

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lancaster County

Honorable R. Markley Dennis, Circuit Court Judge

JOSEPH BRADLEY LOFTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000667

APPENDIX

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Therefore, it can factually stated that not only by the Applicant's Fourteenth Amendment Rights of Due Process, but also by the provisions of Article V. Section 4 of the South Carolina Constitution, it is mandatory that the Applicant's Due Process matters be disposed of before the Criminal Court within (180) days after his arrest. The Applicant was arrested on or about February 13, 2008. This means that the Applicant's Due Process matters should have been disposed of by August of 2008 yet they were not disposed of until October of 2011. To go beyond the prescribed deadline without an Order of Continuance creates a "procedural defect" which deprives the Trial Court of Subject Matter Jurisdiction and/or the Right and/or power to enact its Subject Matter Judiciary powers to adjudicate the Applicant Trial. Subject Matter Jurisdiction is the power to hear and determine cases of a general class to which the proceeding in question belong. Bell v. Monsanto Corp., 579 S.E.2d 325 (SC 2003). Subject Matter Jurisdiction does not only cover and/or involve whether or not the matter resides in a proper Court of Jurisdiction to hear it. The Court's power to hear and determine a case is also defined as the Court's ability to hear and determine a case. Thus, Subject Matter Jurisdiction also involved any issue that may affect and/or hinder that power and/or ability to act in accordance to Rule of Court and Due Process law, such matters can be raised at anytime and the court shall not fail to take notice Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001).

Without an Order of Continuance being issued the parties were prohibited from continuing the case. Such deprived the Criminal Court of Subject Matter Jurisdiction and/or Right to enact and/or invoke its Subject Matter Judiciary powers to adjudicate the Applicant's Trial and violated his Due Process Rights. Therefore, the sentence and conviction must be vacated.

Perhaps the Courts of South Carolina would contend that Subject Matter Jurisdiction and sufficiency on an indictment are and/or have been combined in the various cases, that the indictment is merely a "notice document" and Subject Matter Jurisdiction is the Court's ability to hear a matter and each should be viewed as being separate and distinct from one another and the insufficiency of an indictment does not take away from or affects the Court's ability and/or power to hear this case. As a result, the matter presented for review is not a challenge to the Court's general grant of authority to hear and determine cases. That authority is rightfully granted by our Constitution, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), and will not be at issue here.

III. The Asst. Solicitor Mingo committed "Prosecutorial Misconduct at the Second Trial.

On February 14, 2012, the Asst. Solicitor Mingo committed (prosecutorial misconduct) by failure to give a "Due notice" of the new indictment for the "same conduct". As a result, the "same conduct" test, meaning that a prosecution is for the same offense if it is for a crime that arose from the same conduct that the subject of a previous prosecution. The Applicant was in the process of selecting the Petit Jury, when the Asst. Solicitor Mingo present him with the second indictment for the same offense. The indictment reads as follows:

COMMITTING A LEWD ACT UPON A CHILD

- ° That Joseph Bradley Loftin, a person over the age of fourteen (14) did in Lancaster County on or about August 2007 through December 31, 2007, willfully and unlawfully commit a lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen (16) years, to wit: ---date of birth ---, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desire of himself or said child --- in violation of § 16-15-140, Code of Laws of South Carolina, (1976), as amended.

The Applicant contends that the Asst. Solicitor Mingo, had no mitigating circumstance or probable cause to up-grade the original charge. as set forth, at the first trial, the Applicant only can be retried on the original indictment. Thus, there was no [Arrest Warrant] for "Committing A Lewd Act Upon A Child". Here, the Asst. Solicitor Mingo's sidestep the Constitutional machinery provided in the Constitution.

Here, the indictment was overbroad and vague, in violation of Applicant's due proces rights, because they lacked specifity as to when the alleged acts occurred; applicant was taken by surprise and significantly limited in his ability to combat the charges against him, as there was no way for applicant to know whether he could plead an acquittal and due to the State's belated presentation of the [New Indictments], applicant was given a mere no time to complete the task of researching events that occurred over a continuous six-year period. This case is similar to State v. Baker, Supra..

On the one hand, strict common law practice requires an indictment to allege the day of the Month and Year when the offense was committed. State v. Brown, 24 S.C. 224 (1885). This rule still applies in any case where the day or place is a material element of the offense. See State v. Rutledge, 232 S.C.223, 101 S.F.2d 282 (1957). Here, both indictments is overbroad and vague. The statutory text of S.C.Code Ann. Section 17-19-20, require that the place of jurisdiction of the offense be stated in the body of the charging instrument. Failure to not allege the state where the crime(s) occurred gives birth to a possible jurisdiction defect.

In the case at hand, in body of the indictment reads as follows:

- That Joseph Bradley Loftin did in Lancaster County, on or about August 2007 through December 31, 2007, engage in sexual battery-

- as least 11 years of age, to wit: Sexual battery as defined in Section 16-3-651 upon or with—, date of birth —, in violation of section 16-3-655 (B)(1), (C)(3) S.C.Code of Laws (1976), as amended.

The Applicant contends it is the body of the indictment that is the vital part of the charging instrument. State v. Tate, 345 S.C. 577, 549 S.E. 2d at 603 (S.C.2001). It cannot be so cryptic or the words so loose and ambiguous that it fail to comply with the basic Right of the accused. Be fully informed of the nature and cause of the accusation against him which is one of his most basic and universally recognized Right and Requirement of Due Process, Smith v. O'Grady, 312 U.S. 329, 61 S.Ct. 572 (1941).

The charging instrument in the body of the indictment must allege that the Solicitor Barfield failed to allege place of the crime in the indictment.

GROUND C. BRADY VIOLATION

SUPPORTING FACTS AND ARGUMENT

The Applicant humbly contends, the Asst.Solicitor Mingo, withheld Exculpatory Evidence from the Applicant defense Counsel, by not allowing Applicant to inquire about the victim's prior sexual activity after the Asst.Solicitor Mingo introduced a pregnancy test and medical testimony into evidence, this exculpatory evidence would have proven beyond a reasonable doubt that Applicant did not committed this allege crime.

Shortly after the victim made the false allegation in January 2008, she became pregnant and eventually gave birth to a child who was fathered by the victim's underage boyfriend, not the Applicant. (R.P.57, lines 4-18). Moreover, if this exculpatory evidence was introduced it would have exonerated the Applicant of these false allegation.

This legal framework and foundation being firmly in place, the Duty of the Asst. Solicitor Mingo to Disclose Exculpatory Evidence to the [Defense Counsel]. Under Brady that the Asst. Solicitor Mingo, failed to disclose to Mr. Lofton that victim was sexual activities. Here, the Asst. Solicitor Mingo have to provide Applicant any "exculpatory" information know to the Asst. Solicitor Mingo, tending to prove that the Applicant is not guilty of a crime (Brady v. Maryland, U.S. Sup. Ct. 1963). By the Asst. Solicitor Mingo fails to turn over exculpatory information and the Applicant was deprived of his due process of law.

On the other hand, on R.P.Tr.45, lines 12-25 and R.P.Tr.46, lines 1-25, Mr. Bell, inquire at the Pretrial motions about the videotaped that the State has never allowed him access to the videotaping that occurred on the first interview of January 9th of '08 which he is entitled to see. As set forth, the Asst. Solicitor Mingo, withheld this "EXCULPATORY EVIDENCE" from the defense counsel. The request for the videotape in his Rule 5 [Motion]. Obviously, the videotape was destroyed the Asst. Solicitor Mingo along with other Judicial Official. See US v. Gil, 297 F.3d 93 (2nd Cir.2002), Brady material must be disclosed in time for its effective use at trial. See also, Thompson v. Calderon, 109 F.3d 1358, the Asst. Solicitor Mingo, may not obtain criminal conviction through use of false evidence. The Asst. Solicitor Mingo, obtain false evidence to convict the Applicant. Here, exculpatory Evidence will prove beyond a reasonable doubt that the Applicant did not have sexual intercourse with the victim's at any time. See Smith v. Cain, 132 S.Ct. 627 (2012), Smith obtained police files containing statements by the eyewitness contradicting his testimony. Smith argued that the prosecution's failure to disclose those statements violated-

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, Brady, held that Due Process bars the Asst. Solicitor Mingo from withholding evidence that is favorable to the defense and material to the Applicant's guilt or punishment.

GROUND D. ACTUALLY INNOCENT

SUPPORTING FACTS AND ARGUMENT

The Applicant humbly contends that his Constitution Rights and Rights of Due Process were violated. Here, DNA analysis was establish that the Applicant is not guilty of this allege crime by showing that DNA was found on the victim did not match the Applicant.

During the Trial of February 14, 2012, the Testimony of Janice Bryson, she testified as follows:

R.P.Tr. 242 lines 3-4, which provide:

- Q. Presumptive test for positive semen.
- A. My test does not confirm semen.

Here, the DNA Test conducted by Mary Ann Boehm, will prove beyond a reasonable doubt, the DNA did not match the Applicant.

R.P.Tr. 255 lines 22-25 and R.P.Tr. 256 lines 1-4, which provide:

- Q. I'm not asking you for the body fluid. Whatever was there you couldn't identify it to whoever it belong yo by DNA, could you?
- A. Right. Both [redacted] victim and Joseph Loftin-- no conclusive statement could be made regarding them as minor contributors.
- Q. I understand. So the point is whatever was there you cannot DNA it to attach it to whoever?

A. I did not make a match, No.

The petitioner in Pop was convicted of sexual intercourse without consent. Pop, supra, at 385, 1234. Several years later, after the statute of limitation for filing a petition for post-conviction relief had expired, Pope became aware of DNA evidence which had not been presented at his trial and which tended to exonerate him (though it did not do so conclusively). Id., at 390, 1237. Pope filed a petition for post-conviction relief, which the District Court denied on the grounds that the evidence was not newly-discovered and failed to prove that he did not commit the crime of which he was convicted. On appeal, the Montana Supreme Court reversed, holding that the District Court erred in concluding that Pope had to prove he did not commit the crime to overcome the statutory bar. Id., at 397, 1242. Given the DNA evidence, it was probable that no reasonable juror would have found Pope guilty as charged. The combination of the new evidence and the errors at Pope's trial entitled him to a new trial, according to the Supreme Court. Id. at 401, 1244.

The situation at bar is analogous to that of Pope. Here too, the applicant has discovered new evidence since his trial, as set forth, the DNA test did not match the Applicant. (Pope's evidence qualified as "new" even though he and his counsel were aware that the test results were forthcoming at the time of his trial and did not seek a continuance.) Finally, Loftin was also prejudiced by errors at his trial, including prosecutorial misconduct, and the loss of crucial evidence by the State.

