason for the objection.
6 You must not consider for any purpose any offer of
7 evidence that was rejected or any evidence that was
8 stricken by the Court. Such matter is to be treated as
9 though you had never known it.

10 You must never speculate to be true any simulations
11 -- excuse me. You must never speculate to be true any
12 insinuation suggested by a question asked of a witness. A
13 question is not evidence and may be considered only as it
14 supplies meaning to the answer.

15 As I said earlier, you are the judges of the facts in
16 this case. And you are to determine only if this
17 Defendant is guilty or not guilty based upon the testimony
18 and evidence presented in the trial and after applying the
19 law as I have given it to you.

20 If, from the evidence, you have a reasonable doubt as
21 to whether or not the Defendant is guilty, it is your duty
22 to acquit him, to write the two words 'not guilty.'

23 Under the oath you took, you swore to try this case
24 based only and solely on the testimony, evidence and law
25 presented and heard in this courtroom. It is your duty to

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1 lay aside all bias, all prejudice or sympathy you may have
2 in reaching your verdict. You have no friends to reward
3 or enemies to punish.

4 I might note that the word verdict comes from the
5 Latin term vere dicto, which means to speak the truth.
6 Abide by your oath and return a verdict which, in fact,
7 does speak the truth.

8 And whatever verdict that you return, of course, has
9 to be a unanimous verdict. That means the verdict of all
10 twelve members. However, I have prepared a verdict form
11 for you to use, Mr. Foreman. And as you'll note, it
12 provides for indictment number 2005-GS-04-0382, criminal
13 sexual conduct in the first degree. And as I've said, it
14 has to be a unanimous verdict. So the statement of the
15 verdict is, "We, the jury, unanimously find that the
16 Defendant, Maxwell Eugene Sipes, is ..." And you have two
17 possible verdicts, guilty of criminal sexual conduct in
18 the first degree or not guilty.

19 Now, whichever is your verdict, as I've said before,
20 it must be unanimous. That is, all twelve members of the
21 jury must agree to it. But, Mr. Foreman, once the jury
22 has reached its verdict, then you will check the
23 appropriate blank and sign your name as foreman and date
24 it.

25 I'm again going to have to ask you to retire to the

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1 jury room and not begin your deliberations as yet. I need
2 to take up a few matters with the attorneys. But after I
3 do that, I'll send in the verdict form together with the
4 exhibits that have been introduced in this case. Once you
5 get the verdict form and the exhibits, you may begin your
6 deliberations. Once you have reached a unanimous verdict,
7 fill out the form as requested, knock on the door and
8 we'll return and receive your verdict.

9 I'm now going to ask the twelve members of the jury
10 to retire to the jury room. And as I say, when you get
11 the verdict form and the exhibits, you may begin your
12 deliberations. The two alternates I'm going to ask to
13 stay with me just for a moment. You may retire.

14 (WHEREUPON, the jury exited the open court at
15 approximately 3:03 p.m.)

16 THE COURT: All right. The alternates, I'm
17 going to ask y'all to go with Dr. Graham. He'll take you
18 to another jury room where I'm going to ask you to wait a
19 few minutes, if you would, please. Again, thank you very
20 much and I'll be right with you.

21 Now, it will probably be some time, so they'll have
22 some refreshments there.

23 THE BAILIFF: Yes, sir.

24 THE COURT: Very good. Thank you.

25 Everyone else remain seated while the jury retires

1 from the courtroom.

2 (WHEREUPON, the alternate jurors exited the
3 courtroom.)

4 THE COURT: All right. Any exceptions or
5 requests from the State?

6 MS. HERVEY: None from the State.

7 THE COURT: From the Defense?

8 MR. STODDARD: None from the Defense.

9 THE COURT: All right. Look over the exhibits
10 to be sure the exhibits that are supposed to go back do go
11 back and the ones that do not don't, of course.

12 MS. HERVEY: I believe there's only one.

13 THE COURT: And pick up the verdict form. All
14 right. You've got to get them together before they can
15 start.

16 MS. HERVEY: Well, there's only one. We've
17 agreed to it already.

18 THE COURT: All right. I thought there were
19 some others that came in.

20 MS. HERVEY: No. We kind of showed people a
21 bunch of stuff.

22 THE COURT: That's what I was thinking.

23 MS. HERVEY: Nothing ever really came in.

24 THE COURT: Very well. So I guess Dr. Graham --
25 well, you can take it back.

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1 MADAM CLERK: I'll be happy to.

2 THE COURT: Yes, ma'am.

3 All right. We'll stand at ease until the jury
4 returns with a verdict. Again, I want to thank both
5 counsel for a very aggressively tried case, and you
6 represented your parties well. And I thank you for it.
7 We'll stand at ease.

8 (WHEREUPON, the exhibit and verdict forms were
9 delivered to jury to begin deliberations at
10 approximately 3:05 p.m.)

11 THE COURT: Can you get the length of audio?

12 MADAM COURT REPORTER: Yes, I can tell you how
13 long.

14 THE COURT: It was about the first three, wasn't
15 it?

16 MADAM COURT REPORTER: Yes, **Minor** is about an
17 hour. Dr. Payne's was thirty-five or forty minutes. And
18 who was the third one?

19 MS. HERVEY: Dr. DeFelice, the woman.

20 MADAM COURT REPORTER: Two nineteen to three
21 fifty-six.

22 THE COURT: Goodness.

23 MS. CATO: An hour and a half?

24 THE COURT: Uh-huh (affirmative).

25 MS. HERVEY: So we're looking at three and a

1 half hours of testimony.

2 THE COURT: I mean, it shouldn't be ---

3 MS. HERVEY: You know, they may not want to hear
4 it all. They obviously think they can get the transcript.
5 So if you tell them that they can't get the transcript,
6 that the only thing we can do is replay testimony ...

7 MADAM COURT REPORTER: Yeah. The problem in
8 here is that we don't have -- I mean, the sound system, I
9 don't think, is good enough that I can put a microphone
10 over here and get it -- I'm not sure I can get it loud
11 enough for them. I would have to try it and see. I mean,
12 will this microphone come off?

13 MS. HERVEY: Cathy, does that mike over there
14 work? No?

15 MADAM COURT REPORTER: See, it's hooked in. I
16 don't even know if there's one I can get close.

17 MR. STODDARD: You can take it off the stand.

18 MS. HERVEY: What about that one right there,
19 Renee?

20 MADAM COURT REPORTER: It goes down through the
21 ...

22 THE BAILIFF: Yeah.

23 MS. HERVEY: What about the one in the corner
24 right here on my table?

25 THE COURT: What about this one?

1 MADAM COURT REPORTER: How long is the cord? I
2 think this one will work. Once they find out how much it
3 is, they may not want to hear it.

4 THE COURT: Okay.

5 MS. HERVEY: Well, why don't we tell them that
6 they can only hear the testimony and approximately how
7 long?

8 THE COURT: Let's see what we have. The first
9 one is Minor .

10 MS. HERVEY: Uh-huh (affirmative).

11 THE COURT: The first one was Dr. Payne. Let's
12 see how much that one is. That's what you have first,
13 isn't it? That was forty-five minutes, you think?

14 MADAM COURT REPORTER: Yes, sir.

15 THE COURT: All right. And Minor ?

16 MS. HERVEY: About an hour.

17 MADAM COURT REPORTER: About an hour. And then
18 the doctor was about an hour and a half.

19 THE COURT: Doctor?

20 MADAM COURT REPORTER: DeFelice.

21 THE COURT: DeFelice.

22 MADAM COURT REPORTER: Now, there was a point
23 where the jury went out for about seven minutes. So that
24 doesn't take much time off.

25 THE COURT: All right. Why don't I put it down

1 as minutes? Dr. Payne is forty-five minutes, Minor
2 is sixty minutes and Dr. DeFelice is ninety minutes
3 approximately.

4 All right. Is the Defendant here?

5 MR. STODDARD: He's here.

6 THE COURT: Renee?

7 MADAM COURT REPORTER: Yes, sir?

8 THE COURT: Mark that one for me.

9 (WHEREUPON, Court's Exhibit Number 1 was marked for
10 identification only.)

11 THE COURT: All right. Let's see. Do we have
12 everybody that we need? All right. Ask the jury, to
13 include the alternates, to join us, please.

14 (WHEREUPON, the jury entered the open court at
15 approximately 5:39 p.m.)

16 THE COURT: All right. Let the record reflect
17 the jury and alternates are in the jury box.

18 Mr. Foreman, ladies and gentlemen, I have a message
19 that says, "May we have copies of the transcripts of Minor
20 Dr. DeFelice and Dr. Payne?" Signed the Foreman.
21 Actually what we have at this stage are just the
22 recordings. A transcript is later done from those
23 recordings. We can play back recordings. And I've asked
24 the court reporter to give us an estimate as to time. Dr.
25 Payne is the first part of the testimony, and that was

1 forty-five minutes. Minor was the second, and
2 she's sixty minutes. And Dr. DeFelice is ninety minutes.
3 So you're talking about two hours or three hours really.
4 Two hours. Almost three hours. So do you want the whole
5 -- all of the testimony replayed or is it just -- are
6 there portions that you might be particularly interested
7 in? Or ... would you like to rest and come back in the
8 morning refreshed and we can start off with the testimony?
9 Now, if you -- go ahead and consult briefly if you can.
10 Otherwise, I'm going to ask you to go back and discuss it.

11 (Pause.)

12 JUROR: Judge, we'd like to go back to the jury
13 room and discuss it.

14 THE COURT: All right. Very good. I think so.
15 I tell you what. I still have the alternates here. I'm
16 going to let the jury discuss it, and if the alternates
17 would wait though a few minutes and find out what their
18 decision is. All right. Very good. The alternates -- if
19 the jury will go to the jury room, and the alternates, if
20 you would, please, take them back to their -- be sure that
21 they've got some refreshments or something. And also if
22 they need to make a phone call, they can use my office.

23 THE BAILIFF: They already did.

24 THE COURT: Oh, they did? Okay. Wonderful.

25 (WHEREUPON, the jury exited the open court at

1 approximately 5:42 p.m.)

2 THE COURT: All right. Anything from the State?

3 MS. HERVEY: Nothing from the State.

4 THE COURT: Anything from the Defendant?

5 MR. STODDARD: Nothing from the Defendant.

6 THE COURT: All right. I also told the -- I'm
7 going to let the alternates go as soon as we find out what
8 the jury wants to do. If they want it played back, then
9 I'll ask the alternates to stay. But I'm going to let
10 them go and ask them to call back at ten o'clock in the
11 morning. That's in the event that something should happen
12 to one of the jurors overnight that they could come in and
13 fill in. But if not or if the jury has a verdict this
14 evening, they can call and be told to let go. So I'm
15 going to dismiss them once we find out what the jury's
16 going to do. Or not dismiss them, but let them go today
17 and call back tomorrow.

18 All right. Anything from the State?

19 MS. HERVEY: No.

20 MR. STODDARD: No, sir.

21 THE COURT: All right. Very good. We'll stand
22 at ease.

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

24 THE COURT: All right. It's my understanding
25 that the jury wants to come back and announce their

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1 decision. Not the verdict. Just what they intend to do.

2 Anything from the State before we bring them back?

3 MS. HERVEY: No.

4 THE COURT: Anything from the Defense?

5 MR. STODDARD: Nothing from the Defense.

6 THE COURT: All right. Ask the jury and
7 alternates to join us, please.

8 (WHEREUPON, the jury entered the open court at
9 approximately 5:51 p.m.)

10 THE COURT: Let the record reflect the jury and
11 alternates are in the jury box.

12 Mr. Foreman?

13 JUROR: Your Honor, we respectfully request that
14 we adjourn for the night and be allowed to come in -- back
15 in the morning and listen to all three tapes at the same
16 time.

17 THE COURT: All right. Very good. And that
18 will help us to get everything in order for that part. As
19 I understand, Dr. Payne was first, Minor was second
20 and the Dr. DeFelice was later on but she'll be the last.
21 All right. With that I will -- I'll excuse you until --
22 what time would you like to come in?

23 JUROR: We discussed that as well, and we
24 suggest at nine o'clock.

25 THE COURT: Nine o'clock. Very well. I'm going

1 to have to ask the alternates to come back at nine o'clock
2 in the morning, too, if they would. And we'll see how
3 things go at that time.

4 Again, do not undertake a discussion of the case
5 among yourselves or permit anybody to discuss it with you.
6 In fact, the best thing to do is just take a little
7 respite and come back with a fresh mind. Very good.
8 Thank you very much. And I do appreciate your patience,
9 and I'll see you in the morning at nine o'clock. Very
10 good. Thank you very much.

11 Everyone else remain seated.

12 (WHEREUPON, the jury exited the open court at
13 approximately 5:53 p.m.)

14 THE COURT: Anything from the State?

15 MS. HERVEY: Nothing from the State.

16 THE COURT: Anything from the Defense?

17 MR. STODDARD: Nothing from the Defense.

18 THE COURT: All right. See you at nine o'clock
19 in the morning.

20 (WHEREUPON, court stood at recess for the day.)

21 **MARCH 9, 2007**

22 (WHEREUPON, court convened with all parties present
23 and the following proceedings were had.)

24 THE COURT: Is there anything from the State
25 before we proceed?

1 MS. HERVEY: Nothing from the State.

2 THE COURT: From the Defense?

3 MR. STODDARD: Nothing from the Defense.

4 THE COURT: All right. I think we're going to
5 let the two alternates go. I understand all ten -- I mean
6 all twelve jurors are here, so if they want to leave they
7 can leave. So bring in the alternates first if you would,
8 please.

9 (WHEREUPON, the alternates entered the courtroom.)

10 THE COURT: We do have all twelve jurors this
11 morning, so I'm going to give you a choice. If you'd like
12 to leave, I am going to excuse you. But you can stay if
13 you'd like. I don't think it's going to be necessary for
14 your service because everybody came back this morning and
15 I think we're going to complete the case today. So I'll
16 leave it up to you. You can either stay or leave.

17 JUROR: I'm already off work, so I ...

18 THE COURT: All right. I'll tell you what then.
19 You'll stay? All right. I'm going to ask you to sit in
20 the jury box if you would just as you've been doing.

21 And bring the rest of the jurors in.

22 THE BAILIFF: All right.

23 THE COURT: That way you'll hear the same
24 testimony that the other jurors do.

25 (WHEREUPON, the jury entered the open court at

1 approximately 9:07 a.m.)

2 THE COURT: All right. Let the record reflect
3 the jury and alternates are in the jury box.

4 Mr. Foreman, ladies and gentlemen of the jury, we
5 will now play the testimony of Dr. Payne, Minor and
6 Dr. DeFelice. Now, this is about three hours and fifteen
7 minutes. So if at any time you need a break, just if you
8 would please let me know and we'll take a break.

9 All right. You may proceed, Madam Court Reporter.

10 (WHEREUPON, the testimony of Dr. Dolford Payne and
11 the direct examination portion of the testimony of
12 Minor were played in their entirety.)

13 THE COURT: MR. Foreman, advise me if the jurors
14 indicate they'd like to take a break. Thank you, sir.
15 We'll take a break at this time. Again, do not undertake
16 a discussion of the case until we finish all of the
17 testimony. Thank you very much.

18 (WHEREUPON, the jury exited the open court at
19 approximately 10:37 a.m.)

20 THE COURT: Anything from the Plaintiff --
21 State? Excuse me.

22 MS. HERVEY: No, Your Honor.

23 THE COURT: Anything from the Defendant?

24 MR. STODDARD: Nothing from the Defendant.

25 THE COURT: All right. We'll take a short break

1 while the jury takes a break.

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

3 THE COURT: If there's nothing from the State or
4 the defense, let's bring the jury back.

5 (WHEREUPON, the jury entered the open court at
6 approximately 10:55 a.m.)

7 THE COURT: Let the record reflect the jury and
8 alternates are in the jury box.

9 It looks like we broke a little bit prematurely to
10 the end. We'll work through that.

11 You may proceed, Madam Court Reporter.

12 (WHEREUPON, the remaining testimony of Minor
13 Sipes and the direct examination of Dr. Allison
14 DeFelice were played in their entirety.)

15 THE COURT: I would suggest taking a break at
16 this time and coming back and finishing the testimony.
17 Please retire to the jury room.

18 (WHEREUPON, the jury exited the open court at
19 approximately 12:29 p.m.)

20 THE COURT: Anything from the State?

21 MS. HERVEY: Nothing from the State.

22 THE COURT: Anything from the Defense?

23 MR. STODDARD: Nothing from the Defense.

24 THE COURT: Very good. We'll take a break, and
25 when they're ready to come back, we'll start back.

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

2 THE COURT: Anything from the State?

3 MS. HERVEY: Nothing from the State.

4 THE COURT: From the Defense?

5 MR. STODDARD: Nothing from the Defense.

6 THE COURT: Bring us the jury, please.

7 (WHEREUPON, the jury entered the open court at
8 approximately 12:42 p.m.)

9 THE COURT: Let the record reflect the jury and
10 alternates are in the jury box. We'll now continue with
11 the playing of the testimony of Dr. DeFelice.

12 (WHEREUPON, the remainder of the testimony of Dr.
13 Allison DeFelice was played in its entirety.)

14 THE COURT: All right. That concludes the
15 testimony of Dr. Payne, Minor [REDACTED] and Dr.
16 DeFelice. If you'll now return to your jury room and
17 continue your deliberations. I think lunch has been
18 ordered, so you'll have something.

19 Again, I'm going to ask the alternates to stay with
20 me for a moment.

21 (WHEREUPON, the jury exited the open court at
22 approximately 1:10 p.m.)

23 THE COURT: Anything from the State?

24 MS. HERVEY: No.

25 THE COURT: Anything from the Defense?

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1 MR. STODDARD: Nothing.

2 THE COURT: All right. We'll stand at ease.

3 (WHEREUPON, Court's Exhibit 2 was marked for
4 identification only after which court stood at recess
5 awaiting the verdict of the jury.)

6 THE COURT: We're back in the case of State
7 versus Sipes. I have a note from the foreman. "We're
8 having trouble making a decision. We would like to hear
9 your instructions again and anything else you can share
10 with us."

11 Anything from the State?

12 MS. HERVEY: Nothing from the State. I don't
13 know other than, you know, adding the Allen charge at the
14 end what you could really add to it. I don't know if
15 they're at that stage yet or not.

16 (WHEREUPON, Court's Exhibit Number 2 was marked for
17 identification only.)

18 THE COURT: Well, this is the second day really.

19 MS. HERVEY: Yeah.

20 MR. STODDARD: Yeah. It's not a whole day. I
21 mean, it's been interrupted a lot because we broke
22 probably earlier that you would have last night.

23 THE COURT: Well, there's no way we could have
24 gone through three and a half hours -- three hours and
25 fifteen minutes at six o'clock and then ---

1 MR. STODDARD: That's my point. It hasn't been.
2 I think they've been out about four hours today, and I
3 guess it -- was it three hours last night? Two?

4 THE COURT: All right. How much of my charge do
5 you think the -- just the substance of it, the instructor
6 of the law, presumption of innocence, the indictment, the
7 charge on first-degree criminal sexual conduct, no
8 corroboration and reasonable doubt?

9 MR. STODDARD: That's ---

10 THE COURT: I mean, do you think they need
11 credibility of witnesses or anything?

12 MR. STODDARD: You may need, since there's
13 expert testimony, you know, there is some stuff in there
14 how to evaluate experts, I think, that's pretty
15 informative.

16 THE BAILIFF: It's only sixteen minutes.

17 THE COURT: All right. I'll do the whole thing.
18 I won't do the Allen charge now. But if they ---

19 MS. HERVEY: That's fine.

20 THE COURT: --- come back. The rule or the
21 statute is that, of course, if they come -- I can only
22 send them out one time when they don't request any
23 instruction. And that's when I usually give the Allen
24 charge.

25 MS. HERVEY: Okay. That's fine.

1 THE COURT: Very good. Ask them to join us and
2 I'll give them the whole ---

3 MADAM COURT REPORTER: Can we take two minutes?

4 THE COURT: Yes, ma'am. Let's do. We've been
5 busy this whole afternoon. So we'll take about five
6 minutes.

7 MR. STODDARD: Judge, can I make a -- it's just
8 a suggestion. It may make no sense. One part of the
9 charge that actually seems the most important but I really
10 think we probably left out is the statute itself. The
11 crime -- I'm not sure if they're having a problem with
12 that, if that makes sense.

13 THE COURT: I will charge that. I will charge
14 the indictment. It's in the indictment. It's not that
15 much.

16 All right. We'll give them five minutes.

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

18 THE COURT: All right. Anything from the State
19 before we bring the jury back?

20 MS. HERVEY: Nothing from the State.

21 THE COURT: Anything from the Defense?

22 MR. STODDARD: Nothing from the Defense.

23 THE COURT: All right. Ask the jury to join us,
24 please.

25 (WHEREUPON, the jury entered the open court at

1 approximately 4:04 p.m.)

2 THE COURT: All right. Let the record reflect
3 the jury is in the jury box.

4 Mr. Foreman, ladies and gentlemen of the jury, I have
5 a message, "We are having trouble making a decision.
6 Would you like -- or we would like to hear your
7 instructions again and anything else you can share with
8 us." I can't add to the record, of course. If you have
9 any specific questions -- I'll go ahead and do the
10 instructions again. But if you have any specific
11 questions about it, let me know and I'll try to explain to
12 you if there's some question I can't address.

13 Now, as I've said, you are the jurors in this case,
14 and you and I have different responsibilities. I am
15 prohibited by the Constitution of our state from charging
16 you on the facts. I'm also prohibited from discussing the
17 facts of the case with you or in any way intimating any
18 feeling, if any, that I might have about the facts of the
19 case.

20 It is your responsibility, and yours alone, to pass
21 upon all issues and facts presented in the case. I would,
22 therefore, charge you that if during the course of the
23 trial or during my charge you have been given or left with
24 the impression or feeling that I do have a personal
25 feeling about the facts of the case, I would specifically

1 instruct you to disregard that feeling or impression.
2 Moreover, you are the sole judges of what the testimony
3 was and not the argument of counsel.

4 Now, it is also your duty, and yours alone, to weigh
5 the testimony and evidence in the case and pass upon the
6 credibility or believability of the witnesses. In this
7 connection, you have the right to believe all that a
8 witness tells you or to disbelieve all that a witness
9 tells you. You have the right to believe a part of what a
10 witness tells you or to disbelieve a part of what a
11 witness tells you. You have the right to take into
12 consideration any bias or prejudice or interest you feel a
13 witness might have in the case.

14 I say this merely to emphasize that the weight you
15 see fit to give to the testimony, to the credibility of
16 the witnesses as well as all the issues of fact are for
17 your sole determination. As judges of the facts, you are
18 the sole judges of the credibility, that is the
19 believability, of the witnesses who have testified in this
20 case. In passing upon their credibility, you may take
21 into consideration many things such as the appearance and
22 manner of the witness on the stand, sometimes referred to
23 as the demeanor of the witness. Was the witness
24 forthright or hesitant? Was the witness' testimony
25 consistent or did it contain discrepancies? What was the

1 ability of the witness to know the facts about which he or
2 she testified? Did the witness have a cause or a reason
3 to be biased or prejudiced in favor of the testimony he or
4 she gave? Was the testimony of the witness corroborated
5 or made stronger by other testimony and evidence, or was
6 it made weaker or impeached by such other testimony and
7 evidence?

8 As jurors you have the right to believe a small
9 portion of a witness' testimony and disregard the larger
10 or vice versa. You may believe all of a witness'
11 testimony or none. You may believe the testimony of a
12 single witness against that of many witnesses or the other
13 way around. Most certainly, you do not determine the
14 matter of credibility or believability by counting up the
15 witnesses who may have testified on behalf of the parties.

16 Now, in this case we had expert witnesses. The rules
17 of evidence ordinarily do not permit witnesses to testify
18 as to opinions or conclusions. An exception to this rule
19 exists for witnesses we call expert witnesses. A witness
20 who, by education and experience or has become an expert
21 in some art, science or profession may give an opinion as
22 to the subject the witness claims to be an expert in and
23 may also give the reasons for that opinion.

24 You should consider any expert opinion given by a
25 witness and, like any other evidence, give it the weight

1 you think it deserves. If you decide that an expert
2 witness' opinion is not based on sufficient education and
3 experience or if you decide that the reasons given in
4 support of the opinion are not sound or that the opinion
5 is outweighed by other evidence, you may disregard the
6 opinion entirely.

7 An expert witness' testimony is to be given no
8 greater weight than that of other witnesses simply because
9 the witness is an expert. And you do not have to accept
10 an expert's opinion even though it's uncontradicted.
11 Throughout the entire process, you have but one single
12 objective, and that is to seek the truth regardless of
13 from what witness the testimony may have come.

14 Now, by the same constitution and law which makes you
15 the finders of the facts and the evidence, as I have
16 discussed with you, I am, as the judge, made the sole and
17 only instructor in the law. You must accept as correct
18 the law which I charge and apply to it the evidence as you
19 find it and reach your verdict. If I should make an error
20 in the law as I instruct it to you, there's another time
21 and place that error can be considered and, if necessary,
22 corrected. But for the purposes of this case today, you
23 must accept the law as I charge it to be the correct law.

24 Now, the Defendant has pled not guilty to this
25 indictment. And that plea puts the burden on the State to

1 prove the Defendant guilty. A person charged with
2 committing a crime in South Carolina is never required to
3 prove himself innocent. I charge you that it is an
4 important rule of the law that the Defendant in a criminal
5 trial, no matter what the seriousness of the charge may
6 be, will always be presumed to be innocent of the crime
7 for which the indictment was issued unless the guilt has
8 been proven by evidence satisfying you of that guilt
9 beyond a reasonable doubt.

10 This presumption of innocence does not end when you
11 begin your deliberations, but it accompanies the Defendant
12 throughout the trial until you reach a verdict of guilt
13 based upon evidence satisfying you of that guilt beyond a
14 reasonable doubt. The presumption of innocence is like a
15 robe of righteousness placed upon the shoulders of the
16 Defendant which remains with the Defendant until it has
17 been stripped from the Defendant by evidence satisfying
18 you of the Defendant's guilt beyond a reasonable doubt.

19 The presumption of innocence is not a mere legal
20 theory. It is not just a legal phrase. It is a
21 substantial right to which every defendant is entitled
22 unless you, the jury, are satisfied from the evidence of
23 the Defendant's guilt beyond a reasonable doubt.

24 A reasonable doubt is the kind of doubt that would
25 cause a reasonable person to hesitate to act.

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1 Now, the indictment in this case, 2005-GS-04-382,
2 charges the Defendant, Maxwell Eugene Sipes, with criminal
3 sexual conduct in the first degree. I remind you that the
4 fact the Defendant was arrested, charged and indicted in
5 this case is not evidence in this case and cannot be
6 considered by you as evidence of guilt in this case, nor
7 does it create any presumption or inference of guilt. The
8 indictment is simply the formal written instrument which
9 contains the charge made against the Defendant. It is the
10 formal documents by which the case is brought into this
11 court.

12 As I said, the Defendant, Maxwell Eugene Sipes, is
13 charged with criminal sexual conduct in the first degree
14 pursuant to section § 16-3-652 of our Code of Laws of
15 South Carolina which provides in pertinent part, "A person
16 is guilty of criminal sexual conduct in the first degree
17 if that actor engages in sexual battery with the victim
18 and if any one or more of the following circumstances are
19 proved. A, the actor uses an aggravated force to
20 accomplish sexual battery, or B, the victim submits to
21 sexual battery by the actor under circumstances where the
22 victim is also the victim of forcible confinement,
23 kidnaping, robbery, extortion, burglary, house-breaking or
24 any other similar offense or act."

25 The first element which the State must prove beyond a

1 reasonable doubt is that the Defendant engaged in a sexual
2 battery with the victim. A sexual battery is sexual
3 intercourse, cunnilingus, fellatio, anal intercourse or
4 any intrusion, however slight, of any part of a person's
5 body or of any object into the genital or anal openings of
6 another person's body except when the intrusion is
7 accomplished for medically recognized treatment or
8 diagnostic purposes.

9 If you find the State has not shown beyond a
10 reasonable doubt that a sexual battery occurred, you would
11 stop deliberating and your verdict would have to be not
12 guilty. If you find that a sexual battery did occur, you
13 must then decide whether the State has proved beyond a
14 reasonable doubt that either the Defendant used aggravated
15 force to accomplish the sexual battery or the alleged
16 victim submitted to the sexual battery under circumstances
17 where the victim was also the victim of forcible
18 confinement, kidnaping, robbery, extortion, burglary,
19 house-breaking or any other similar offense or act.

20 Aggravated force means the use of physical force or
21 physical violence of a high and aggravated nature to
22 overcome the victim. This includes the threat of using a
23 deadly weapon. Whether a sexual battery amounts to first-
24 degree criminal sexual conduct is dependent upon the
25 degree of force used. A sexual battery constitutes first-

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1 degree criminal sexual conduct only if it was aggravated
2 -- excuse me -- only if it was accomplished through the
3 use of force and that force constitutes aggravated force.
4 The aggravation necessary is not related to the general
5 circumstances surrounding the alleged attack. Instead the
6 statutory definition of aggravated force requires that the
7 aggravation necessary for first-degree criminal sexual
8 conduct be associated with the degree of force used to
9 complete the sexual battery.

10 In prosecutions for allegations of sexual misconduct,
11 the testimony of any alleged victim need not be
12 corroborated.

13 If you find that the State has proved beyond a
14 reasonable doubt all of the elements of the offense of
15 criminal sexual conduct in the first degree -- excuse me.
16 If you find that the State has failed to prove beyond a
17 reasonable doubt all of the elements of the offense of
18 criminal sexual conduct in the first degree, you must find
19 the Defendant not guilty. On the other hand, if you have
20 no reasonable doubt that the State has proven all of the
21 elements of criminal sexual conduct in the first degree,
22 then you must find the Defendant guilty.

23 As I said earlier, you have been selected as fair and
24 impartial jurors sworn to impartially try and determine
25 the facts of this case. And when you comply with your

1 oath to do so, then no one will have a right to criticize
2 your verdict and you will have fully discharged your
3 duties as jurors.

4 You should not be influenced by opinions or
5 expressions of opinions, if any, which you may have heard
6 on the outside. But you are to decide this case according
7 to the testimony that you have heard from the lips of the
8 sworn witnesses along with other evidence that may have
9 been introduced.

10 As I've said earlier, you are the judges of the facts
11 in this case. And you are to determine only if this
12 Defendant is guilty or not guilty based upon the testimony
13 and evidence presented in the trial and after applying the
14 law as I have given it to you.

15 If, from the evidence, you have a reasonable doubt as
16 to whether or not the defendant is guilty, it is your duty
17 to acquit him and write the words 'not guilty.'

18 Under the oath you took, you swore to try this case
19 based only and solely on the testimony, evidence and law
20 presented and heard in this courtroom. It is your duty to
21 lay aside all bias, prejudice or sympathy you may have in
22 reaching your verdict. You have no friends to reward or
23 enemies to punish in this case. Abide by your oath and
24 return a verdict which speaks the truth.

25 Now, Mr. Foreman, ladies and gentlemen of the jury,

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1 is there any specific questions that you might have for
2 the Court?

3 JUROR: Your Honor, could we ask you a question
4 directly, the individual members?

5 THE COURT: I tell you, I find it is better that
6 you write the questions down so that I might be able to
7 consider them before I -- go ahead. I'll permit one.

8 JUROR: One question ---

9 THE COURT: Yes.

10 JUROR: --- can you define further the term
11 reasonable doubt?

12 THE COURT: All right.

13 I'm going to ask you, Mr. Foreman, if you don't mind,
14 ladies and gentlemen, if you would retire to the jury
15 room. I want to check something very carefully before I
16 give you that charge. Very good. Thank you.

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

19 THE COURT: All right. Does anybody have Victor
20 v. Nebraska because I seem to have misplaced it?

21 MS. HERVEY: I can bring it up on Lexus if you
22 want. I don't have it printed out.

23 (Off record discussion.)

24 THE COURT: Let me read this to you. This is
25 from State v. Meades and State v. McCollum.

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1 The State has the burden of proving the
2 Defendant guilty beyond a reasonable doubt.
3 Some of you may have served as jurors in civil
4 cases where you were told that it's only
5 necessary to prove that a fact is more likely
6 true than not such as by the greater weight or
7 preponderance of the evidence. In criminal
8 cases the State's proof must be more powerful
9 than that. It must be beyond a reasonable
10 doubt. Proof beyond a reasonable doubt is proof
11 that leaves you firmly convinced of the
12 Defendant's guilt.

13 There are very few things in the world that
14 we know with absolute certainty. And in
15 criminal cases, the law does not require proof
16 that overcomes every possible doubt. If based
17 on your consideration of the evidence you are
18 firmly convinced that the Defendant is guilty of
19 the crime charged, you must find the Defendant
20 guilty. On the other hand, if you think there
21 is a real possibility the Defendant is not
22 guilty, you must give the Defendant the benefit
23 of the doubt and find him not guilty.

24 MS. HERVEY: That's fine.

25 MR. STODDARD: I object if it doesn't include --

1 I just object. I like the charge as it was.

2 THE COURT: Well, they've requested a charge on
3 it, so I will give them this charge.

4 MR. STODDARD: I would ask that you read that in
5 combination with the charge you've already given.

6 THE COURT: All right.

7 MS. HERVEY: You mean just the reasonable doubt
8 part?

9 MR. STODDARD: Yeah, not the whole charge.

10 (Off record discussion.)

11 THE COURT: All right. Ask the jury to join us,
12 please.

13 (WHEREUPON, the jury entered the open court at
14 approximately 4:28 p.m.)

15 THE COURT: Mr. Foreman, ladies and gentlemen of
16 the jury, I had previously charged you a reasonable doubt
17 is the kind of doubt that would cause a reasonable person
18 to hesitate to act. Now, the State has the burden of
19 proving the Defendant guilty beyond a reasonable doubt.
20 Some of you may have served as jurors in civil cases where
21 you were told that it is only necessary to prove that a
22 fact is more likely true than not true such as by the
23 greater weight or preponderance of the evidence. In
24 criminal cases the State's proof must be more -- excuse
25 me. In criminal cases the State's proof must be more

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1 powerful than that. It must be beyond a reasonable doubt.
2 Proof beyond a reasonable doubt is proof that leaves you
3 firmly convinced of the Defendant's guilt.

4 There are very few things in this world that we know
5 with absolute certainty. And in criminal cases, the law
6 does not require proof that overcomes every possible
7 doubt. If, based on your consideration of the evidence,
8 you are firmly convinced that the Defendant is guilty of
9 the crime charged, you must find the Defendant guilty.
10 If, on the other hand, you think there is a real
11 possibility the Defendant is not guilty, you must give the
12 Defendant the benefit of the doubt and find him not
13 guilty.

14 Now, that is as complete a charge on reasonable doubt
15 as I can give you. In fact, I might as well tell you that
16 there is a thought among judges that it's within the
17 judges' discretion to refuse to define reasonable doubt at
18 all. But I think that's an acceptable charge.

19 Very good. I'll leave it with you then. If you'll
20 retire to the jury room. Unless you have some other
21 question, you can continue your deliberations.

22 Thank you very much.

23 (WHEREUPON, the jury exited the open court at
24 approximately 4:31 p.m.)

25 THE COURT: All right. Any exceptions or

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1 requests from the State?

2 MS. HERVEY: Nothing from the State.

3 THE COURT: From the Defendant, other than your
4 objection to any charge other than that?

5 MR. STODDARD: No, sir.

6 THE COURT: Very good. All right. We'll await
7 the jury's response.

8 (WHEREUPON, court stood at recess awaiting the
9 verdict of the jury.)

10 THE COURT: It's my understanding the jury has
11 reached a verdict. Is there anything from the State
12 before we bring the jury back?

13 MS. HERVEY: Nothing from the State.

14 THE COURT: From the Defendant?

15 MR. STODDARD: Nothing from the Defendant.

16 THE COURT: All right. Ask the jury to join us,
17 please.

18 MS. HERVEY: I'm sorry.

19 THE COURT: Excuse me?

20 MS. HERVEY: I don't have -- the victims are on
21 their way up.

22 THE COURT: Oh, that's what I was asking.

23 MS. HERVEY: And I'm sorry.

24 THE COURT: Hold the jury.

25 MADAM CLERK: Hold on just a minute.

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1 MS. HERVEY: I'm sorry. They told me that and
2 it just completely left my head. I was thinking legally
3 and not logistically.

4 MR. STODDARD: Judge, there is one thing I want
5 to say. I just want to clarify something that was said at
6 the end of the -- when the jury asked for the reasonable
7 doubt verdict [sic]. You asked me if I had any
8 objections, and I started to renew my objection and you
9 said, other than the one you made earlier, and I said yes.
10 And I meant that to the latter half of your statement.
11 And it occurred to me that the record might reflect that I
12 was saying, yes, I have an objection. It was no, I had no
13 objection.

14 THE COURT: You have no objection to the charge
15 given?

16 MR. STODDARD: No. I have -- the objection I
17 made before the charge about I'd rather leave as it is.

18 THE COURT: Okay.

19 MR. STODDARD: And I only say that because it
20 occurred to me that if you're reading that record it would
21 have sounded like I said, yes, I have an objection.

22 THE COURT: Well, I took it that your -- it was
23 a continuing objection that you had made to any further
24 charge on reasonable doubt.

25 MR. STODDARD: Yes, sir, that's it. That's what

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1 I did.

2 THE COURT: But I didn't find that any
3 particular objection to the charge itself. It was a
4 continuing objection that I gave it over your objection.

5 MR. STODDARD: Yes, sir.

6 THE COURT: Which is the way I took it.

7 MS. HERVEY: They got locked out of the
8 courthouse, and they just went down to let them in. They
9 walked outside and got caught, but they'll be up.

10 (Pause.)

11 THE COURT: Ask the jury to join us, please.

12 Regardless of what the verdict is, there will be no
13 emotional outburst in this courtroom. So if you don't
14 feel that you can control your emotions or your responses,
15 you should leave at this time.

16 (WHEREUPON, the jury entered the open court at
17 approximately 6:08 p.m.)

18 THE COURT: Mr. Foreman, I understand the jury
19 has reached a verdict?

20 JUROR: That's true.

21 THE COURT: If you would, please, hand it up to
22 the bailiff.

23 (WHEREUPON, the verdict form was handed up to the
24 Court.

25 THE COURT: If the Defendant would please stand.

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1 (WHEREUPON, the Defendant stood.)

2 THE COURT: The State of South Carolina versus
3 Maxwell Eugene Sipes, 2005-GS-04-0382. "We, the jury,
4 unanimously find that the Defendant, Maxwell Eugene Sipes,
5 is guilty of criminal sexual conduct in the first degree."
6 Signed John A. Miller, Foreman, Anderson, South Carolina,
7 March 9th, 2007.

8 Mr. Foreman, ladies and gentlemen of the jury, is
9 this your verdict, and is it still your verdict, so say
10 you all? If so, indicate by raising your right hand.

11 (WHEREUPON, all jurors hands were raised.)

12 THE COURT: Very good. Thank you very much.
13 Let the record reflect that all members of the jury
14 responded in the affirmative.

15 Is there anything from the State before I dismiss the
16 jury?

17 MS. HERVEY: Nothing from the State.

18 THE COURT: Anything from the Defendant?

19 MR. STODDARD: I'd ask that the jury be polled.

20 THE COURT: If you would, please, ma'am.

21 MADAM CLERK: Thank you, Your Honor.

22 Mr. Foreman, ladies and gentlemen of the jury, I'll
23 read the verdict once again and ask each of you
24 individually if this was your verdict in the jury room and
25 if it's still your verdict.

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1 2005-GS-04-0382, the State of South Carolina versus
2 Maxwell Eugene Sipes. The verdict, "We, the jury,
3 unanimously find that the Defendant, Maxwell Eugene Sipes,
4 is guilty of criminal sexual conduct in the first degree.

5 John A. Miller, Jr., was this your verdict? Is it
6 still your verdict?

7 JUROR: Yes, it is.

8 MADAM CLERK: Thank you.

9 Dean Williams, was this your verdict? Is it still
10 your verdict?

11 JUROR: Yes, ma'am, it is.

12 MADAM CLERK: Jimmy Andrews, was this your
13 verdict? Is it still your verdict?

14 JUROR: Yes, ma'am.

15 MADAM CLERK: Mary Thompson, was this your
16 verdict? Is it still your verdict?

17 JUROR: Yes.

18 MADAM CLERK: Lance Dubaere, was this your
19 verdict? Is it still your verdict?

20 JUROR: Yes, ma'am.

21 MADAM CLERK: Brittany Key, was this your
22 verdict? Is it still your verdict?

23 JUROR: Yes, ma'am.

24 MADAM CLERK: Katherine Patterson, was this your
25 verdict? Is it still your verdict?

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1 JUROR: Yes, ma'am.

2 MADAM CLERK: Scott Humphrey, was this your
3 verdict? Is it still your verdict?

4 JUROR: Yes, ma'am.

5 MADAM CLERK: Hampton Cason, was this your
6 verdict? Is it still your verdict?

7 JUROR: Yes, ma'am.

8 MADAM CLERK: Cynthia Lockaby, was this your
9 verdict? Is it still your verdict?

10 JUROR: Yes, ma'am.

11 MADAM CLERK: Jean Moulder, was this your
12 verdict? Is it still your verdict?

13 JUROR: Yes, ma'am.

14 MADAM CLERK: The jury has been polled, Your
15 Honor. All answered in the affirmative.

16 THE COURT: Anything further from the Defendant?

17 MR. STODDARD: Nothing further.

18 THE COURT: Mr. Foreman, ladies and gentlemen of
19 the jury, the Court is never interested in a verdict, only
20 how that verdict is reached. And I can say in this
21 particular case, I have been -- well, you might think I'm
22 doing everything else in the world but paying attention
23 here. But I've developed a certain method, I guess you
24 might say, of doing more than one thing at a time. And I
25 have throughout the trial of this case kept in touch with

1 you. And I've found that each of you paid very careful
2 and close attention to all the testimony, exhibits and all
3 the evidence introduced in the courtroom, and I am
4 satisfied that having reached a verdict in conformity with
5 your conscious you have no one to answer to. You have
6 done your duty well as jurors.

7 In fact, not only does our judicial system owe you a
8 great debt of gratitude, but also the people of Anderson
9 County. And I thank you very much for your service today.
10 I know that none of you asked to be here and would rather
11 be anywhere else but where you've been for the last five
12 days. But I do thank you for your services. If not for
13 citizens like you, our system would not work. And I thank
14 you very much for your service.

15 I wish there was something I could do for you, but
16 the only thing I can think of to say is on Monday when I
17 qualified the entire jury panel I asked if any members had
18 served on a jury in the last three years. At least you
19 won't have to serve for another three years. But I do
20 hope that your service has not been without some benefit
21 because, as I said earlier, without citizen participation,
22 our system would not work.

23 I might note just in passing Winston Churchill,
24 former Prime Minister of England, once made the
25 observation that, "No greater service can a citizen

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1 perform in peace time than that as jurors." And I thank
2 you for doing your duty as citizens, and I thank you again
3 on behalf of Anderson County.

4 I understand that the bailiff might have some papers
5 for you as far as employment or anything of that nature.
6 So if you would please retire to the jury room for the
7 last time. I will need to see the foreman, if I may, Mr.
8 Miller. Everyone else may be excused. And I do again
9 thank you for your service.

10 (WHEREUPON, the jury exited the open court at
11 approximately 6:14 p.m.)

12 THE COURT: All right. Let's take about five
13 minutes while we get the sentencing sheet and everything
14 ready, if you would, please. All right. We'll stand at
15 ease for five minutes.

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

17 THE COURT: Is the State ready for sentencing?

18 MS. HERVEY: Yes, Your Honor, we are.

19 THE COURT: The Defendant?

20 MR. STODDARD: Yes, sir.

21 THE COURT: Very well.

22 All right. Anything from the State?

23 MS. HERVEY: Your Honor, Minor just asked
24 me to speak to you. She thought she'd be a little too
25 emotional speaking on her own behalf today. She did want

1 me to impress upon you that the serious nature of this
2 crime. And I told her that you appreciated that, that you
3 see this kind of thing unfortunately all too often. But
4 as you can realize, this crime will haunt her for the rest
5 of her life. It will affect every relationship she has
6 with a man for the rest of her life. And that she was
7 very brave and courageous to come in here.

8 I think it's also very telling that he did --
9 although it is criminal sexual conduct in the first degree
10 and it's not with a minor, this was a very young victim, a
11 very tender victim, a very vulnerable victim that he
12 preyed upon. And for that reason, **Minor** wants him
13 sentenced to the maximum sentence of thirty years and
14 punish -- thirty years in jail.

15 Investigator Garland Major asks that he be sentenced
16 to the maximum punishment as well. I think that's
17 appropriate given the nature of this crime. He not only
18 conflicted and inflicted this crime upon **Minor**, but
19 he injured her in such a way that she actually required
20 surgery. And the gravity of that, Your Honor, is just
21 impossible, I think, for the rest of us to fathom. I
22 think the maximum sentence is appropriate.

23 His only prior conviction is a 1987 conviction for
24 driving under the influence. And I understand that that's
25 something that the judge will take into consideration.

1 But given the fact that this victim was put through this
2 trial, was forced to tell this tale, was brave enough and
3 courageous enough to do that and to confront him in this
4 manner, I think it's merited that type of punishment just
5 given the nature of this crime.

6 THE COURT: Very well.

7 Mr. Stoddard?

8 MR. STODDARD: Your Honor, first of all, I would
9 ask that even though the Defendant did go through a trial,
10 that you not add additional punishment or punish him in
11 any way for exercising his constitutional right to trial
12 which is his right.

13 Second, I would disagree strongly that this
14 recommends the maximum. I realize this is a serious
15 crime. Any criminal sexual conduct first degree is a
16 serious crime, but the law does provide for a range of
17 sentences. And I have met a number of people who know the
18 Defendant very well in connection with getting the trial
19 prepared. Everyone I've talked to speaks very highly of
20 him.

21 He's been a good worker. He's been conscientious in
22 every way. I know he's just been convicted of a serious
23 crime, but I would ask that you consider the rest of his
24 life, that he only has this minor prior record, so that a
25 -- for example, an individual convicted of this same crime

1 with a history of violent crime should get a higher
2 sentence than Mr. -- than Max Sipes. Which if you give
3 Max the maximum, that means he gets the same as someone
4 that commits this crime with a history of violent crime.

5 In fact, I not too long ago represented a client who
6 had a prior criminal sexual conduct. And on his second
7 offense for criminal sexual conduct first degree, he got a
8 fifteen-year sentence, by way of example. So I would just
9 ask that you consider the rest of his life outside this
10 crime. And I understand that you're going to give -- he's
11 going to get a substantial sentence for this crime
12 obviously. But I do believe the maximum for this
13 individual would be out of proportion to all the factors
14 that the Court would consider in a case like this.

15 He has some family in here. I don't know that any of
16 them want to speak on his behalf. They've been here
17 supporting him. It's very obvious that they are -- would
18 want the Court to show mercy to Mr. Sipes. And there's
19 other people who have been calling us on the phone with an
20 interest in this case that all -- I've had a number of
21 people that are working and can't come to court this week
22 that are supporting Mr. Sipes and would ask the Court on
23 their behalf -- well, if they were here they would ask for
24 mercy.

25 THE COURT: All right. Mr. Sipes, anything

State of South Carolina v. Maxwell Eugene Sipes 2005-GS-04-0381
Verdict and Sentencing

611

1 you'd like to say?

2 THE DEFENDANT: Yes, Judge, Your Honor. I still
3 renounce that I'm innocent. And I do forgive them for
4 what they have brought against me. I'm sorry it had to
5 come to this. And I know I'm at this stage of the trial.
6 The trial is over, but have mercy on me, please.

7 THE COURT: All right. Anything else?

8 MR. STODDARD: Nothing further.

9 THE COURT: All right. Anything else, Mr.
10 Sipes?

11 MR. STODDARD: Nothing further.

12 THE COURT: Indictment 2005-GS-04-0382, the
13 State of South Carolina versus Maxwell Sipes, also known
14 as Maxwell Eugene Sipes, it's the sentence of the Court
15 that the Defendant be committed to the Department of
16 Corrections for a term of thirty years. Provided upon the
17 service of twenty-five years plus payment of costs and
18 assessment as applicable, the balance is suspended with
19 probation for five years. The Defendant will register
20 with the sex offender registry.

21 Very good. Good luck.

22 (END OF REQUESTED TRANSCRIPT OF RECORD)

1

CERTIFICATE OF REPORTER

2

I, THE UNDERSIGNED RENEE H. TOLLISON, OFFICIAL COURT
3 REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF
4 SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
5 TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL
6 THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE
7 TRIAL/HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL,
8 IN THE CIRCUIT COURT FOR ANDERSON COUNTY, SOUTH CAROLINA,
9 ON THE 5TH THROUGH 9TH DAYS OF MARCH 2007.

10

THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH
11 MATERIAL IS REPRODUCED AS READ BY THE SPEAKER.

12

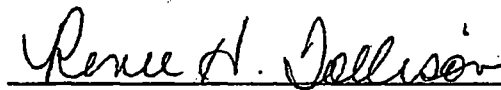
I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
13 COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

14

DECEMBER 18, 2007

15

16



17

CIRCUIT COURT REPORTER

FORM 5

STATE OF SOUTH CAROLINA FILED - CLERK'S OFFICE
ANDERSON SC

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

2012 JAN 13 P 2:10

Maxwell E. Sipes, 320502,

Full name and prison number (if any) of Applicant. COMMON PLEAS AND
GENERAL SESSIONS

2012 - CP - 04 - 00084

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Correctional Institution
2. Name and location of Court which imposed sentence Anderson County General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2005 GS 04 0382 /16-3-652 (160)
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) March 9, 2007
 - (b) _____

A TRUE COPY

Revised 3/2008
JAN 17 2012

CLERK OF COURT

- (c)
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty
 - (b) after a plea of not guilty x
 - (c) after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court
 - iii.
 - (b) the result in each such Court to which you appealed:
 - i. Conviction affirmed
 - ii. Petition for certiorari was denied and remittitur issued
 - iii.
 - (c) the date of each such result:
 - i. November 19, 2009
 - ii. March 02, 2011 (remittitur issued March 11, 2011)
 - iii.
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. South Carolina Court of Appeals No. 2009-UP-540
 - ii. Petition for certiorari denied without written opinion
 - iii.
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) n/a
 - (b)
 - (c)
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective assistance of trial counsel.
- (b) Ineffective assistance of appellate counsel.
- (c) Failure of the State to adequately comply with the rules of discovery.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Trial counsel failed to properly investigate the case and prepare an adequate defense based on the evidence in the case; Trial counsel failed to request a continuance in order to allow him to properly investigate the case and prepare an adequate defense; Trial counsel failed to make necessary objections during the trial or otherwise properly raise and/or preserve issues; Trial counsel failed to effectively cross-examine the State's witnesses during the trial; Trial counsel failed to introduce relevant evidence in the defense case in chief; Trial counsel failed to state and/or argue relevant facts and and law to the jury in his statements and arguments to the jury.

(b) Appellate counsel failed to properly raise and argue viable issues on appeal.

(c) The State failed to provide discovery materials that were in its possession or which were known or should have been known to the State or its agents.

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. n/a

ii.

iii.

iv.

(b) the name and location of the Court in which each was filed:

- i. n/a
- ii. _____
- iii.
- iv.

(c) the disposition thereof:

- i. n/a
- ii. _____
- iii.
- iv.

(d) the date of each such disposition:

- i. n/a
- ii.
- iii.
- iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. n/a
- ii.
- iii.
- iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. n/a
- ii.
- iii.

(b) the proceedings in which each ground was raised:

- i. n/a
- ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
 - (a) Issues raised herein are proper for PCR.
 - (b)
 - (c)
17. Were you represented by an attorney at any time during the course of:
 - (a) your arraignment and plea? Yes
 - (b) your trial, if any? Yes
 - (c) your sentencing? Yes
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
 - (a) the name and address of each attorney who represented you:
 - i. David F. Stoddard, Waldrep & Stoddard, PO Box 2367, Anderson, SC 29622
 - ii. Tara Dawn Shurling, 3614 Landmark Dr., Ste. A, Columbia, SC 29204
 - iii. J. Falkner Wilkes, 114 Whitsett St., Greenville, SC 29601
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal
 - iii. PCR
19. State clearly the relief you seek in filing this application:
Reversal of the conviction and a new trial.
20. Are you now under sentence from any other court that you have not challenged?
No.

STATE OF SOUTH CAROLINA)

County of Anderson)

VERIFICATION

I, Maxwell E. Sipes, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Maxwell E. Sipes

SWORN to and subscribed before me this 16th
day of September, 2011.

[Signature] (L.S.)
Notary Public

My Commission Expires: 2-12-14

FILED-CLERK'S OFFICE
ANDERSON SC
2012 JAN 13 P 2:10
COMMON PLEAS AND
GENERAL SESSIONS

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Maxwell Sipes, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Maxwell E. Sipes
Applicant

SWORN or affirmed to and subscribed before me this

21 day of December, 2011.

Jeffrey Dill
Notary Public

My Commission Expires: 2-12-14

FILED-CLERK'S OFFICE
ANDERSON SC
2012 JAN 13 P 2:10
COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	Case No. 2012-CP-04-0084
	)	
Maxwell E. Sipes,	)	
S.C.D.C. No. 320502,	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed January 13, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was indicted at the March 2005 term of the Court of General Sessions for Anderson County for criminal sexual conduct first degree (2005-GS-04-0382). David F. Stoddard, Esquire, represented the Applicant. On March 5, 2007, the Applicant proceeded to a trial by jury. On March 9, 2007, the jury convicted the Applicant as indicted. The Honorable Alexander McCaulay sentenced the Applicant to thirty years imprisonment.

The Applicant filed a notice of appeal to the South Carolina Court of Appeals on March 16, 2007. Tara Dawn Shurling, Esquire, represented the Applicant. The South Carolina Court of Appeals affirmed the Applicant's sentence and conviction on November 2, 2009 in Opinion No. 2009-UP-540.

The Applicant thereafter filed a Petition for Rehearing on December 3, 2009. The South Carolina Court of Appeals denied the Applicant's Petition for Rehearing in an Order dated January 20, 2010.

On April 20, 2012, the Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. The Applicant was represented by Tara Dawn Shurling, Esquire. The Respondent made a response on May 11, 2010. The South Carolina Supreme Court, in an Order dated May 2, 2011, denied the Applicant's petition and the matter was remitted to the lower court.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, and the trial transcript of the proceeding against the Applicant, and the Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel"
 - a. Trial counsel failed to properly investigate case and prepare a defense
 - b. Trial counsel failed to request a continuance which would have helped him properly prepare/investigate for the case
 - c. Trial counsel failed to make necessary objections during trial or raise/preserve issues for appeal
 - d. Trial counsel failed to cross-examine the State's witnesses effectively
 - e. Trial counsel failed to introduce relevant evidence in its case-in-chief

- f. Trial counsel failed to argue relevant facts/law in opening and closing statements
- 2. "Ineffective assistance of appellate counsel"
 - a. Appellate counsel failed to raise "viable issues on appeal"
- 3. "Failure of the State to adequately comply with the rules of discovery"

III.

The Applicant alleges ineffective assistance of trial and appellate counsel. The Respondent contends that the Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient.

Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of trial and appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant raises additional direct appeal allegations. These allegations are not proper matters for PCR. Simmons v. State, 264 S.C. 417, 215 S.E.2d 833 (1975). Therefore, Applicant's direct appeal allegations must be summarily dismissed.

V.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial and appellate counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

VIII.

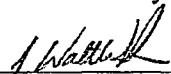
WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

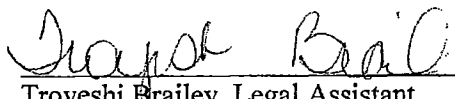
Mar 26th, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE TENTH CIRCUIT
COUNTY OF ANDERSON	)	
	)	2012-CP-04-0084
	)	
Maxwell E. Sipes, # 320502	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

J. Falkner Wilkes, Esquire
114 Whitsett St.
Greenville, SC 29601

DATED this 26th day of March, 2013


 Troyeshi Brailey, Legal Assistant
 For Respondent

Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

1 State of South Carolina

In the Court of Common Pleas

2 County of Anderson

3

4 Maxwell E. Sipes,

5 Applicant,

6 -vs-

7 The State of South Carolina,

8 Respondent.

9

2012-CP-04-00084

June 9, 2016

Transcript of Record

10

11

B E F O R E:

12

The Honorable R. Scott Sprouse, Judge

13

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

15 J. Falkner Wilkes, Esquire
Attorney for Applicant

16

17 Johanna C. Valenzuela, Esquire
Attorney for Respondent

18

19

20

21

Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

22

23

24

25

Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

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E x h i b i t s

For the Applicant:

Marked	Description	I.D.	Admitted

1	Redacted medical records	16	

2	Opinion 2009UP540	91	

For the Respondent:

Marked	Description	I.D.	Admitted

None offered.

Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

1 (WHEREUPON, court convened with all parties
2 present and the following proceedings were had
3 commencing at approximately 10:25 a.m.)

4 MS. VALENZUELA: This is the case of Maxwell Sipes
5 vs. The State of South Carolina, case number
6 12-CP-04-0084. The respondent filed his application on
7 January 13th of 2012. He is still currently confined
8 in the Department of Corrections. This is because he
9 was indicted in the March 2006 term of Anderson County
10 criminal sexual conduct in the first degree. He was
11 represented at trial by David Stoddard and went to
12 trial on March 5, 2007.

13 On March 9, 2007, the jury convicted the applicant
14 as indicted, and Judge Macaulay sentenced the applicant
15 to 30 years in prison. The applicant did file a notice
16 of appeal with the South Carolina Court of Appeals on
17 March 16, 2007. The applicant was represented by Tara
18 Dawn Shurling in that appeal, and the South Carolina
19 Court of Appeals affirmed the applicant's sentence and
20 conviction on November 2, 2009.

21 The applicant thereafter filed a petition of
22 rehearing on December 3, 2009. The South Carolina
23 Court of Appeals denied that rehearing in an order
24 dated January 20th, 2010. On April 20th of 2012, the
25 applicant filed a petition for writ of cert to the

Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

1 South Carolina Supreme Court. The applicant was still
2 represented by Tara Dawn Shurling at the time, and the
3 respondent made his response, South Carolina Supreme
4 Court, in an order dated May, 2, 2011, denied the
5 applicant's petition and the matter was remitted at
6 that time to the lower court.

7 The applicant is represented today in court by
8 Mr. Jeff Wilkes, and he is going to put the allegations
9 on the record, Your Honor.

10 THE COURT: Thank you, Ms. Valenzuela.

11 Mr. Wilkes.

12 MR. WILKES: Thank you, Your Honor. We will
13 proceed on ineffective assistance of counsel grounds,
14 broken down, I guess, into three basic groups. One,
15 failure to timely obtain and utilize medical records,
16 properly cross-examine the State's expert, and use
17 those records in support of the defense theory of the
18 case.

19 Also somewhat related to that will be the failure
20 to use those medical records to properly present
21 psychological evidence as to a specific diagnosis in
22 the medical records, particularly the borderline
23 personality disorder, among other things, but primarily
24 that one, as it may impact the issues at trial.

25 And then the other will be the failure to preserve

David Frank Stoddard - Direct
Maxwell E. Sipes vs. State of South Carolina · 2012-CP-04-0084

1 objection at trial relating to a Fifth Amendment issue.
2 There was a timely objection, but the judge indicated
3 he'd make a curative instruction, and no curative
4 instruction was ever made. And the failure to raise it
5 again and get the curative instruction or put it on the
6 record was the basis for the court of appeals to not
7 address the issue. So we'll look to bring the appeal
8 issue back in on the failure to preserve. And that
9 will be the bulk of our case. Everything else will
10 fall under those.

11 THE COURT: Thank you, Mr. Wilkes.

12 Call your first witness.

13 MR. WILKES: Thank you, Your Honor. We'd call
14 Mr. Stoddard.

15 DAVID FRANK STODDARD,

16 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

17 THE CLERK: Please have a seat around in the
18 witness stand. Once you're seated, if you would please
19 give us your full name for the record.

20 THE WITNESS: David Frank Stoddard.

21 THE CLERK: Thank you, sir.

22 DIRECT EXAMINATION

23 BY MR. WILKES:

24 Q Mr. Stoddard, did you represent Max in the trial
25 of the case?

1 A I did.

2 Q And how long before the trial had you represented
3 Max? Do you recall the length of time prior to trial?

4 A I do not. I will say this. I was just reviewing
5 some records; and I noticed I think the trial date was
6 sometime in 2007, and I noticed that I got discovery
7 from the State in December 2004.

8 Q So it would be at least three years?

9 A At least.

10 Q Okay. Would -- well, I guess working backwards
11 through my issues, do you remember the issue about the
12 witness, I believe the ex-wife, testifying that the
13 police went to talk to Max and Max quit his job and
14 took off? Do you remember that?

15 A I don't have a specific memory. I was, just
16 before coming up here, looking at the transcript, and I
17 think I saw it in the transcript.

18 Q Okay. And you are aware that the court of appeals
19 indicated there was a failure to have the curative
20 instruction given later. Was there any reason not to
21 seek the curative instruction?

22 A Probably, in the length of the trial and all that,
23 I had forgotten that that had happened in the trial.

24 Q Now, you indicated that you had discovery. Do you
25 have your file with you?

David Frank Stoddard - Direct
Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

1 A I do.

2 Q I might be able to shortcut it. Do you recall the
3 Carolina Behavioral Health records being an issue?

4 A Yes, sir.

5 Q And I'm going to ask you to look at this. And
6 there may be -- I know there's other discovery.

7 MR. WILKES: May I approach the witness?

8 THE COURT: Yes, sir.

9 BY MR. WILKES:

10 Q If you will take a look at this, the supplemental
11 answer to your discovery request. Is Carolina
12 Behavioral Health listed as one of the things that the
13 State provided you with? I think I gave you the right
14 one. Oh, no, I didn't. I'm sorry. I may have given
15 you the wrong one. It's not on there, is it?

16 A It's not.

17 Q I'm sorry. If you will look at that one. I
18 apologize.

19 A It's okay.

20 Q And that's the State's -- one of the State's
21 responses to your discovery request. Does that one
22 indicate Carolina Behavioral Health?

23 A I don't see it on there. Oh, wait. Wait. Wait a
24 minute. "Following are attached." Yes, they are.
25 Four pages.

1 Q Four pages of records?

2 A Yes, sir.

3 Q Okay. Are you -- and I don't know because all I
4 have is what I've got that I'm showing you, but are you
5 aware of any other Carolina Behavioral records, health
6 records, that you received from the State?

7 A Yes, sir.

8 Q You did?

9 A I believe I did.

10 Q Well, can you help me determine what they did give
11 you and when they gave it to you?

12 A My recollection, and there were several inpatient
13 psychiatric treatments, and I may be referring to the
14 wrong facility, but my recollection is that I had an
15 expert witness, Cindy Stichnoth, who, when she reviewed
16 these records, advised me there should be more than
17 this, which I did not know until she told me that. And
18 then I started making inquiries on how to get those
19 records.

20 Q Okay. And that was the -- as of the day the trial
21 began, the transcript, I believe, indicates that you
22 had still not received -- believed you had not received
23 them all?

24 A I believe that's correct.

25 Q Okay. And you asked the court if you needed an

David Frank Stoddard - Direct
Maxwell E. Sipes vs. State of South Carolina 2012-CF-04-0084

1 order. Do you remember if you got a court order or
2 they delivered it under your subpoena? Do you remember
3 how you got the records?

4 A I don't have a memory other than what I saw in the
5 transcript. And it sort of refreshes -- part of this
6 is just reading what the transcript says and sort of
7 it's a vague memory, but I do believe that the court
8 issued an order. Psychiatric records are kind of hard
9 to subpoena. They are, in fact, really impossible to
10 subpoena. And the court helped facilitate getting
11 those records, and I think they got them during the
12 trial.

13 Q Okay. And would it be fair to say that those
14 records came in after the State's expert had testified?

15 A Yes, sir.

16 Q Okay. And when you actually received the Carolina
17 Behavioral Health records, there were far more than
18 four pages, correct?