Loftin's new evidence, like Pope's, satisfies the conditions necessary to pass through the actual innocence gateway and Loftin deserves a new trial. See State v. Pope, 315 Mont. 393, 80 P.3d 1232 (2003)

CONCLUSION

For all of the reasons, the Applicant respectfully requests this Court vacate the conviction and sentence as a matter of law.

Respectfully Submitted this 9th of May, 2015.

BY: Joseph B. Loftin
Joseph Bradley Loftin, #349859

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

Joseph Bradley Loftin, #349959

Plaintiff(s)

vs.

State of South Carolina

Defendant(s)

(Please Print)

Submitted By: Joseph B. Loftin

Address: P.O. Box 1151

Fairfax, SC 29927

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 -CP- 29 - 619

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|---|
| ☐ Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | ☐ Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Previous Notice of Intent Case # 30 -CP-
☐ Notice/ File Med Mal (230)
☐ Other (299) | ☐ Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | ☐ Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Merchant's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| ☒ Inmate Petitions
☐ PCR (500)
☐ Writamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | ☐ Administrative Law/Relief
☐ Reinstate Drv License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | ☐ Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript of Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | ☐ Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Commission (991)
☐ Other (999) |
| ☐ Special/Complex /Other | | | |
| ☐ Environmental (600)
☐ Automobile Arb (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (610) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Foreign Subpoenas (650)
☐ Motion to Quash Subpoena in Out-of-County Action (660) | | |

Submitting Party Signature:

Joseph B. Loftin

Date:

4/29/15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

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LANCASTER, SC

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STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

Joseph B. Loftin, #349868,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

2015-CP-29-0619

RETURN

In response to the post-conviction relief application filed on May 8, 2015, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Lancaster County Clerk of Court's orders of commitment. The Applicant was indicted at the April 2008 term of the Lancaster County Grand Jury for second degree criminal sexual conduct with a minor (2008-GS-29-0494) and at the February 2012 term of the Lancaster County Grand Jury for committing a lewd act upon a child (2012-GS-29-0206). Francis Bell, Esquire, represented him. On February 16, 2012, the Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Brooks P. Goldsmith sentenced the Applicant to concurrent terms of twelve years imprisonment for criminal sexual conduct and ten years imprisonment for the lewd act.

A notice of appeal was filed on Applicant's behalf and an appeal was perfected by John D. Delgado, Esquire and Robert Louis Bank, Jr., Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction. State v. Loftin. 2014-UP-472 (filed December 17, 2014). The Remittitur was issued on January 6, 2015.

II.

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Actual innocence.
 - b. Brady violation.
2. Due Process violations.
 - a. Improper Grand Jury impanelment.
 - b. Prosecutorial misconduct.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, and the Record on Appeal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. The Respondent also asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner 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 Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent interprets the Applicant's other claims as allegations of due process violations. The Applicant's allegations claim infringement of his rights under certain amendments to the United States Constitution. However, the Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires that the Applicant must "... specifically set forth the grounds upon which the application is based." S.C. Code § 17-27-50 (2003). In an application for post-conviction relief, it is incumbent upon the Applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held.

Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Since the Applicant has failed to make even a *prima facie* showing, the Respondent would submit that this allegation should be dismissed for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. This allegation is so vague that it is impossible for the State to respond.

V.

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

VI.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective and whether the Applicant's appellate counsel was ineffective.

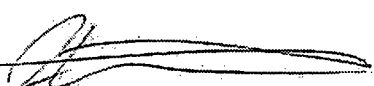
Respectfully submitted,

ALAN WILSON
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JOHN W. McINTOSH
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KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CROOM HUNTER
Assistant Attorney General

By: 
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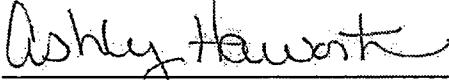
July 7th, 2015.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LANCASTER	)	
	)	
	)	2015-CP-29-0619
JOSEPH BRADLY LOFTIN, #249868	)	
	)	
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** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Nathan James Sheldon, Esquire
Shaw Law Firm
PO Box 36250
Rock Hill, SC 29732

DATED this 7TH day of July, 2015.


 Ashley Haworth, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF LANCASTER

4 2015-CP-29-0619

5 Joseph Bradley Loftin

6 vs.

7 State of South Carolina

8

9 Lancaster, South Carolina

10 July 12, 2016

11 Before the Honorable R. Markley Dennis

12

13 APPEARANCES

14 For the State: Patrick Schmeckpeper

15 For the Applicant: Nathan Sheldon

16

17 Reported by: Michael C. Watkins

18 Official Court Reporter

19

20

21

22

23

24

25

1	Francis Bell:	4
2	Joseph Loftin:	41
3	John Loftin:	52
4	Francis Bell:	56
5	Certificate:	72

6 EXHIBITS

7

8	Applicant's 1 - Defense Motion	6
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1 THE COURT: Mr. Loftin, you are here today on your
2 application for post conviction relief, it's case number
3 2015-CP-29-619. You've talked with your lawyer about this
4 proceeding?

5 THE APPLICANT: Yes, sir.

6 THE COURT: And you understand that the relief that I
7 can give you is to basically -- the best thing for you to
8 win is to start over again.

9 THE APPLICANT: Yes, sir.

10 THE COURT: You understand that?

11 THE APPLICANT: Yes, sir.

12 THE COURT: And the reason I ask you, I've reviewed
13 quickly your file, it appears -- don't misunderstand me, 12
14 years is a long time and I understand that, but you're
15 looking at a potential 35 years, you understand that?

16 THE APPLICANT: Yes, sir.

17 THE COURT: But you still wish to go forward with your
18 application?

19 THE APPLICANT: Yes, sir.

20 THE COURT: Very well. Are you prepared to proceed?

21 MR. SHELDON: Yes, sir, Your Honor.

22 THE COURT: Is the State ready?

23 MR. SCHMECKPEPER: Yes, Your Honor.

24 THE COURT: Good. You may proceed, sir.

25 MR. SHELDON: Thank you, Your Honor. We call Francis

FRANCIS BELL - DIRECT

1 Bell to the stand.

2 THE COURT: Okay.

3 The witness, FRANCIS BELL, was first duly sworn and
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. SHELDON:

7 Q Mr. Bell, you represented Mr. Loftin in this case on
8 actually it looks like two different trials; is that right?
9 A mistrial and then a trial where he ends up getting
10 convicted.

11 A That's correct.

12 Q Just to give the Judge a little background, I don't
13 want to hash out the facts, I'm sure he has the transcript,
14 but this was essentially a CSC second with a minor case,
15 wasn't it?

16 A That's correct.

17 Q And a lewd act that was indicted it appears right
18 before the second trial.

19 A That's correct.

20 Q And did you advise Mr. Loftin of the amount of time
21 that these offenses carry and things like that?

22 A I did.

23 Q What was the State's plea offer in this case, do you
24 remember?

25 A The only plea offer was before the first trial and it

FRANCIS BELL - DIRECT

1 was -- he was unindicted -- or not indicted on a lewd act,
2 the only plea offer was come here and plead straight-up on
3 a lewd act.

4 Q So zero to 15?

5 A Yeah. He and I discussed it, and of course, he never
6 pled to anything.

7 Q Did you recommend any sentence or anything like that?
8 I'm sorry, did you give him any idea of what the sentence
9 would be if he pled straight-up versus going to trial? Did
10 you have any guess, or no?

11 A I did not.

12 Q Okay. And really all I'm going to talk about is the
13 second trial because that's the trial that he ends up
14 getting convicted at. At the second trial, did you file a
15 motion to allow evidence? The name of the document was a
16 motion to allow evidence?

17 A Yes. Further instruction on the Rape Shield Statute,
18 I did, did in both trials.

19 Q I'll hand you a copy of that document -- the second
20 trial was in February of 2012; is that correct?

21 A That's correct.

22 Q I'm going to hand you this document, do you recognize
23 that?

24 A I do.

25 Q And is that the motion to allow evidence that was

FRANCIS BELL - DIRECT

1 filed prior to the second trial?

2 A It was.

3 MR. SHELDON: Your Honor, I would move to put that in
4 as Applicant's Exhibit 1.

5 THE COURT: Any objection.

6 MR. SCHMECKPEPER: No objection.

7 THE APPLICANT: Without objection it is admitted.

8 (The motion was received as Applicant's 1.)

9 Q Mr. Bell, would it be fair to say -- I want to -- just
10 to surmise the facts in this case a little bit, essentially
11 we had at the time of the crime, not at the trial, that we
12 had a 12 year old girl that accused Mr. Loftin, her
13 stepfather, although I don't know that they were ever
14 married, her -- the live-in boyfriend of her mother of
15 essentially having sex with her everyday for a period of
16 four months.

17 A Having some kind of contact everyday from August, I
18 don't remember the exact date, until December the 31st of
19 2007.

20 Q And the testimony at trial, would it be fair to say
21 that it was -- that the majority of the evidence came from
22 the statements of the little girl?

23 A As far as what occurred, yes, sir. No other
24 witnesses were presented that actually saw anything,
25 except one contact that occurred early supposedly at the

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1 house -- and I would have to go back to the trial -- but
2 this little witness was not brought in the first case but
3 she was brought into the second case. She tried to
4 confirm something occurred in the house at one of the
5 events.

6 Q And that was a classmate of the victim.

7 A That's correct.

8 Q Okay. And a friend of the victim.

9 A That's correct.

10 Q At the second trial there's the testimony of the
11 victim, and then the victim's mother also testifies; is
12 that right?

13 A That's correct.

14 Q The victim's mother -- there's evidence at trial that
15 comes out that Mr. Loftin had a vasectomy during the period
16 of time that the alleged sexual misconduct was occurring;
17 is that correct?

18 A Yes, sir.

19 Q And the State essentially used this vasectomy as part
20 of their case in chief to prove that he was trying to
21 continue to have sex with this girl without getting her
22 pregnant; is that correct?

23 A That was their theory. Nobody said that but that was
24 a theory they were using as to why at a young age he was
25 going to have a vasectomy.

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1 Q And the victim's mother in this case had some sort of
2 other birth control method inserted, I think it was an IUD
3 somewhere along those lines; is that correct?

4 A That's correct.

5 Q And so would it be fair to say that the State's theory
6 of the case at least as to the vasectomy was that because
7 she had this other birth control device there couldn't have
8 possibly been a need for the vasectomy as it pertained to
9 having sex with the victim's mother.

10 A That was their theory.

11 Q Did you discuss the vasectomy with Mr. Loftin prior to
12 trial?

13 A Meaning did I know he had a vasectomy prior to trial?
14 Yeah, we knew it, I mean, I knew it.

15 Q Were you aware that was going to be one of the issues
16 that the State brought out at trial?

17 A Well, it came up on trial number one and it came up
18 in trial number two, so yeah. They brought the doctor to
19 court.