19 A Yes, sir.

20 Q Now, did they come in the day that your expert
21 testified?

22 A Lund or Stichnoth?

23 Q Lund, I'm sorry. Did they come in after Lund?

24 A I think it was after -- from my reading of the
25 transcript, I believe it's after.

1 Q After Dr. Lund and before Stichnoth?

2 A Yes, sir.

3 Q Okay. So when Dr. Payne testified, you did not
4 have the benefit of the Carolina Behavioral Health
5 records to be able to cross-examine him with?

6 A Not all of the records.

7 Q You had four page of the records --

8 A Four pages of the records.

9 Q -- we know. Okay.

10 Do you know which four pages you had?

11 A I do not. My guess is it was probably an
12 admission and discharge summary.

13 Q Okay. And when Dr. Lund testified, more than
14 likely you didn't have them then either for his
15 assistance?

16 A More than likely.

17 Q Now, when you did receive them in the middle of
18 the trial, what happened?

19 A Well, I provided them to Cindy Stichnoth, and she
20 reviewed them, and we had a meeting where we discussed
21 her conclusions based on those records.

22 Q And tell me when -- did Max ever tell you about
23 the Carolina Behavioral Health treatment?

24 A I had -- I'm not certain. I feel like he -- I do
25 know that he would tell me generally the problems she

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1 had and -- he probably -- that's -- I -- I believe I
2 specifically asked the State for those records, and it
3 was probably based on information he gave me.

4 Q Okay. And, well, you know in, I guess -- when did
5 they send you that discovery giving you four pages of
6 CBH?

7 A According to what you handed me earlier, around --
8 it was April 2006. Probably April 24, 2006.

9 Q So at least by April 24th of 2016 you were aware
10 that CBH was a treating facility?

11 A Yes, sir.

12 Q Okay. And do you recall subpoenaing -- how long
13 after that, if you did, did you subpoena CBH for the
14 full records?

15 A I would have to look at my file. I noticed some
16 subpoenas in my file, but I didn't look to see if they
17 were those records.

18 Q Would you like to look if it would -- could you --
19 do you want me to bring you your box? I'll bring it to
20 you. Is this yours?

21 A It's mine.

22 Q Is that okay?

23 A And there's some documents to the side of it that
24 I was looking at.

25 Q Do you want those?

1 A Yes, sir.

2 Q I just want you -- I don't want to put you at a
3 disadvantage.

4 A Yeah.

5 (Box and documents provided to witness.)

6 Q Did you find it?

7 A I found --

8 Q I'll hand you two copies. One is a discovery
9 motion and one is a subpoena to CBH, if that helps.
10 That's what I found.

11 A Yes. It appears in October 2015 I made a motion
12 for discovery.

13 Q Not 2015. It would be October when?

14 A I'm sorry, 2000 -- I can't read my writing. It
15 looks like 2005. Probably 2005.

16 Q And that would be a motion?

17 A It's a motion for discovery, and I'm asking for
18 the identity, address of any physician, clinic, or
19 hospital that treated the complaining witness, victim
20 at any time -- well, that's for gastrointestinal
21 issues.

22 Q But in October of 2005 you were seeking some
23 medical --

24 A Medical. And I've got other requests in that time
25 frame where I asked for, I think, authorization to

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1 obtain psychiatric treatment. I've got -- you've
2 handed me a subpoena, February 28th, 2007 --

3 Q Right.

4 A -- where I'm subpoenaing the custodian of records
5 of the Carolina Behavioral Health center to the trial,
6 I think.

7 Q Okay. And that would have been coming straight to
8 the courthouse for the trial?

9 A Right. Right.

10 Q So as far as you know from starting the case in
11 2004, other than the four pages of CBH records that
12 they gave you, you did not get all CBH records until
13 the day of the -- or halfway through the trial?

14 A Yes, sir. I believe that's true.

15 Q Now, why the delay in getting CBH records?

16 A I didn't know that I didn't have them all.

17 Q Okay. The theory of the case -- would you agree
18 that the theory of the case was --

19 MS. VALENZUELA: Objection to leading, Your Honor.

20 BY MR. WILKES:

21 Q What was the theory --

22 THE COURT: Rephrase your question.

23 MR. WILKES: I'm sorry.

24 Q What was the theory of the case?

25 A From the prosecution or from me?

1 Q From yours.

2 A The theory of the case was the victim fabricated
3 her allegation, and it was an -- so there were sub -- I
4 guess subtheories that go along with it.

5 Q What was the medical theory?

6 A The medical theory, well, I learned that the State
7 had a surgeon that was going to testify that there
8 was -- he treated her for a prolapsed colon, the
9 victim, and that in his opinion this prolapsed colon
10 was a result of anal intercourse.

11 Q Okay.

12 A So I sought an expert in Dr. Lund and discussed
13 with him, "This is what the State's witness is supposed
14 to say," and got his -- I sought alternative
15 explanations. For example, if Lund said, "No, he's
16 right," we might have had a different thing. But, no,
17 Lund told me there's lots of causes for prolapsed
18 colon, and the most common is -- well, I'm not sure if
19 he ever told me any other causes other than chronic
20 constipation. He said that's very common in teenagers.

21 Q Now, when you obtained the medical records from
22 CBH, that was after Dr. Lund testified?

23 A Well, again, the four pages I probably had, but
24 the rest of it I did not have.

25 MR. WILKES: If I may, Your Honor. We would

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1 introduce the condensed version of the medical records
2 if there's no objection. They have been properly --
3 well, no, they haven't. They were almost redacted
4 completely.

5 May I take a minute and mark something?

6 THE COURT: Make sure they are properly redacted.

7 Ms. Valenzuela, have you had an opportunity to
8 look at them?

9 MS. VALENZUELA: He e-mailed them to me. I
10 haven't seen the redacted version. I just want to flip
11 through those.

12 THE COURT: Take a moment and make sure they're
13 properly redacted.

14 MS. VALENZUELA: Your Honor, because these are
15 subject to a protective order, I would ask that they be
16 sealed in a way at the clerk's office that is
17 appropriate in dealing with these medical records.

18 THE COURT: The records will be protected as
19 previously ordered by the court.

20 MR. WILKES: I will say I worked diligently.
21 There's thousands of redactions in these records.

22 MS. VALENZUELA: I'm not checking the redactions.

23 MR. WILKES: As soon as I opened it, there was one
24 that was just staring at me, so.

25 (Both attorneys reviewing the exhibit.)

1 MS. VALENZUELA: Your Honor, I would make an
2 objection based on hearsay. That's included in the
3 records where it's based to the extent that he's going
4 to elicit testimony that deals with statements that
5 would be made by a third parties who aren't present in
6 the courtroom. But with that objection, limiting the
7 way that these records would be used, I would not have
8 any other objection.

9 THE COURT: Are these the records that were used
10 by the experts?

11 MR. WILKES: Well, actually they were not. That's
12 the problem. But these are the records -- part of the
13 records that he's received, and they are the
14 prosecutrix's medical records.

15 THE COURT: These are the records that you're
16 alleging the expert would have had?

17 MR. WILKES: Absolutely, yes.

18 THE COURT: So I'll overrule your objection.

19 (WHEREUPON, Applicant's Exhibit Number 1
20 was marked for identification.)

21 BY MR. WILKES:

22 Q When did you have the opportunity to review the
23 records? Did you actually have an opportunity to
24 review those records in detail and scrutinize them in
25 the middle of the trial?

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1 A I did. I think there was -- I think I received
2 them and overnight was able to scrutinize them. I will
3 say I relied more on the expert, Cindy Stichnoth, as
4 she would be more familiar with what's significant in
5 those records than I would, and then I had a meeting
6 with her where we discussed what she thought was
7 significant.

8 Q Okay. Now, you did not call Dr. Payne back to the
9 stand nor Dr. Lund to be able to review any of these
10 medical records?

11 A That's correct.

12 Q Okay. And did the theory of the case involve
13 alternative causes of the prolapse?

14 A Yes.

15 Q Now, after you reviewed the records, did you
16 observe potentially other causes or things that could
17 have been used to show alternative causes?

18 A Not to my recollection.

19 Q Okay. The CBH records, you've indicated you had
20 notice in 2006 at least or before or from the limited
21 disclosure that that was a provider, correct?

22 A I'm sorry. Could you repeat that?

23 Q Tell me the first time you subpoenaed those
24 records.

25 A The Carolina Behavioral records?

1 Q Yes, sir. Is there a subpoena prior to the one
2 you sent during the trial?

3 A I don't think there was, but there -- now, I may
4 have made a request because early on, I was writing
5 letters to the solicitor's office asking them to get
6 things for me that I can't really subpoena. For
7 example, I can't subpoena those records.

8 Q Why not?

9 A There is a statute in South Carolina that
10 prohibits the subpoenaing of psychiatric records. You
11 have to get a court order.

12 Q Right. And why would you not be able to make a
13 motion under both HIPAA and the South Carolina statute
14 for a protective order to get the records?

15 A I could. As I told you, I wrote letters to the
16 solicitor's office. For example, I've got a letter
17 here, June 25, 2005, where I'm asking the solicitor's
18 office for permission to obtain psychiatric records of
19 Minor [REDACTED], and I can't remember how they
20 responded, but I believe at some point I obtained those
21 records and thought that I had -- did not realize that
22 it was not the entire record.

23 Q Okay. So then you obtained them with court order
24 during the trial?

25 A During the trial.

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1 Q Okay. Now, would it have been significant to the
2 defense to be able to show medical records supporting
3 other alternative possibilities for causation of the
4 prolapse?

5 A Yes. If I had medical evidence of other causes,
6 that would be significant.

7 Q Okay. Do you recall the testimony of Dr. Payne --
8 well, do you have a transcript in front of you?

9 A I don't have it in front of me. I do recall a
10 good bit of his testimony. Well, in general, I recall
11 the points he made.

12 MS. VALENZUELA: May I approach?

13 MR. WILKES: She's got a copy for you.

14 BY MR. WILKES:

15 Q If you will look on page 74 of the transcript, at
16 the bottom, at line 24, would you read line 24, which
17 is a question by the solicitor, Mindy Hervey?

18 A What page?

19 Q I think it was Mindy. Yes, it was Mindy.

20 A What page?

21 Q Looks like it's 74. At line 24, the
22 question is --

23 A And the question is, "And you were able to rule
24 out other causes that you normally see in patients
25 presenting with this symptom?" And that symptom, I

1 believe, would probably be the prolapsed colon.

2 Q And if you will flip over to the next page, does
3 Dr. Payne say, "We're able to pretty much exclude
4 them"?

5 A Yes, sir. He does say that.

6 Q And he goes on to say, "But she did not have
7 symptoms of normal people having psychological
8 medications"?

9 A He says that.

10 Q Okay. Now, would it have been significant to the
11 defense at that time to be able to show Dr. Payne the
12 records that would indicate a long history of
13 psychological medication?

14 A Let me read his answer and see.

15 Q Okay.

16 A I'm not -- I don't believe it would have changed
17 his answer because my reading of his testimony in
18 context is he was aware that she had a history of
19 taking psychiatric medications, but he ruled out, and I
20 assume from what I've been told pretrial here that
21 psychiatric medications can cause constipation which is
22 one of the causes of prolapsed colon. And what he's
23 saying here, to me, is, "Even though she has a history
24 of psychiatric medications, I ruled that out." And he
25 had this other explanation that's very medical that I

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1 can't -- I'll paraphrase. It has to do with the muscle
2 tone of the rectum. He saw something in the muscle
3 tone that told him it was from anal penetration and not
4 chronic constipation.

5 Q But the whole theory of your case is there's
6 alternative causation?

7 A It is. But what I'm saying is he admits, I
8 believe, that, "I'm aware of her history of psychiatric
9 medication." In other words, I don't believe I could
10 have said, "But, Doctor, did you know she had this long
11 history of psychiatric medication?" I believe he would
12 have said, "Yes, I'm aware of that. My answer is the
13 same." Now --

14 Q What about Dr. Lund? Dr. Lund testified that
15 constipation as being the primary trauma to cause that?

16 A Yeah. And I don't know if it would have helped
17 with Dr. Lund or not.

18 Q You're saying you don't think it would have helped
19 Dr. Lund to be able to say --

20 A I said I don't know.

21 Q Okay. Did Dr. Lund indicate that she had a
22 history of constipation? He did not, did he?

23 A He indicated that he saw a history of constipation
24 in the medical records. He had no personal knowledge
25 of any of this because he's just reviewing the medical

1 records.

2 Q And he was cross-examined by the solicitor about
3 that, correct?

4 A He was.

5 Q And when he was cross-examined, the solicitor
6 pointed out the document he was looking at was
7 postsurgery, wasn't it?

8 A I don't -- I remember her -- well, I had read in
9 the transcript she made a point of it, but I didn't
10 have the document in front of me that they were looking
11 at, so I'm not sure -- I wasn't sure of the point she
12 was making.

13 Q Well, give me just a second. The date of the
14 record she identified which Dr. Lund was testifying
15 about was, was it not after the surgery?

16 A Oh, that's possible.

17 Q And if after the surgery, it really wouldn't be
18 relevant to causation, would it?

19 A If it's a history of constipation, I think it
20 would be.

21 Q But if --

22 A Unless it's indicated constipation that occurred
23 after the surgery.

24 Q Exactly.

25 A And I don't know if that's what that record is

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1 saying or not.

2 Q And the dates are in the record, and I think we
3 can point to that later. But if that's the case and
4 Ms. Hervey impeached him by saying, "You're looking at
5 a document after the surgery," then that impeaches his
6 whole testimony on the theory of constipation then,
7 does it not?

8 A The transcript is the transcript. I thought he
9 still maintained that there's a history of
10 constipation, but I may be misreading the testimony.

11 THE COURT: Mr. Wilkes, what page in the
12 transcript are you referring to?

13 MR. WILKES: Let me find it. Give me just a
14 second.

15 THE COURT: I'm trying to follow along.

16 MR. WILKES: I'm sorry. I'll try to give you page
17 numbers. If you will look on page 320, I believe it
18 is. If you will look on page 320 at line 14,
19 Ms. Hervey says, "The notation of constipation that you
20 relied upon, what's the date of that summary?"

21 THE COURT: All right. I see it. Thank you.

22 MR. WILKES: Thank you, Judge.

23 Q And Dr. Lund responded, "April 14, 2004." Do you
24 see that?

25 A What page was that again?

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1 Q 320 of the transcript. If you have a record on
2 appeal with the big numbers at the top, it would be
3 226, but it's 320 of the transcript.

4 A I may not have that volume. No, I think I do have
5 that volume.

6 Q Do you see that?

7 A I do see it.

8 Q Okay. So April 14th, 2004, that would be after
9 the surgery?

10 A I don't know the date, but I suppose -- if -- I
11 don't recall the date of the surgery, but I would
12 assume that's true.

13 MR. WILKES: Just for the record, then, I think
14 the State will stipulate that, according to North
15 Fulton Regional Hospital surgical or operative report,
16 the date of the operation itself was 12/18/2003.

17 MS. VALENZUELA: Yes, I stipulate.

18 BY MR. WILKES:

19 Q So when Mindy Hervey, the solicitor, says, "You're
20 looking at something postoperative," he had to agree to
21 that, correct?

22 A He did. And he did go on to say it had been
23 present in the past on April 14th, which is the point I
24 was trying to make, that it's a history --

25 Q I understand.

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1 A -- that was given on April 14th, but that does --

2 Q Well, read line 22, the solicitor's last question
3 to Dr. Lund.

4 A "This is after the surgery, is it not?"

5 Q And Dr. Lund's response?

6 A "I'm sorry, I didn't notice the dates of that
7 surgery."

8 Q So the solicitor sat down at that point --

9 A She did.

10 Q -- because she clearly thought, you would assume,
11 she had made her point?

12 A Yes.

13 Q Okay. Now --

14 A But I don't know that I agree that she completely
15 made it because I still say that's a history that's in
16 the record.

17 Q Well, would it have been better to show that
18 history predating the surgery?

19 A Any history -- well, yes. Any history -- what I'm
20 saying is when Dr. Lund references a history that's
21 given on April 14th, to me, it doesn't imply that that
22 history occurred on April 14th. It's a history of
23 medical problems that predate that date. But, yes, any
24 record of constipation predating that date would be
25 helpful.

1 Q Okay. So would it have been more effective to use
2 the Carolina Behavioral Health records if they
3 indicated constipation the year before --

4 A Yeah -- yes.

5 Q -- the allegation?

6 A Yes.

7 Q And other things that might medically be
8 alternative causation for prolapse?

9 A Yes.

10 Q Now, at the time, were you aware that CBH records
11 indicated and within the past probably two years from
12 the allegations indicated chronic diarrhea and use of
13 suppositories, laxatives --

14 MS. VALENZUELA: Objection, Your Honor. Are we
15 referencing the exhibit right now or is this --

16 MR. WILKES: I'm just asking if he knew it. I can
17 go specifically through it. I'm just asking him first
18 as a predicate question if he was aware of it.

19 THE COURT: Overruled.

20 BY MR. WILKES:

21 Q Assume for a moment that I can find those things
22 in that record, but were you aware that those records
23 included constipation, laxative use, chronic diarrhea,
24 use of suppositories, bulimia and other things that
25 possibly could have been linked to causation for

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1 prolapse?

2 MS. VALENZUELA: Your Honor, I'm going to renew my
3 objection here because this question and the answer
4 here suggests to the court that the records include
5 that information, and that hasn't been pointed out. So
6 if the question had been asked where in those records
7 do those records show here, in pointing out that it has
8 those things, it's different. He answers that
9 question. You're left with the idea that the records
10 include all of the things that he just listed out.

11 THE COURT: First of all, has the records -- have
12 you marked them?

13 MR. WILKES: It's introduced.

14 THE COURT: Well, we had an objection. But is it
15 Exhibit Number 1? We stated that for the record?

16 MR. WILKES: Yes, sir.

17 THE COURT: All right. I want you to direct your
18 question to specific pages in the records so that we
19 can move along and not have the same issue arise.

20 MR. WILKES: I can do that.

21 BY MR. WILKES:

22 Q Do you have Exhibit Number 1 up there, the medical
23 records?

24 A Yes, sir.

25 Q All right. If you will, and I'm going to just go

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1 through these. You will have to hunt for them on the
2 page and they will be in medical writing so it will be
3 a little tricky, but I'm sure you can find them.

4 If you will look on page three of the medical
5 records.

6 A Not -- there's a table of contents that has a page
7 three. You're not -- you're talking about the actual
8 records?

9 Q Yes, sir. Let me show you. These will be the
10 page numbers on the bottom right. Those page numbers.

11 A Okay.

12 Q The little bitty ones.

13 A Got it.

14 Q If you will look on page three.

15 A Yes, I see it.

16 Q If you will look on page three. All right. Do
17 you see the fourth full paragraph that says that the
18 patient -- and I'm not going to -- well, you don't have
19 the name in there -- that the patient has many symptoms
20 of borderline personality disorder?

21 A Yes, sir, I see that.

22 Q Okay. Well, it would be easier just to go down to
23 the bottom. Do you see the bottom where it says
24 "diagnostic impressions"?

25 A Yes.

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1 Q Do you see "oppositional defiant disorder"?

2 A Yes, sir.

3 Q "Dysthymic disorder"?

4 A Yes, sir.

5 Q And a "major depressive disorder"?

6 A Yes, sir.

7 Q "Anxiety disorder"?

8 A Yes, sir.

9 Q If you will flip over to page seven, the third
10 paragraph, do you see where it indicates the word -- I
11 think it's "kleptomaniac"?

12 A Yes, sir.

13 Q "Blames voices in her head to tell her to steal
14 things."

15 If you will flip over to page eight, do you see
16 where, "The patient indicates there is trazodone,
17 Depakote, and Effexor"? And then the last sentence or
18 next-to-last sentence may be saying, "In the past,
19 Luvox, Adderall, and Risperdal"?

20 A Yes, sir.

21 Q Okay. If you will look at page nine, do you see
22 "oppositional defiant disorder," second paragraph?

23 A Yes, sir.

24 Q "Dysthymic disorder, major depressive disorder,
25 anxiety disorder, and borderline personality traits"?

1 A Yes, sir.

2 Q Do you see the fifth paragraph, do you see,
3 "Pattern of oppositional behavior since childhood"?

4 A Yes, sir.

5 Q Just a second. I'm looking for one more thing
6 here. The fifth paragraph down, do you see where it
7 says, "Annoyed, experiencing anger and acting in ways
8 that are spiteful and vindictive"?

9 A Yes, sir.

10 Q If you will turn over to page ten, do you see
11 "behavioral emotional personality measures," that
12 paragraph?

13 A Wait a minute. I'm on the wrong page. I'm sorry.

14 Q It will be little pages.

15 A I was on the big numbers. "Behavioral emotional
16 personality measures"?

17 Q Yes.

18 A Yes, sir.

19 Q Do you see in the middle of the paragraph where it
20 says, "Feeling worried about future in terms of family
21 and school"?

22 A Yes, sir.

23 Q If you will turn to page 12, do you see the fourth
24 paragraph, the drugs trazodone, Depakote, Effexor?

25 A Yes, sir.

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1 Q And Luvox, Risperdal, and Adderall?

2 A Yes, sir.

3 Q Okay. If you will turn to 14, the paragraph
4 marked number five. It's actually the fourth
5 paragraph. "Patient currently prescribed Celexa,
6 trazodone, and Depakote"?

7 A Wait a minute.

8 Q It's on page 14. Last paragraph.

9 A Yes, sir.

10 Q Okay. If you will look at page 15, you see where
11 it indicates, "She took a knife to school and stole a
12 purse while she was sitting in a doctor's office with
13 her mother"? That would be the first paragraph.

14 MS. VALENZUELA: Your Honor, objection there to
15 the extent that if that were presented at trial, there
16 would have been an objection that I think would have
17 prevented that from going in front of the court based
18 on bad acts, character. It was presented -- this
19 discussion was had in the trial transcript.

20 THE COURT: Okay. I'll continue to overrule the
21 objection.

22 Now, Ms. Valenzuela, this packet of medical
23 records is being admitted as something that would have
24 been able to be considered by an expert in analyzing
25 the case.

1 MS. VALENZUELA: Yes.

2 THE COURT: This is not going to direct
3 admissibility should this allegation had been made at
4 trial.

5 MS. VALENZUELA: If that's what we're agreeing the
6 limitations of this are for, then --

7 MR. WILKES: Well, without going into each and
8 every one, some of these things could have been
9 admissible at trial and he could have taken -- counsel
10 could have taken steps to obtain the witnesses directly
11 or to elicit that testimony.

12 And, in addition, as far as the expert goes, of
13 course, the expert can rely on it. But some of these
14 things could certainly have been admissible and may
15 have been subject -- proper subject of
16 cross-examination of either the State's expert, relied
17 on by the defense expert, and some even subject to
18 cross-examination to the victim or other witnesses.

19 THE COURT: And I'm not making any ruling as to
20 specific statements. Again, depending on the
21 circumstances at the trial, some of these statements
22 may have been admissible, but some of them may not have
23 been. But I'm hearing them today for the limited
24 purpose of -- they're making the allegation that these
25 records were not -- Mr. Wilkes, don't let me put words

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1 in your mouth if you're alleging that he did not
2 diligently pursue these records and that these records
3 could have been helpful to his expert and in
4 cross-examination of the State's expert.

5 Now, have I misstated the allegation?

6 MR. WILKES: I think that's fair, Your Honor.

7 THE COURT: And, Ms. Valenzuela, again, I'm not
8 making a ruling as to whether the specific incidents
9 that are mentioned -- that would be something that the
10 court at the time would have had to have determined on
11 each specific one. But for the purposes of today, it's
12 just what the expert had for evaluation.

13 MS. VALENZUELA: The analysis of this is whether
14 there was prejudice. And when you look at the
15 prejudice prong, you do have to look at whether it
16 would be admissible, whether it would have even gotten
17 in front of it. And he hasn't limited the use of these
18 records solely for the argument that if the expert had
19 been able to review them, they would have testified
20 differently. He said it himself. That part of it is
21 to admit it.

22 So to that extent, for the record, I want to make
23 clear there would have to be a determination of
24 admissibility, and there are a lot of situations where
25 this would not be able to go into it because that goes

1 straight into the prejudice prong that has to be proved
2 in this case.

3 THE COURT: Your objection is noted,
4 Ms. Valenzuela.

5 BY MR. WILKES:

6 Q If you will look at page 17, first paragraph close
7 to the end of it in the middle. "I look at it like I
8 don't have a father." Do you see that?

9 A Yes, sir.

10 Q If you will turn to page 21, do you see the Axis I
11 and Axis II diagnostic impressions? They're up at the
12 top of the page.

13 A Yes, sir.

14 Q Do you see, "Adjustment disorder with mixed
15 disturbance of emotions, bipolar disorder mixed,
16 history and adolescent antisocial behavior"?

17 A Yes, sir.

18 Q On page 37, do you see the medication list
19 including Depakote, Effexor, ranitidine, trazodone, and
20 Risperdal and Adderall and Luvox listed?

21 A Yes, sir.

22 Q And on the left-hand side, or if your page is
23 open, on the left-hand page, which would be 36, where
24 it says "plan and recommendations," do you see where it
25 says, "Depakote, Effexor, and trazodone"?

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1 A Yes, sir.

2 Q If you look on page 44, which is an inch or two
3 down, it says, "Current medications: Effexor and
4 Depakote"?

5 A Yes, sir.

6 Q "Axis I," down a little further, "Bipolar I,
7 ADHD"?

8 A Yes, sir.

9 Q And "Plan recommendations," again, "Effexor,
10 continue Depakote and trazodone"?

11 A Yes.

12 Q If you will look on page 76, if you will look
13 under "psychological history," first paragraph toward
14 the end, "Patient stated it's third time she tried" --
15 let's see. You would have to read the whole thing --
16 "to cut her wrist with a kitchen knife, third time she
17 tried." Do you see that?

18 A Yes, sir.

19 Q Okay. And at the bottom, "The first time was in
20 August of '01; second time in September of '01." Do
21 you see that?

22 A Yes, sir.

23 Q Now, if you will look at page 81, if you will go
24 down to where there's -- above the box where it says,
25 "GI probs, rectal" -- I assume that's bleeding --

1 "bldg, 2/02," followed by the quotation, "It just
2 stopped." Do you see that?

3 A Tell me where it is on the page again.

4 Q It's --

5 A Oh, wait a minute.

6 Q It's -- well, it's above the box at the bottom.
7 There is a half a page box and then right above that.

8 MS. VALENZUELA: Your Honor, he's redacted on this
9 one, and I'm just going to ask that the exhibit have
10 the date added to that medical record because the date
11 of the rectal bleeding is important to be included.

12 THE COURT: Okay.

13 THE WITNESS: I see it.

14 THE COURT: I'll grant that request. Mark the
15 date.

16 MR. WILKES: Absolutely, Your Honor. I can -- in
17 the unredacted version, the dates are all there. I can
18 identify any of the dates. The problem is they were
19 all squeezed in with her personal information.

20 MS. VALENZUELA: Right. He had explained that
21 before.

22 MR. WILKES: For the record, the date indicated
23 appears to be 9/25/02. And that would be under the
24 redacted portion of the exhibit.

25 MS. VALENZUELA: Are you writing that on the

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1 exhibit?

2 THE WITNESS: No. I've got a pad here.

3 MS. VALENZUELA: Is it okay if the witness goes
4 ahead and writes that on that page?

5 THE COURT: Go ahead and mark the page.

6 MS. VALENZUELA: On page 81, 9/25/02.

7 THE WITNESS: Just put 9/25/2002?

8 THE COURT: Just write it at the bottom of the
9 page and initial it, please.

10 MR. WILKES: Thank you.

11 BY MR. WILKES:

12 Q Do you see where it indicates "rectal bleeding"?

13 A Yes, sir.

14 Q "Colonoscopy"?

15 A Uh-huh.

16 Q If you will turn to page 85. Will you look at
17 where it says, "Impression number one"?

18 A I see it.

19 Q And what does that read?

20 A "Borderline personality disorder with
21 self-inflicted wound. These wounds are rather
22 superficial and did not require suturing."

23 Q On page 87, if you will look about midway, you
24 will see "medications." Do you see where it says,
25 "Zyrtec, Luvox, Adderall, Augmentin, Zantac, Risperdal

1 and Risperdal"?

2 A Yes.

3 MR. WILKES: Judge, just for the record, we'll go
4 back and date any of them that look like they need a
5 date from the unredacted copy.

6 THE COURT: Okay.

7 MR. WILKES: And if we're going to seal it, we can
8 actually seal an unredacted copy.

9 MS. VALENZUELA: I think the redacted is fine, and
10 we can work this out during maybe a quick break. I
11 think we have two redactions that we noticed were
12 missed, too.

13 THE COURT: Okay. That's fine.

14 BY MR. WILKES:

15 Q If you will look on page 89. Tell me when you
16 find 89.

17 A I've got it.

18 Q You see where at the top it says, "ED physician
19 urgent case record," on the right-hand side?

20 A Yes.

21 Q If you will go down, you see where it's
22 handwritten, says, "Chronic diarrhea, rectal bleeding"?

23 A Yes.

24 Q And behind it, it says "Feb 02"?

25 A Oh, yeah. Yeah. Okay. Uh-huh. I see that.

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1 Q And above that, if you will go just a little bit
2 above that, I certainly can't read that word but I can
3 read the -- says, "Times four past month," and then it
4 says -- looks like associated -- "a-s-s-o-c with
5 vomiting." Do you see that?

6 A Now, I'm not --

7 Q It's about that far above what you just read
8 before.

9 A Right above it? Not to the left but right above
10 it?

11 Q It's right above it. See where it says "past
12 history"? It's on the line above that.

13 A Oh, yeah. "Epigastric times four past month
14 associated with vomiting." Yeah, that's how I read it.

15 Q Okay. If you will look on page 90. If you will
16 look down at the bottom of the page where the discharge
17 medications are.

18 A Uh-huh.

19 Q Do you see, "Geodon, Ambien, Adderall," and
20 there's another one. On the next page it continues,
21 "Adderall," and I guess that's "Remeron"?

22 A Yes, sir.

23 Q Or "Remeron."

24 Page 93, do you see "Paxil" located under
25 "medical"? "Current medication, Paxil 2.5 milligrams."

1 It's about the middle of the page.

2 A You said 93, right?

3 Q Yes, sir. And there's "current medication"?

4 A Paxil, yes, sir. I see that.

5 Q Thank you.

6 On page 112, do you see a list of drugs, and on
7 the second one, let's see, two down, do you see, "MOM
8 30 ccs constipation"?

9 A Wait a minute.

10 Q It's the second block.

11 A I do.

12 Q Will you look at the dose period and tell me what
13 the dose period is? It's on the top right-hand side,
14 handwritten.

15 A 4/30/02 to 5/1/02.

16 Q Okay. And if you will look at page 121. Do you
17 see where it says, "Number four, eating," at the top
18 left?

19 A Let's see.

20 Q 123. Did you say 123? I'm sorry. I said the
21 wrong page.

22 A You may have said it.

23 Q I'm so sorry.

24 A It could have been my fault.

25 Q So it was mine. On 123, do you see where it

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1 indicates, "Bingeing, purging, laxative use, and
2 compulsive overeating," where those are checked?

3 A I can't find it. But I'm sure it says it. Where
4 is it?

5 Q Top left. Just says, "Number four, eating," and
6 then --

7 A Oh, eating.

8 Q "Bingeing, purging."

9 A Oh, checkmarks. I'm sorry. I'm reading the
10 handwritten stuff. Yes, sir, I see that.

11 Q Okay.

12 A It's checked.

13 Q And, "Makes self throw up." Do you see that?

14 A Yes.

15 Q Do you see "other" where it says "suppositories"?

16 A Yes.

17 Q Can you tell me what it says to the right of that?

18 A "Continuously," looks like, "no reports."

19 Q And "continuously" is in quotations?

20 A Right.

21 Q Below that, where it says "psychosis," you see
22 where it's circled "visual" and "auditory"?

23 A Yes.

24 Q And where it is checked, "Hallucinations: Visual,
25 auditory, delusions, bizarre and paranoid ideations"?

1 A Yes.

2 Q And besides that, will you tell me what those
3 things say to the right that are handwritten?

4 A "Black images, green men, monkeys in her ears,
5 mice," I think; "in her head."

6 Q Or "voice," maybe?

7 A "Voice in her head. Tells her to steal things.
8 Think people watching me all the time."

9 Q Okay. And that's -- if you will look over at
10 one -- the page before that. Look at 122.

11 A Okay.

12 Q Would you tell me the discharge diagnosis.

13 A "Bipolar disorder NOS, borderline personality
14 disorder traits." Axis III is "none." Axis IV,
15 "Family, severe." Axis V, "Admission GAF 30, discharge
16 60."