20 Q Did you discuss with the victim -- with Mr. Loftin who
21 was present at the vasectomy when he actually got it, when
22 he had the procedure?

23 A When he actually had the procedure I was of the
24 opinion it was medical people and him. I think his
25 girlfriend was in the vicinity but I don't think she was

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1 in the room.

2 Q Not in the room but in the facility.

3 A As far as I know she was, that's what he told me.

4 Q Well, why -- at the second trial why during cross
5 examination did you not bring out the fact that she was not
6 only essentially complicit in the vasectomy, but present at
7 the facility where it happened?

8 A I cannot answer that other than to say that at the
9 time of the trial I didn't think that much importance as
10 to that, meaning anything to this jury, to the second
11 jury.

12 Q So the fact that the victim's mother is present in the
13 facility wouldn't have been important to the jury to know,
14 is that what you're saying?

15 A Well, I don't -- again getting ready for today I have
16 not reviewed the complete transcript as to what every
17 witness said because I keyed in on what I thought I was
18 going to be accused of not doing properly. And the hard
19 thing to explain, as I tried to explain to my client and
20 explain to you, the worst thing that can happen is a
21 mistrial and then the State is better prepared the second
22 time around. They brought in more evidence the second
23 time around that actually convicted my client than they
24 used the first time; and the issue of the vasectomy to me
25 wasn't that big of an issue in either trial. So no, it

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1 wasn't an issue that I was really concerned about from the
2 standpoint of the fact that she was there or not. I don't
3 remember off the top of my head whether or not my client
4 mentioned her being there or not during his direct
5 testimony, because at both trials he did testify.

6 Q And we're going to get to kind of the each individual
7 issue in this case, but just taking this case as a whole,
8 you have the State presenting the testimony that there was
9 a pregnancy test purchased and discarded when it was
10 negative, sexual intercourse with a 12 year old, you
11 have -- but in the middle of all of this is this vasectomy,
12 and they even go as far as to bring in the doctor that
13 performed the vasectomy. So certainly the State was
14 relying on this as a -- I don't know if it's --

15 MR. SCHMECKPEPER: Your Honor, I object, I think this
16 is argumentative.

17 THE COURT: I sustain the objection. Let's just ask
18 the question please, really he has answered the question so
19 you could move on to something else. You can argue that.

20 Q In the whole of the trial the vasectomy was a crucial
21 piece of evidence or was not?

22 A To me it was not.

23 Q Okay. And you filed this motion to allow evidence
24 pretrial and Judge Goldsmith denied that motion; is that
25 right?

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1 A I filed it before the trial commenced, yes, sir. We
2 took it up after the jury was sworn as I best remember.

3 Q And Judge Goldsmith referred to it as a motion in
4 limine; is that right?

5 A He did. And I must say that I didn't agree with him
6 then and I don't agree with him now, but that's what he
7 said.

8 Q And a motion in limine is not preserved for the
9 appellate review; is that correct?

10 A Well, that's what the appellate court said. I'm not
11 disagreeing with them but I am saying I didn't take it to
12 being a motion in limine to begin with because we don't
13 have much guidance from the statute other than it says it
14 must be filed before the defendant presents any evidence
15 and that's the only thing it says. So I was somewhat at a
16 loss when -- I knew to file it before he took the stand,
17 but what I was going to try to do if allowed was through
18 cross examination of the young lady get out some pertinent
19 facts that I thought I needed and that's what he prevented
20 me from doing. He prevented me from first of all using it
21 for cross examination if it was going to be allowed, and
22 then secondly he prevented me from using my client backing
23 up the issues that I filed came from the client. And the
24 biggest thing that I was worried about was the pregnancy
25 test, I was scared to death of that because he would not

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1 admit that he bought it, and I wasn't with him, but the
2 evidence strongly indicated that he would be the one to
3 purchase the thing. And therefore when the jury came back
4 in the second trial and wanted to rehear that part of the
5 testimony my heart hit my foot because I was scared to
6 death of that one piece of evidence.

7 Q So Judge Goldsmith does not allow you to go into these
8 issues when arguing this motion after the jury is sworn but
9 pretrial; is that right?

10 A That's correct, nor would he allow me to bring it up.
11 Because I argued to him -- of course that wasn't taken up
12 on appeal, but I did argue with Judge Goldsmith that the
13 statute did not cover lewd act, which it doesn't, and
14 therefore I should be able to get around the Rape Shield
15 Statute and ask the same questions on the lewd act case,
16 but he denied that. In fact, he -- unless you were in the
17 courtroom he had to lean on me because he knew I was going
18 to maybe breach that with her, and he literally almost
19 talked about locking me up if I broached the subject, so I
20 didn't even ask anything about the lewd act.

21 Q And what you were trying to get out was that this 12
22 year old girl had prior sexual relationships, right, or
23 during the same time was having sex with someone else?

24 A Well, let me digress if I may. This event occurred
25 between August and December of '07. I was contacted in

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1 '08, January, I don't remember the exact date, before the
2 arrest. He got arrested, we started Rule 5 and all of the
3 stuff. Then he got brought into family court, and that
4 occurred maybe in October of '08, and she comes to family
5 court pregnant. And I cannot tell you I knew that because
6 I get hired to go to family court and she's pregnant and
7 then Judge Sprott was limiting what I could do there, and
8 so that's what -- why I was trying to bring it up. Now,
9 when she had sex I don't know, how many times she had sex
10 with this fellow or any other people or the particular
11 father I had no idea because I never got to ask the
12 questions. And, of course, my client couldn't tell me
13 that. He told me during the timeframe about her leaving
14 the house, he and the mother thought she had gone to meet
15 this young man about some dirty books, for lack of a
16 better word, that they found somewhere, and then things
17 like that that I was trying to bring about and that's what
18 the Rape Shield Statute was stopping me from doing in
19 criminal court, and just Judge Sprott in family court kept
20 me from doing it. So obviously she had sexual relations
21 one time because she got pregnant. Now, how many times
22 she had and who she had it with I have no idea.

23 Q But at trial there was no in-camera testimony with
24 this trial to at least try to preserve that issue for
25 appeal, was there?

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1 A No. I took the position that my motion had enough
2 factual basis in it as to what it would be from that
3 standpoint. I did not bring it back up, I agree with
4 that, I never brought it back up.

5 Q And you also agree that the court of appeals agreed
6 that that issue was not preserved; is that correct?

7 A Yeah, that's what they said.

8 Q But the State at trial brought a doctor essentially
9 that examined -- that did some sort of rape kit
10 examination; is that right?

11 A They brought the OBGYN that brought in -- I don't
12 remember her name, but two big things she had talks about,
13 one that the child was having period problems as a layman
14 would say, and that something showed a little bit of tear
15 if I remember correctly, and she didn't examine her until
16 January or either February of '08, without going through
17 the file I can't remember. I know the little girl had
18 some kind of breakdown at Buford School after coming back
19 from the Christmas holiday and that's what blew it wide
20 up, and then the sheriff's department gets involved and
21 then the rape crises people got involved, and, of course,
22 none of that came in.

23 Q But the OBGYN testified at trial that this deep cleft
24 or trauma, whatever you want to call it, could only have
25 been caused essentially by having sex; is that right?

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1 A If I remember correctly.

2 Q Or some sort of violent car accident or something
3 along those lines.

4 A And we were faced with that. She couldn't tell us
5 when it occurred or who did it, but --

6 Q And had you been able to get in to prior sexual acts
7 you would have been able to shore up some of that testimony
8 and that would have presented an alternative theory of how
9 this child was injured so to speak.

10 A Well, conceivably could have. Of course, the trouble
11 is I will never know unless somebody eventually tells me,
12 did the sex that caused the pregnancy occur after him
13 leaving the house? I'm assuming it did because the
14 baby -- if you just back up nine months it looks like she
15 got pregnant sometime in either February or March. So, I
16 mean --

17 Q And it could have -- we know that she got pregnant in
18 February or March, testimony about sexual acts with some
19 other man would have also potentially created an
20 alternative theory for the pregnancy test; is that right?

21 A No, not necessarily. Because my client would not
22 admit he bought it and therefore the use of it from his
23 perspective. The mother denied she bought it, she said
24 that he got it or he showed up with it. If I remember
25 correctly the little girl was there and therefore she knew

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1 he bought it according to her testimony because she was
2 there when it was purchased, and I think the evidence was
3 that it was used once. Nobody got real clear on why it
4 was used, meaning who was worried about what in reference
5 to what made her possibly have a period problem and
6 therefore pregnant, that came from nobody, that didn't
7 even come from the mother of the child that I know of.
8 The husband -- excuse me, my client, you know, denied any
9 knowledge of it all the way around.

10 Q But at the end of the day you're left with an OBGYN
11 saying that this deep cleft in the victim's vagina was
12 caused by sexual intercourse or sexual trauma, right?

13 A I agree.

14 Q At no point did you ask -- you asked if anything else
15 could cause it but at no point did you ask could another
16 man cause this, could consensual sex cause this. None of
17 those questions came out at trial, did they?

18 A I don't remember my cross of her off the top of my
19 head, I do not remember that, not in details. I remember
20 what she said very broadly that I was concerned about and
21 I remember crossing her as to saying other than
22 circumstantial how could you tie this to my client, and
23 that's all I remember off the top of my head.

24 Q Did you meet with Mr. Loftin's parents prior to trial
25 at all?

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1 A Yeah.

2 Q Did they help with trial strategy? I mean, were they
3 informed?

4 A Well, my staff has prepared -- because obviously I
5 can't remember off the top of my head, but my staff -- in
6 fact, one of my staff was in there about every time we met
7 and her name is Jill who does my criminal work. I can
8 give you a chronological, and the parents were there about
9 every time. The initial consult was there January of '08,
10 and that was pre-being arrested. 2/13 of '08 the parents
11 came in, and it was listed as a walk-in meaning that they
12 did not have an appointment, said Brad has now been
13 charged. Preliminary hearing -- I don't know if she
14 necessarily logged in when they paid and all of that
15 stuff. Preliminary hearing was on 4/2. 6/12/08 parents
16 came in, family court notice 6/17 with Brad and family
17 court, met with client, DSS hearing on 9/24. Then I
18 started getting ready for trial. The hearing in DSS was
19 10/7, they were involved in every time he came in, I can't
20 remember if it was one or both, but both were involved.
21 The daddy back then worked for EMT as I remember, the
22 mother works for my doctor, she's phlebotomist, I don't
23 know if she's still there or not but she has drawn my
24 blood. We started getting ready for trial in June --
25 October -- it was so intense about trial one and this

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1 pregnancy thing. See, you've got to realize that Mr.
2 Loftin was given a credit card by his boss for Christmas,
3 and he used that credit card at K-Mart, which is no longer
4 in existence right up the street towards the north end and
5 had the little girl with him to buy a camera for his then
6 live-in friend. The CVS is about a five minute drive at
7 the most on the bypass, and that same card was used within
8 five minutes plus or minus to buy that pregnancy kit.
9 That was the big thing I was scared to death of. It was
10 bad enough facing this little girl saying, "He did
11 something to me from August to December," because it just
12 didn't make sense to me about having a pregnancy kit
13 unless you've got somebody being pregnant. And, of
14 course, by then I had the medical stuff and I found about
15 her claiming she was having period problems. And, you
16 know, as a man the first thing is, "Oh, the girl is having
17 period problems, she may be pregnant," it's just common
18 sense how you react to that. I even -- on the day of the
19 trial I took him to lunch by myself to go with him, was
20 there any way that he would admit that he bought the thing
21 so we could then get into why, and the why would be they
22 were scared the girl was having relations and I was going
23 to get around everything by saying that was it. But he
24 would never admit to me he did it, and that's where it
25 went from there. So we had the first trial, ended up

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1 being six-six mistrial. The State made a decision and
2 told me in advance that they were going to add the lewd
3 act, I've got a letter here where they told me in late
4 January. I brought him in, brought his mom and dad in and
5 said, "Okay, they're upping the ante, they've got a legal
6 right to do it, you're going to be indicted for lewd act,
7 they're going to try them together." The indictment on
8 lewd act probably is outside the ten days as I remember
9 the rules, and I said, "I can probably get the lewd act
10 continued, I may can get the whole thing continued, you
11 tell me what to do." After we discussed my concerns about
12 it they -- I've got a double barrel shotgun now instead of
13 a single barrel shooting at me, and he made the decision
14 to go to trial, so we went to trial. The first trial was
15 four days, the second trial was four days. The biggest
16 problem we had with trial number two was they brought
17 witnesses they didn't bring in trial one, they brought
18 paperwork. The mama of that child said in trial one and
19 in trial two that, "I didn't have anything to do with the
20 buying of the pregnancy kit because I was in Monroe."
21 Trial one they had no evidence to back her up, trial two
22 they did. They brought in the credit card receipts, her
23 credit card showing where she was at about the same time
24 that pregnancy kit was purchased. That gave me great
25 concern from the standpoint that I've been doing this for

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1 40 plus years but I still don't like to lose or my clients
2 lose so it made it even harder. So were they involved?
3 Yeah, they were involved in a lot of stuff. Sometimes I
4 couldn't let them in there because I had to talk in
5 confidence with my client.

6 Q Did you discuss with them at all a conversation that
7 they had with the victim's mother regarding potential
8 motive for maybe why this was going on?

9 A Oh, the thing about the property? I did but the
10 little girl kind of admitted that. It was something like
11 living in Chester County if I remember correctly, and I
12 can't remember if it was one of the parents, I can't
13 remember off the top of my head, but it was something
14 about that. And supposedly my client and the mother of
15 the child had a falling out of some kind. Yeah, we
16 discussed that. And I had them technically to be a
17 witness on that issue only but the little girl admitted
18 that as I remember, meaning the mother. The mother
19 admitted that she and Brad had some kind of issue with the
20 thing about whether or not to move to Chester and live in
21 this house and all of that stuff, so I didn't put anybody
22 else up, no, there wasn't a need to.

23 Q What other potential witnesses for the defense could
24 have been called at trial? How long was your witness list?

25 A Which potential witness?

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1 Q Pardon me?

2 A I talked to mother and daddy about that, I don't
3 remember which one was going to be lined up to do it. But
4 the mother -- as I remember the mother of the child
5 admitted what I wanted to get into evidence as to possibly
6 her talking this child into doing all of this, and that
7 was the fallout they had about whether or not to move to
8 Chester County -- actually Fort Lawn but it's Chester
9 County, I remember that. But I didn't put anybody else on
10 that issue because the little girl -- I keep saying the
11 little girl, the mother admitted it.

12 MR. SHELDON: Judge, beg the Court's indulgence for
13 just one minute.

14 THE COURT: Certainly, take your time.

15 (Break in proceedings.)

16 Q Mr. Bell, I'm almost finished. Did you at any
17 point -- DNA was also a big part of this case, right?
18 There was a lot of potential DNA; is that right?

19 A Yeah.

20 Q Did at any point you hire your own DNA expert?

21 A No, there was no need. The DNA did not directly
22 connect him in any fashion to this child. They had a sex
23 toy, it was called a penis ring that they were making a
24 big issue of, and I don't remember whose DNA was on it but
25 the little girl wasn't. They had DNA -- his DNA on a

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1 comforter that was in her bedroom, but my client explained
2 that that comforter went from bed to bed, things like
3 that. Her DNA never showed up anywhere. The mother's DNA
4 showed up I don't remember where. And then the strangest
5 thing was there was an unknown male semen DNA that showed
6 up, and I couldn't get the State to go check anybody else
7 out. There was a young man that lived there, the son, and
8 then, of course, this fellow that conceivably was the
9 father of her child, but the State wouldn't do anything.
10 Of course, I didn't have the authority to get anybody else
11 to submit to anything. So we discussed that, Brad and I
12 did. There was absolutely no reason to necessarily
13 question because of the fact that his DNA was found in the
14 house where he lived with this woman that he had sex with.
15 I've been living in my house since 1978, I would hate to
16 know what's around my house there somewhere if somebody
17 came in and put that blue light and started looking for
18 anything, so that didn't give me any concern from a
19 strategic standpoint.

20 Q And the unknown male semen was found where the victim
21 slept, wasn't it, near where the victim slept?

22 A I don't remember that, Mr. Sheldon, I would have to
23 go back. I was thinking it was found on the sofa
24 somewhere I was thinking, I don't remember. But wherever
25 it was found they got it into evidence and therefore I

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1 think I'm sure I used it. In fact, I know I used it. I
2 was raising cain about somebody else running around
3 throwing semen all over that house, I was raising cain
4 about that, I can assure you of that. So it had some
5 unusual things in it. But I keep going back to that
6 pregnancy kit, that scared the hell out of me, I'm telling
7 you, Brad will tell you, I think, I was scared to death of
8 that being connected with him. And the jury -- in the
9 second trial the jury came out and keyed on that and
10 re-listened to that part of the testimony and he got
11 convicted.

12 Q Did you ever consider having Mr. Loftin evaluated for
13 propensity to do these things for minors in general?

14 A No, never. I've never done that unless I'm dealing
15 with a Predator Act or something like that, I didn't see
16 that to being an advantage at all. You never know until
17 the last minute whether or not your client is going to
18 testify, that's a big thing. In most of my cases clients
19 don't testify, and therefore, you know, he had to make the
20 call. But no, I didn't take that to be an issue at all, I
21 don't think that hurt him or helped him with the jury.

22 MR. SHELDON: Your Honor, I don't have any more
23 questions.

24 THE COURT: Cross examine?

25 MR. SCHMECKPEPER: Thank, Your Honor, may it please

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1 the Court?

2 THE COURT: Yes, sir.

3 CROSS EXAMINATION

4 BY MR. SCHMECKPEPER:

5 Q Good morning, Mr. Bell.

6 A Yes, sir.

7 Q I'm going to hop around just a little bit. If you
8 don't mind, let's start about at the beginning of your
9 representation of Mr. Loftin. I know there were two
10 trials, you represented him for a good time, is that fair
11 to say?

12 A Yes, sir. My first contact was January the 10th of
13 2008.

14 Q And do you know roughly how many times you met with
15 Mr. Loftin in preparation for these two trials?

16 A Fifteen plus.

17 Q And you tried it at one time and got it mistried?

18 A Yes, sir.

19 Q So it was fair to say you were ready to go and you
20 were prepared to try this case?

21 A Both times.

22 Q Could you tell me just for a moment about your
23 experience, when were you licensed?

24 A 1970.

25 Q And you've been practicing criminal law most of that

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1 time?

2 A Yeah. I had two years of active duty from '70 to '72
3 but I was infantry captain but I was in the JAG Department
4 so I did some court martial stuff. But came back in '72
5 and been here since then.

6 Q Thank you for your service. This wasn't your first
7 felony trial.

8 A No, sir.

9 Q This wasn't your first criminal sexual conduct trial.

10 A No, sir.

11 Q Could you for a second tell me what your theory was in
12 this case?

13 A My theory? Well, that's kind of hard to answer. I
14 don't look at it from a theory point, I look at it from
15 the standpoint of what the State could prove. I'm an old
16 fashioned guy in that I don't push my clients to admit to
17 me if they violated the law. I do tell them there's one
18 thing and one thing only, that even if they're guilty
19 they've got a right to a trial. If they start admitting
20 to me that they did something then that puts me in a
21 predicament to where I can't let them testify under oath.
22 They can give a sworn statement type, which I have never
23 been involved in that. From the very get-go this young
24 man denied all of this and therefore I took it from there
25 and ran with it, and as we got into the evidence I would

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1 bring him in and we would go over the evidence and I would
2 make sure he understood what we were facing from the --
3 assuming they were going to present all of that. And then
4 when the offer came in, which was right before the first
5 trial, we got him in to explain that to him and the offer
6 was drop the CSC but plead straight-up to the lewd act.
7 He has to tell me what to do. I never suggest to
8 clients -- I don't know if they're guilty as sin, I don't
9 tell them what to do, I never suggest what to do. I tell
10 them very simply that it's their case, they've got to make
11 the call, because when this case is over with I'm going to
12 either go back to my office or go out to supper or go
13 home, they've got to tell me what to do. You know, you've
14 got to be unemotional in these things. I don't like
15 losing, I don't like people to go to jail. I knew the
16 parents. All I could go is do what he said do and he said
17 go to trial both times.

18 Q Let's talk about the facts in this case for a moment.
19 Correct me if I'm wrong, the underlying allegation came
20 from the victim and she pretty much said the applicant
21 raped her everyday for roughly two or three months; is
22 that --

23 A She claimed it started in August and went to December
24 31st if I remember correctly, which was New Years Eve. I
25 don't know if it was a rape -- son, that was the law when

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1 I got out of law school, we now call it criminal sexual
2 conduct -- I don't know if it was pure sexual approach
3 from that standpoint. But every time when there was at
4 least some type of illegal touching either on the breast
5 or the vagina -- I cannot tell you if we ever knew how
6 many times it was actual penetration for lack of a better
7 word, I can't answer that, I don't know if anybody ever
8 knows that. She was very adamant that something happened
9 everyday, that's how adamant she was.