17 Q All right. On page 128, if you will look at
18 number five, "History of physical sexual emotional
19 abuse."

20 A Yes.

21 Q Can you tell me what has been checked?

22 A "Patient has a history of physical abuse. Patient
23 has a history of emotional abuse."

24 Q Okay. And if you will look below that -- I'm
25 sorry. Page 130. If you will look on page 130, if you

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1 will look at the top, "Does patient purge, use laxative
2 or diuretic?" What's indicated there?

3 A "Two to three laxatives a day."

4 Q And the answer "yes" to the purging?

5 A Yes. Yes.

6 Q Okay. Number 29, "The onset of eating disorder or
7 disordered eating," what's the answer on that?

8 A "This past year."

9 Q And on page 131, which is the next page, you have
10 to go about halfway down. Do you see where it says,
11 "She admits to bingeing and purging as well as
12 inappropriate taking of laxatives"?

13 A Yes.

14 Q Okay. I'm going to skip over all the other
15 multiple -- there are other references to drugs, but
16 we're just going to skip over it. And if you will look
17 at page 167, "current medical problem," would you tell
18 me what that is on 167? It's up at the top.

19 A It's "purging."

20 Q And under that?

21 A "Vomiting with" -- well, so symbol for "with" --
22 "vomiting within" -- I can't read that.

23 Q "Minutes," maybe?

24 A Something "eating."

25 Q "After eating," okay. And, again, if you will

1 look at the next page I think is 168. If you will look
2 at the "other," you see where it says "bulimia,
3 anorexia"?

4 A Yes, I see it.

5 Q And do you see in the, I guess, block below that
6 where it says, "Depression, anorexia, bulimia"?

7 A Yes.

8 Q Okay. And on page 169, can you see where it says
9 "anorexia nerv," which was actually "nervosa" until I
10 redacted over it at the top.

11 A 16.

12 Q Very top says "nutritional amendment"?

13 A Oh, "nutritional amendment, anorexia n-e-r-v," and
14 then the redaction starts.

15 Q "N-e-r-v," right. Now, looking at those things
16 that existed in those medical records, did you have an
17 opportunity -- well, no. Was Dr. Lund gone by the time
18 you got these records?

19 A I believe so.

20 Q So to the extent that those things in these
21 records could have established alternative causation,
22 they would have been desirable in your theory of the
23 case?

24 A Yes.

25 Q Okay.

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1 MR. WILKES: If I can have just a second to talk
2 to Mr. Sipes.

3 BY MR. WILKES:

4 Q You had an expert witness that was a -- I can't
5 remember -- Ms. Stichnoth, licensed practical
6 counselor, or a therapist or something?

7 A That's an accurate description.

8 Q For testifying about what? What did you seek
9 her --

10 A I can't remember the exact words the judge used to
11 qualify her for, but generally she counsels sex abuse
12 victims and perpetrators and has some expertise in --
13 the way I used her is -- oh, and she has expertise also
14 in forensic interviewing.

15 So what I asked her to do was review the records
16 and if she sees anything that's consistent or
17 inconsistent with the victim's allegations, you know,
18 to bring that out.

19 Q Okay.

20 A If she sees something consistent, let me know that
21 also because I need to know that. So it was really an
22 expert in -- I don't know a good way of putting it,
23 just --

24 Q For the --

25 A -- indications of -- the behavior of a sex abuse

1 victim, I think, for lack of a better term.

2 Q Did she start out as a witness or did she start
3 out as a consultant to just give you a review of the
4 case?

5 A Probably just a consultant but with the view she
6 could become a witness if she found something helpful.

7 Q Did she -- reading the transcript, it appears that
8 she wasn't aware that she would be a witness until
9 right before the trial. Do you recall, is that
10 accurate or do you recall it different?

11 A I don't recall it that way. I don't remember when
12 we first consulted. I do remember this, though. It
13 was shortly -- one thing that occurred, and I'm not
14 sure how this happened, is she realized, and this was
15 shortly before the trial, that she was at the -- I
16 think is this the Carolina Center?

17 Q Yes, sir.

18 A She was at the facility on the staff where the
19 victim was treated which caused -- well, worried me
20 because I felt like she may be conflicted from
21 testifying. But she said, "No, I think I could still
22 testify."

23 Q Tell me -- and if you need to look at your notes,
24 you can, but tell me what was it that she told you that
25 made you decide to put her on the stand? Was there

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1 anything that she said she could testify to as far as
2 something that was inconsistent?

3 A That wasn't inconsistent --

4 Q That was inconsistent with sexual abuse?

5 A I would have to read the transcript. Her
6 testimony -- she testified -- my recollection is she
7 testified to a lot of things that might indicate
8 alternate reasons why the victim would be making this
9 allegation.

10 Q Well, you asked her about borderline personality
11 symptoms, did you not?

12 A I probably did. I don't -- I would have to read
13 the transcript. I probably did.

14 Q Well, do you recall having asked her about as to
15 the effect as to the believability of a borderline
16 patient?

17 A I don't recall that specific question.

18 MR. WILKES: Thank you, sir.

19 That's all I have of Mr. Stoddard.

20 Thank you, sir.

21 THE COURT: Ms. Valenzuela.

22 MS. VALENZUELA: Your Honor, may I be allowed to
23 sit for this cross-examination?

24 THE COURT: Yes, ma'am.

25 CROSS-EXAMINATION

1 BY MS. VALENZUELA:

2 Q Mr. Stoddard, how long have you been practicing
3 law when you represented the applicant at trial?

4 A At trial? Well, I was admitted to the bar in
5 August 1985, so 12 years, I think. Whatever the math
6 is.

7 Q I didn't mean to make you do math in public.
8 That's the worst.

9 Okay. So you have been practicing for 12 years?

10 A No. I think it's longer than that, actually. I
11 think '95 would be ten years. 2005 is 20 years. I
12 think 22 years. I just can't believe it had been that
13 long, but I guess it had been.

14 Q So at the time, you had been practicing for over
15 20 years?

16 A Yes.

17 Q And how much of your career was spent in criminal
18 defense?

19 A Well, I started in the solicitor's office as an
20 assistant solicitor for eight years. I think in '94 is
21 when I left the solicitor's office. So from '94 to
22 2007, I did criminal defense that whole time.

23 Q So about 13 years?

24 A Yes.

25 Q But you had still been doing criminal law

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1 practice --

2 A I had been doing criminal law the whole time.

3 Q Okay. And you were able to secure court orders
4 from the court to get medical records?

5 A I was.

6 Q And do you remember having to share some of the
7 medical records that you got with the prosecution
8 during that trial?

9 A Yes.

10 Q Do you remember when you were crossing the State's
11 expert witness that she indicated that she had never
12 seen some of the medical records that you were handing
13 her?

14 A I think I saw that in the transcript. I don't
15 really have a recollection outside of what I saw in the
16 transcript.

17 Q Can you turn to page 253 in the transcript.

18 A Got it.

19 Q And do you see there -- let me see if I can point
20 you to the line number -- where you start your cross
21 and you hand her some records and she indicates to you
22 that -- I might need to correct that page number.

23 Okay. I'm sorry. Page 255, line ten. Do you see
24 where she says, "Okay. I did not receive that specific
25 document, although I do have information pertaining to

1 that month"?

2 A Yes, I see that.

3 Q Okay. But do you remember giving the prosecution
4 records that they didn't have in the middle of the
5 trial?

6 A Well, now that you mention it, I remember this
7 order receiving the records -- I'm going to backtrack a
8 little bit. I'm assuming that I gave them everything I
9 received. I remember receiving a big package, and
10 either we both received the same package or I gave them
11 copies.

12 Q At the same time?

13 A Yes.

14 Q Actually, yes. So continuing on there, you had
15 the option of recalling witnesses, too, correct?

16 A Well, yes, or trying to. I think it's in the
17 court's discretion. They may say -- I think under the
18 circumstances, if I received new records that I didn't
19 have, if you're talking about Lund, I could recall
20 Lund. Yeah, I can recall witnesses.

21 Q Okay. So you received the records in time where
22 if you felt that there was something important or
23 material that you wanted to redirect your expert
24 witness on, you could have recalled him to the stand?

25 A Provided he was available. And he is a doctor in

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1 Anderson, so he may have been available. I think I
2 could have gotten him up here if I would have noticed
3 something.

4 Q When you identified that you thought that you had
5 additional records that you could get before the close
6 of the trial, you asked the court to help you with that
7 order and, in fact, had the court even make some phone
8 calls on your behalf to get that order?

9 A I don't have a specific memory of that, but
10 reading the transcript, it appears to me that the court
11 may have made phone calls, but it -- I'll put it this
12 way. I think that it went beyond the ordinary course
13 of getting things like a subpoena or whatever.

14 Q And your last expert witness did have an
15 opportunity to review those records because she, in
16 fact, brought them and had personal knowledge because
17 she had been involved in the therapeutic treatment of
18 the victim?

19 A Yes, that's correct.

20 Q And earlier you testified that with Dr. Lund, your
21 expert witness, you were focused on trying to provide
22 different reasons that could have caused the rectal
23 prolapse in the victim, right?

24 A That's correct.

25 Q And you were focusing on how it could have been a

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1 different type of trauma through the form of chronic
2 constipation?

3 A That's the information -- that's an alternative
4 explanation he gave me, yes.

5 Q And you focused with Dr. Lund -- your strategy was
6 focusing with Dr. Lund on breaking -- on having
7 Dr. Lund, without pitting him, break down how this
8 surgeon had failed to actually use tools to verify
9 the -- I don't know if it was the firmness or what
10 exactly the definition was, but how the rectum would
11 kind of go back to its usual position?

12 A Yeah, something similar to what you are
13 describing. And, again, I'm not sure I ever completely
14 understood, but the doctor, the State's expert doctor,
15 stated that this had to be anal penetration to cause it
16 as opposed to other explanations, and it had to do with
17 muscle tone. Dr. Lund stated an opinion that that's
18 not correct, that you cannot conclude -- that Dr. -- I
19 think it was Dr. Payne, but whatever the State's
20 witness, his -- you could not draw the conclusion he
21 drew from that and especially unless you did a certain
22 medical test to, I think to quantify the degree of the
23 muscle tone problem or whatever. There was a special
24 test, yes.

25 Q So let's back up to Dr. -- and you have the

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1 transcript in front of you -- to Dr. Payne, who is the
2 State's expert, starts testifying at page 57, if you
3 want that. And Dr. Payne, who was the State's witness,
4 was the surgeon who actually performed the colorectal
5 surgery on the victim to fix her rectal prolapse?

6 A That's correct.

7 Q And he was the doctor who she finally disclosed to
8 in terms of that this was caused by forcible anal rape,
9 is what the victim told Dr. Payne and what Dr. Payne
10 testified to?

11 A Well, yes, although I think there was some dispute
12 in the record as to whether the victim disclosed it to
13 the doctor or her mother.

14 Q Right. Which is a second strategy, was to focus
15 on how the mother was manipulating this entire thing?

16 A That's correct. But Dr. Payne -- let me stop.
17 Dr. Payne's testimony was the victim disclosed this to
18 me, yes.

19 Q And so Dr. Payne indicated that he believed in
20 his, you know, expert opinion that the trauma -- that
21 the rectal prolapse was caused by trauma due to
22 repeated forcible anal penetration?

23 A That's correct.

24 Q But he was asked about chronic constipation,
25 correct?

1 A I think so.

2 Q And, in fact, he was asked, if you look on page
3 64, there was a reference to the victim being on
4 several different drugs and that that possibly could be
5 the problem?

6 A That's on page 64?

7 Q 64, line five.

8 A In his answer, "While things can happen and when
9 the victim did present, she was on a number of
10 different drugs so it is possible that that could be,
11 you know" -- and I'm having trouble reading this
12 because of the highlighting.

13 Q I know. I have the same problem. But it talks
14 about the number of different drugs?

15 A It does. He does mention drugs.

16 Q And then later, further down, it says on line
17 eight, if you can read that with that, "But given the
18 history of constipation problems," he didn't feel like
19 that was a medical reason?

20 A "But given the history about -- given the history
21 that she -- that she really didn't present with a lot
22 of constipation problems, I didn't feel like that was
23 medically the reason not to have her true rectal
24 prolapse." So, yes --

25 A Thank you for that. So, yes, given the history

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1 that she didn't really have constipation problems, he
2 thinks, no, that's not what's causing the rectal
3 prolapse?

4 A Yes.

5 Q Then he does go through that there's no indication
6 of this being caused by a diet or gastrointestinal
7 problem on pages 67 and 68?

8 A Right. Yes, he says that.

9 Q And he says again that it's because there's no
10 history of chronic constipation?

11 A Right.

12 Q And it was with this -- and then later he ends up
13 talking about -- let me see -- how he did a flexible
14 sigmoidoscopy where he looked up inside and tested her
15 that way, and then also it talks about doing a test
16 called a defecogram, which is a radiologic test?

17 A I don't --

18 Q Page 66 is the sigmoidoscopy. I'm completely
19 butchering that. And on page 67, the defecogram.

20 A Okay. I see the sigmoidoscopy or however you say
21 it. And he mentions that rare cases where a polyp can
22 cause a rectal prolapse and we didn't see it.

23 Q And directing you to page 69, do you see a
24 discussion there about where he focuses on how she had
25 pretty good muscle tone and how she could pull it up in

1 part and it didn't come back to its normal position --
2 I believe he's talking about the rectum at this
3 point -- and it indicated that it was not a chronic
4 ongoing problem?

5 A I don't -- that's on 69?

6 Q 69. And I have it going into page 70.

7 A Okay. Yeah. I see that now. "Fairly good muscle
8 tone which meant that she could pull it up in part and
9 it did not come to its normal position. This would
10 indicate that this was not a chronic ongoing problem."

11 Q Okay. And so is it fair to say that with
12 Dr. Lund, your expert there, you were trying to
13 challenge the way that he tested out her good muscle
14 tone in order to get to the conclusion of it not being
15 chronic constipation was not really a good medical way
16 for Dr. Payne to have tested that theory?

17 A Yes. And keep in mind, I don't believe I had any
18 kind of expert report from Dr. -- I had his medical
19 records, and I knew that he had this conclusion. I did
20 not know the specific explanation, and so Lund and I
21 got together, you know, after he testified. I talked
22 to Lund about, "This is what he's saying. What's your
23 opinion of that?" And Lund came up with the opinion he
24 testified to that that -- to sum it up is what
25 Dr. Payne observed does not lead to the conclusion that

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1 it has to be anal penetration. It doesn't follow it.

2 Q In fact, Dr. Lund, just expanding on what you just
3 said, ended up spending a significant amount of time
4 talking about how qualitative tests, and I think he put
5 it colloquially as a finger in the bum, was not helpful
6 and that you really needed quantitative testing through
7 this -- what, I mean, I'm calling it a balloon
8 apparatus. But he used a more -- he also called it a
9 balloon apparatus to be able to explain it to the jury
10 but it was as --

11 A That's one of the -- I'm sorry.

12 Q No. That's okay.

13 A That is one of the reasons he said I disagree with
14 Dr. Payne's conclusion that what we were just talking
15 about muscle tone, or whatever, has to be -- indicates
16 anal penetration. Dr. Lund, one of the reasons he says
17 he cannot make that conclusion is because he didn't do
18 the correct testing. He didn't do the quantitative
19 testing.

20 Q When you say "he," he was talking about Dr. Payne
21 had not done that?

22 A Yes.

23 Q In fact, Dr. Lund just straight out informed the
24 jury that Dr. Payne had jumped to the conclusion of
25 forcible rape?

1 A He does testify to that.

2 Q And then he goes on to explain medically why, if
3 Dr. Payne had done it the way he was supposed to, he
4 would have used different sort of tests --

5 A That's right.

6 Q -- instead of just a finger, and that might have
7 led him to a different conclusion, right?

8 A That's correct.

9 Q So is it fair to summarize the strategy with your
10 expert trying to defeat Dr. Payne's testimony as really
11 trying to call into question what exactly caused the
12 rectal prolapse?

13 A Yes.

14 Q How did the jury think it could have possibly been
15 constipation if only Dr. Payne had not jumped to a
16 conclusion?

17 A That's correct.

18 Q And you questioned Dr. Payne on his access to
19 medical records also. Do you remember that?

20 A I don't remember that.

21 Q Let me find the page for you. Page 77 of the
22 transcript. So I'm looking at line nine.

23 A Yeah. I asked, "You did not have her family --
24 you did not get her family doctor records from any
25 previous treatment prior to you, did you, and review

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1 that, did you?" And his answer was, "No, I really did
2 not because what I was interested in is I'm a surgeon,
3 and she presented with a problem that needed surgical
4 correction. And that's all the information that I
5 need."

6 Q So you're trying -- you make a point there as well
7 that the doctor didn't even look at all the traditional
8 records to see if she had a history of constipation?

9 A That's what I was getting at.

10 Q Or to see if she had a history of taking
11 psychotropic medications?

12 A I'm not sure I was making that point because I'm
13 not sure I knew at the time that psychotropic
14 medications can cause constipation. But, generally, I
15 was trying to say yes, you don't know what her medical
16 history is and whether she has a history of
17 constipation is what I'm trying to get at.

18 Q But on page 63, Dr. Payne did testify about late
19 teens to early 20s with psychological problems who have
20 a long history of being on drugs and --

21 A Yes, he did.

22 Q So he pointed out for the jury that that would be
23 important. And then you were able to establish that he
24 had not even reached out to get medical records in
25 order to review them?

1 A Yeah. That's what I'm getting at, that you don't
2 know whether she has had a history of constipation.

3 Q Before he, as with your help from Dr. Lund, jumped
4 to that conclusion?

5 A Right. Uh-huh.

6 Q And you were asked earlier about this and now that
7 you have seen the records, you were asked on direct
8 about whether you had had those records, if you felt
9 like you would have been able to do better with the
10 State's witness. And you indicated that you still felt
11 like the State's witness, Dr. Payne, would have pushed
12 back on you because his position was that because of
13 the tests to the rectum, he felt like that answered his
14 question on chronic constipation better than anything?

15 A If I recall the question I was asked earlier and
16 what my response was, essentially, yeah, if I had -- I
17 think I was being asked if I had some evidence that
18 this victim had chronic constipation, would that have
19 helped. And, yeah, I think it would have helped. I
20 don't believe it would have changed -- I don't think
21 Dr. Payne would have changed his testimony because my
22 understanding is this thing he recognized in the rectum
23 muscles tells him that this was anal penetration that
24 caused it, not some chronic constipation. That's my
25 understanding of what he was saying.

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1 Q And that's -- you know, the transcript is before
2 the court. There's several instances where he
3 explains -- where he addresses why he doesn't believe
4 this is chronic constipation and the reasons why he
5 doesn't believe that while admitting that he hadn't
6 reviewed past family records?

7 A Right.

8 Q And so -- and the State's expert was limited in
9 talking about the physical injuries that he had
10 observed in the victim approximately a year -- let me
11 back up.

12 Dr. Payne, his interaction with the victim was
13 limited to an emergency room referral in November of
14 2003 and then the surgery in December of 2003, correct?

15 A That sounds correct. What I do recall is, yeah,
16 he was presented with a patient with a prolapsed colon
17 and he identified it needing surgery, and he performed
18 the surgery. So it was a -- he had no history treating
19 this patient before she came -- had the prolapsed
20 colon, is my recollection.

21 Q So did the State end up having an expert
22 presenting evidence that showed physical injuries to
23 the victim's rectum closer to the time -- and,
24 actually, let me -- I'm going to withdraw that.

25 Looking at the timeline, the time frame in the

1 indictment for this case was March 1, 2002, to May 1,
2 2003.

3 A That sounds correct.

4 Q So May 1, 2003, would have been approximately six
5 to seven months prior to her surgery?

6 A I would have to review records to determine that,
7 but that sounds correct.

8 Q Okay. But the State didn't have or at least they
9 didn't present an expert or a doctor or medical records
10 showing physical injuries or complaints about the
11 victim's rectum at the time that the victim was
12 claiming that she was being abused?

13 A Yeah. I agree. I don't recall any of that kind
14 of evidence being presented.

15 Q Do you still have the medical records in front of
16 you?

17 A I do.

18 Q Give me just a second to find this.

19 So looking at page 89, is that the one -- do we
20 have the date written at the bottom of that one
21 already?

22 A No.

23 Q So we're looking at it right now.

24 With the court's permission, would you please
25 write -- is it okay if he writes on the exhibit?

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1 THE COURT: In the same manner as before.

2 MS. VALENZUELA: Write at the bottom 9/25/02.

3 THE WITNESS: And this is page 89?

4 BY MS. VALENZUELA:

5 Q If you look at that, it's a physician urgent care
6 record, right?

7 A Yes.

8 Q And it says, like towards the middle of the page
9 right beside where they have the drawing of the body,
10 "Chronic diarrhea, rectal bleeding"?

11 A Yes.

12 Q Okay. So September 25, 2002, is within the
13 parameters of abuse which were March 1, 2002, from
14 May 1, 2003?

15 A Yes.

16 Q And do you recall testimony from the victim that
17 she said that she -- what her allegations were on the
18 stand was that the applicant was forcibly anally raping
19 her while her mother was pregnant with twins?

20 A I don't recall that specifically, but that sounds
21 correct.

22 Q If you will look on page 119.

23 A Okay.

24 Q And this is where she starts talking about the
25 abuse, correct? And then going on to page 120 starting

1 at line ten, the prosecutor begins asking the victim
2 how she would come to be alone?

3 A Are you in the trial transcript?

4 Q Yes.

5 A I'm sorry.

6 Q Sorry for the confusion. Page 120 of the trial
7 transcript, line nine.

8 A Yes. I see that.

9 Q Okay. So she starts to get asked how she was
10 alone with the applicant at the time?

11 A Right.

12 Q And then she, the victim -- when I say she, the
13 victim -- is explaining that her mother would stay
14 downstairs and slept downstairs on occasion?

15 A -- That's correct.

16 Q And she says it was because her mother couldn't
17 get up and down the stairs, right?

18 A Right.

19 Q If you continue on to the next page, she's asked
20 if -- "You said she couldn't get up and down the
21 stairs. Why couldn't she?" And the victim responds,
22 "Because she was pregnant with my brother and sister"?

23 A That's what she was saying, yes.

24 Q Does that refresh your memory about the victim
25 saying that the forcible anal rapes were happening

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1 while her mother was pregnant with the twins?

2 A Yes. Right.

3 Q And then you're not going to -- you might -- do
4 you remember the mother testifying for the State and
5 the mother telling the date of when she was pregnant
6 with the twins?

7 A I don't remember the date.

8 Q So twins born -- so page 183 of the transcript,
9 and that's where her testimony starts. Give you this
10 page, 185. Sorry. I'm trying to find the exact page.

11 Okay. So I'm looking at 187, line 19.

12 A Yeah. "And the twins were born at that time?"

13 And she says, "Yes, ma'am. October the 22nd of 2002."

14 Q So just going with this year, we've established
15 that the victim has testified that she is having this
16 happen to her sometime around her mother being pregnant
17 with twins who were born October 22nd of 2002?

18 A Yes.

19 Q And now you would have a medical record from
20 September 25, 2002, so the month when the mother would
21 have been most likely to not be able to go up and down
22 the stairs because she was nearing her delivery date,
23 with the victim reporting to the emergency room that
24 she is having chronic diarrhea and rectal bleeding?

25 A Yes.

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1 Q And then -- but you didn't have this medical
2 record -- the State didn't present this medical record
3 at the trial, correct?

4 A What page was that again?

5 Q Page 89.

6 A I can't tell if this is something that I got from
7 the Carolina -- those records I got during the trial, I
8 can't tell if that was part of those or not. It may
9 be, but this may be things that --

10 Q Do you remember there being -- I mean, I feel like
11 the State would have made a big deal out of putting
12 forth physical evidence that showed that the victim was
13 suffering from anal injuries at almost approximately
14 the same time she was claiming she was being raped by
15 the applicant.

16 A Well, if your question was did the State provide
17 it to me, then no, I'm sure --

18 Q Did the State use it at trial?

19 A No.

20 Q Did the jury see that the victim --

21 A No.

22 Q -- had this?

23 No?

24 A Not that I recall.

25 Q And so there was actually no evidence that there

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1 were injuries at the same time other than the victim's
2 own testimony?

3 A Yeah. I don't believe so.

4 Q Would you agree that it would have been harmful to
5 your client's case to have supporting physical
6 documentation of an injury to the area of her body that
7 corresponded with the type of attack that she was
8 describing and the timeline that she was describing?

9 A My layman's opinion is yes. I remember reviewing
10 some of the records -- these records last night and
11 seeing things in the records that I thought cut against
12 us and things that might help us. And that's one of
13 the things I noticed. Now, it's something that I would
14 discuss with Lund and see -- or some expert to see is
15 this more consistent with forcible sodomy, that symptom
16 of rectal bleeding, or is it -- is there another
17 explanation. But my layman's opinion is if I heard
18 that as a juror, I would -- you know, I would think it
19 corroborates the victim's story somewhat.

20 Q And how about strategically, as the defense
21 attorney in charge of the strategy of the case, would
22 it have been important to you to prevent something like
23 this from being entered into so the jury could see it?

24 A I will tell you, when I see stuff that's cutting
25 both ways, you know, I don't know that I want the jury

1 to hear that. And, you know, with Lund, Lund told me
2 chronic constipation is an alternative explanation and
3 it's very common with teenagers, then I might be more
4 likely to just want to leave it there. This is a
5 general way this can happen than to get in all this
6 stuff that I'm seeing in this record.

7 Q So that you can avoid evidence that can cut both
8 ways and some of which can hurt your client?

9 A It's possible. Again, I just saw this, some of
10 this stuff last night, but I remember seeing stuff
11 saying, you know, there's some stuff in here that I
12 think helps me, and there's some other stuff that I
13 don't know that I like.

14 Q And I'd just point out page 137 for the record
15 where the victim describes what she had going on with
16 her after this was happening and she says, "Anal
17 bleeding and problems in the restroom." So I think
18 we've covered why strategically you would have made
19 different decisions about the medical records and how
20 to use them at trial.

21 Let's talk a little bit about the discussions on
22 constipation. Was it presented at trial through
23 different witnesses that there was at least some
24 evidence of constipation in the victim's medical
25 records?

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1 A Well, Lund mentioned that, and he was somewhat
2 impeached, and I don't know if he was completely
3 impeached. My recollection is that I found a medical
4 record that described a history of constipation and
5 introducing that. And I think it was probably through
6 the victim herself or her mother, is what I recall.

7 Q And was there testimony about the victim's
8 psychological problems?

9 A Yes.

10 Q Was there testimony about her having ADD?

11 A I don't remember the specific psychological
12 problems, but my recollection is most of that probably
13 came in through Cindy Stichnoth, and she described
14 problems and how those problems might cause a false
15 allegation.

16 Q Going through the exhibits that you went through,
17 and you don't have to turn to each one, but going
18 through the first one, the applicant's counsel had you
19 look at page three which talked about symptoms for
20 personality and talked about Axis I. And I'm saying
21 a-x-i-s I.

22 Do you remember Dr. DeFelice, who was the State's
23 other witness, addressing whether there had been a
24 diagnosis of personality disorder for the victim?

25 A I remember seeing on -- oh, borderline personality

1 disorder specifically?

2 Q Yes.

3 A I remember she testified that there had not been a
4 diagnosis of that and that, in fact, you really can't
5 diagnose that until adulthood.

6 Q Until the child is 18. But she is questioned
7 about that on page 273, right, and ends up having a
8 discussion about how at least someone, one of the
9 people treating the victim, had either diagnosed her
10 with or said that there were things that they needed to
11 look out for associated with borderline personality
12 disorder with the victim?

13 A Yeah. My recollection is that she said borderline
14 personality traits had been identified but no
15 diagnosis.

16 Q And that was when they were looking at the records
17 from the Carolina Center?

18 A I think so.

19 Q And I think we can see that from page 273.

20 Now, there was also -- you were directed to look
21 at page seven where they talked about the victim, that
22 they use words such a "kleptomania," voices in her
23 head, stealing things.

24 Do you remember that there was testimony about how
25 the victim had trouble with DJJ, had trouble with

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1 stealing? And you're nodding your head.

2 A Yes. I remember things like that coming out. I
3 think there were probably some skirmishes about getting
4 in the bad acts that might be crimes versus -- or
5 presenting character evidence versus evidence of a
6 problem that might lead to a false allegation, I guess.

7 Q But despite the objections that y'all had, you
8 still had it presented to the jury that she had
9 problems with lying and stealing?

10 A Yeah. I think we had presented that. But one of
11 the things I recall is, and, you know, it's stuff you
12 want the jury to hear but it's also -- it kind of cuts
13 both ways, too, because all that behavior, according to
14 even my expert, I believe, says is consistent with
15 somebody that's a victim of sexual assault.

16 Q Right.

17 A You know, it goes to their credibility in the
18 sense that they're doing these bad things, but it's
19 also things that victims do.

20 Q So you would say -- am I summarizing what you're
21 saying correctly to say even these medical records that
22 reference stealing or lying throughout that were
23 referenced in these supposedly new medical records were
24 things that could have cut both ways for you?

25 A That's my belief is that the evidence of bad

1 behavior on the part of the victim is an indication of
2 someone who might have problems being trustworthy, but
3 it's also consistent -- it's the kind of behavior
4 that's expected of a sex abuse victim.

5 Q And, in fact, the State's witness, Dr. DeFelice,
6 ended up talking for a long time about how there was a
7 significant correlation between eating disorders and
8 history of child sex abuse, also self-mutilating
9 behaviors, truancy, runaway behavior, lying, and
10 stealing?

11 A I believe that's correct.

12 Q And then your witness, as you pointed out, who was
13 also, you know, testifying on what they see with
14 victims of sex abuse, had to agree that, yes, that
15 behavior was consistent with or could be consistent
16 with victims of substance abuse?

17 A Yes. She had to agree.

18 Q Especially in a situation -- and this was
19 testified to by Dr. DeFelice -- where the victim is
20 still living with her perpetrator?

21 A I think that's correct. I don't remember that
22 specific part, but, yeah, I think that's probably
23 accurate.

24 Q And that's on page 236 and 237 of the transcript
25 focuses on victims of family members versus victims of

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1 strangers and a discussion of externalized
2 relationships versus internalized relationships.

3 So just going through these very quickly, the
4 personality disorder, that was before the jury, that
5 the victim may have had a personality disorder. It was
6 before the jury that she had a problem stealing -- with
7 stealing?

8 A I think that did come in, yes.

9 Q And then do you remember -- and one of these was
10 both on page seven, and there was a separate reference
11 to a medical record that had the victim describing a
12 situation where she had hallucinated green monkeys or
13 something? Do you remember reading that?

14 A That sounds like something Cindy Stichnoth might
15 have brought out in her testimony.

16 Q If you will let me take it one at a time. Page
17 123 of the medical records, and this was one of the
18 examples that applicant was citing. Do you see in the
19 center where it says something about black images,
20 green men, monkeys in her ears, voices in her head tell
21 her to steal things?

22 A Yes. I recall that.

23 Q And that was one of the things the applicant's
24 counsel read out as one of the examples in the records.

25 Can you please turn to page 134 of the transcript.

1 Of the transcript. Are you on the transcript or the
2 medical records?

3 A I'm sorry. I'm not listening well.

4 MR. WILKES: What page?

5 MS. VALENZUELA: Page 134.

6 THE WITNESS: Okay. I'm there.

7 BY MS. VALENZUELA:

8 Q Okay. So on page 134, this is the victim's direct
9 testimony by the victim, says that at the top. And it
10 says, "Answer: I told her I was seeing things."

11 And there's a question, "And were you seeing
12 things?"

13 And the answer is, "No."

14 And then the question is, "Why did you tell her
15 that?"

16 "Answer: Because I wanted to go."

17 And then there's a further discussion about how
18 the victim had to go to the mental hospital where she
19 was treated for eating disorders; is that right? Page
20 eight -- I mean line eight.

21 A Yes. She mentions eating disorders.

22 Q In fact, the victim says, and this is all before
23 the jury, "I was making myself throw up"?

24 A Yes.

25 Q So hallucinations and her problems with bulimia

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1 were testified to before the jury?