10 Q And just to clarify, the victim did allege
11 intercourse.

12 A Oh, yes, sir.

13 Q I think one of the first incidents was he had
14 intercourse with her in a deer stand; is that correct?

15 A That's correct. And see, I was fighting that. That
16 occurred in Chester County and Judge Goldsmith, of course,
17 overruled my motion to avoid all of that stuff because he
18 never was indicted or charged with that charge and I'm
19 fighting that charge in Chester County and I'm trying a
20 case here in Lancaster.

21 Q So looking at some of the cooperative evidence of the
22 victim's story, I want to start with -- for the life of me
23 I can't find out this witness' name because we've got the
24 transcripts that we got from the record on appeal. But I
25 think Mr. Sheldon referenced, there was one witness who was

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1 there for at least one of the events; is that correct?

2 A That's correct. She was not brought to court in the
3 first trial. Her name came up -- excuse me, I don't know
4 if her name came up but her presence came up, and I made
5 hay about that with that first jury because she wasn't
6 here and they somehow told the jury about her. I could go
7 through and try to figure out who she is, I don't remember
8 her name either. But she was a classmate -- I don't
9 remember the exact date she was at the residence, some
10 allegations of alcohol if I remember correctly, and then
11 some allegation of the young girl and my client going to a
12 bedroom and she did not follow them in there but something
13 of that nature as I remember. Like I say, she did not
14 testify at trial one but they brought her in trial two.

15 Q And just to put it in the record, this is starting
16 around page 107 of the transcript.

17 A Yes, sir.

18 Q And just the specifics of that allegation, or that
19 witness' testimony, would you agree with me that she
20 testified more or less that the applicant offered both of
21 them alcohol one afternoon?

22 A Yes, sir.

23 Q And that she heard the applicant offer the victim \$20
24 to go in the back room and make out with him.

25 A I think that's correct.

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1 Q And she testified that she heard the victim and the
2 applicant making out together in that back bedroom?

3 A That's correct. I had forgotten about the \$20, I
4 remember the alcohol.

5 Q And the applicant also mentioned something about they
6 had offered \$20 to make out with him.

7 A I'm not saying it didn't occur.

8 Q Is it also true that the applicant testified to those
9 facts as well?

10 A If it's in the transcript, yes.

11 MR. SCHMECKPEPER: Beg the Court's indulgence.

12 THE COURT: Certainly.

13 (Break in proceedings.)

14 Q Let's talk about the vasectomy for a moment. I know
15 you say you didn't think it was a major issue in the
16 State's case.

17 A No, I didn't and I still don't.

18 Q And just looking at other corroborative evidence,
19 though, the DNA -- there was -- the applicant's DNA was on
20 the victim's comforter.

21 A Well, it was a comforter that from time to time was
22 in her room, but based on what I remember the testimony
23 being there was a big dispute about whether or not it was
24 in her room everyday and so forth. And then again -- and
25 y'all have read the transcript better than I have, I tried

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1 this thing four years ago so I don't remember all of the
2 details, but I am pretty sure that that was the point we
3 were taking. And I think my client admitted having sex
4 with the mother in about every room in the house if I
5 remember correctly.

6 Q If I could turn -- do you have a transcript with you?

7 A Yeah.

8 Q Do you mind turning your attention to page 165.

9 A 165?

10 Q Yes, sir.

11 A Okay.

12 Q I'm sorry, 165 right around line six. So you would
13 agree that the mother testified that she and Mr. Loftin
14 never used that comforter?

15 A Yeah. There was a big dispute about what was where.

16 Q And there's also DNA on the brother's bed; is that
17 correct?

18 A If the transcript says that I'm not going to tell you
19 I remember that off the top of my head. I knew there was
20 other -- there was DNA all over the house, yes.

21 Q And when we say DNA we're talking about semen
22 specifically from the applicant?

23 A Well, we're talking about my client's DNA, unknown
24 DNA. They found the mother's DNA if I remember correctly,
25 and that may have been on that sex toy. They may have

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1 been able to introduce that thing into evidence, I have
2 forgotten, and I don't remember exactly wherever it was
3 off the top of my head.

4 Q And just for a moment we can look at some more
5 corroborative evidence. I think you mentioned something
6 about the pregnancy test and how -- correct me if I am
7 wrong, the applicant testified at trial he didn't buy the
8 pregnancy test?

9 A That's correct.

10 Q He told you he didn't buy the pregnancy test.

11 A That's correct.

12 Q But the receipts and the evidence presented at trial
13 suggested it was very likely that he bought the pregnancy
14 test.

15 A If believed by the jury, yes. Because it was a
16 credit -- they brought in the boss' wife of the company he
17 worked for. She identified the credit card, it was a
18 Christmas gift to that particular employee, I think it was
19 \$400 if I remember correctly. And I knew from his
20 pretrial conference and everything to me that he used the
21 credit card on whatever date it was, I don't remember the
22 exact date, some time in December, and the little girl was
23 with him. They left Chester if I remember correctly at
24 somebody's house over there, his side of the family, drove
25 to Lancaster, went to K-Mart and bought some type of movie

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1 type camera back then for the mother for Christmas. And
2 then the next time that card was used was within five
3 minutes and it was at CVS Lancaster which as the crow
4 flies is about 1,000 yards, and that's what I was faced
5 with. He claimed the mother interceded and they swapped
6 around and the mother had the child.

7 Q And you argued that in the first trial; is that
8 correct?

9 A Oh, yeah, and six of them bought it because they
10 didn't have any corroboration. But when they showed up at
11 the second trial with receipts -- because in the first
12 trial she said, "Monroe, I was here and I was there and I
13 bought stuff," but they had no credit card receipts.
14 Well, they found them, and of course, they produced them
15 to me in sufficient time before the second trial, because
16 they have a continuing obligation under Rule 5, and it
17 unfortunately corroborated her story.

18 Q And you think that hurt the applicant's credibility to
19 the jury.

20 A Oh God yeah, it scared me to death, and I told him
21 so. I said, "We are hurting." The problem I had in
22 addition to that, you know, we had his first trial, he was
23 going to be in worse trouble if all of the sudden he was
24 going to remember something different, particularly
25 something big. After the first trial I ordered -- I

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1 didn't order a complete transcript of the whole trial, I
2 ordered the little girl's testimony, I ordered my client's
3 testimony and a couple of other witnesses and I then
4 produced a copy for him to go over to make sure there
5 wasn't going to be any big changes. Because I didn't want
6 that coming up in some fashion, not saying that it
7 wouldn't come up if he would have changed his story but it
8 had a great potential to because I don't know how much
9 leeway the State would have had to bring up having a prior
10 trial. So, I mean, that gave me very great concern. And
11 then they came back -- the jury came back -- as I remember
12 the jury did not come in for any testimony from the court
13 reporter in trial number one, but they did in trial two,
14 and they wanted to hear from my client in trial two, and
15 they wanted to hear in particular the purchase of that
16 pregnancy kit. As an experienced trial lawyer when I
17 heard that I couldn't turn to my client and say, "We're
18 going to lose," but it had me upset.

19 Q Was there any evidence in your mind that the victim
20 was sexually active with anybody besides the applicant in
21 this time period?

22 A None that I could discover. My client couldn't
23 really tell me anything in details except what I put in
24 the motion; one, that she'd left the house -- he couldn't
25 give me an exact date. But when I put in the motion --

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1 and I don't mind telling you, the Rape Shield Statute from
2 a defense standpoint is terrible law, I mean, you've got
3 to be that blunt about it. We've been fighting -- well,
4 we fight a lot of stuff, us defense lawyers, but it's
5 terrible law, and therefore I'm very limited in what I can
6 bring up. And mine wasn't strong to begin with because
7 I've got to go to my client and say, "Okay. We've got the
8 Rape Shield Statute, here is what I'm telling you about
9 trying to break it down layman wise," because he's got to
10 give me the facts. And you go to him and say, "Okay, what
11 do we have?" And we knew about the pregnancy but she
12 didn't become pregnant until after he left the house,
13 because he left December 31st. And I said, "What else do
14 we have?" And so he told me about them sneaking out, and
15 if I remember it was more than one, and I don't remember
16 off the top of my head exactly who they called or where
17 they were calling, but the mother was involved in that as
18 I remember. And then the thing about the dirty books, for
19 lack of a better word, I don't remember if it was worse
20 than Playboy or what, I don't remember what it was. I
21 don't mind telling you, I was stretching, that's all I
22 had, and that's -- as a lawyer in the field I had to use
23 what I could come up with, and that's why we did it.
24 Because the main thing I wanted was to try to get this
25 jury to know she got knocked up, I don't mind telling you

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1 that, but it didn't work because I couldn't get it in.
2 Now, would it have made a difference? I have no idea or
3 way of knowing. I can show prior contact -- I could show
4 she was pregnant, therefore somebody, for lack of a better
5 word, got in her britches at least one time and it wasn't
6 me, meaning my client, so that's the only thing I can show
7 to this jury. I have no idea how they would have reacted
8 to it but it was something worth trying. Would it have
9 made a difference? I have no idea. But I still go back
10 to she wasn't pregnant while we were there -- and I'm not
11 saying my client did it, I don't judge that way, I stay
12 neutral, I present what I've got, defend what's being
13 thrown at me. I don't judge people based on the fact that
14 he exercised his constitutional rights, I fought as hard
15 as I could twice. If he wants another shot and they say
16 I'm incompetent then this Judge has got to say I'm
17 incompetent I reckon because all I can do is what I did.
18 And I don't think it would have made a difference, I
19 really don't. That pregnancy thing, I told him and told
20 him and told him I wish we could admit that. I wish we
21 could admit we bought it because the evidence indicated he
22 did buy it.

23 Q And you're talking about you're wishing he could have
24 admitted he bought the pregnancy test.

25 A Yeah. Then we could have got in why, or at least had

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1 a better chance of getting it in why.

2 Q I'm repeating testimony, you did testify you think
3 that hurt the applicant's credibility with the jury?

4 A Yeah.

5 Q Talking about this Rape Shield Statute just for a
6 moment. You brought this up -- I mean the exhibit,
7 Applicant's Exhibit 1, your motion to admit evidence, you
8 filed that twice; is that correct?

9 A That's correct, I filed it in the first trial.
10 There's two -- in the clerk of court's file there's should
11 be two, the first one was filed some time in October of
12 '11.

13 Q And that first trial went to -- well, not to a verdict
14 but the jury was hung, right, went to a hung jury?

15 A It's a verdict but it's just not a final verdict. A
16 mistrial verdict is a verdict.

17 Q But at that point the Judge had already ruled on
18 whether or not this evidence was coming in.

19 A Oh yeah, he'd already ruled against me.

20 Q So he ruled against you twice in whether or not --

21 A That's right. The first trial didn't have lewd act,
22 the second trial had lewd act. And I tried the additional
23 tact once I made sure I was on solid legal ground, that
24 lewd act isn't covered by Rape Shield, and it's not. But
25 Goldsmith, he's the judge, he ruled against me.

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1 Q And he put -- you made these motions in what you
2 thought was in compliance with the statute?

3 A I did.

4 Q So you believe you were doing everything you needed to
5 do to preserve the record.

6 A At that time, yes, sir. And I'm not an appellate
7 lawyer by any stretch of the imagination, I have good days
8 and bad days being a trial lawyer. It did not cross my
9 mind that it wasn't preserved until I read the unpublished
10 opinion of the State versus Brad Loftin, and I reckon that
11 teaches me in this case so if I ever had it again I maybe
12 protect somebody better but do it a different way the next
13 time, because I still don't agree with that, I don't agree
14 with the opinion that it was in limine. Because again,
15 the statute -- see, it would technically be in limine any
16 way you look at it because the statute says I've got to
17 file it before I put my client up and therefore the
18 statute has got to be anticipating that if I am going to
19 go through my client to attack the statute. But I wasn't,
20 I was going to try to get it through the little girl
21 first. I did what I did, I can't dispute that I did what
22 I did.

23 Q You put what you felt was sufficient facts in that
24 motion to preserve the issue.

25 A Yeah. Because it was more of a -- it was a very

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1 factual motion, it wasn't just a plain motion saying let
2 me do it, I set out the grounds and that's why I did it
3 that way, not thinking in limine. And then on top of
4 that, you know, I wish the appellate court had been asked
5 about Judge Goldsmith's ruling of the Rape Shield Statute
6 as applies to the lewd act, but that question didn't go
7 up, or the appellate lawyer didn't ask that question. I
8 wish they had because I definitely preserved the record on
9 that. But that's what -- whether it was pre-tried or not
10 he said it covers lewd act regardless of testimony, it
11 doesn't by statute. And then again, the other thing that
12 I did my best to protect the record on, and there's a
13 fairly new case that came out about quashing the
14 indictment, I didn't move to quash the indictment but I
15 moved to stop the Chester stuff from coming in. And then
16 I moved for them to have been definite and certain as to
17 which particular crime I'm defending against, because
18 you're talking about a pellet shotgun hitting me and my
19 client. Because the little girl is saying that something
20 happened everyday from August 8th until December 31st, I
21 was trying to get them to pin it down, which they couldn't
22 do. Of course, there's that new case that has come out
23 since then but I'm not saying my facts would fit it. That
24 poor guy faced six years worth of stuff.

25 Q To be fair, this wasn't she was alleging -- she

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1 alleged once or twice over a two month period, it was
2 everyday over a two month period?

3 A Yeah. And I don't remember her saying that in the
4 first trial. I'm not trying to justify what I did, I did
5 what I did, but unless you've been through a mistrial you
6 don't really understand how better somebody is the second
7 time around. Because I threw everything that I had, which
8 was my 45 years as being a SOB defense lawyer, which I'm
9 known as, at every witness. And this is my second bite at
10 her, I met her at family court and I had her crying in
11 family court. And she broke down here the first trial as
12 I remember and we had to take a break, and I wasn't
13 leaning on her that bad but I was just being thorough with
14 her. I don't remember her being as emotional the second
15 time around because she was tougher, and that's my
16 language. Every witness that testified the second time
17 was better prepared, and they were better prepared
18 paperwork wise the second time around. And you face that
19 every time you have a mistrial, and I've had quite a few
20 in my career.

21 Q Just turning back to a question you were asked on
22 direct examination, I think counsel asked why you didn't
23 cross examine on whether or not the mother was present
24 during the vasectomy. Any my question was whether or not
25 the mother ever said she didn't know a vasectomy was going

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1 to happen. She was aware there was going to be a
2 vasectomy, right?

3 A As I remember.

4 Q And she was just caught offguard at his decision.

5 A As I remember. And I do remember -- I don't
6 remember -- I remember my client -- she may have denied
7 she was there -- I'm going by pure memory. She may have
8 denied she was there, but I think if she did -- because I
9 know my client indicated that she was there, but again
10 maybe I looked at it wrong, but to me that was a
11 non-issue. Because we didn't know -- well, for one
12 thing -- see, I know the urologist. I haven't necessarily
13 had a vasectomy but I've got a kidney stone and the same
14 guy that did that is one of my urologists, and I don't
15 mind telling you, I called. And the problem you've got
16 with a vasectomy is that it takes some time before the
17 flow stops, and therefore even after a vasectomy you may
18 have a enough there to where some sperm is going to show
19 up.

20 Q It will show up on a DNA test?

21 A That's right. And therefore I didn't know, you know,
22 I've got no idea. When they came in in January with the
23 little blue light looking for all of this stuff, God knows
24 how long it had been there, because it ain't got to be
25 alive to be examined based on what everybody told me, and

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1 therefore that's why I didn't make a big issue out of it
2 because it just wasn't a big issue to me as far as the
3 strategy of the trial.

4 MR. SCHMECKPEPER: Thank you, Mr. Bell. Your Honor, I
5 have no further questions. I would ask that Mr. Bell
6 remain under subpoena in case I need to recall him.

7 THE COURT: All right. Redirect?

8 MR. SHELDON: I don't have anything further at this
9 time, Your Honor.

10 THE COURT: Mr. Bell, you may step down, but please
11 remain. Call your next witness.

12 MR. SHELDON: Joseph Loftin, Your Honor.

13 The witness, JOSEPH LOFTIN, was first duly sworn and
14 testified as follows:

15 DIRECT EXAMINATION

16 BY MR. SHELDON:

17 Q Okay. Mr. Loftin, state your name for the record.

18 A Joseph Bradley Loftin.

19 Q And you've heard the testimony of Mr. Bell, your trial
20 attorney, right? You've been listening?

21 A Yes, sir.

22 Q What specifically -- are you seeking ineffective
23 assistance of counsel today?

24 A Yes, sir.

25 Q And you're asking this Court to grant you a new trial,

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1 basically vacate everything that's been done and grant you
2 a new trial; is that right?

3 A Yes, sir.

4 Q What did you tell Mr. Bell regarding sort of the
5 victim or the victim's mother's motive for why this might
6 have happened?

7 A It was just a break-up. I left the mom. It was
8 really no problem with any of the children or anything, it
9 was just me and the mom couldn't get along and we decided
10 to make it through Christmas because we'd already brought
11 all of their Christmas presents and all and then I was
12 going to leave.

13 Q Was that Christmas of 2007?

14 A Yes.

15 Q When did you all break up?

16 A Probably a couple of weeks right before Christmas,
17 but I didn't leave until after Christmas.

18 Q Is it fair to say that you left shortly before these
19 allegations came about?

20 A Yeah.

21 Q Did you have a conversation with Mr. Bell about
22 your -- the vasectomy that you had?

23 A Yes, sir.

24 Q And how to use that at trial?

25 A We really didn't know what they was going to throw at

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1 us with that, but yeah, we talked about it.

2 Q Did you tell him who was present with you at the time
3 that you got the vasectomy?

4 A Yes, sir.

5 Q And who was present?

6 A Me and Ms. Threatt.

7 Q Okay. Do you feel that Mr. Bell did a good enough job
8 of relaying that message to the jury?

9 A I mean, on that issue I guess. I wish the fact that
10 the doctor had, you know, said that she was there, and
11 then she sat here in court said, "I wasn't there," I wish
12 that, you know, that could have been put more out there,
13 that she was trying to hide a couple of more things and
14 hide the truth a little bit about --

15 Q What was the truth behind why you got a vasectomy?

16 A We had -- there were five children in our house at
17 the time. She had an IUD and was having problems with
18 seizures and passing out. When she had had the last
19 child, Aaron, which was supposed to be my child, she went
20 down in the operating room to have her tubes tied, and she
21 got emotional, started crying and they brought her back up
22 to the room and told her they weren't going to do the
23 surgery right now because the way she was acting. Well,
24 after a few weeks we'd talked about it, her brother-in-law
25 was up there and he was talking with me about it. She

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1 actually called my -- the place I worked trying to get
2 information on the insurance paying for it, she called the
3 insurance company about the insurance company paying for
4 it, and they told her that the insurance company wouldn't
5 pay for it so we said we were going to have to try to find
6 another method of paying for it.

7 Q Was she in support of you having the vasectomy?

8 A Yes.

9 Q What other issues did you have with Mr. Bell in terms
10 of trial strategy?

11 A I don't know. I kind of wish there would have been a
12 few more -- I had a lot of character witnesses that was
13 willing to stand up for me, a lot of people who were
14 willing to come here and speak up for me saying that they
15 knew me, they knew my family, they knew what kind of
16 people we are, they know we're not this type person.
17 People that had witnessed me with all these kids for
18 almost five years now, with my daughter and they know I'm
19 not this type of person.

20 Q And he didn't call those witnesses for you?

21 A No. I was the only one who, I guess, got up on my
22 behalf.

23 Q What about at trial, did you have any problems with
24 any of his behavior at trial? And specifically speaking
25 about the second trial.

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1 A The only thing that upset me in that one really was
2 they had a lady up here with a receipt -- the receipt
3 about the pregnancy test as a matter of fact, and they
4 were asking her about the times and dates. And she called
5 out -- she sat here and told them the time and date on the
6 thing, on the receipt. He looked over at me and said,
7 "We've got them, look right here, that's the wrong time
8 and wrong date she just gave them." And at that time he
9 slides over to the solicitor and shows her, and they
10 immediately recalled their witness, put her back on the
11 stand to fix her mistake.

12 Q There's been talk about a family court case where
13 you -- were you a part of that case?

14 A Yes, sir.

15 Q And as part of that case did you end having to see any
16 doctors or therapists or anything like that?

17 A They sent me to Kershaw, I don't remember the
18 doctor's name, he was a psychiatrist, I had to see him for
19 I want to say ten weeks. I had to take a parenting class,
20 pay \$100 to, I guess, DSS. And a caseworker came to my
21 house once a week and met with me, checked my house,
22 interacted, watched me and my daughter interact with each
23 other, things like that.