2 A Yes, I think so.

3 Q And the victim was one of the first use of the
4 State's witnesses, correct, in terms of order?

5 A The victim?

6 Q The victim.

7 A One of the first, I think, yeah, not the first.

8 Q And the victim also stated on page 132 that she
9 was cutting herself when she got out of the juvenile
10 detention home, and that that was part of the reason
11 she was sent to the mental hospital for a month?

12 A I do recall testimony of cutting, yes.

13 Q And so going through that, we have already in the
14 transcript already before the jury and the court the
15 personality disorder, the stealing, the voices,
16 patterns of oppositional behavior, expressions of
17 anger, and spitefulness. And I'm going to stop here to
18 remind you, do you remember how you and the prosecutor
19 had an extensive discussion about how the victim's
20 juvenile charge for criminal domestic violence was not
21 supposed to come in, but then the victim accidentally
22 testified to her own conviction and what led to that
23 conviction where she threw a shoe at her mother, and
24 this was all testified to before the jury?

25 A Yes, I think I do remember that.

1 Q So there was evidence already presented on
2 spiteful and vindictive behavior by the victim?

3 A Yes.

4 Q Do you remember that there was also on page 15 of
5 the medical records, you were told to look at a
6 statement that said, "It looked like -- I felt like I
7 did not have a father." Do you remember there was a
8 large portion of the trial that focused on how the
9 mother was manipulating the victim by telling her that
10 the defendant, the applicant, didn't want to get
11 custody of her?

12 A Yes. I remember focusing on a custody fight. I
13 also remember trying to elicit evidence that the mother
14 was saying things about the father to alienate the
15 father in the victim's eyes.

16 Q In fact, your witness -- I'm going to say her name
17 wrong -- Cindy --

18 A Stichnoth.

19 Q Stichnoth was able to provide -- she was your
20 expert witness, but she also ended up being a factual
21 witness as well, correct? She had actually observed
22 the family interacting and had observed the victim
23 through different group treatments and testified to
24 that?

25 A I don't remember if that's part of her testimony

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1 or not. I was thinking --

2 Q We'll turn to it. There's -- let me get you real
3 quick to the page. So page 355 -- actually, if you
4 will turn to page 361. And this is the trial
5 transcript. It's going to be volume two.

6 A 355.

7 Q 361. I did say 355 originally, but 361.

8 Do you see on 361 where your expert, Cindy
9 Stichnoth, is saying that the victim's mother had prior
10 suicide attempts, had chased the stepmother with a
11 butcher knife, had had multiple relationships, and had
12 a history of removing affection when somebody didn't do
13 what she wanted them to do?

14 A Yes.

15 Q And, in fact, she, the mother, your witness, was
16 able to testify that the victim's mother had threatened
17 to kill the victim if she caused the mother to lose
18 custody of the other two children?

19 A Right.

20 Q And you were able to elicit this in your testimony
21 of your witness?

22 A Right.

23 Q Your expert witness?

24 A Yes.

25 Q And this is because Cindy not only was the expert

1 but she was also a person who offered treatment to the
2 victim and to the family through different group
3 sessions?

4 A Well, yeah. But here she -- my question was, "Was
5 there anything in the record to suggest that Tina Sipes
6 might have some borderline traits?" And that's when
7 she starts talking about these things you were just
8 describing. So it's hard for me to tell how much is
9 from her personal treatment. But she was involved in
10 the treatment, I would say that.

11 Q Do you remember at the end of Cindy's testimony
12 where she felt -- she said, "Actually looking at these
13 records, it reminds me of a couple of other things."
14 And she was very, very firm that she wanted to clarify
15 a situation where the mother told the victim in a group
16 family session that the defendant would only have sex
17 with the mother in the victim's bed?

18 A I remember something to that -- I do remember
19 something to that effect being in the testimony.

20 Q So Cindy was able to add different things that
21 were even in addition to the medical records that you
22 have in front of you and even in addition to just a
23 straightforward expert witness?

24 A Yes.

25 Q And do you remember that on page 363 Cindy was

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1 able to testify that the victim admitted to significant
2 drug use, claimed to like to do speed, abused diet
3 pills, abused Adderall, abused diuretics to induce
4 diarrhea?

5 A Yes.

6 Q And all of that is presented to the jury,
7 testified to before the jury?

8 A It is.

9 Q And then, of course, but then Cindy also says that
10 the records indicate that although the victim was
11 saying she abused drugs, her drug screen indicated that
12 she was clean?

13 A Yeah. I think I saw that in there. Yeah.
14 That -- yeah.

15 Q And then there was a discussion about why a person
16 would claim to do something, drugs, when they didn't.
17 And the expert was able to share information about how
18 the victim might want to appear tougher?

19 A Yes.

20 Q And so you had that in terms of challenging
21 information where medical records have a lot of
22 information that's provided from a victim telling a
23 provider about what they're suffering from, correct?

24 A Let me make sure I understand your question. Are
25 you saying that that information might contradict

1 something in the medical record that she's using --
2 well, say that again.

3 Q So just focusing on my question, when a victim
4 goes -- when a patient goes in to a doctor and the
5 doctor records that you already looked through, is a
6 lot of that information provided from the patient
7 telling the doctor about symptoms that they're
8 experiencing?

9 A Right.

10 Q And then you already had testimony before the jury
11 that would explain reasons why the patient, the victim
12 in this case, might give different information to the
13 doctors than what she was actually experiencing?

14 A (Nodding.)

15 Q Which would have called into question some of the
16 medical records?

17 A Well, you could make an argument that some of the
18 history given by the patient might not be factual, yes.

19 Q And the victim did testify to her suicide attempts
20 and her cutting behavior, her self-mutilation behavior?

21 A Yes. I've seen that in the transcript.

22 Q So looking at the allegations that have been made
23 by the applicant in this case, the first one is timely
24 obtaining the medical records. And so looking at that,
25 did you feel like your expert, Cindy Stichnoth, had

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1 time to review the records that she brought with her
2 especially considering that she was intimately involved
3 in the actual treatment of the victim?

4 A Yeah, I did. And, again, I cannot remember.
5 Again, we did get records during the trial, and I don't
6 remember how -- well, I guess it was prior to the start
7 of the trial, but it was within weeks that she let me
8 know there are more records -- I thought I had all of
9 the records from that Carolina Center, and I think
10 she's that one that alerted me that no, there should be
11 more than that. But she was familiar with the kind of
12 records they keep. But we did get them.

13 Q And with Dr. Lund, your focus was on, rather than
14 a discussion of what could cause the constipation or
15 whether there was constipation present, although that
16 was part of it, was mostly trying to defeat the expert
17 witness from the State's diagnosis that this was caused
18 by forcible rape?

19 A That's true. And, you know, I mean, I suppose one
20 could say, well, why didn't you get this child's entire
21 medical history, which is not easily done in criminal
22 because we don't -- it's more limited to civil
23 discovery, but I felt like Dr. Lund, his explanation
24 was helpful. And then we discovered that maybe there's
25 even evidence in the medical records of constipation.

1 But I'm not even sure today we have this child's entire
2 medical history.

3 Q And still understanding that you, if you had had
4 everything that they're claiming you didn't have or if
5 you had had it earlier, that you would have made
6 decisions based on strategy on whether to pursue the
7 medical records based on whether they could hurt your
8 client more than help your client?

9 A Right. If I go through these records that I was
10 given -- well, I mean, I'm sure I had these records
11 during the trial, but my focus on these records during
12 the trial was on the psychiatric stuff. If I was
13 looking at more of the medical things in these records,
14 I'm not -- there may be stuff in the records that hurt
15 us more than helped us.

16 Q Like --

17 A Like --

18 Q -- physical supporting evidence that matches up
19 with the date, the month that the victim is saying this
20 happened to her?

21 A That's right.

22 Q And if you were able to get out everything that
23 was in the medical records another way, either through
24 cross-examination or because it was brought out on
25 direct, would that have further supported your

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1 strategic decision not to use medical records and to
2 use other ways that would have limited your negative
3 exposure to your client?

4 A Yes.

5 Q The second one was failure to present borderline
6 disorder. And do you remember, we touched on this
7 briefly, Dr. DeFelice -- and I'm sure I'm butchering
8 her name -- the State's witness, when she talked about
9 how you cannot diagnose a child with borderline
10 personality disorder because a child has ups and downs
11 and emotional upheaval related to her -- I'm blanking
12 right now. I'm sorry.

13 A Hormones, I think.

14 Q Her hormones. Thank you. Yes, it was an H word.
15 Due to her hormones. That could give you a false
16 impression of how to diagnose someone?

17 A Yeah. That expert said you really can't make that
18 diagnosis. But, also, I relied on Cindy Stichnoth to
19 tell me what in the psychiatric records is important.
20 And I'm not sure why -- I think I'll hear later why PCR
21 counsel thinks that borderline personality is
22 important, but I presented what Stichnoth -- and she
23 knew these diagnoses or these -- it's not even a
24 diagnosis -- these traits are in there. But I'm even
25 highlighting that in my -- a question we went over

1 earlier. I'm even trying to get in the fact that the
2 mother has borderline personality traits, but I'm a
3 layperson, you know. How that relates to a false
4 allegation, I don't know. It's something I heard in
5 another case that can be important, though.

6 Q Let's assume that the diagnosis of borderline
7 personality disorder is somehow going to be linked to a
8 victim's truthfulness and willingness to be
9 manipulative to make false accusations. Did the
10 strategy in your case focus on how the current ongoing
11 custody dispute between the victim's mother and the
12 defendant could have been the cause of the victim's
13 decision to claim this abuse?

14 A That was -- yeah. That was a point I wanted to
15 make and think I made is that this allegation came up
16 in close proximity, temporal proximity, to the
17 defendant filing a custody case for custody of the
18 children. And, yeah, I wanted that -- then I also went
19 into the fact that the mother seems to be manipulating
20 the daughter. And the point I was trying to make is
21 the mother has basically cooked this up because of the
22 custody dispute.

23 Q Okay. So you -- that's fair to say that was a
24 large part of your strategy that you spent a lot of
25 time emphasizing the ongoing custody dispute and the

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1 manipulative actions of the mother. And, in fact, your
2 expert, Ms. Stichnoth, ended up focusing on what
3 children -- children who have parents who have
4 personality disorder, what they're more likely to do as
5 well?

6 A Yes. Yes.

7 Q And that's where you brought out the testimony of
8 how this victim's mother had threatened to kill the
9 victim if she did anything to cause the mother to lose
10 custody of the other children in the case?

11 A And I think there was other testimony that goes
12 into all of that that she had a bad relationship with
13 her mother, and I think I got both the State's expert
14 and Cindy Stichnoth to talk about a child with that
15 kind of relationship with their mother, a mother could
16 get them to make these kind of false allegations. If
17 the child felt like this will please my mother, I will
18 do this to get closer to my mother. I think that was
19 sort of a theme that came up.

20 Q And so to the extent that the borderline disorder
21 is -- would have brought out some sort of external
22 evidence that the victim may be more likely to lie or
23 collude or manipulate, do you think there was other
24 evidence presented on the victim's lies and the reason
25 why she might have a motive to collude with her mother?

1 A I do. Like I say, if Cindy Stichnoth had said,
2 "Oh, there is a diagnosis of borderline personality
3 disorder, and this is a strong correlation with false
4 allegations," or whatever, but she never said that. I
5 think I used it as far as the evidence I had.

6 Q And this was -- you're talking about Cindy who had
7 the records and who had access to the victim --

8 A Right.

9 Q -- and was able to still not give you that answer
10 on it?

11 A Right.

12 Q Okay. Now, turning to the third -- the last point
13 on failure to preserve the objection at trial due to
14 the Fifth Amendment issues with the curative
15 instruction, first I'm going to turn your attention to
16 page 127 in the transcript. It starts on 126. And on
17 line 13, you object to her leading.

18 A Okay.

19 Q Do you see that?

20 A Yes, I do.

21 Q The court ends up saying that he's going to permit
22 it. Do you see that?

23 A Yes.

24 Q And then do you see how, on page 23 or line 23,
25 from line 23 going into page 127, he takes the time to

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1 explain to the jury what a leading question is?

2 A Yes.

3 Q And do you recall that he also did that, a long
4 explanation on what hearsay is, whenever someone
5 objected to hearsay?

6 A I think I do remember seeing that in there.

7 Q And then let's talk about the actual, you know,
8 language that was at issue on that appeal. And if you
9 will give me just a second to pull that up. Just for
10 the court's edification, this entire issue of
11 preservation is linked around the victim's mother is on
12 the stand testifying, correct?

13 A Correct.

14 Q And you're trying to bring out custody disputes
15 and how the victim's mother was not honest in court
16 about some child support check?

17 A Okay.

18 Q And the victim's mother answered your question,
19 "No. That was for child support. When I was going
20 through child support getting my kids medical help
21 because my daughter was needing prolapsed rectum
22 surgery, Max, the defendant at the time, quit his job.
23 When Eddie Holbrooks went to go look for him, he
24 wouldn't come in for an interview. When Eddie
25 Holbrooks, the investigator, looked for him and

1 questioned him about the sexual abuse mess, he quit his
2 job and left, so I had to go get assistance."

3 And so you informed the court that the jury needs
4 to step out at that time. So outside the presence of
5 the jury, you and the court and the prosecutor have a
6 discussion which, first, is whether that's even a Fifth
7 Amendment challenge for the defendant at the time,
8 correct?

9 A Correct.

10 Q The position of the prosecutor and what the court
11 ended up doing was there wasn't anything that was even
12 suggested from that language that a jury would be able
13 to pick up on that being some sort of statement on the
14 defendant's ability to remain silent should he choose
15 to?

16 A I'm not sure if that was the court's reasoning or
17 not. I would have to read it in the transcript.

18 Q But you remember there was a discussion about
19 that?

20 A Right.

21 Q And then taking into account the court's, you
22 know -- and the court offered to do a curative
23 instruction should you so choose?

24 A I think so, yes, from what I --

25 Q In your 20-plus, and, of course, now it's more

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1 than 20-plus considering how old this trial is, but in
2 your over 20 years of experience in criminal and in
3 doing trials, do you make different strategic decisions
4 as to what you choose to emphasize or object to in
5 front of a jury because it might bring more attention
6 to the issue?

7 A Absolutely, yeah. And on a curative instruction,
8 now I will tell you sitting here today --

9 Q Yes.

10 A -- I can't say that I made a strategic decision.
11 But on that particular issue, I -- there is a very good
12 chance -- normally I'm not going to want a curative --
13 or often I won't want a curative instruction because it
14 may highlight it more. I don't think curative
15 instructions help a whole lot. I'm sure what I was
16 objecting to when the mother said when the police
17 wanted to question him, he ran, I did not like that and
18 I objected to it, and I think I asked for a mistrial.

19 Q Yes.

20 A When I didn't get the mistrial, I think the damage
21 was done. And, again, I can't remember, but normally,
22 often on those kind of issues, I don't seek the
23 curative instruction because I feel like it just
24 reminds the jurors of what they already heard.

25 Q So assuming the jury is listening to this

1 back-and-forth about the child support check doesn't
2 pick up because none of them are lawyers on the
3 importance of what's just been said, they're sent out
4 and brought in, and then they are told, by the way, you
5 cannot hold the defendant not seeking against himself,
6 could have brought attention to an issue that instead,
7 if you would have just left it alone, they might not
8 have noticed what was said?

9 A I do a similar thing when you can have an
10 instruction when your defendant doesn't testify. Often
11 I waive that instruction to the jury that you can't
12 hold his silence, the fact that he didn't testify
13 because I think, well, the jury may not have even
14 noticed that, you know, that -- they may not have
15 expected that anyway.

16 Q So you have made that strategic decision in the
17 past, although I did hear you say you don't know if it
18 was an intentional decision here?

19 A Until I didn't read -- until I read this in the
20 transcript, I don't even remember that happening. I'm
21 somewhat surprised I was quick enough to make the
22 objection in a way, but I did.

23 MS. VALENZUELA: Your Honor, at this time we would
24 rest, but we would ask that we be able to recall this
25 witness at a later time.

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1 THE COURT: Okay.

2 MR. WILKES: Without objection.

3 THE COURT: All right.

4 Any redirect?

5 MR. WILKES: Yes, sir, just a few questions.

6 MS. VALENZUELA: Your Honor, the judge's packet
7 that we gave to you, I was looking at it. Did we put
8 the order in there? I was worried that we might not
9 have. So I don't have any problem with this actually
10 being made a formal part of the record.

11 THE COURT: Let me see it.

12 MR. WILKES: Opinion number 2009UP540. That's the
13 appeal.

14 THE COURT: I believe --

15 MS. VALENZUELA: I think we labeled something
16 "order and remittitur," but I was worried when I looked
17 through it, it was only the remittitur and you would
18 want the language of the court's holding.

19 THE COURT: I'm checking it. That's not a part of
20 it, so just mark this as Exhibit Number 2.

21 (WHEREUPON, Applicant's Exhibit Number 2
22 was marked for identification.)

23 MR. WILKES: May it please the court. May I go --

24 THE COURT: Yes, sir.

25 REDIRECT EXAMINATION

1 BY MR. WILKES:

2 Q Mr. Stoddard, you would agree with me that the
3 basis of the court of appeals' finding was lack of
4 error of the preservation?

5 A Yes, sir.

6 Q And you gave some reasons a minute ago talking
7 about what you do sometimes. But when you originally
8 answered my question, you said you probably forgot it?

9 A I did say that, but -- and that may be. But I'm
10 telling you, if I had remembered, I would have an
11 internal debate of whether I want the jury to hear that
12 curative instruction.

13 Q But that decision was not made?

14 A No, I didn't say it wasn't made. I can't recall
15 that being made. I may very well have strategically
16 decided I don't want that, but it's been a long time
17 ago. Because I did that a lot.

18 Q But you said originally --

19 A Probably.

20 MS. VALENZUELA: Objection, Your Honor. Asked and
21 answered.

22 THE COURT: Sustained.

23 BY MR. WILKES:

24 Q Now, when you said, talking about the medical
25 records, you said it can't be done, getting the whole

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1 medical records?

2 A No. I didn't say it can't be done. I said
3 it's -- or if I did say it can't be done, it's not as
4 easily done in criminal prosecution as civil
5 prosecution. It's much easier. Especially records
6 that go across state lines.

7 Q Okay. Well, let's talk for a minute about records
8 in this state. You're familiar with HIPAA and you're
9 familiar with this South Carolina statute on privacy?

10 A Yes, sir.

11 Q And do you know the procedures to obtain medical
12 records?

13 A In civil or criminal court?

14 Q Any court. Any court.

15 A In civil court, I could subpoena the medical
16 records. I can't subpoena mental health records. I
17 can file a motion and ask for a court order.

18 Q Okay.

19 A I didn't have to do that in this case because I
20 asked the prosecutor to provide them and they did. I
21 did not know they hadn't provided everything until
22 Cindy Stichnoth reviewed them.

23 Q Okay.

24 A Now, I'm not certain that you can subpoena medical
25 records in a criminal case. You can subpoena a

1 custodian of records to come to court, but I don't know
2 that there's really a subpoena duces tecum procedure in
3 criminal court.

4 Q Okay.

5 A So I asked the prosecutor for the records that I
6 wanted, and I think I got everything that I thought was
7 out there.

8 Q Okay. But you would agree, looking at those
9 medical records, are far more than what you received?

10 A You're talking about Exhibit 1?

11 Q Uh-huh.

12 A More than I received?

13 Q From the prosecution.

14 A From the prosecution, that's correct. But then --
15 yes.

16 Q Now --

17 A Then I filed a motion to get additional records.

18 Q Okay. And you did that, though -- you did not do
19 that in 2004, 5 or 6, you did that the day of the
20 trial?

21 A Well, again, it was within weeks of the trial that
22 I was alerted there's more records that -- I didn't
23 know that I didn't have. I thought I had everything.
24 I subpoenaed the custodian of records to come to trial,
25 and I believe early in the trial when I -- when these

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1 people didn't show up, I alerted the judge, "Judge,
2 I've done this. Help."

3 Q What steps did you undertake to obtain medical
4 records other than simply ask the solicitor, if any?

5 A I subpoenaed the custodian of records of the
6 Carolina Center or whatever the center is to come to
7 court with the records.

8 Q In 2004?

9 A Not in 2004.

10 Q 5?

11 A No, sir.

12 Q When?

13 A The trial.

14 Q At the trial?

15 A At the trial.

16 Q Okay.

17 A As I told you, I didn't realize -- now, in 2004 or
18 5, I had records from the Carolina Center that the
19 prosecution had provided and thought that was
20 everything because I'm not familiar with medical
21 records at that center.

22 Q Okay. And you took no further steps to determine
23 whether or not they were complete? In other words, you
24 thought four pages from an inpatient facility would be
25 all there would be; is that right?

1 A When I got the records, I had other aspects of
2 trial I was working on, but, yeah, I suppose I could
3 have questioned, "Is that everything?" And I actually
4 did that with the Atlanta -- the records from the
5 surgeon because when I read his records, I could
6 tell -- he referred to other records so I asked for
7 those also.

8 Q Can you tell me which institutions did you attempt
9 to get records from at any time?

10 A I would have to -- I would have to go through my
11 file and, actually, probably go to my office just for
12 thoroughness to see if I generated any letters to any
13 other places besides -- or asked of the prosecution,
14 but I think just the Carolina Center.

15 Q Okay. What about AnMed? Did you attempt to
16 obtain records from AnMed?

17 A I don't know. I may have. I do -- now that you
18 mention it, I did get records from Ernest Martin, a
19 psychiatrist.

20 Q Okay. Did that come in the motion of discovery,
21 or did you attempt to get records outside of what you
22 were just given by the State?

23 A I can't recall. I think -- I don't think I filed
24 a motion to get those records. I think that I got them
25 probably from the State.

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1 Q Okay. Can you tell me if you received AnMed
2 records from the State? Do you have anything that
3 would indicate whether or not you got AnMed records
4 from the State?

5 A I can't -- I don't know unless it's in a discovery
6 response, and I don't -- I'm not -- I haven't reviewed
7 all my discovery responses. My suspicion is no because
8 you've probably reviewed them because I think I gave
9 you everything in my file.

10 Q Okay. Now, the idea of the constipation being an
11 alternative cause for the prolapse, that was your
12 defense in the case, correct?

13 A Not the only defense. It was a part of it, yes.

14 Q Okay. And you, I think, agreed earlier that it
15 would appear that the solicitor impeached Dr. Lund
16 about the constipation record he was using was
17 postoperative?

18 A Again, I thought Lund said, and I agree with Lund,
19 it showed -- it says -- the record is dated
20 postoperative, but it says that prior to that date, she
21 had a problem with constipation.

22 Q But that did not prove that it was prior to the
23 operation, correct? Or do you think it did?

24 A I think it may be evidence that it was prior to
25 the operation. I think that can be inferred.

1 Q Would it have been more effective to have the
2 AnMed record that actually showed constipation? If you
3 look on page 112 of Exhibit 1.

4 MS. VALENZUELA: Will you give the date of that
5 record.

6 MR. ALLEN: And the date of that record is -- I
7 don't see the date.

8 MS. VALENZUELA: Dose period.

9 MR. WILKES: Oh, yes, the dose period and the
10 date.

11 Q If you will look down to where the entry is for
12 constipation, if you will see the date that that
13 notation appears or the date appearing above that
14 notation for constipation?

15 A 4/30/02.

16 Q Okay. So that's preoperative?

17 A Yeah, that would be --

18 Q Okay.

19 A -- more effective.

20 Q This would be Anderson area medical records,
21 correct?

22 A Yes.

23 Q And do you have any reason to believe that you had
24 that record and did not use it?

25 A No, I don't unless -- unless it was part of the

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1 Carolina Center, in their records, and I just didn't
2 notice it.

3 Q Okay. If -- well, then, one of two things, then.
4 Either you didn't obtain it and you didn't use it --

5 A Right.

6 Q -- or you had it and you didn't use it. But
7 either way --

8 A But I agree, I did not get the complete medical
9 history of this victim.

10 Q And you would agree that in the theory of defense,
11 that would have been helpful for Dr. Lund to respond to
12 Ms. Hervey?

13 A But the State's expert didn't have the whole
14 medical history either.

15 Q And since he did not and he says, Dr. Payne
16 says -- let's see. Dr. Payne --

17 A I think he said, "She didn't give me a history of
18 constipation," so he wasn't interested in it.

19 Q Right. She had no significant history?

20 A Right.

21 Q So what he's saying is from what she's told him or
22 the records that he's had, there's no real significant
23 history that would give any other causation, correct?

24 A I think that's close to what he said, yes.

25 Q Okay. And with that being said, would it not have

1 been helpful to have those medical records that would
2 have established, contrary to what he says, that there
3 is a history of other possible causation?

4 A It would. It would. Now, again, I would have to
5 review all these records carefully because if there's
6 stuff that is helpful to the State, I might choose not
7 to use that and be more general like we were with Lund.

8 Q Sure. But being helpful to the State, if the
9 State wanted to bring that stuff in, they would have
10 brought it anyway?

11 A Not if they don't have it. I would be giving
12 it -- in other words, if I brought in the whole medical
13 history and used it, I would be giving it to the State
14 because I don't think they had the whole medical
15 history either.

16 Q What in it would be more harmful than showing
17 other causality or proof of the history of
18 constipation? It was the whole defense. What would
19 have been worse, so bad that you would forgo that
20 evidence?

21 A First of all, it wasn't the whole defense, and we
22 had that as an alternative explanation. For example,
23 we just highlighted --

24 Q That's not my question. I'm asking what would
25 have been so bad in those medical records that you

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1 would have forgone --

2 A I don't have but, for example, the start of the
3 stuff about rectal bleeding during the time period that
4 she alleges.

5 Q Uh-huh.

6 A Again, Lund or your expert may say that's not --
7 doesn't indicate anal penetration. But if it does, I
8 wouldn't want that in there.

9 Q Well, what did Lund say it indicated?

10 A He didn't have that record so we --

11 Q Okay. That's my point. Lund didn't have it to
12 evaluate it to determine if it would be something that
13 you could use without the harm of something in it
14 worse?

15 A And that's all I'm saying is there may be stuff in
16 there that cuts both ways.

17 Q And it may be. But that was not an intelligently
18 made decision by Dr. Lund?

19 A That's true.

20 Q Okay.

21 Now, you talked a little bit and were asked
22 questions about Dr. Allison DeFelice, formerly
23 Dr. Foster or vice versa. She testified that you can't
24 diagnose somebody under the age of 18 borderline
25 personality disorder, right?

1 A Right.

2 Q Now, if you had the medical records indicating
3 that there had been a diagnosis of borderline
4 personality disorder, would that not impeach her
5 testimony?

6 A I don't know.

7 Q If the State's expert says you can't do that, look
8 on page 85 of Exhibit 1. If the State's expert tries
9 to say, "No, you can't be diagnosed borderline
10 personality disorder until you're 18 years old,"
11 wouldn't it be significant to cross-examine with a
12 diagnosis of borderline personality disorder by
13 Dr. O'Connor, an MD? Would that not have been
14 effective?

15 A It may have. I see here, "Impression: Borderline
16 personality disorder." And I don't know if that's the
17 same as the diagnosis. I see these words and I'm not a
18 doctor.

19 Q If borderline personality trait and borderline
20 personality disorder are in the medical records, would
21 it not have been something to cross-examine
22 Dr. DeFelice about?

23 A Personally, I'm not impressed with that line
24 because I think she would deflect it very easily
25 saying, "The literature" -- but I'm not a doctor --

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1 "You can't diagnose it prior to that date. You can't
2 identify traits." But again --

3 Q If she's wrong, would that not be significant?

4 A If what?

5 Q If she's wrong.

6 A It may be somewhat significant. But it depends on
7 how important borderline personality, to me, borderline
8 personality disorder is to the theory she made this up.
9 And I don't know how important it is because I haven't
10 heard anything. But if it just shows that she made a
11 mistake on that one issue, it calls her expertise into
12 question a little bit.

13 Q Okay. When did you talk to Cindy Stichnoth about
14 the records? Did you ever have her in your office and
15 go through the entire Carolina Behavioral health record
16 with her?

17 A Yes.

18 Q When did you do that?

19 A During the trial.

20 Q During the trial?

21 A Yes, because that's when I got them.

22 Q And when during the trial did you do that?

23 A I remember -- well, when I say "during the trial,"
24 it was during the week of the trial. It was one
25 evening in my office after hours.

1 Q Okay.

2 A Now, she had already reviewed the records herself.

3 As soon as I got them, I provided them to her.

4 Q You -- and tell me if I'm mistaking this, but I
5 think you said that you weren't sure what psych drugs
6 could cause prolapse or might be connected as an
7 alternative causation; is that accurate?

8 A In talking to counsel in this case, it's my
9 understanding that one of your theories is that
10 psychiatric drugs cause -- can cause constipation.

11 Q Right.

12 A Which is what Lund says can cause prolapsed colon.
13 I don't know. I don't have any knowledge that those
14 drugs directly cause a prolapsed colon.

15 Q Did you -- and you didn't have sufficient records
16 at the time to go over with Dr. Lund and specifically
17 read out a litany of psychotropic drugs to back Lund
18 up?

19 A Not a litany. I do remember in his testimony him
20 referring, when the prosecutor was showing -- asking
21 him about a record, he asked, "Is that part of the
22 psychiatric records or the medical records?" So I do
23 think he had some psychiatric records. I do not know
24 how much knowledge he had of psychiatric drugs. I
25 think he knew she had a psychiatric history.

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1 Q Okay.

2 A And he didn't highlight that to me. He did
3 highlight -- and I think he did in his testimony --
4 aspects of this victim's life that would be consistent
5 with having constipation -- a constipation problem.

6 Q But you would agree with me that, in large part,
7 your expert or the State's expert answers questions
8 based on what you ask?

9 A That's true.

10 Q And did you not ask --

11 A Well, no. But wait a minute. That's true, too,
12 but I don't know what questions -- often the expert
13 educates me on what I need to be asking, too.

14 Q Okay. And for the expert to educate you, he would
15 have to have the appropriate records to review,
16 correct?

17 A Somewhat. I mean, yes, although Lund, I thought,
18 educated me. Until he told me colon -- I mean
19 constipation can cause this, I didn't have any idea of
20 that.

21 Q Again, if you don't have the records with the long
22 history of drugs to discuss with him --

23 A Yeah.

24 Q -- then he can't educate you on what they would
25 mean?

1 A Well, we didn't go so far as to -- and I don't
2 know if there's enough of anything in the record for
3 him to do this, for him to go so far as to say she
4 had -- "I see a diagnosis of chronic constipation in
5 her, and I think this is the cause." He just -- we did
6 not go that far.

7 Q And you agree that you did not review the CBH or
8 any of the medical records from AnMed with him because
9 you didn't receive them?

10 A No. I received some CBH records, and he may have
11 had those, the four pages.

12 Q The four pages. But other than --

13 A Which may have -- you know, it's going to have a
14 summary of what the treatment was.

15 Q Can you find those four pages?

16 A I may be able to.

17 Q If you can. Or maybe you can do that -- can we do
18 it at lunch?

19 THE COURT: I think that's a good idea.

20 MR. ALLEN: Not right now.

21 THE COURT: We need to move along.

22 MR. WILKES: I think I am done with this witness,
23 Your Honor. Thank you.

24 MS. VALENZUELA: Your Honor, I do have brief
25 redirect limited to -- I think I can point to specific

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1 points in the transcript that would help directionally.

2 THE COURT: Be brief.

3 RECROSS-EXAMINATION

4 BY MS. VALENZUELA:

5 Q So turn to page 297 in the transcript.

6 A 296?

7 Q Let me see. I said 297.

8 A 7.

9 Q Okay. And then starting at -- okay. Line 13, you
10 said, "Did you review the records of Dr. Payne
11 regarding the victim?"

12 A And -- yes. And he asked, "Was he the surgeon? I
13 wasn't paying attention to names. Was he the surgeon
14 or the psychiatry people?" And that's what caused me
15 to think that he had some psychiatry records.

16 Q And you said when he got the records of both,
17 that's what you say to him and he says, "Yes, I did."

18 A Okay.

19 Q Right? Line 17, you say, "Well, you got the
20 records of both; is that correct?" And 18, he says, "I
21 did, yeah."

22 And then on line 21, you say, "And we've got new
23 records today that I gave you that you reviewed today
24 also?"

25 A That's correct.

1 Q So your expert had the records that you got during
2 the trial?

3 A Well, "And you got a new record today." I don't
4 know if that's something that the State gave me from
5 Dr. Payne, something that they had not given me before,
6 or if it's -- I really don't think it's that big
7 package that I got from the Carolina Center.

8 Q Well --

9 A It's possible, but I don't think so.

10 Q So Dr. Lund came after the victim in terms of
11 order of testimony. So if you were able to question
12 the victim on certain records, then that would mean
13 that you would have had those to give to Dr. Lund,
14 correct?

15 A I --

16 Q If you were able to ask the victim --

17 A Yeah. If it's a record I showed the victim, then
18 I would have had it. I would have had it to show
19 Dr. Lund, yes.

20 Q And so for brevity, pages 156 to 159 cite to page
21 11 of the medical records of the Carolina Center, asked
22 about laxatives being used for diarrhea, asked about
23 hallucinations, and asked about medications when she
24 was living in South Carolina because of disorders she
25 had. That's pages 156 to 159. And would you agree

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1 that the victim was questioned much earlier in the day
2 or even perhaps a day before your expert witness was
3 questioned?

4 A Yeah, I see that. Apparently I had some Carolina
5 Center records that talked about cutting, at least.

6 MS. VALENZUELA: And, Your Honor, this is my last
7 question.

8 Q On crossing Dr. DeFelice, you asked her about --
9 challenge -- asking her about the issue with the
10 personality disorder. And at one point she says to you
11 that she would not rely on summaries for dots because
12 forensic evaluations require going back to primary data
13 which would be appointment notes and not summation
14 letters, and that's not going to be something she's
15 going to look for and continues to push back on you on
16 the issue of it. And, in fact -- and we had pointed
17 this out to the court much earlier -- but on page 273
18 specifically says that what you're showing her is not a
19 diagnosis. That, instead, it's a document that lists
20 personality disorder traits which is saying be on the
21 lookout for this in the future?

22 A Yes.

23 Q Okay.

24 MS. VALENZUELA: Nothing further from the State,
25 Your Honor.

1 THE COURT: All right.

2 Thank you, Mr. Stoddard.

3 We're going to break for lunch.

4 Counsel, approach.

5 (WHEREUPON, a bench conference was held off the
6 record.)

7 THE COURT: We'll be in recess on this case until
8 2:30.

9 (Lunch recess taken from 1:17 p.m. to 2:06 p.m.)

10 THE COURT: Let's go back on the record.

11 All right. Mr. Wilkes.

12 MR. WILKES: Yes, sir.

13 THE COURT: Call your next witness.

14 MR. WILKES: Thank you. I was going to call
15 Dr. Rubel last, but he is sick, and I'm going to try to
16 get him out of here. So if it's okay, I will call him
17 now.

18 Dr. Rubel, please.

19 CHRISTOPHER JAMES RUBEL M.D.,

20 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

21 THE CLERK: Please have a seat around there on the
22 witness stand. Once you're seated, if you will please
23 give us your full name and spell your last name for the
24 court's record.

25 THE WITNESS: Christopher James, R-u-b-e-l.

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1 THE COURT: Thank you, sir.

2 DIRECT EXAMINATION

3 BY MR. WILKES:

4 Q Dr. Rubel, you have been through the medical
5 records that are Exhibit No. 1, I believe?

6 A Yes, I have.

7 Q And in looking at those records -- I'm not going
8 to go through every one. You were in the courtroom
9 when I read out a lot of medications and the diagnoses
10 that are in those records?

11 A Yes, sir.

12 Q And you were in here during the testimony of
13 Mr. Stoddard just before lunch listening to what the
14 theory of the case was?

15 A Yes, sir.

16 Q Okay. Now, in regards to a prolapsed rectum, are
17 the drugs that you had seen in the medical records of
18 the prosecutrix was taking at the time or within the
19 year or two before the surgery --

20 MS. VALENZUELA: Your Honor, I'm going to object.
21 I don't know if we're skipping a step here. It sounds
22 like we're asking a question that an expert --

23 THE COURT: He has not yet been admitted as an
24 expert.

25 MR. WILKES: Sorry, Judge.

1 Q Dr. Rubel, where did you go to school?

2 A Medical University of South Carolina.

3 Q And when did you -- what is your credential? Are
4 you a doctor?

5 A Yes, sir.

6 Q What type?

7 A Medical doctor.

8 Q And when did you begin practice?

9 A 1993.

10 Q Are you licensed in South Carolina?

11 A Yes, sir.

12 Q And in 1993, where did you begin practicing?

13 A In Charleston.

14 Q And have you practiced in the area of family
15 medicine?

16 A Yes, sir.

17 Q How long did you practice in family medicine?

18 A 20 years.

19 Q And during your practice as a family physician,
20 did you come across, treat, diagnose rectal prolapse
21 cases?

22 A I have seen those cases.

23 Q Okay. And within your training, expertise, and
24 experience, do you commonly deal with the effects of
25 the drugs that you have heard mentioned today?

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1 A Yes.

2 Q And have you reviewed medical literature commonly
3 reviewed by professionals in your position as to side
4 effects or other effects of those particular drugs?

5 A Yes, sir.

6 Q Okay. Have you done that in particular in
7 relationship to the prolapse issue?

8 A Yes.

9 Q You have been a physician for how long?

10 A 1993.

11 Q Okay.

12 MR. WILKES: Your Honor, I would offer Dr. Rubel
13 as an expert in family medicine and have him -- an area
14 of expertise in the medications at issue as well as the
15 condition of the rectal prolapse.

16 THE COURT: All right.

17 MS. VALENZUELA: Can I do some voir dire?

18 VOIR DIRE EXAMINATION

19 BY MS. VALENZUELA:

20 Q Dr. Rubel, you said that you have seen rectal
21 prolapse?

22 A Yes, ma'am.

23 Q Can you tell me what that means in terms of how?
24 Have you diagnosed rectal prolapse?

25 A A couple times, yes, ma'am.

1 Q Okay. So twice in your 20-year career?

2 A That's true.

3 Q And have you treated rectal prolapse?

4 A No, ma'am. I refer to a surgeon.

5 Q So you have never treated rectal prolapse?

6 A No, ma'am.

7 MS. VALENZUELA: Then just to be clear with
8 counsel, Your Honor, would this witness be offered as
9 an expert limited to expertise in the psychotropic
10 medication and in diagnosing rectal prolapse?

11 MR. WILKES: Yes. We would offer him as an expert
12 in family practice, which would encompass the
13 diagnosis, treatment and, I guess, identification of
14 side effects related to the prolapse but also into the
15 medications in particular that we mentioned today which
16 I believe would be within the scope of any competent
17 qualified physician.

18 MS. VALENZUELA: No objection.

19 THE COURT: All right. So admitted.

20 MR. WILKES: Thank you, Your Honor.

21 DIRECT EXAMINATION (Resumed)

22 BY MR. WILKES:

23 Q Dr. Rubel, you have heard and also seen, I think,
24 in the records in Exhibit No. 1 a number of different
25 drugs that the prosecutrix was prescribed within the

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1 year or two before the allegations, correct?

2 A Yes.

3 Q Okay. And those drugs would include trazodone --
4 and if I say these wrong, I'm sorry -- trazodone,
5 Depakote, Effexor, Luvox, Adderall, Risperdal, Celexa,
6 Geodon, Ambien, Zyprexa, Remeron, and there is a bunch
7 of other ones, but are those the ones that may have
8 some connection to the condition of prolapse?

9 A They are.

10 Q Okay. Can you explain the connection between --
11 are the majority of those psychotropic drugs?

12 A Yes, sir.

13 Q Now, can you explain the connection between those
14 drugs and prolapse, a condition of the prolapse, and
15 what that causality is and why it happens?

16 A Constipation. They slow the motility of the
17 bowel.

18 Q And is the connection significant between the use
19 of those drugs and the condition of the prolapsed
20 rectum?

21 A There are studies that show that.

22 Q And have you pulled one of those studies to refer
23 to?

24 A Yes, I have.

25 Q And can you tell me what study that was?

1 A The *Journal of Visceral Surgery*.

2 Q And would that be an appropriate resource or
3 reference for a physician in family practice or any
4 practice to use in regards to that connection?

5 A Yes.

6 Q Can you tell me what the connection is? And you
7 can refer to that if you need to.

8 A The connection would be basically constipation
9 which can lead to rectal prolapse.

10 Q And is that based on a study?

11 A Yes, it is.

12 Q And is there, do you say, empirical evidence from
13 the study? Is there -- I think that's the right
14 term -- empirical evidence showing that connection?

15 A Yes, there is.

16 Q And what is that connection from a statistical or
17 however it's determined?

18 A The constipation can cause straining; straining
19 can cause prolapse.

20 Q And from the study, is there a percentage of
21 patients experiencing it? Is there some quantitative
22 way to signify the significance?

23 A This particular study of the study group,
24 64 percent had constipation with psychotropic
25 medications.

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1 Q And was that directly linked to the condition of
2 prolapse in that study or to just constipation?

3 A Just constipation.

4 Q Okay. And then what from that condition, where do
5 you go from there with the condition of prolapse?

6 A They have a higher percentage of prolapse in these
7 patients that have psychotropic medications that have
8 constipation.

9 Q Is that something that would support causality, an
10 argument for causality between the prosecutrix's use of
11 the therapeutic drugs and the condition of the rectal
12 prolapse?

13 A There is a correlation.

14 Q Okay. And I believe there were several diagnoses
15 or conditions noted also in the medical records that
16 you reviewed. Is there any correlation between chronic
17 diarrhea or bingeing, purging, laxatives,
18 suppositories, any connection or causality between
19 those conditions and the rectal prolapse?

20 A There is.

21 Q And have you pulled a research study on that
22 connection between anorexia nervosa or bulimia and the
23 prolapse?

24 A Yes.

25 Q Can you explain that connection for me?

1 A If you're taking psychotropic medications and you
2 have a commitment, psychiatric disorder such as
3 anorexia or bulimia, it provides dehydration and also
4 straining, which can induce prolapse.

5 Q And does the case report indicate that binge and
6 purge subtype is directly associated with the prolapse?

7 A There is a correlation between the two.

8 Q Is there a quantitative analysis on the
9 significance of it? In other words, is that based on a
10 study of single or multiple patients?

11 A Multiple factors are involved with psychotropic
12 medications, those particular diseases, and
13 constipation and prolapse.

14 Q Is there a -- do either of the conditions or
15 articles relate specifically to younger adults?

16 A Yes, it does.

17 Q Specifically applicable to females?

18 A Yes, mostly females.

19 Q Okay. And is it statistically significant, in
20 other words, does it occur with some regularity?

21 A Yes.

22 Q Okay. Is it sufficient to say, is it possible to
23 say that the psychotropic drugs could cause rectal
24 prolapse?

25 A Yes.

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1 Q Okay. And the medical record indicating chronic
2 diarrhea, is that something that could be a
3 contributing factor?

4 A Some of the factors with this are laxatives,
5 suppositories to relieve the constipation.

6 Q Okay.

7 A And that can lead to diarrhea, straining, and so
8 on and so forth.

9 Q Okay. And in your opinion, would somebody -- I'm
10 assuming two to three laxatives a day as part of
11 anorexia or bulimia, whichever, using two or three
12 laxatives a day and suppositories, would that be a
13 contributing factor to consider in rectal prolapse?

14 A Along with the psychotropic medications, yes, and
15 the constipation.

16 Q So is it fair to say that the medical records that
17 you've looked at being from Carolina Behavioral Health,
18 AnMed, and DJJ that are in Exhibit Number 1, do they
19 support an alternative causation to rectal prolapse
20 from what the State's theory of sodomy was?

21 A I believe the studies show that with the
22 psychotropic medications that the young lady was on,
23 you probably would end up with constipation which could
24 end up leading to potentially a prolapse.

25 Q In Dr. Payne's testimony when he testified about

1 there being psych -- he didn't say psychotropic. When
2 he said psychological drugs or the psychiatric drugs
3 mentioned, he said that the -- but he didn't think that
4 was important because, the quote is, I believe, the
5 history wasn't significant relating back to the
6 psychotropic drugs. Would you agree with that, having
7 now seen Exhibit No. 1?

8 A I would not. She was on several psychotropic
9 medications.

10 Q And would that indicate that the history was
11 indeed significant for the potential of other
12 causation?

13 A I would say so.

14 Q And can you say that to a reasonable degree of
15 medical certainty?

16 A Yes.

17 Q Okay. Is -- and I may have added some that are
18 not relevant. Celexa is not one of those drugs, is it?
19 It's in there, but I'm asking, Celexa is not a
20 psychotropic drug, is it?

21 A Celexa is an antidepressant.

22 Q Okay. So it is. I guess Strattera is not. I may
23 have included one that's not. Trazodone, Depakote, and
24 Effexor are in that class of psychotropic drugs?

25 A Yes.

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1 Q And Luvox and Risperdal are?

2 A In those drugs, it would be that those have a side
3 effect of constipation. And the significance would be
4 between ten and 20 percent of the constipation, and now
5 if you add these drugs together, that increases the
6 chances of constipation. It would be Remeron, Geodon,
7 Ambien, Zyprexa, Luvox, Risperdal, Effexor, and
8 Adderall.

9 Q Okay. And that would be consistent or would have,
10 I guess, supported or backed up Dr. Lund's testimony
11 that constipation was a potential cause?

12 A Yes.

13 Q Okay. Very good.

14 MR. WILKES: No further questions. Thank you.

15 THE COURT: All right. Ms. Valenzuela.

16 MS. VALENZUELA: Thank you, Your Honor.

17 CROSS-EXAMINATION

18 BY MS. VALENZUELA:

19 Q Dr. Rubel, how much of your practice has involved
20 gastroenterology?

21 A During family practice, I would say probably 15 to
22 20 percent. When you say "gastroenterology," you're
23 talking about disorders of the abdomen or the
24 gastrointestinal tract?

25 Q The gastrointestinal tract, how much of your

1 practice has involved that?

2 A Right now we probably have 30 percent of our
3 practice that has minimal to major GI events.

4 Q And your current practice is that you do pain
5 management?

6 A Yes, ma'am.

7 Q Now, how much of your practice has involved eating
8 disorders?

9 A Do not have a lot with eating disorders.

10 Q When you say "do not have a lot" --

11 A Well, when I did family practice, we did.

12 Q I'm sorry?

13 A When I did family practice, we did, the 20 years.
14 We would see those patients and refer them to a
15 psychiatrist or behavioral health person. Typically,
16 as a primary care, you would diagnose a patient and
17 then refer them to a specialist.

18 Q Okay. So your interaction with eating disorders
19 is having someone come in, say they have an issue, and
20 refer them out?

21 A Yes, ma'am.

22 Q How many of those patients did you see who had
23 eating disorders who you spoke to and referred them to
24 other doctors?

25 A I don't have a percentage number with that. I

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1 deal with pain management, if I may speak. And with
2 that, we have an incidence of about 75 percent of
3 constipation with narcotics. So we deal with
4 constipation on a daily basis --

5 Q So, Dr. Rubel, I'm going to ask you to answer the
6 questions that I ask you so that we can keep this
7 moving, but I appreciate that, and your attorney will
8 have an opportunity to recross you on things.

9 MR. WILKES: I believe he's trying to explain his
10 last answer, which he's certainly entitled to do.

11 MS. VALENZUELA: No, he went into discussing --

12 THE COURT: Ask another question.

13 BY MS. VALENZUELA:

14 Q Now, have you ever had a patient who suffered
15 rectal prolapse due to forcible anal rape?

16 A No, ma'am.

17 Q I'm sorry?

18 A No, ma'am.

19 Q Have you ever had a patient who was a victim of
20 forcible anal rape?

21 A No, ma'am.

22 Q You have never even had one who -- okay -- who was
23 just a victim?

24 A No, ma'am.

25 Q And didn't have the -- okay.

1 And dealing with rectal prolapse, how many
2 patients have you had over your career who came in with
3 rectal prolapse?

4 A Just a few, not a -- not a great deal of them.

5 Q So is three patients over the last 20 years of
6 your career correct?

7 A Three to five.

8 Q Okay. And in diagnosing those patients, did you
9 ever did a physical exam of their rectum?

10 A Yes, ma'am.

11 Q Okay. And then did you ever perform surgery on
12 the rectal prolapse?

13 A No, ma'am.

14 Q And what were the causes of those three to five
15 patients who you saw? What was the cause of their
16 rectal prolapse?

17 A I really can't remember. It could have been
18 constipation. I just -- I can't remember what the
19 actual cause was.

20 Q But you know that none of them were due to
21 allegations of a foreign object being put in the
22 rectum?

23 A No, ma'am.

24 Q Now, is it fair to say that the psychotropic drugs
25 have some connection to rectal prolapse?

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1 A Yes, ma'am.

2 Q But not -- okay. Yes. And but there are other
3 causes that can lead to rectal prolapse?

4 A Yes, ma'am. The most common cause is
5 constipation.

6 Q And, well, I'm skipping a step there because
7 psychotropic drugs, the reason that we link those to or
8 you're linking those to rectal prolapse is only because
9 of their connection to causing long-term or chronic
10 constipation, and it's the chronic constipation that
11 causes the rectal prolapse, correct?

12 A That's true.

13 Q So it's not a direct link. It's not if you take
14 these drugs, you're going to have a rectal prolapse.
15 It's if you take these drugs, you might have a higher
16 incidence of constipation which then might lead to a
17 rectal prolapse?

18 A That's correct.

19 Q So I'm going to turn to your study that you said
20 about the *Journal of Visceral Surgery*. The conclusion
21 in that case -- and just let me know if I'm right.
22 That conclusion was just that medication-induced
23 constipation in psychiatric patients and possible
24 pelvic floor weaknesses in patients with previous
25 pelvic surgery may be contributing factors to rectal

1 prolapse in a group of patients, correct?

2 A Yes.

3 Q Okay. So the study didn't actually reach a
4 conclusion that made a direct link between the
5 psychiatric patients and rectal prolapse because they
6 had another contributing factor which was that the
7 patients studied had pelvic floor weaknesses due to
8 previous pelvic floor surgery?

9 A That's in elderly patients. The group that they
10 studied were younger. The actual median age was 23.

11 Q But the conclusion -- I'm reading from the
12 conclusion of the study that you provided. So let me
13 know -- I understand what you're saying, that it was
14 the methods were used with adults younger than 30. But
15 the conclusions don't say that that's limited to
16 patients who were not listed in the study. It says --
17 and I'm asking for correction -- that this was about
18 whether constipation in psychiatric patients and
19 possible pelvic floor weaknesses with previous pelvic
20 surgery may be contributing factors?

21 A All of those are, yes, ma'am.

22 Q But that was the conclusion of the study you were
23 citing a moment ago?

24 A Right.

25 Q And in reviewing the records for the victim in

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1 this case, did she have pelvic floor surgery?

2 A I do not know that.

3 Q In the records that you reviewed, did it say that
4 this victim had pelvic floor surgery?

5 A I did not see that.

6 Q How long do you have to be taking some of these
7 medications that you listed before you would have --
8 you would run the risk of having constipation that was
9 so chronic and so long-term at that it would cause
10 rectal prolapse?

11 A I don't have that answer.

12 Q Is that because you don't know the answer?

13 A Every person is different, so I don't know the
14 answer to that.

15 Q But you have been speaking in general terms about
16 your experience in this area, so do you have any
17 knowledge as to how long you would need to be on this
18 medication before it led to constipation which led to
19 rectal prolapse?

20 A I don't have that information.

21 Q Okay. Do you know how long someone would have to
22 be purging or taking diuretics in order for that to
23 contribute to them having a rectal prolapse?

24 A A time period?

25 Q Yes.

1 A I do not.

2 Q And earlier you said when asked about the chronic
3 diarrhea, what you can get from the chronic diarrhea in
4 the records is that that could lead to dehydration?

5 A It could, yes, ma'am.

6 Q And that dehydration could be a cause of
7 constipation?

8 A It could be.

9 Q And did you physically see the victim in this
10 case? Have you ever physically looked at her rectum?

11 A No, ma'am.

12 Q And have you ever done the qualitative, as
13 Dr. Lund kind of put it bluntly, finger-in-the-bum test
14 to the victim?

15 A No, I have not.

16 Q Have you ever physically seen the victim in person
17 at all?

18 A No, ma'am.

19 Q And for the patients that you have, I think you
20 said the three, three to five who you diagnosed with
21 rectal prolapse, did you see them in person?

22 A Yes.

23 Q And did you conduct a physical examination on them
24 before diagnosing them with rectal prolapse?

25 A Yes.

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1 Q And so seeing them in person and conducting a
2 physical inspection of the patient was an important
3 part for you to be able to diagnose the rectal
4 prolapse?

5 A Yes, ma'am.

6 Q And you would agree that along with medical
7 history, a physical examination is necessary in order
8 to identify the causes that could have led to that
9 rectal prolapse?

10 A Yes.

11 Q And what did you have that you reviewed that let
12 you know the victim's description of the forcible
13 penetration that she claimed to suffer?

14 A I have not seen that part of the record.

15 Q So when you reviewed this to determine what could
16 have led to the rectal prolapse, you had no information
17 before you that the victim had said that she had been a
18 victim of forcible anal penetration over and over again
19 in the months leading up to that diagnosis?

20 A Actually, the information that I looked over was
21 mostly medical with the medications that she was
22 taking.

23 Q So you did not have the same information before
24 you that Dr. Payne had before him when he determined
25 what he thought caused this victim's rectal prolapse?

1 A If you've asked me, I went through the records,
2 but I did not see that part of the medical history.

3 Q But you agree -- so you agree that you did not
4 have the same information before you to reach your
5 conclusion that Dr. Payne did?

6 A I can't answer that question. I don't know.

7 Q What are the -- on the psychotropic medications
8 that you listed out, what are the chances that a
9 patient will become dehydrated, is it 100 percent of
10 patients will become dehydrated to the point where they
11 have constipation? Do you have all of your patients
12 who are on that kind of medication become constipated?

13 A Actually, these medication don't cause
14 dehydration.

15 Q Okay. What is it -- how does -- what is the link
16 between the medication and the constipation?

17 A They slow the motility of the bowel.

18 Q Okay. And so slowing the motility of the bowel,
19 does that happen to such an extent that it causes
20 chronic constipation in every person who takes these
21 medicines?

22 A No, ma'am.

23 Q Okay. So it could be possible that you could be
24 taking these medications and not suffer such slowing of
25 the bowel as to have chronic constipation?

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1 A That is true.

2 Q If someone is suffering -- is there a difference
3 between regular constipation and chronic constipation
4 in terms of what causes rectal prolapse? Putting it
5 more clearly, is rectal prolapse only going to be the
6 result of chronic long-term constipation?

7 A It could --

8 Q Even when we're talking about constipation being
9 one of the causes, understanding that there are other
10 causes.

11 A Yes.

12 Q So it has to be chronic and long term?

13 A It would be long-term constipation, yes.

14 Q So the rectal prolapse can also be caused by a
15 foreign object being inserted forcibly into the anal
16 cavity?

17 A Yes, ma'am.

18 Q Would you expect someone with -- what would you
19 expect to see with someone who has chronic
20 constipation?

21 A Abdominal pain.

22 Q Okay.

23 A Less than one stool a week.

24 Q Okay.

25 A And those would be the symptoms.

1 Q Okay. And did you see anything in the medical
2 records that told you the number of stools this victim
3 was passing in a week in the time -- in the six months
4 leading up to her surgery?

5 A I did not see that.

6 Q So you had no information on stool counts?

7 A No, ma'am.

8 Q And how many references did you see from the
9 victim claiming abdominal pain?

10 A I had not seen that record. I had not seen that
11 part of the record.

12 Q So in the records that you reviewed, you did not
13 see any claims by the victim that she suffered from
14 abdominal pain?

15 A I have not seen that in the record.

16 Q Okay. So no abdominal pain and no stool count for
17 this victim?

18 A I did not see that in the record. I didn't review
19 the entire record, though.

20 Q Is it fair to say that your testimony here today
21 is basically that because she was taking some
22 psychotropic medications that maybe she was constipated
23 and maybe that led to the rectal prolapse?

24 A Well, her records stated constipation. And with
25 these medications combined with that on the record,

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1 yes, I mean, that could be a possibility.

2 Q But the records in front of you don't have stool
3 counts, don't have references to abdominal pain, so
4 you're only counting that there is a reference to
5 constipation and that she was on some of these
6 psychotropic medications that maybe could cause
7 constipation?

8 A Yes.

9 MS. VALENZUELA: Nothing further from the State.

10 THE COURT: Any redirect?

11 MR. WILKES: Just a couple questions.

12 REDIRECT EXAMINATION

13 BY MR. WILKES:

14 Q There's no way you can diagnose the actual cause
15 of prolapse if you didn't examine her, correct?

16 A That's true.

17 Q But from the record, from what you see, can you
18 say that the drugs, the history of constipation,
19 laxatives, suppositories, the bulimia and anorexia,
20 those things singularly and more importantly combined,
21 would they be a significant potential causality of
22 prolapse?

23 A Of constipation and potential prolapse.

24 Q Constipation and thus prolapse?

25 A Yes.

1 Q Thank you.

2 MR. WILKES: No further questions.

3 THE COURT: Anything further from this witness?

4 MS. VALENZUELA: No, Your Honor.

5 THE COURT: Any objection to this witness being
6 excused?

7 MR. WILKES: No, Your Honor.

8 THE COURT: Thank you, Doctor. You are excused.

9 MR. WILKES: We'll call Gaye Allen-Cook.

10 GAYE ALLEN-COOK,

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 THE CLERK: Please have a seat around on the
13 witness stand. If you would, please state your full
14 name and spell your last name for the record.

15 THE WITNESS: Gaye Allen-Cook, A-l-l-e-n, hyphen,
16 C-o-o-k.

17 DIRECT EXAMINATION

18 BY MR. WILKES:

19 Q Ms. Cook, tell me your educational background,
20 please.

21 A I have a master's degree in clinical counseling.
22 I have postgraduate studies in trauma and abuse.
23 Licensed in the state of South Carolina to practice
24 therapy, previously licensed in the state of North
25 Carolina to practice therapy.

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1 Q And tell me your clinical experience.

2 A When I first graduated, I worked in a mental
3 health center in Charlotte, North Carolina. I taught a
4 couple classes adjunct at a university there. And then
5 from there, I went to a private practice in Charlotte,
6 North Carolina. And then I left there and came back
7 home to Florence, South Carolina and practiced at the
8 Child Advocacy Center in Florence for about three and a
9 half years. Then I left there and went into private
10 practice which I continue to be in.

11 Q And over the course of your clinical experience,
12 have you had occasion to work with psychiatric
13 patients?

14 A I have.

15 Q And in doing so, are you familiar with the DSM?

16 A I am.

17 Q Being the Diagnostic and Statistical Manual. Can
18 you tell me what the DSM, now DSM --

19 A 5.

20 Q 5? Tell me what that is.

21 A It's basically the go-to book for us clinicians
22 when we are diagnosing psychological, psychiatric
23 issues in people of all ages.

24 Q Now, have you encountered individuals in your
25 clinical work that suffer from borderline personality

1 traits or borderline personality disorders?

2 A I have.

3 MR. WILKES: Your Honor, I would offer Ms. Cook as
4 an expert in the area of her clinical practice, in
5 particular abuse victims and the -- I guess the
6 treatment of abuse victims in therapy.

7 Let me ask a question.

8 Q Do you do therapy? Is that the right terminology,
9 therapy?

10 A Yes, I do.

11 Q Okay. Therapy with abuse victims?

12 A I do, yes, sir, and their families.

13 Q And do you do -- outside of abuse victims, do you
14 do a general practice?

15 A I do.

16 MR. WILKES: Okay. We would offer her as an
17 expert in therapy and in regards to diagnosis of
18 borderline personality disorders.

19 THE COURT: Any voir dire?

20 MS. VALENZUELA: May I have just a moment, Your
21 Honor?

22 THE COURT: Yes.

23 MS. VALENZUELA: I would like to do some voir
24 dire, Your Honor.

25 VOIR DIRE EXAMINATION

Gaye Allen-Cook - Voir Dire
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1 BY MS. VALENZUELA:

2 Q Ms. Allen-Cook, have you testified as an expert
3 before?

4 A I have.

5 Q And what was the subject matter that you were
6 qualified as an expert in your previous --

7 A It varies. I have been qualified as an expert in
8 diagnostics and treatment of all maltreatment
9 modalities of children. I have been qualified as an
10 expert in just basic clinical diagnoses, clinical
11 treatment, been qualified as an expert in the family
12 dynamics in therapy. I've been qualified in civil
13 court matters to look at ramifications of abuse in
14 children and families. I've been qualified in criminal
15 court through the State and defense in diagnoses and
16 treatment of abuse and various diagnoses that surround
17 that.

18 Q Have you diagnosed and treated specifically on
19 borderline personality disorder?

20 A I have.

21 MS. VALENZUELA: No further questions, and we have
22 no objection, Your Honor.

23 THE COURT: All right.

24 Mr. Wilkes, state -- she's qualified as an expert
25 in therapy, and I think you said treatment of abuse

1 victims?

2 MR. WILKES: Well, it would be diagnosis and
3 treatment of -- I guess much broader than that. We
4 don't have to limit it to abuse victims, but diagnosis
5 and treatment of individuals with psychological
6 disorders.

7 THE COURT: Okay. That's without objection, she
8 will be admitted.

9 DIRECT EXAMINATION (Resumed)

10 BY MR. WILKES:

11 Q Do you have the DSM-5 with you?

12 A I do.

13 Q And you may -- is the DSM a professional reference
14 for the diagnosis of psychological disorders?

15 A -- It's the Diagnostic and Statistical Manual of
16 Mental Disorders.

17 Q That's something you would rely on frequently in
18 your practice?

19 A It stays on my desk.

20 Q Okay. Now, can you tell me -- you've heard the
21 testimony today so I assume you're familiar with the
22 background of the case?

23 A Yes, sir.

24 Q Okay. Can you tell me the significant portions or
25 the common traits of a borderline personality disorder

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1 that are significant in the situation that we've
2 discussed today?

3 A Based on what I've reviewed and based on what I've
4 heard today, I would say there are several, one being
5 the individual's extreme reactivity to interpersonal
6 stress, meaning stressors that are going on inside of
7 that individual, anger. And then typically these
8 patients have a real sense of either real or imagined
9 abandonment, and they also do not respond well to
10 change, meaning, you know, in where they're living and
11 where they're going to school, in who is residing in
12 their home.

13 Q Would -- from your clinical practice, your
14 experience with individuals -- well, first tell me,
15 borderline personality disorder, which axis does that
16 fall on?

17 A Falls on number I.

18 Q Is borderline personality disorder, that's a
19 personality trait, correct?

20 A Yes, sir.

21 Q Is that invasive throughout in personality?

22 A Yes, sir.

23 Q That's not necessarily something that can be
24 treated with medication, is it? You can't -- can you
25 fix it?

1 A No, sir, you can't fix it.

2 Q From your clinical practice with borderline
3 patients and your education, what is the general
4 reliability of things said by a borderline patient?

5 Are they higher, lower, the same as a general
6 population?

7 A No. People who are diagnosed with borderline
8 personality disorder have a much higher prevalence of
9 not telling the truth, of embellishing things, even
10 often minor things. And oftentimes that comes from
11 their lack of empathy towards other people and their
12 lack of regard for what their untruth may or may not do
13 to themselves or other people.

14 Q Is the lack of empathy also, is that correct if I
15 say is it narcissistic?

16 A Narcissism is a personality disorder, yes, sir.

17 Q And do borderline personality disorder patients,
18 without that ability or the decreased ability for
19 empathy, does that affect what we would think of as
20 their conscience?

21 A Yes.

22 Q Would it be correct to say that a borderline
23 personality disorder patient can at times be wickedly
24 vindictive?

25 A Yes.

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1 Q More so than the general population?

2 A That's correct.

3 Q In this case is -- would it -- would a pending
4 custody issue be a factor that might challenge a
5 borderline personality individual?

6 A Yes.

7 Q Would it be possible that that diagnosis would
8 contribute to a reaction?

9 A Yes.

10 Q Based on your experience, is the believability in
11 general of a borderline personality disorder patient
12 significantly less, more than what you would expect
13 with a nonborderline person?