24 Q Did he represent you in the family court case, Mr.
25 Bell?

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- 1 A Yes, sir.
- 2 Q So he was aware that there was some sort of therapist
3 involved?
- 4 A Yes, sir.
- 5 Q Was therapy essentially completed prior to trial?
- 6 A Yes, sir.
- 7 Q Prior to the criminal trial I should say.
- 8 A Right.
- 9 Q Did you have any issue with potential recusal of Judge
10 Goldsmith in this case?
- 11 A Explain what you mean?
- 12 Q Did you have any issues with the trier, Judge
13 Goldsmith? Did you believe he should be presiding over
14 this case?
- 15 A We brought that issue up because Judge Goldsmith was
16 Virginia Threatt's divorce attorney.
- 17 Q When you say you brought that issue up, who did you
18 bring that up with?
- 19 A I brought that up to my lawyer, to Francis. He said
20 he didn't think that would be an issue because he said
21 Judge Goldsmith was a pretty good judge is what he said.
- 22 Q And did you trust Francis that that was the best
23 advice?
- 24 A Yes, sir.
- 25 Q But he was aware that -- Mr. Bell was aware that Judge

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1 Goldsmith was the victim's mother's divorce lawyer,
2 correct?

3 A Yes, sir.

4 Q You heard Mr. Bell, in fact, testify about the
5 pregnancy test. Do you deny you had these conversations
6 with him?

7 A Yeah, we talked about it.

8 Q And he brought you to lunch and sat you down and said,
9 "We've got to explain this?"

10 A Yes.

11 Q What was your explanation for the pregnancy test?

12 A We ate dinner at my grandmother's house, it was a
13 Sunday afternoon, we eat Sunday dinner there every Sunday.
14 We ate dinner, me and the youngest son, Tyler, I think,
15 was going hunting that afternoon. So I left dinner, we
16 went and bought the mother's Christmas present, met -- I
17 can't remember if it was the mother or the grandmother,
18 they were all going shopping in Monroe. I can't remember
19 which one I said I met, but I met one of them, gave them
20 and the daughter the remainder of my money on the card and
21 we went straight back to Fort Lawn to go hunting, and the
22 mother -- the grandmother and mother, they all went
23 shopping for other Christmas stuff.

24 Q How long did you live with the victim prior to these
25 allegations coming about?

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1 A I want to say we were together on and off for around
2 four or five years.

3 Q You heard Mr. Bell testify that there were essentially
4 three different instances, I think, that he wanted to get
5 out of this victim by way of previous things. Well, one
6 was a pregnancy post-allegations, right?

7 A Yes, sir.

8 Q One was sneaking out of the house?

9 A Yes, sir.

10 Q And one was having some pornographic books or
11 material, whatever it may have been?

12 A Yes, sir.

13 Q Did you discuss these things with Mr. Bell?

14 A Yes.

15 Q Did you have any other knowledge of the victim having
16 sexual conduct with anyone?

17 A Not directly, but we had to call the police --

18 MR. SCHMECKPEPER: Your Honor I would object to this
19 at this point, he just said he didn't directly know.

20 THE COURT: I'll overrule the objection, I'll allow
21 it.

22 Q Go ahead.

23 A Yes, sir. We had to call the police numerous times
24 for this little Brandon boy who was dating the victim at
25 the time. He was -- he kept walking up the street, coming

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1 to the house. We had numerous occasions where we would
2 get up in the middle of the night, her mom would get up in
3 the middle of the night and check on her and she would be
4 gone, couldn't find her anywhere, she would be out of the
5 house, we would have to go out and find him. The
6 magazines were in a clubhouse that her and her brother and
7 the little girl and the little boy next door all shared,
8 they had the magazines in there. And the grandmother
9 actually was out there and found those magazines and
10 brought them in, and the brother and all -- they claimed
11 that they had them from the nextdoor neighbors and the
12 little boy that was coming up.

13 Q But going back to the boy that you had to chase out of
14 the house and call the police, did you make Mr. Bell aware
15 of that?

16 A Yes, sir.

17 Q Where was the semen from the unknown male found?

18 A On the couch bed.

19 Q And who slept on the couch bed?

20 A Really about all of us did half of the time, we would
21 all pile up in there watching movies. It was in the
22 living room so we would watch movies and sleep right there
23 on the couch bed.

24 Q Did the victim ever sleep on the couch bed?

25 A Yeah.

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1 Q Did she ever sleep on the couch bed alone?

2 A Yeah.

3 Q When you were chasing this boy, Brandon, out of the
4 house, would they be in the room where the couch bed was
5 ever?

6 A Not that I recall, I don't remember that.

7 Q Where would you typically find them at?

8 A Most of the time we would just try to keep him away
9 from the house period, but he would be on the back porch,
10 at her window, you know, things like that.

11 Q Anything else you want to tell the Court?

12 A I'm still maintaining what I've been doing since 2008
13 when I was accused of this that I didn't do this. I think
14 this was a vindictive thing, it was to get back at me for
15 leaving them, which the victim's mother actually stated
16 that to my parents, that if I ever tried to leave her or
17 do anything like that that she would make sure she got me,
18 and I think that's exactly what she did.

19 Q And just to reiterate one more time just so everybody
20 is clear, you understand that if the Judge vacates this
21 sentence there's no guarantee of 12, there's no guarantee
22 of anything, you could potentially go on trial and get 35
23 years?

24 A Yes, sir.

25 Q And you're still asking this Court to grant the relief

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1 you're seeking.

2 A Yes, sir.

3 MR. SHELDON: Your Honor, I don't have anymore
4 questions.

5 THE COURT: Cross examination?

6 MR. SCHMECKPEPER: Briefly, Your Honor.

7 CROSS EXAMINATION

8 BY MR. SCHMECKPEPER:

9 Q Mr. Loftin, your attorney just asked you a question
10 about visiting a psychiatrist. When did you visit the
11 psychiatrist?

12 A I can't remember the exact date, it was sometime in
13 2008. I had to go to them, like I said, maybe eight or
14 ten sessions.

15 Q You said you had to?

16 A Yeah. The family court ordered me to go.

17 Q So that was a condition of your DSS case?

18 A Yes, sir.

19 Q And you mentioned something about Judge Goldsmith
20 being Virginia Threatt's divorce attorney?

21 A Yes.

22 Q Where did you find that out from?

23 A I knew it, she had told me that plenty of times.

24 Q Did you tell your attorney that?

25 A Yes.

JOSEPH LOFTIN - CROSS

1 Q When did you tell your attorney that?

2 A As soon as we found out we were coming, who the judge
3 was going to be and everything.

4 Q That was the first trial?

5 A Yes, sir.

6 Q And you didn't tell your attorney you didn't want him
7 to be your judge, correct?

8 A I asked what he thought and he said he didn't think
9 it would be a big issue, because like I said, he thought
10 he was a pretty good judge.

11 Q Just to be clear, your testimony was that you found
12 out from Virginia Threatt, correct?

13 A Uh-huh.

14 Q And then you told your attorney before the first
15 trial?

16 A Yes, sir.

17 MR. SCHMECKPEPER: I have no further questions.

18 THE COURT: Redirect?

19 MR. SHELTON: No, Your Honor.

20 THE COURT: Thank you, you may come down. Call your
21 next witness.

22 MR. SHELTON: John Loftin, Your Honor.

23 The witness, JOHN LOFTIN, was first duly sworn and
24 testified as follows:

25 DIRECT EXAMINATION

JOHN LOFTIN - DIRECT

1 BY MR. SHELDON:

2 Q Mr. Loftin, please state your name for the record.

3 A John Edward Loftin.

4 Q Are you Joseph Loftin's father?

5 A Yes, sir, I am.

6 Q I just want to very briefly talk about one issue. Did
7 you have a few conversations with Francis Bell while your
8 son was awaiting trial essentially while the charges were
9 pending?

10 A Say it one more time, I'm hard of hearing.

11 Q Did you have a few conversations with Mr. Bell
12 regarding your son's case while the charges were pending
13 prior to trial?

14 A Right, we did.

15 Q Is that a yes?

16 A Yes, sir.

17 Q And did you make Mr. Bell aware of the conversation
18 that you had had with the victim's mother in this case?

19 A Yes.

20 Q And what was the that conversation?

21 MR. SCHMECKPEPER: Your Honor, I would object to
22 hearsay.

23 MR. SHELDON: Judge, I'm not asserting it for the
24 truth of the matter, just essentially --

25 THE COURT: What's the significance of asking the

JOHN LOFTIN - DIRECT

1 question?

2 MR. SHELDON: Not that what the --

3 THE COURT: Sustain the objection, it's not offered
4 for the truth of matter. You can ask him what he did as a
5 result of it, but I'm not going to allow the question.

6 Q So you had a conversations with the victim's mother.

7 A Yes, I did.

8 Q And did you bring that conversation to Mr. Bell's
9 attention?

10 A Yes, I did.

11 Q Did you believe that conversation was pertinent to the
12 cross examination of the victim's mother in this case?

13 A Yes, sir.

14 MR. SHELDON: Judge, I think that is a proper
15 foundation as to why the conversation should come in.

16 THE COURT: I'm not going to allow the conversation.
17 Thank you, sir.

18 Q So you did have that conversation with Mr. Bell,
19 though; is that correct?

20 A Yes, sir.

21 Q During the trial did the contents of that conversation
22 come in at all during cross examination? Well, I'm sorry
23 let me back up for a minute. Were you present at the
24 trial?

25 A Yes, I was.

JOHN LOFTIN - CROSS

1 Q And were you present for the whole trial?

2 A Yes, I was.

3 Q Do you recall Mr. Bell asking the victim's mother
4 about the conversation that you had had with the victim's
5 mother?

6 A I don't recall.

7 Q Without telling me what the victim's mother said, was
8 the conversation relevant to the case?

9 A Yes, it was.

10 Q Do you believe it could have provided potential reason
11 for these accusations?

12 A Yes.

13 MR. SHELDON: Judge, I don't have anymore questions.

14 THE COURT: Cross examination?

15 CROSS EXAMINATION

16 BY MR. SCHMECKPEPER:

17 Q You said you did tell counsel about this conversation?

18 A Yes, I did.

19 MR. SCHMECKPEPER: I don't have any further questions,
20 Your Honor.

21 THE COURT: Redirect?

22 MR. SHELDON: No.

23 THE COURT: You can come down, sir. Any additional
24 witness?

25 MR. SHELDON: Your Honor, that's our case.

FRANCIS BELL - DIRECT

1 THE COURT: Do you have any additional witnesses?

2 MR. SCHMECKPEPER: Your Honor, the State recalls
3 Francis Bell.

4 THE COURT: Okay.

5 The witness, FRANCIS BELL, remained sworn and
6 testified as follows:

7 DIRECT EXAMINATION

8 BY MR. SCHMECKPEPER:

9 Q Thanks for staying with us, Mr. Bell. I just have a
10 couple of brief questions. The first one is did the
11 applicant ever tell you before trial that Judge Goldsmith
12 was the victim's mother's divorce attorney?