14 A It's less.

15 Q And is it significantly less?

16 A I'd say it's significantly less.

17 MR. WILKES: No further questions, Your Honor.

18 THE COURT: Ms. Valenzuela.

19 MS. VALENZUELA: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. VALENZUELA:

22 Q Ms. Cook, do you prefer Ms. Allen-Cook or
23 Ms. Cook?

24 A Allen-Cook, please.

25 Q Ms. Allen-Cook, did you have an opportunity to

1 meet the victim in this case?

2 A I did not.

3 Q And when you diagnose patients in your practice,
4 do you, in diagnosing them, do you meet with them in
5 person?

6 A Yes, ma'am. I mean, my license precludes me from
7 diagnosing someone that I have not treated.

8 Q And that would include the victim because you have
9 never treated the victim?

10 A That's correct. And I'm not diagnosing her,
11 obviously.

12 Q And in your practice, how many of your -- how many
13 people have you diagnosed with personality disorder?

14 A I would say, just a random estimate, maybe around
15 30.

16 Q And how many have you treated?

17 A Random estimate again, probably around 50.

18 Q And of those, how many of them were children, so
19 people under the age of 18 who had been diagnosed?

20 A I would say a very small amount of those were
21 diagnosed as children. Most of the ones that I
22 inherited from other practitioners or maybe who had
23 moved from different geographical locations and were
24 now seeking treatment from me, they had been diagnosed
25 post 18.

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1 Q So when you say "small amount," are we talking,
2 out of the 50 you've treated, two or three or ten?

3 A I mean, I'd say no more than ten, but that is,
4 once again, a rough estimate.

5 Q And of those, you know, the estimate that you're
6 giving, how many of those did you diagnose?

7 A I can recall two just off the top of my head in my
8 memory bank today that I've diagnosed prior to 18.

9 Q So of all the people -- of the 30 you have
10 diagnosed, only two of them were under the age of 18
11 when you did that?

12 A That I can recall, yes, ma'am.

13 Q And in your training, are you trained that you're
14 supposed to wait to diagnose your patients until after
15 they're over the age of 18 in order to allow for
16 hormonal changes and other things that contributed to
17 people in their teenage years?

18 A Typically, you do not diagnose a personality
19 disorder in a child or a young adolescent. There are
20 various reasons for that. One of those being what
21 you've just said, hormones. Another one of those is
22 when children are young, their personalities are still
23 being developed, and so we don't want to go and
24 diagnose them with some permanent diagnosis and label
25 them, I guess, for lack of a better word, whenever that

1 may not be exactly that's going on. However, when we
2 look at the DSM-5, it does allow us to diagnose a
3 patient under the age of 18 with borderline personality
4 disorder if they have had characteristics of that for a
5 year or more.

6 Q But it's rare to do so, correct?

7 A It is. It is rare. I would say that.

8 Q Is it more common that a review of medical records
9 would find a listing of qualities that might indicate
10 that this person, once they turn 18, might develop a
11 personality disorder but not go ahead and diagnose that
12 child at that time?

13 A I would say it's common to look at
14 characteristics. And we also, or at least in my
15 practice, one of the things that I do is I look at
16 genetic history. I'm doing, you know, histograms and
17 genograms of family members to see what diagnoses they
18 may have because, you know, much of that can be
19 genetic. So if you have a parent or a grandparent that
20 has borderline personality disorder or even
21 characteristics, radar are going up in my head to say
22 wait a minute. The prevalence of this may be higher
23 for this child because they have a genetic makeup that
24 may constitute that.

25 Q And the majority of your practice -- or is it fair

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1 to say the majority of your practice is treating
2 victims of sexual abuse?

3 A When my career first started, that was all I did.
4 I would tell you for the first seven years of my
5 career, that's all I did. For the past about eight,
6 nine years of my career, I've still kept quite a bit of
7 that population in my practice. I would tell you
8 currently, as of today, probably 40 percent of my
9 practice is made up currently of people who have been
10 abused or maltreated in some manner.

11 Q And so looking at the victims of sexual abuse and
12 focusing on children of sexual abuse who are still
13 living with their perpetrators, do you see common
14 incidents of child victims of sexual abuse lying?

15 A I mean, yes, they can lie. I mean, all children
16 lie. All human beings lie, obviously. But, yes,
17 sometimes you do see children who have been sexually
18 abused have a high prevalence of lying.

19 Q And tell me, how would you describe somebody with
20 a -- what's the term that we're using, the borderline
21 personality disorder?

22 A Yes, ma'am.

23 Q What are the -- what are you looking for to
24 diagnose them?

25 A I guess the big things that we're looking for is a

1 lack of empathy. A lot of social inadequacy, for lack
2 of a better word, meaning, you know, do they have --
3 are they stealing, are they manipulating, are they
4 making up stories that aren't appropriate, are they
5 having trouble in the home with defiance or opposition.
6 Oftentimes people with borderline personality disorder
7 have a real sense of fear of abandonment. It either
8 may be real or it may just be fantastical that they
9 made up in their head.

10 And so when I am looking at the possibilities of
11 diagnosing someone with borderline personality
12 disorder, I want to see as far back as I can see as far
13 as their history and how they have behaved in their
14 home, how they have behaved in society, how they have
15 behaved in school, how they have behaved in the
16 community.

17 Q So stealing and making up stories are things that
18 you see both in people who you're looking to diagnose
19 for borderline personality disorder but also in
20 children victims of sexual assault?

21 A Children who have been sexually abused can exhibit
22 those, yes, ma'am. Not all of them do.

23 Q And children of sexual assault also deal with fear
24 of abandonment?

25 A They can.

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1 Q In fact, fear of abandonment contributes to the
2 reason why a child sexual assault victim who is living
3 with their perpetrator might delay in telling anybody
4 of the sexual abuse?

5 A There is a possibility of that, yes, ma'am.

6 Q And, in fact, some victims of sexual abuse, when
7 they do finally try to -- is it true that victims of
8 sexual assault can sometimes do kind of like a safe
9 release of their story so that they don't come out and
10 say everything that happened to them, but they tell a
11 little bit of it to see what the response is going to
12 be from the adults that they're disclosing to?

13 A That's typical of children in disclosure, yes,
14 ma'am.

15 Q And is it also typical with children who suffer
16 from sexual assault to take back their story or change
17 their story?

18 A We call that recantation. That does happen in
19 some -- in some cases. Not in all.

20 Q And when you're talking about lack of empathy,
21 would you, if you had someone who was concerned about
22 siblings, especially younger siblings, would that
23 indicate a lack of empathy or an appropriate showing of
24 empathy?

25 A To me, we would have to put that in context

1 because what happens is with empathy sometimes, someone
2 who is a true borderline can show empathy when it
3 benefits them, when it makes them in a better place,
4 somewhat of a manipulation tactic. But true
5 borderlines do not have a real sense of empathy. They
6 are just able to use that as a manipulation tactic.

7 Q Do victims of sexual assault, children of sexual
8 assault, sometimes respond with anger, an inappropriate
9 level of anger?

10 A They can.

11 Q Do children of sexual assault sometimes show
12 extreme reactivity to stress?

13 A They can.

14 Q And then I think we've already covered where they
15 can feel real or imagined abandonment, correct?

16 A Typically, with children who have been sexually
17 abused, it's usually more of a real sense of
18 abandonment versus an imagined one.

19 Q And then children of sexual assault would also not
20 respond well to change?

21 A It would depend. Some do, some don't.

22 Q Would you say that children in general don't
23 respond well to change?

24 A No, I wouldn't say that. I think there are many
25 children who don't have any problem with change. There

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1 are some children who do. There are lots who don't.

2 Q Do children -- are children usually seen as being
3 more narcissistic than adults?

4 A They can be.

5 MS. VALENZUELA: No further questions.

6 THE COURT: Any redirect?

7 MR. WILKES: A few, Judge. Thank you.

8 REDIRECT EXAMINATION

9 BY MR. WILKES:

10 Q Is lying, stealing, rebellious behavior, lying
11 about a death of a classmate, flirtatious, tendency to
12 seek retaliation, "steals anything she can get her
13 hands on," impulsive and attention seeking, suspected
14 making a copycat allegation during a group therapy,
15 inappropriate during groups, attention seeking,
16 claiming she has multiple personalities any time she
17 does something wrong, going to get even with her
18 roommate when she's asleep, is that more consistent
19 with a borderline personality disorder or a sexual
20 abuse victim?

21 A Borderline personality disorder.

22 Q There's no question that she's been diagnosed
23 borderline personality disorder?

24 A Based on what I've read, I would say she's been --
25 or let me say based on what I've reviewed in her file,

1 I would say that's been diagnosed.

2 Q And that's a diagnosis and I can -- I believe I
3 can probably find it in here. I think Dr. Martin --

4 A Yes, sir. That's correct.

5 Q And so if Dr. DeFelice testified that you cannot
6 diagnose someone with borderline personality disorder
7 if they're under the age of 18, is that inconsistent
8 with the Diagnostic and Statistical Manual?

9 A Yes.

10 Q And so for this diagnosis of the prosecutrix at
11 age -- if it's 16, she would have exhibited
12 consistently the behavior for an extended period of
13 time, at least a year?

14 A The diagnostic manual that I have in front of me
15 will not allow us to diagnose someone borderline
16 personality disorder who's under the age of 18 if they
17 have not had characteristics of that for a year or
18 more.

19 Q Okay. I didn't ask you to diagnose her. I think
20 my question was, earlier when I said that, she has been
21 diagnosed?

22 A I did not diagnose her. From what I read,
23 Dr. Martin diagnosed her.

24 Q Right. And you could not because you did not
25 interview her?

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1 A Correct. No, sir.

2 MR. WILKES: No further questions. Thank you,
3 Your Honor.

4 MS. VALENZUELA: Your Honor may I do a brief
5 redirect?

6 THE COURT: Yes.

7 RECROSS-EXAMINATION

8 BY MS. VALENZUELA:

9 Q So just to clarify, you're not here diagnosing,
10 but never having seen or interacted with the victim,
11 you're going to say that -- let me back up.

12 If you had a client come in to you, a patient come
13 in to you, and you only saw their records and you
14 hadn't met with them and you needed to diagnose them,
15 would you feel comfortable labeling them as either
16 having a personality disorder or being the victim of
17 sexual assault based purely on looking at their
18 paperwork before you met them in person?

19 A No. But I have not given any diagnosis.

20 Q Thank you.

21 MS. VALENZUELA: No further questions.

22 THE COURT: All right. Anything further from this
23 witness?

24 MR. WILKES: No, sir.

25 THE COURT: Any objection to this witness being

1 excused?

2 MR. WILKES: I object. She's my ride home. I
3 rode with the doctor, but --

4 THE WITNESS: Oh, I didn't know.

5 THE COURT: I'll let y'all work that out.

6 Call your next witness -- let's take about a
7 ten-minute break.

8 (WHEREUPON, a recess was taken from 3:37 p.m.
9 to 3:45 p.m.)

10 THE COURT: Call your next witness.

11 MR. WILKES: We'll call Max Sipes to the stand.

12 MAXWELL EUGENE SIPES,

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 THE CLERK: Please have a seat around on the
15 witness stand. Once you're seated, please state your
16 full name for the record.

17 THE WITNESS: Maxwell Eugene Sipes.

18 DIRECT EXAMINATION

19 BY MR. WILKES:

20 Q Mr. Sipes, did Mr. Stoddard represent you in your
21 criminal trial?

22 A Yes, sir.

23 Q And how long did he represent you? Do you recall
24 specifically when -- was he hired or appointed?

25 A He was hired.

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1 Q And do you recall when he was retained in your
2 case?

3 A I believe the date I have is 9/7/2004.

4 Q And what was the date of your trial?

5 A March 5, 2007.

6 Q So that's roughly how long?

7 A 30 months.

8 Q Okay. Almost three years -- well, two and a
9 half -- maybe two and a half years. During that time,
10 were you incarcerated or out on bond?

11 A Out on bond.

12 Q Did you have opportunity to meet with
13 Mr. Stoddard?

14 A Yes, sir.

15 Q Did you meet with him early on?

16 A Yes, sir.

17 Q Do you recall if you ever gave Mr. Stoddard -- I'm
18 not going to -- for the record, I'm not going to refer
19 to her name. I'm going to call her your daughter,
20 stepdaughter -- your stepdaughter's medical psychiatric
21 history?

22 A Yes, I did.

23 Q And do you remember when you would have done that?

24 A Early on. He asked for a list of the locations.

25 Q And when you say "early on," can you give me

1 roughly how far into the case was that?

2 A I'd say right after he was hired.

3 Q Okay. So at the beginning of his representation,
4 you described her medical history?

5 A Uh-huh.

6 Q And psychological, whatever, treatments?

7 A Yes.

8 Q Did that include her inpatient treatment at DJJ
9 and AnMed and Carolina Behavioral Health?

10 A And Carolina Children's home and the Scottish Rite
11 Hospital in Atlanta.

12 Q And did you describe to him what you believed her
13 mental state was?

14 A Yes.

15 Q At least as much as you had been told
16 by whoever --

17 A Well, what I knew, yes.

18 Q And did you ever ask him to obtain records from
19 those facilities?

20 A I did.

21 Q Now, did you discuss those medical records on more
22 than one occasion?

23 A I did.

24 Q And how many occasions might that be?

25 A I'd say more than three.

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1 Q Okay. And did you, prior to the trial, ever, as
2 far as you know, did you ever see those Carolina
3 Behavioral Health records, AnMed records, or the DJJ
4 records?

5 A The only records that I saw that you mentioned,
6 there was four pages that came from the Rule 5
7 discovery motion of discovery.

8 Q Other than the discovery material --

9 A Yes. That's it.

10 Q Okay. All right. Now, tell me, these charges
11 were taken when? Do you remember the date or
12 circumstances when you learned of the charges?

13 A The day that I was in a custody hearing,
14 December 2, 2003, to try to get custody of my children
15 because --

16 Q Why is that?

17 A Because they were living with a convicted child
18 molester.

19 Q But why -- where were you living? Where was your
20 ex-wife living?

21 A I was living in Central, South Carolina, and she
22 was living in Cumming, Georgia in the home of this
23 child molester.

24 Q And did you file an action for custody?

25 A Yes, I did.

1 Q And tell me again, when did you learn of the
2 charges? You said you were in court?

3 A Yes.

4 Q In family court?

5 A Yeah. The allegation. The allegation come out in
6 the courtroom.

7 Q And did that -- what effect did that have on the
8 custody battle?

9 A Well, she retained temporary custody and I got
10 nothing.

11 Q Okay. And after that, what happened with custody
12 after that?

13 A The allegations -- I was arrested September 2004
14 or as soon as the allegation.

15 Q Okay.

16 MR. WILKES: Nothing further from Mr. Sipes.

17 CROSS-EXAMINATION

18 BY MS. VALENZUELA:

19 Q Mr. Sipes, were you offered a plea agreement in
20 this case?

21 MR. WILKES: Your Honor, I am going to object to
22 questions outside the scope of my direct. I don't know
23 that that's relevant.

24 THE COURT: It goes toward the quality of the
25 representation. I'll allow the question. Overruled.

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1 MS. VALENZUELA: Thank you, Your Honor.

2 THE WITNESS: He had called me up a couple times
3 to plead guilty, and I didn't -- I didn't plead guilty.

4 BY MS. VALENZUELA:

5 Q Do you remember what your offer was?

6 A I think one was five years, and there was one less
7 than that maybe.

8 Q So no more than --

9 A I didn't see anything in writing. It just -- he
10 was just telling me over the phone.

11 Q But no more than five years?

12 A Yes.

13 Q And it was your decision not to plead?

14 A Yes.

15 Q And you testified at your trial?

16 A Yes, ma'am.

17 Q And you were able -- you were asked about the
18 details of your -- of the victim's medical history that
19 you were aware of?

20 A Uh-huh.

21 Q And you were able to tell the jury about that?

22 A Yes.

23 Q And you were able to tell the jury about your
24 understanding of your -- of the victim's mental health?

25 A Yes.

1 Q And at your trial, you were able or through your
2 defense attorney were able to present how your -- you
3 had several people testify on your behalf that the
4 mother of the victim was a liar and had lied in the
5 past?

6 A Yes.

7 Q In fact, your defense attorney had your mother
8 testify as to how the victim's mother had known about
9 an allegation that was eerily similar to the one made
10 by the victim in this case?

11 A Yes.

12 Q And that came out before the jury?

13 A Yes.

14 MS. VALENZUELA: No further questions.

15 THE COURT: Any redirect?

16 REDIRECT EXAMINATION

17 BY MR. WILKES:

18 Q In considering the plea offer of five years, did
19 Mr. Stoddard tell you that there was a very high
20 likelihood that you could be convicted?

21 A Yes.

22 Q Why would you not plead guilty to five years in
23 that case?

24 A Because I wasn't guilty, and I wanted to clear my
25 name in the jury trial.

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1 MR. WILKES: No further questions.

2 THE COURT: Anything further from this witness?

3 MS. VALENZUELA: No, Your Honor.

4 MR. WILKES: No, Your Honor.

5 THE COURT: Thank you, Mr. Sipes. You can step
6 down.

7 THE WITNESS: Thank you.

8 MR. WILKES: That would be the applicant's case,
9 Your Honor.

10 THE COURT: Applicant has rested.

11 Does the State have anything they wish to present?

12 MS. VALENZUELA: No, Your Honor.

13 THE COURT: Okay. I will give each attorney
14 opportunity to make a summation.

15 Ms. Valenzuela, you will go first, and I'll give
16 you the last word, Mr. Wilkes.

17 MR. WILKES: Thank you.

18 MS. VALENZUELA: Your Honor, the three allegations
19 before the court are timely -- failure to timely obtain
20 the medical records in support of defense theory and
21 cross the State's witnesses, and they were all combined
22 into one.

23 As you know, the plaintiff here, the petitioner in
24 this case, the applicant, carries the burden of proving
25 to you that, one, that there was ineffective assistance

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1 of counsel and, two -- and it's important -- that there
2 was prejudice caused by ineffective assistance of
3 counsel.

4 You had testimony before you today that there may
5 or may not because it's unclear what the medical
6 records were that were available to both of the expert
7 witnesses. At least one of the expert witnesses who
8 was one of the last ones to testify for the defense
9 brought most of the records with her and was able to
10 address this. So there does not seem to be ineffective
11 assistance of counsel because the records were received
12 and, additionally, because counsel testified to you
13 that this was a strategic decision. He felt there were
14 things in the medical records that could go in every
15 single different direction, and he wanted to focus on
16 highlighting the things out of those records in
17 different ways, in ways that would have helped his
18 client and not hurt his client.

19 The applicant argues that those medical records
20 would have shown constipation. There was in the record
21 in trial, it was pointed out that she had suffered from
22 constipation. The history that someone takes whenever
23 they check into a -- to give a doctor medical history
24 usually predates and says this is my full medical
25 history. This isn't necessarily my, you know, the case

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1 as it is. Applicant's counsel testified that he
2 thought that that's what the jury was getting when the
3 prosecutor crossed his witness and said, "Well, isn't
4 it true that that constipation record is from a date
5 after the surgery?" He still felt like no, the point
6 was getting across.

7 The fact that she had issues lying or she had
8 issues stealing or that she had issues with
9 psychotropic medications all came out during the trial.
10 In fact, when the first -- the State's expert witnesses
11 himself, Dr. Payne, testified at length about how there
12 were three different causes that he saw rectal
13 prolapse. He saw it in women over the age of 50, he
14 saw it in young children, and he saw it in teenage
15 people with mental problems. And he linked and
16 explained how that works, just like the psychotropic
17 medication causing constipation, and then went through
18 at length for different reasons.

19 There was nothing that was presented in the
20 records today that didn't come out in some other way
21 throughout the trial. Now, applicant argues that the
22 constipation should have been made a bigger deal of and
23 should have been spent more time on, but that truly
24 does, in the heat of the moment when you're going to
25 trial, you get to make decisions on strategy. And the

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1 strategy seemed to say why don't we highlight the fact
2 that the State's witness didn't have all of these
3 records and was really quick to judge so that we can
4 really try to slam the fact that he might have made a
5 decision that this was forcible rape when it wasn't
6 forcible rape, instead of presenting things that would
7 have gone to the jury showing that, for example, she
8 had anal bleeding right around the time. She testified
9 to the jury that she had anal bleeding consistent with
10 being anally raped right around that same time frame,
11 right before her mother ended up having her twins,
12 which is one of the records before the court.

13 So there's -- the evidence before you could go
14 different ways. It comes down to a strategy decision,
15 and case law says that strategy decisions have to be
16 respected for trial court. Especially in light of
17 analyzing whether there was ineffective assistance of
18 counsel. But, further, there's no prejudice in this
19 case because of the timely -- or because of the medical
20 records issues.

21 Additionally, applicant has argued that there was
22 a failure to present borderline personality disorder,
23 and the witness in our case testified -- counsel
24 testified in this case that he thought that it would
25 have -- that the State's expert witness would have been

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1 able to defeat that. And, in fact, she did. She was
2 asked specifically about whether a diagnosis had been
3 done for the victim, and she stated that that wasn't a
4 diagnosis and what her reasons were. And so it might
5 have ended up being just a battle of the experts in
6 terms of whether she had bipolar or whether she had the
7 personality disorder that they want.

8 However, all the descriptors that led to the
9 personality disorder, had she had incidents of lying,
10 had she had incidents of extreme anger, had she had
11 incidents where she was responding to stress
12 inappropriately, did she indicate that she felt
13 abandoned at times by the applicant in this case, had
14 she had problems with truancy and with getting in
15 trouble with the law? Yes. And all of that came out
16 through various different ways so that even without the
17 bipolar personality disorder being focused on with one
18 additional expert, the jury could still get all of the
19 points that the applicant's expert witness tried to
20 make today in terms of why those factors would go to a
21 credibility issue with the victim. Those were all
22 present in the record at the time and so there was
23 nothing ineffective about it, and there was nothing
24 prejudicial -- there was no prejudice there.

25 And as to the final point of failing to preserve

Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

1 the objection at trial due to the Fifth Amendment
2 issues, counsel testified that he, in all candor to the
3 court, could not remember if it was an intentional
4 decision at that point or if he just forgot.

5 However, he did testify that in other cases he had
6 made a strategic decision not to have a curative
7 instruction charged because it runs the risk of
8 highlighting an issue that you don't want to highlight.
9 The facts in this case, as you can see from the
10 appellate record, are that there is a very brief
11 statement that's buried in testimony dealing with
12 back-and-forth child support where something is made
13 where he spotted the issue, had the jury leave, and
14 then after they discussed it, there was still a
15 question of ~~did that even implicate it, much less to~~
16 the jury did it indicate something. So if the jury had
17 come back and had the judge said, "I'm going to charge
18 you on why you shouldn't use the fact that the
19 defendant, the applicant now, doesn't have to testify
20 himself and doesn't have to cooperate with law
21 enforcement," all it could have done is highlight a
22 statement that the jury might have completely missed.
23 And it's just like telling somebody, "Don't look at the
24 elephant in the room. Don't look at the elephant in
25 the room." They're going to end up thinking or looking

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1 at it the entire time. So it's certainly a strategic
2 decision that should be respected. Regardless of the
3 fact of whether counsel can remember whether it was an
4 intentional strategic decision or not, he knows that
5 he's used that strategy in the past and there was no --
6 and we argue there is no prejudice for that same
7 reason, and we would ask you to deny the application.

8 THE COURT: Thank you, Ms. Valenzuela.

9 Mr. Wilkes.

10 MR. WILKES: Thank you, Your Honor.

11 The rule is the jury is presumed to follow the
12 instructions of the court. There's no harm in asking
13 the jury to disregard the statement in its entirety and
14 give it no weight. It doesn't highlight it. It takes
15 it out of the jury's consideration. And the rule that
16 says a jury is presumed to follow those instructions I
17 think is the law, and I think we can rely on it. It
18 would be foolish to say that we're going to highlight
19 something when, in fact, the court is going to say,
20 "Ladies and gentlemen of the jury, you may not consider
21 it." And so it had been brought up by the objection
22 and a motion for mistrial, and there was an offer for a
23 curative instruction. It never came. What the jury
24 could infer from that is they're certainly allowed to
25 consider it. And very well may have. And, in fact, it

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1 being a Fifth Amendment right, it is one thing that
2 must be protected above all others. So there's no
3 prejudice that could possibly come from giving the
4 curative instruction that's already been offered by the
5 court to the jury.

6 The essence of the State's case was to put their
7 experts up and say this is what caused it. Sodomy
8 caused the rectal prolapse. And Dr. Payne's testimony
9 is very clear that he essentially ruled out any other
10 cause, and he was not challenged effectively on that.
11 He was not. So the State was able to put that up, say
12 that for all intents and purposes he's ruled out any
13 other potential causality, and then they're able to
14 say, Well, she does lie, but that's consistent with
15 sexual abuse. Yes, she does steal, and that is
16 consistent with sexual abuse, and she does do this.
17 It's consistent with sexual abuse. So they went
18 through all of the symptoms of poor coping with sexual
19 abuse that can occur, but the borderline personality
20 disorder has poor coping mechanisms that have the same
21 symptoms. That's not the point.

22 The point is borderline personality disorder not
23 only has the same symptoms, but it also has a
24 persistent trait that's unconnected to that of a sexual
25 abuse victim which is the pervasive lying, the lack of

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1 a conscience, the vindictiveness, and the way that they
2 can focus on something that is not really accurate in
3 an interpersonal relationship and just be vindictive.
4 And they have no conscience in doing it. And that's
5 the reason that the borderline personality disorder is
6 significant because of that propensity to lie because
7 they're unhinged from a conscience. So if they see a
8 motive, it's nothing to a borderline to lie to get to
9 an end. That's not consistent. There's no testimony
10 that that is consistent with a symptom of the sexual
11 abuse or a trauma from sexual abuse or a coping
12 mechanism from abuse. So there is a difference.

13 Although the symptoms are the same, the point of the
14 borderline personality disorder is that it is that
15 propensity to be untruthful or that lack of conscience.

16 Now, what was very important with Dr. DeFelice,
17 Dr. DeFelice testified that you can't be diagnosed
18 borderline personality, and she completely eviscerated
19 the whole borderline personality and turned everything
20 back into a symptom of sexual abuse. And that's
21 problematic. Because according to the DSM, which is
22 the statistical manual, it indicates that you can
23 diagnose somebody that's under 18 as borderline
24 personality disorder.

25 In this case what Mr. Stoddard unfortunately

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1 didn't have in time to review and to challenge
2 Dr. DeFelice was clear evidence that Dr. Martin had
3 diagnosed her with borderline personality disorder and
4 that it was because of an extended buildup of the
5 borderline personality traits, which is in the record.
6 It starts with antisocial -- adolescent antisocial
7 behavior or disorder, which is in the records that I've
8 submitted, and it builds up from there to borderline
9 personality traits and moves into a diagnosis finally
10 at 16 borderline personality disorder, which is pretty
11 severe to get that at age 16.

12 So what happened and why I introduced the
13 testimony of Ms. Allen-Cook was to show that that was
14 the missing link at the trial was to make, one, the
15 apparent ability to contradict Dr. DeFelice in a very
16 important point, that it can be a diagnosis under the
17 DSM and the effect of that diagnosis and then put that
18 upon the lack of conscience, the vindictiveness, and
19 the general characteristics of borderline personality
20 disorder is generally if they're talking, they're
21 lying. And it doesn't take a lot of motivation for
22 that to happen.

23 So that was really the critical point of the whole
24 borderline personality disorder testimony that
25 Dr. DeFelice just chopped off and was not challenged by

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1 proper cross-examination with what was in those medical
2 records.

3 There is a lot of stuff in the medical records,
4 and Dr. Lund's testimony focused on constipation. He
5 talks about trauma. It's trauma that -- I guess
6 technically trauma causes prolapse, not constipation,
7 not anything. It's trauma. It's what is the perhaps
8 modality of the trauma, or what is the vehicle that
9 causes the trauma. Of course, there's no question
10 that, sodomy, yes, could cause that trauma. But just
11 because they say that does doesn't remove his right to
12 contradict it and the duty of the defense to put the
13 State's case to the proverbial crucible of
14 cross-examination and to show that there is evidence
15 supporting what the defense expert says and disproving
16 what the State's expert says.

17 State expert came in and said, "No, I don't think
18 it's constipation because she doesn't have a history of
19 it." Well, the medical records show, and that's why
20 Dr. Rubel testified, that statement is challengeable
21 based on those medical records. She did have a
22 significant history underneath those psychotropic
23 drugs, and that is what was not challenged with
24 Dr. Payne's testimony. It was just not challenged.
25 There was nothing else for the jury to do. Dr. Payne

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1 said it was sodomy. That's the end of the case.

2 Even if it was just a matter of Max's testimony,
3 "I didn't do it," and her testimony is, "He did it,"
4 then you've got Dr. Payne that says, "Well, it's
5 sodomy. Nothing else proves anything different.
6 There's nothing else to support it," and that is the
7 failure of the defense in the case is taking all of
8 that medical record. And that's just the condensed
9 version. And those are the most important records.
10 There is a lot of records, but those records right
11 there are just chock full of ammunition to
12 cross-examine Dr. Payne and have him have to admit,
13 "Yes, there is a significant history." And even if he
14 doesn't agree, it doesn't matter if he's not going to
15 agree. The point is in a defense is that he's got the
16 right to put up an expert that disagrees with the State
17 and says, "Yes, there is a significant history." So
18 even if it is a battle of experts, as the attorney
19 general says, that's what the case is about. That is
20 what the defense is supposed to do is make it a battle
21 of the experts if they differ on an opinion and support
22 his expert with the ammunition that is clear in the
23 medical record to give the doctor, in particular
24 Dr. Lund, the ability to say, "Yes, here is where the
25 constipation is supported. It's in the medical

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1 records."

2 And, again, I think -- I don't remember the page
3 number, but it was the Solicitor Mindy Hervey's,
4 closing. That's when she felt good and sat down when
5 she said to Dr. Lund, "Well, that document you're
6 talking about constipation isn't even relevant. It's
7 from 2004, isn't it?" And he said, "Well, yeah." And
8 she sat down because she had discredited him and his
9 basis for saying the constipation was the cause.

10 It's not a matter of whether or not we can decide
11 today that the defense experts definitely would have
12 won in the jury's eyes or the State would have
13 definitely won in the jury's eyes. It's a matter of
14 whether the defense put forth all of the available
15 evidence to aggressively defend the case.

16 And there is a case. And if I find it, then I'll
17 sit down. There is a case, and the case deals with
18 something very similar. It is dealing with the failure
19 to put up a gynecological expert in a sex -- I believe
20 it was a sex abuse case. A little different, but the
21 gist of it was the duty of the defense in a sex abuse
22 case to put up evidence, to put up and challenge what
23 the State says. It's insufficient to simply bow down
24 to the State's expert without attempting to defend it.

25 Somewhere there is a case. And I may not find it.

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1 But I will summarize it. The duty, and it is a
2 long-standing duty recognized, that the main -- it's
3 not even to put up the State's -- I mean the defense
4 evidence, but the main duty of the defense is to
5 challenge the State's case. The crucible of
6 cross-examination is the standard. When that is not
7 done, the adversarial system fails and there is lacking
8 the effective assistance of counsel.

9 I was trying to think of it and I couldn't. It's
10 Bobby Joe Reeves vs. State of South Carolina.

11 MS. VALENZUELA: What's the cite?

12 MR. WILKES: I only have the appellate case number
13 2011.

14 THE COURT: State the name of that case again.

15 MR. WILKES: Bobby Joe Reeves vs. State of South
16 Carolina, 2011-187246. And I noted that the attorney
17 general can make significant distinguishments between
18 this and this case, but the gist of that case is the
19 duty of the defense to put up that aggressive
20 cross-examination and evidence to make their case. And
21 in this case it was failed to talk to, find, and put up
22 a gynecological expert.

23 But that's very similar here. Now, Mr. Stoddard
24 did well to find Dr. Lund. And I know because I think
25 we both did the same thing, have to call on a personal

Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

1 favor to get a doctor because it's hard to get a doctor
2 as an expert in this type of case. But the point is
3 Dr. Lund was ineffective in the failure to present him
4 in that he was not presented with the tools to combat
5 the testimony of Dr. Payne and to support his own
6 testimony. It's clear in the record that there was
7 sufficient evidence to do that. And that was the duty
8 of the defense, to find it. As Mr. Sipes said, he did
9 give counsel a lot of notice on that. There was plenty
10 of time to do it. It is not easy to do, but it is
11 doable through a court order and a HIPAA protective
12 order. And had he done that, I think there's enough
13 evidence to say without it, it clearly draws the jury's
14 verdict in question because they did not have the
15 testimony that they should have had. Thank you.

16 THE COURT: Thank you, Mr. Wilkes.

17 Each side has given me a lot of testimony through
18 questioning, a lot of materials to read over. I'm
19 going to take this under advisement. I want to make
20 sure I have -- there's, I believe, two exhibits. You
21 put in two exhibits?

22 MS. VALENZUELA: If we could, there's at least two
23 times that we need to mark out the victim's name, and
24 then we wanted to add the dates to one of the exhibits.

25 THE COURT: The attorneys can confer, go off the

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1 record here, make sure that the proper redactions are
2 done. But I just want to make sure that I have both
3 the exhibits.

4 If there's nothing further, I'll take it under
5 advisement and close the record.

6 (WHEREUPON, the hearing ended at 2:45 p.m.)

7 ***END OF REQUESTED TRANSCRIPT OF RECORD***

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Maxwell E. Sipes vs. State of South Carolina 2012-CP-04-0084

Certificate of Reporter

I, Diane L. Marcengill, Official Court Reporter
for the Tenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a
true, accurate, and complete transcript of record of a
portion of the proceedings had and evidence introduced
in the trial of the captioned case, relative to appeal,
in the Circuit Court for Anderson County, South
Carolina, on the 9th day of June 2016.

This transcript may contain quoted material. Such
material is reproduced as read by the speaker.

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

March 13, 2017


Diane L. Marcengill, RPR, CRR
Circuit Court Reporter

Jackson, Angela

From: Leah Howell <lhowell@andersoncountysc.org>
Sent: Wednesday, April 19, 2017 9:44 AM
To: Jackson, Angela
Subject: 2012-CP-04-84 Maxwell Sipes
Attachments: img04192017_0001.pdf

Here is Exhibit 2. Exhibit 1 has been sealed. I have attached a copy of the order. An Order to unseal will need to be signed for me to send these to you.

Leah

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON

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 ANDERSON SC

IN THE COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT



1016 PM -3 M 9:20

Maxwell Sipcs, #320502,

COMMON PLEAS AND
 GENERAL SESSIONS

Case No.: 2012-CP-04-0084

Petitioner,

v.

ORDER SEALING RECORDS

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 13, 2012. Respondent made a Return on or about March 27, 2013.

This Court convened an evidentiary hearing into the application on June 9, 2016, at the Anderson County Courthouse. J. Faulkner Wilkes, Esquire, appeared on behalf of Applicant. Senior Assistant Deputy Attorney General Johanna C. Valenzuela represented Respondent.

Applicant moved to admit medical records belonging to the juvenile victim, and Respondent moved for the records to be sealed. Applicant had no objection to the records being sealed.

"Public access to court records may be restricted in certain situations, such as matters involving juveniles, legitimate trade secrets, or information covered by a recognized privilege. Restrictions may be based on a statute or the court's inherent power to control its own records and supervise the functioning of the judicial system." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 10, 630 S.E.2d 464, 469 (2006); see, e.g. S.C.Code Ann. § 20-7-755 (Supp. 2005) (allowing general public to be excluded from hearings that involve neglected, abused, or delinquent children); *Jessup v. Luther*, 277 F.3d 926, 928 (7th Cir. 2002) (holding when there is a

RSS

compelling interest in secrecy, as in case of the privacy of children, portions, and in extreme cases the entirety, of a trial record may be sealed).

"In deciding whether to seal or unseal a court record, the court must make specific factual findings, on the record, which weigh the need for secrecy against the right of access." The Court must consider the following factors:

- (1) the need to ensure a fair trial;
- (2) the need for witness cooperation;
- (3) the reliance of the parties upon expectations of confidentiality of the proceeding;
- (4) the public or professional significance of the proceeding;
- (5) the perceived harm to the parties from disclosure;
- (6) why alternatives other than sealing the documents are not available to protect legitimate private interests as identified by this Rule; and
- (7) why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.

SCRCP 41.1.

"In addition, the court may consider (8) public interest in the proceeding; (9) the private or public status of the litigants and case generally; (10) whether release would enhance the public's understanding of an important historical event; (11) whether the public already has access to information contained in the records; (12) whether a particular decision will sustain or offend the fundamental interests of public access, and any other relevant factors." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. at 12, 630 S.E.2d at 470.

The case before the Court involves medical records of a juvenile victim of a sexual assault. The medical records were originally part of the underlying criminal case. The victim had an expectation that her medical records would be treated in a confidential manner. There is public significance in the proceeding; however, there is no public significance in the specific medical records. The medical records have been redacted; however, because the victim was related to Applicant, the redactions will do little to preserve the privacy of the victim. Sealing the medical records will prevent the specific medical details linked to the victim from being

released. Patients have an expectation of privacy as to their medical records. An expectation of privacy is what allows patients to be honest about their medical situations with their health providers; as such, maintaining the privacy of medical records contributes to the public health and safety.

Weighing the need for secrecy against the right of access, this Court finds the factors of Rule 41.1 weigh in favor of sealing the records.

IT IS THEREFORE ORDERED THAT

- The medical records will be sealed.

AND IT IS SO ORDERED this 27 day of June, 2016


HONORABLE R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

Waltham, South Carolina

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JANUARY 10
2016 JAN -5 PM 9:20
COMMON PLEAS AND
GENERAL SESSIONS

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

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

The State, Respondent,

v.

Maxwell E. Sipes, Appellant.

Remittitur

March 10, 2011

Appeal From Anderson County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2009-UP-540
Submitted November 2, 2009 – Filed November 19, 2009

AFFIRMED

Tara Dawn Shurling, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, Assistant Attorney General William J.
Blitch, Jr., all of Columbia; Solicitor Christina T.
Adams, of Anderson, for Respondent.

COMMON PLEAS AND
GENERAL SESSIONS

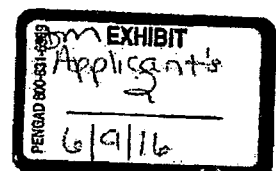
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ENTERED
[Signature]

PER CURIAM: Maxwell E. Sipes appeals his conviction for first-degree criminal sexual conduct, arguing the trial court erred in denying his motion for a mistrial. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911-12 (1996) ("No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); State v. Council, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999) ("The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law.").

AFFIRMED.[1]



WILLIAMS, PIEPER, and LOCKEMY, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FILED-CLERK'S OFFICE
 ANDERSON SC IN THE COURT OF COMMON PLEAS
 STATE OF SOUTH CAROLINA
 2017 JAN 30 PM 12:10 TENTH JUDICIAL CIRCUIT
 COUNTY OF ANDERSON

Maxwell Sipes, #320502, COMMON PLEAS AND GENERAL SESSIONS Case No.: 2012-CP-04-0084

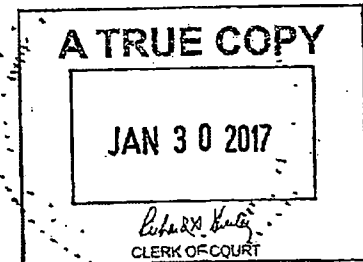
Petitioner,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL



This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 13, 2012. Respondent filed a Return on or about March 26, 2013. An evidentiary hearing into the matter was convened on June 9, 2016, at the Anderson County Courthouse. Applicant was present and represented by J. Falkner Wilkes, Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Johanna C. Valenzuela.

Applicant; Applicant's trial counsel, David Stoddard, Esquire; Dr. Christopher Rubel; and Gaye Allen-Cook testified at the hearing. This Court also had before it all relevant pleadings and documents, the Clerk of Court records for Anderson County, the South Carolina Department of Corrections' records, the transcript of Applicant's trial, and Applicant's appellate records. At the hearing, Applicant admitted Victim's redacted medical records¹ and Opinion 2009UP540 as Exhibits 1 and 2. Following the hearing, by stipulation of the parties and permission of the Court, Respondent admitted the State's Rule 5 Filing as Exhibit 1.

¹ At Respondent's request and without objection by Application, in an order filed July 5, 2016, the Court ordered Victim's medical records to be sealed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. Applicant was indicted at the March 2005 term of the Court of General Sessions for Anderson County for criminal sexual conduct, first degree (2005-GS-04-0382). Applicant was represented by David Stoddard, Esq., On March 5, 2007, the jury convicted Applicant as indicted. The Honorable Alexander Macaulay sentenced Applicant to thirty years imprisonment.

Applicant filed a timely Notice of Appeal to the South Carolina Court of Appeals on March 16, 2007. Tara Dawn Shurling, Esquire, represented Applicant. The South Carolina Court of Appeals affirmed Applicant's sentence and conviction on November 2, 2009, in Opinion No. 2009-UP-540.

Applicant thereafter filed a Petition for Rehearing on December 3, 2009. The South Carolina Court of Appeals denied Applicant's Petition for Rehearing in an order dated January 20, 2010.

On April 20, 2012, Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. Respondent made a response on May 11, 2010. The South Carolina Supreme Court, in an order dated May 2, 2011, denied Applicant's petition and the matter was remitted to the lower court.

At the hearing, Applicant's counsel stated the allegations were as follows:

1. Trial counsel was ineffective for failing to "timely obtain and utilize medical records, properly cross-examine the State's expert, and use those records in support of the defense theory of the case."
2. Trial counsel was ineffective for failing to use "medical records to properly present psychological evidence as to a specific diagnosis in the medical records, particularly the borderline personality disorder, among other things, but primarily that one, as it may impact the issues at trial."

3. Trial counsel was ineffective for failing to "preserve [an] objection at trial relating to a Fifth Amendment issue. There was a timely objection, but the judge indicated he'd make a curative instruction, and no curative instruction was ever made. And the failure to raise it again and get the curative instruction or put it on the record was the basis of the court of appeals to no address the issue."

(PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

SUMMARY OF TESTIMONY

David Stoddard

Applicant's trial counsel, David Stoddard, Esquire, testified first. He explained that at the time he represented Applicant, he had practiced law for about twenty-two years with at least thirteen years spent in criminal defense. (PCR Hearing Tr. p. 48, ll. 2-13, ll. 17-24.) He testified he represented Applicant for about three years before Applicant's case was called to trial. (PCR Hearing Tr. p. 6, ll. 2-7.)

When asked about the discovery, trial counsel explained he had received discovery starting in 2004. Trial counsel could not remember what medical records he received as part of discovery and which he received in trial. (PCR Hearing Tr. p. 8, ll. 3-19.) He believed the State gave him four pages of medical records in 2006 and had possibly given him more records after that. (*Id.*) Later, counsel testified that other than those four pages, he may not have received all the Carolina Behavioral Health medical records until the day of trial. (PCR Hearing Tr. p. 13, ll. 10-13.) Counsel further clarified that in 2005 he sent a letter to the State seeking help in obtaining the victim's psychiatric records and at some point obtained those records. (PCR Hearing Tr. p. 18, ll. 15-22.) He did not realize he did not have the entire set of medical records at that time. (*Id.*) The State's Rule 5 showed it had provided counsel records from Georgia Mountains Community Services therapist Michelle Matthews (1 page), Letter from therapist Denise Houston (2 pages), Forsyth Mental Health Correspondence (4 pages), and North Fulton

Regional Hospital Medical Records and Children's Health Care of Atlanta Medical Records (62 pages) three years prior to the start of trial. (Respondent's Exhibit 1.) Counsel testified the State did not have at least some of the medical records at the time of the trial either, and the State received a copy in trial when he received them. (PCR Hearing Tr. p. 49, ll. 6-9.) Trial counsel explained he received medical records from several facilities and that after he spoke to Cindy Stichnoch, and she advised there should be more records, he made inquiries on how to get those records. (PCR Hearing Tr. p. 6, ll. 12-19.) Trial counsel confirmed once he was alerted there were more medical records in the middle of trial, he secured a court order to get those records. (PCR Hearing Tr. p. 18, ll. 15-25.) Counsel testified he did have an opportunity to "scrutinize" the records and review them with his expert, Cindy Stichnoch. (PCR Hearing Tr. p. 11, ll. 19-21; p. 16, l. 22-p. 17, l. 7.)

Trial counsel testified his theory of the case was that the victim fabricated her allegations, the victim's mother was manipulating the victim due to the ongoing custody battle, and that the victim's rectal prolapse was caused, not by anal intercourse, but rather by chronic constipation. (PCR Hearing Tr. p. 14, ll. 2-20; p. 53, ll. 14-16; p. 84, ll. 6-p. 85, l. 6.) While trial counsel acknowledged that he received additional records after the State's expert testified, (PCR Hearing Tr. p. 9, ll. 13-25) he confirmed he could have recalled the expert if necessary and would have made the decision to recall the expert if he had seen anything important or material that he wanted to redirect the witness about. (PCR Hearing Tr. p. 50, ll. 14-p. 51, l. 3.) After reviewing the records, counsel did not "observe potentially other causes or things that could have been used to show alternative causes" to the victim's rectal prolapse. (PCR Hearing Tr. p. 17, ll. 15-18.) Counsel further noted that he did not believe the records he received would have changed the State's witness's answer, noting the State's witness, Dr. Payne, testified that he was aware of the

victim's history with psychiatric medication and that Dr. Payne's conclusion that it was not chronic constipation that caused the prolapse was based in part on Dr. Payne's physical examination of the victim's rectum. (PCR Hearing Tr. p. 20, l. 10-p. 21, l. 13; p. 54, ll. 8-15; p. 54, ll. 8-15; p. 60, ll. 15-25.)

Counsel testified he did not know if the specific medical records that came in the middle of trial would have helped his expert, Dr. Lund. (PCR Hearing Tr. p. 21, l. 14-p. 23, l. 1.) Counsel also agreed the transcript showed testimony from Dr. Lund stating he reviewed medical records that had come in that same day, indicating he may have reviewed the new records prior to testifying. (PCR Hearing Tr. p. 107, ll. 19-25 (referencing Trial Tr. p. 297.) Counsel also agreed his last expert witness, Cindy Stichnoch, testified after reviewing the records. (PCR Hearing Tr. p. 51, ll. 14-19.) Counsel confirmed that Cindy Stichnoch, who had personal interactions with the victim and who had reviewed all the records prior to testifying, could not definitely state the victim had borderline personality disorder and that this had a strong correlation with false allegations. (PCR Hearing Tr. p. 86, ll. 1-11.)

Counsel disagreed with the characterization that the State had been able to impeach Dr. Lund by relying on a medical record that noted a finding of constipation had a date that followed the victim's surgery for rectal prolapse because the record still noted a "history of constipation," which went to the Applicant's strategy of the case, but agreed that any record of constipation predating the date would be helpful. (PCR Hearing Tr. p. 24, l. 8- p. 26, l. 6.) After a review of Applicant's Exhibit 1, counsel agreed that "to the extent . . . [the references in the medical] records could have established alternative causation, they would have been desirable in [his] theory of the case." (PCR Hearing Tr. p. 44, ll. 20-25.)

However, counsel also agreed that there were things in the medical records that "cut against us" as well, and agreed that the medical record that showed anal bleeding in the victim near the time the victim claimed she had been anally raped by Applicant would have been harmful to his case. (PCR Hearing Tr. p. 62, l. 8-p. 68, l.13.) Counsel testified that when he sees "stuff that's cutting both way, you know, I don't know that I want the jury to hear that." (PCR Hearing Tr. p. 67, l. 24-p.68, l.1.) Counsel also agreed that he was able to elicit information through direct or cross-examination in front of the jury about victim's diagnosis of borderline personality disorder (Trial Tr. p. 273), victim's past history of lying and stealing, victim's statements to providers that she was "seeing things" (Trial Tr. p. 134), victim's being treated at a mental hospital for eating disorders (Trial Tr. p. 134), victim's problems with bulimia (Trial Tr. p. 134), victim's history with self-mutilation (Trial Tr. p. 132), examples of victim's spiteful or vindictive behavior, victim's significant drug use, victim's claim to abuse speed, diet pills, Adderrall, and diuretics (Trial Tr. p. 363), and mother of the victim's manipulative behavior (Trial Tr. p. 361) through testimony and his witness Cindy Stinoch. (PCR Hearing Tr. p. 69, l. 7-p. 83, l. 4.)

As to the curative instruction, trial counsel testified he had forgotten to follow up on the curative instruction. However, on cross-examination, trial counsel agreed the trial court gave long explanations to the jury a few times after objections were made. (PCR Hearing Tr. p. 86, l. 13-p. 87, l. 6 (referencing Trial Tr. pp. 126-127).) Counsel agreed that "there is a very good chance—normally I'm not going to want a curative—or often I won't want a curative instruction because it may highlight it more. I don't think curative instructions help a whole lot. . . . I objected to it, and I think I asked for a mistrial. . . . When I didn't get the mistrial, I think the damage was done. And, again, I can't remember, but normally, often on those kind of issues, I

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don't seek the curative instruction because I feel like it just reminds the jurors of what they already heard." (PCR Hearing Tr. p. 89, ll. 1-24.) Counsel agreed the jury may not have even noticed the limited reference in the testimony to Applicant running off when the investigator tried to speak with him. (PCR Hearing Tr. p. 90, ll. 1-15.)

Dr. Rubel

Dr. Rubel, a medical doctor, was admitted as an expert in family medicine. (PCR Hearing Tr. p. 114, ll. 11-20.) Dr. Rubel testified he reviewed the medical records that were Applicant's Exhibit 1. Dr. Rubel testified some of the medications the victim was taking slowed the mobility of the bowel.

Dr. Rubel said studies show a significant connection between the use of the drugs and the condition of prolapsed rectum. (PCR Hearing Tr. p. 115, ll. 13-21.) Dr. Rubel explained that constipation could cause straining and straining could cause prolapse. (PCR Hearing Tr. p. 116, ll. 18-19.) He agreed, however, that the study on which he was relying used patients who also had pelvic weakness due to previous pelvic surgery. (PCR Hearing Tr. p. 126, ll. 3- 24.) Dr. Rubel agreed the medical records did not indicate the victim had ever had pelvic surgery. (PCR Hearing Tr. p. 126, l. 25-p. 127, l. 5.) Dr. Rubel explained that his review of the medical records showed the victim was on several psychotropic medications, leading Dr. Rubel to disagree with the State's witness, Dr. Payne, when he stated the victim's history with psychotropic drugs was not significant. (PCR Hearing Tr. p. 120, ll. 4-9.) Dr. Rubel admitted, however, that he did not know how long someone would have to be taking psychotropic medications before they would run the risk of having constipation so chronic it would cause rectal prolapse. (PCR Hearing Tr. p. 127, ll. 6-20.) Dr. Rubel agreed that not everyone who takes psychotropic medication suffers

such slowing of the bowel as to have chronic constipation. (PCR Hearing Tr. p. 130, ll. 23-p. 131, l.1)

Dr. Rubel also testified there was a research study showing a connection between eating disorders and prolapse, where the study specifically related to young women. (PCR Hearing Tr. p. 117, ll. 16-24; p. 118, ll. 15-18.) He admitted, again, that he did not know how long someone would need to suffer from an eating disorder before being vulnerable to having constipation so chronic it would cause rectal prolapse. (PCR Hearing Tr. p. 127, l. 21-p. 128, l.1)

Finally, Dr. Rubel testified that in a person suffering from chronic constipation he expects to see abdominal pain and indications they are having less than one stool a week. (PCR Hearing Tr. p. 131, ll. 18-24.) He admitted he did not see any information on stool counts or the number of stools the victim was passing in a week in the victim's medical records. (PCR Hearing Tr. p. 132, ll. 1-7.) He also admitted he did not see any references to abdominal pain in the victim's medical records. (PCR Hearing Tr. p. 132, ll. 8-11.)

Gaye Allen-Cook

Ms. Allen-Cook was admitted as an expert in diagnosis and treatment of individuals with psychological disorders. (PCR Hearing Tr. p. 138, ll. 2-8.) Ms. Allen-Cook testified that people who are diagnosed with borderline personality disorder have a "much higher prevalence of not telling the truth, of embellishing things, even often minor things," that this relates to their lack of empathy, and that they can also be "wickedly vindictive." (PCR Hearing Tr. p. 140, ll. 7-p. 141, l. 25.) Ms. Allen-Cook stated her review of the records indicated the victim had been diagnosed with borderline personality disorder by Dr. Martin. (PCR Hearing Tr. p. 150, ll. 19-23.)

Ms. Allen-Cook agreed she had not met the victim in this case and that her license precluded her from diagnosing someone she had not treated. (PCR Hearing Tr. p. 141, l. 20- p.

142, l. 7.) She agreed that typically children under the age of eighteen were not diagnosed with personality disorder because of their hormones and developing personalities, but stated, that although it was rare, the DSM-5 allowed diagnosing of a patient under the age of eighteen if they had characteristics of borderline personality disorder for a year or more. (PCR Hearing Tr. p. 143, l. 13-p.144, l.7.) Ms. Allen-Cook agreed that in her experience treating victims of sexual abuse, she observed "stealing and making up stories" in both people who are diagnosed with borderline personality disorder and in children victims of sexual abuse, along with other similar characteristics such as extreme anger, abandonment issues, and not handling change well. (PCR Hearing Tr. p. 146, ll. 17-22-p.148, l. 25.)

Applicant

Applicant testified he was represented by his trial counsel for about three years prior to trial, and he was out on bond during that representation. (PCR Hearing Tr. p. 153.) He also testified that at the beginning of trial counsel's representation, Applicant had described victim's medical history and treatments, including her time at DJJ, AnMed, Carolina Behavioral Health, Carolina Children's Home, and the Scottish Rite Hospital in Atlanta. (PCR Hearing Tr. p. 154.) Applicant said he asked counsel to get those records from those facilities and discussed those records with counsel more than three times. (Id.) Applicant claimed to have only seen the medical records produced by the state. (PCR Hearing Tr. p. 155.)

Applicant agreed he testified at trial and was able to testify as to the victim's medical history and his understanding of the victim's mental health. (PCR Hearing Tr. p. 157.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. Furthermore, this Court has had the opportunity to observe the witnesses presented at the hearing, and closely pass upon all witnesses' credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S.Ct. at 2064). Second,

counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"However, where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006 (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992))).

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland, 466 U.S. at 690, 104 S.Ct. 2052).

"Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id. (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)).

In Watson, this Court reversed a PCR court's determination that counsel was ineffective for failing to prevent the introduction of hearsay testimony of several witnesses who testified about the abuse allegations against the defendant. Watson, 370 S.C. at 72, 634 S.E.2d at 644. This Court held that "counsel articulated a valid reason for failing to object to the hearsay testimony" where that reason was that counsel "wanted to avoid the possibility that the prosecution would have shown the video of the victim talking about the sexual abuse." Id.

Allegation Number 1: Medical Records

Applicant claims trial counsel was ineffective for failing to "timely obtain and utilize medical records, properly cross-examine the State's expert, and use those records in support of the defense theory of the case." (PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

At the PCR hearing, trial counsel testified he was not aware he was missing some of the medical records until one of his consultants pointed out that there should be more records. In response, trial counsel made efforts to secure the medical records and did secure them before the end of trial. Through direct or cross-examination, the content of the medical records that supported the defense's theory of the case was presented to the jury. Counsel also testified there were strategic considerations as to what he chose to highlight and how he chose to highlight the information in the medical records. (PCR Hearing Tr. p. 62, l. 8-p. 68, l.13; p. 67, l. 24-p.68, l.1.)

A review of the trial transcript shows the State's witness, Dr. Payne, testified his belief that the rectal prolapse in the victim was caused by forcible rape rather than anything else was related, at least in part, to his physical examination of the victim. (Trial Tr. p. 70.) Dr. Payne testified he did not believe the medication or constipation caused her prolapse. (Trial Tr. pp. 74-75.) Trial Counsel challenged Dr. Payne's limited review of victim's medical records, and also presented an expert, Dr. Lund, to challenge Dr. Payne's physical examination of the victim and resulting conclusion that forcible rape had caused her rectal prolapse.

This Court finds Applicant showed additional evidence may have been helpful and strengthened his defense, particularly in cross-examining the State's expert; however, the Court finds the evidence presented falls short of meeting Applicant's burden. Dr. Payne was questioned about his lack of review of the patient's medical records before reaching a conclusion, and he was questioned about the victim's medications and the possibility of chronic constipation

causing the prolapse. Applicant's own medical expert at the PCR hearing agreed that a review of the victim's medical records did not show evidence of either stool counts or complaints of abdominal pain; the two indicators Dr. Rubel stated were associated with chronic constipation that could cause rectal prolapse. (PCR Hearing Tr. p. 131, ll. 18-24; p. 132, ll. 1-11.)

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland: that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief on this allegation.

Allegation Number 2: Borderline Personality Disorder

In his second allegation, Applicant alleges trial counsel was ineffective for failing to use "medical records to properly present psychological evidence as to a specific diagnosis in the medical records, particularly the borderline personality disorder, among other things, but primarily that one, as it may impact the issues at trial." (PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

At trial, Applicant presented two expert witnesses. It is undisputed the second witness, Cindy Stichnoth, had complete access to the medical records before testifying. A review of the trial transcript shows Cindy Stichnoth testified at length to the qualities observed in the victim that called the victim's motives into question and highlighted the victim's trouble telling the truth

and managing her emotions. (Trial Tr. pp. 355-411.) Trial counsel testified he made strategic decisions about what to present with the medical records he had because the medical records included information that cut against him. (PCR Hearing Tr. p. 62, l. 8-p. 68, l.13; p. 67, l. 24-p.68, l.1.) A review of the trial transcript shows trial counsel cross-examined the state's expert, Dr. DeFelice, using the medical records and the reference to the victim's discharge diagnosis by Dr. Shane Shabonde with The Carolina Center. (Trial Tr. p. 272) Dr. DeFelice was asked directly about the borderline personality disorder diagnosis, which Dr. DeFelice challenged was not a diagnosis. (Trial Tr. p. 273.)

At the PCR hearing, Ms. Allen-Cook testified the records indicated a clear diagnosis of borderline personality disorder in the victim by Dr. Martin. Ms. Allen-Cook also testified to the characteristics of a person with borderline personality disorder, such as exhibiting a tendency to lie, showing a lack of empathy, showing extreme anger, having abandonment issues, and not handling change well.

While this Court finds that the medical records could have been used in a different way and Cindy Stichnoth's testimony could have been expanded to strengthen the defense, it also finds that this would have been cumulative evidence, not new evidence. See Edwards v. State, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) ("We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward." (citing Jackson v. State, 329 S.C. 345, 350-51, 495 S.E.2d 345, 770-71 (1998); Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); Cherry v. State, 300 S.C. 115, 118-19, 386 S.E.2d 624, 625-26 (1989))).

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A review of the trial record shows that through direct and cross-examination, trial counsel was able to show the jury the victim's medical record references to borderline personality disorder (Trial Tr. p. 273), victim's past history of lying and stealing, victim's statements to providers that she was "seeing things" (Trial Tr. p. 134), victim's being treated at a mental hospital for eating disorders (Trial Tr. p. 134), victim's problems with bulimia (Trial Tr. p. 134), victim's history with self-mutilation (Trial Tr. p. 132), examples of victim's spiteful or vindictive behavior, victim's significant drug use, victim's claim to abuse speed, diet pills, Adderrall, and diuretics (Trial Tr. p. 363), and mother of the victim's manipulative behavior (Trial Tr. p. 361).

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

This Court also finds Applicant has failed to prove the second prong of Strickland: that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief on this allegation.

Allegation Number 3: Failure to Preserve Objection

Applicant's last allegation is that trial counsel was ineffective for failing to "preserve [an] objection at trial relating to a Fifth Amendment issue. There was a timely objection, but the judge indicated he'd make a curative instruction, and no curative instruction was ever made. And

the failure to raise it again and get the curative instruction or put it on the record was the basis of the court of appeals to not address the issue." (PCR Hearing Tr. p. 4, l. 7-p.5, l. 10.)

Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007). The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes." State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1997). The Supreme Court favors the exercise of wide discretion of the trial judge in determining the merits of a mistrial motion in each individual case. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988). Among the factors to be considered are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony. Id. "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005).

A review of the record shows the testimony at issues is as follows:

- A. No. That was for child support. When I was going through child support getting my kids medical help because my daughter was needing prolapsed rectum surgery, [Applicant] quit his job. When Eddie Colbert went to look for him, he would not come in for the interview. When Eddie Colbert, the investigator, looked for him to question him about the sexual abuse, [Applicant] quit his job and left. So I had to go get assistance."

(Trial Tr. p. 193, ll. 9-16.)

Immediately following this testimony, trial counsel informed the Trial Court he had a matter of law, and the jury was removed from the court room. Counsel then made a motion for mistrial on the grounds the witness commented on his client's assertion of his Fifth Amendment

rights. After argument from trial counsel and the State, the Trial Court denied the motion for a mistrial, explaining "I don't think that it has risen to the degree of prejudice that would make it impossible for the Defendant to have a fair trial. However, if the Defendant wants, I will give a curative instruction that there's no need for the Defendant to ever present a defense." (Trial Tr. pp. 193-199.) No curative instruction was given.

Trial counsel testified at the PCR hearing that, although he could not remember specifically, and it is possible he just forgot to follow up on the instruction, it was his practice, with over twenty years of criminal experience, to consider whether he actually wanted a curative instruction in situations where he thought the instruction may draw more attention to the issue.

Like in Watson, 370 S.C. at 72, 634 S.E.2d at 644, this Court finds trial counsel has articulated a valid reason for failing to object when no curative instruction was given. Furthermore, a review of the character of the testimony given, the circumstances under which it was offered, the nature of the case, the other testimony offered at the trial, and considering the Trial Court's clear ruling that the testimony had not risen to "the degree of prejudice that would make it impossible for the Defendant to have a fair trial," (Trial Tr. p. 199), this Court finds that even had the issue been preserved, it would not have resulted in the Trial Court's ruling being reversed.

Accordingly, this Court finds Applicant has failed to prove the first prong of the Strickland test: that Counsel failed to render reasonably effective assistance under prevailing professional norms. Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of Applicant.

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This Court also finds Applicant has failed to prove the second prong of Strickland; that he was prejudiced by Counsel's performance. This Court concludes Applicant has not met his burden of proving counsel failed to render reasonably effective assistance.

Therefore, having reviewed the pleadings, considered the applicable law, reflected upon the testimony and evidence at trial, and considered the arguments of counsel, this Court finds Applicant is not entitled to relief.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

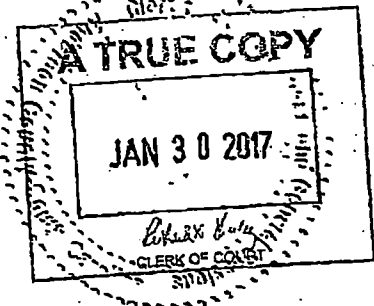
**IT IS THEREFORE ORDERED:**

1. The application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Respondent.

IT IS SO ORDERED.

R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

1-24-2017 (date)
Waltham, South Carolina



WITNESSES

ACSD/Major

ARREST WARRANT NO. I-143770

TRUE BILL
ACTION OF GRAND JURY

MAR 01 2005

Robert A. Gant
Foreperson

Foreman of Grand Jury

VERDICT

GUILTY

J. Miller 39-07
Foreman of Petit Jury Date:

DOCKET NO. 2005-GS-04-382

The State of South Carolina,

County of ANDERSON

COURT OF GENERAL SESSIONS

MAR 01 2005

TERM

MIN

THE STATE

vs.

Maxwell Eugene Sipes

Indictment for

CRIMINAL SEXUAL CONDUCT 1ST DEGREE
16-3-652 [0160]

A TRUE COPY

JAN 17 2002

Patricia A. Gant
CLERK OF COURT

03/09/07-cmg

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT 1st DEGREE
16-3-652 [0160]At a Court of General Sessions, convened on MAR 01 2005
the Grand Jurors of ANDERSON County present upon their oath:**CRIMINAL SEXUAL CONDUCT 1st DEGREE**

That Maxwell Eugene Sipes did in Anderson County, South Carolina, on or
between March 1, 2002, and May 1, 2003, unlawfully engage in sexual battery with ■
Minor ■ by using aggravated force and/or forcible confinement. All in violation of Section
16-3-652, *Code of Laws of South Carolina*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

Mandy H. Hume
SOLICITOR

A TRUE COPY

JAN 17 2012

Patsy R. Harty
CLERK OF COURT