13 A Not before trial.

14 Q Did he tell you that?

15 A He never told me, his wife told me.

16 Q When did she tell you?

17 A Let me back up, I'm saying wife. His first trial
18 there was a lady up here that was not his wife, I think
19 I'm right in saying they got married second trial. That
20 issue came up after he'd been sentenced, after
21 reconsideration that this trial -- he got sentenced, I
22 filed a motion, a written motion for reconsideration, it
23 was not done that day, it wasn't done that week. We came
24 back, I think, the next week. I had a room full of people
25 that the mother and daddy got together to speak for him,

FRANCIS BELL - DIRECT

1 not as to guilt or innocence but as to sentencing, and, of
2 course, Judge Goldsmith did not change his sentence.

3 After that -- because we tried it in this courtroom, in
4 one of the two rooms, I think the one on my left at the
5 front of the courthouse, then who I took to be his wife
6 supposedly brought it up to me and I said if somebody had
7 mentioned that to me at the first trial, you know, I would
8 have tried to do something about it, but I didn't know
9 anything about it until after this thing was over with.

10 Q And this information didn't come from -- you said it
11 came from his then wife but not from the victim's mother,
12 correct?

13 A No. The only time I ever met her was in court, I
14 never interviewed her outside of court. It came from Mr.
15 Loftin's girlfriend first trial, wife second trial, I
16 believe they got married.

17 Q And Judge Goldsmith didn't say anything about any of
18 this?

19 A I didn't bring it up, the case was other with.

20 Q Having been through two trials with Judge Goldsmith,
21 do you have any reason to question his fairness?

22 A No, none whatsoever. I have yet to have a judge who
23 has overruled the Rape Shield Statute so that's the first
24 strike we got, and then -- maybe I didn't have the right
25 facts. It is doable but I couldn't get it done in this

FRANCIS BELL - DIRECT

1 case. And then no, Goldsmith, he was our resident circuit
2 judge and he was known as a fairly good sentencer from
3 that standpoint.

4 Q Now, you represented Mr. Loftin also during the DSS
5 case?

6 A I did.

7 Q So were you aware that he was ordered to see a
8 psychiatrist?

9 A I don't remember it being a psychiatrist, it was a
10 counselor of some kind. He went to the man in Kershaw
11 which is the southern part of Lancaster County but still
12 Lancaster County, little community of Kershaw, there's a
13 guy down there whose name escapes me right now that does
14 counseling. You know, I went to family court, and, of
15 course, we fought that under the condition that he wasn't
16 covered under the statute because he wasn't married to the
17 lady or kin to the child. I didn't get much further than
18 that, and then, of course, we lost it at the hearing. I
19 can't tell you I knew exactly what the plan was, because
20 once you lose these type hearings, DSS, they don't come
21 through me, DSS has the most contemptful (sic) lawyers and
22 agency in this state, they then go to the person involved
23 in this and work out the plan with him. I'm not involved
24 in it, I can't tell you that I really knew what he was
25 doing. But going back to the other issue that I was

FRANCIS BELL - DIRECT

1 asked, I certainly wouldn't bring that up in trial and let
2 this jury know we got our butts whooped over in family
3 court, I wouldn't have opened that door.

4 Q But this wasn't ordered because you had competency
5 concerns about the defendant.

6 A No. I had no issue of competency of this young man.
7 He clearly knew the difference between right and wrong, he
8 was very actively involved in his defense. Every time we
9 met he fully understood what the evidence was, the
10 difference between a first trial and a second trial as far
11 as paper evidence. And I do disagree with one thing he
12 said, I didn't -- I realize a lawyer is the first one the
13 people yell at when they get a bad result, but I can
14 assure him and his family that I didn't lean over and help
15 convict this boy. Jesus Christ, I would never do that.
16 The point is that when the evidence mistake was made it
17 was a mistake in the girl's testimony, it wasn't a mistake
18 based on what was in the paperwork and what was introduced
19 into evidence, that's what they cleared up.

20 Q And that was my next question, that receipt was
21 actually in evidence?

22 A Oh yeah. And unfortunately her testimony was a
23 little off until the solicitor caught it, I didn't catch
24 it. I saw it, heard it and showed it to him, but it was
25 corrected by the solicitor by reminding the witness what

FRANCIS BELL - DIRECT

1 was on the document.

2 MR. SCHMECKPEPER: Thank you, Mr. Bell. I have no
3 further questions.

4 THE COURT: Cross examination?

5 MR. SHELDON: No, sir, Your Honor.

6 MR. SCHMECKPEPER: The State has no more witnesses.

7 THE COURT: All right. Any reply testimony?

8 MR. SHELDON: No, Your Honor.

9 THE COURT: Okay. Any arguments? I'll be happy to
10 hear from you.

11 MR. SHELDON: Your Honor, briefly. Your Honor, the
12 issues I want to focus on are solely related to trial.
13 Regardless of when Judge Goldsmith -- when he found out
14 about the divorce, I'll go ahead and tell the Court that a
15 12 year sentence on these facts is a good sentence and I
16 don't think that my client was prejudiced by the judge in
17 this case so I will abandon that issue to what extent it
18 exists. At trial, Your Honor, there's basically three
19 issues, two that were addressed at the court of appeals, so
20 there's a preservation issue. There was no in-camera
21 hearing. It's clear from the transcript, it's clear from
22 the court of appeals' unpublished opinion that Judge
23 Goldsmith said this was a motion in limine, and motions in
24 limine are not preserved. There could have been in-camera
25 testimony with this child regarding the potential -- the

1 alternative explanations. When you have a OBGYN testifying
2 that the only thing that can cause the deep cleft like we
3 had in this case was essentially a major car accident or a
4 male penis, and the testimony goes unrefuted that there
5 were no other possible male penises that could have been in
6 this child, that is damning, that is damning evidence and
7 there is no other way to get around that. If there is
8 evidence, which obviously a month later she turns up
9 pregnant, if there is evidence to suggest that during this
10 time frame she was having sex with someone else, that is an
11 alternative explanation. That should have been preserved,
12 there should have been an in-camera hearing on the other
13 sexual potential behavior that this child had had. And I
14 remind you, at trial this is five years later, so -- yeah,
15 essentially five years later from the time of the incident,
16 so this child is now 17. Your Honor, the other issue is
17 that there's a pregnancy test. So this child turns up
18 pregnant a month after the hearing -- a month after the
19 trial, the second trial and -- or I'm sorry, a month after
20 the allegations and there's a pregnancy test purchased in
21 the beginning of December. Again, the issue is not
22 preserved, that could have been explored, this alternative
23 theory could have been explored, should have been
24 preserved. There should be in-camera testimony about
25 whether or not this testimony is relevant, whether or not

1 it's outside the Rape Shield Statute, whether or not it's
2 being presented for some other reason other than
3 embarrassment, things like that, and it wasn't. And
4 regardless of whether or not he knew or agrees with the
5 court of appeals or not, it was clearly not preserved, and
6 that's what they said. The other big issue, Your Honor, is
7 this testimony about the vasectomy. I agree that in a
8 vacuum the vasectomy is not a big deal, however when you
9 look at the way this case plays out the State's theory was
10 that -- well, that he had sex with this victim everyday or
11 some sort of sexual contact with the victim everyday for a
12 period of three months, and basically takes her to get this
13 pregnancy test because they're worried that she's pregnant,
14 and then when she's not have it discarded in the woods in
15 December, so two and a half months after it begins. When
16 you have that and you have a doctor testifying that he, in
17 fact, performed the vasectomy, the State is using that as
18 part of their theory of the case. And I think it's a
19 bigger part than Mr. Bell is letting on in that it came up
20 from multiple witnesses in this case. They brought the
21 doctor in that performed the vasectomy, but he failed to
22 mention in any cross examination of the doctor and any
23 cross examination of the mother, and really didn't get it
24 out from his own client on direct as to the circumstances
25 surrounding the vasectomy, and more importantly that the

1 mother was there for this and was present when this was
2 going on. And I think the testimony actually kind of
3 contradicts to say that he did get that out is false based
4 on the mother's testimony, I just don't think it is there,
5 Your Honor. So when you have these two preservation issues
6 along with the pregnancy test -- I mean, I'm sorry, along
7 with the vasectomy issue it becomes a pattern where this
8 all kind of fits together, it's not one single incident
9 that was a problem. But if this stuff comes in at trial
10 there's a good chance that there's alternative explanations
11 for the most damning evidence provided, and I think when
12 you look at it from that standpoint that is ineffective.
13 The defense bar has to be conscious of how to preserve
14 these issues. We have to fight. Now justice, at the time,
15 Chief Judge Few went to a CLE and said preservation,
16 preservation, fight with the trial judges, preservation. I
17 only point that out to say that it's becoming a big issue
18 at the appellate levels that we have to preserve these at
19 the trial level. And with no in-camera testimony, just
20 having the door shut pretrial prior to the opening
21 arguments isn't good enough and we need to start preserving
22 those issues, and when we don't it's ineffective
23 assistance.

24 THE COURT: Okay.

25 MR. SCHMECKPEPER: Thank you, Your Honor. May it

1 please the Court? It's certainly a preservation issue. I
2 think there's at least an argument that counsel reasonably
3 thought that he was preserving the issue properly for
4 appeal. Counsel got up here and he testified that he read
5 the statute and the statute required submitting the motions
6 prior to the court laying out the issues. Obviously the
7 court of appeals disagreed. I'm not necessarily sure that
8 actually means he was actually deficient. The question
9 isn't whether or not the appellate courts openly disagree,
10 the question is whether or not at the time counsel's
11 actions were objectively reasonable, and I think they were
12 and I think counsel's testimony indicates that it was. In
13 any event the applicant is half right when he says that the
14 failure to preserve stuff -- it may very well be deficient
15 performance, which the State is certainly not conceding, it
16 doesn't show prejudice. In this case that's just not here.
17 Counsel testified first off that it was substantially
18 corroborative by the victim in this case. There was the
19 mother's testimony, there were the -- the timelines matched
20 up as far as the vasectomy went. There was the other
21 witness who saw firsthand -- or I want to call her an ear
22 witness rather than an eye witness -- heard the applicant
23 abusing the victim. There's also the applicant's semen all
24 over the victim's comforter, all over her brother's bed.
25 Circumstantial though it may be, the applicant's semen was

1 everywhere the victim said it was. In looking at the
2 pregnancy test, which is the second issue, it is
3 corroborative evidence, even if you take that away the
4 corroborative evidence is still substantial. And the
5 pregnancy test serves two purposes here, the first is
6 correct, it is corroborative evidence; but second, as
7 counsel testified on the stand and I would say credibly,
8 the fact that the applicant -- the issue of the receipts
9 and the fact that the applicant's story was inconsistent
10 with the evidence went towards his credibility in front of
11 the jury. And I think the jury could easily disregard the
12 pregnancy test as corroborative value and just say "Okay,
13 well he said the evidence says this, I don't believe the
14 applicant." And I beg the Court's indulgence.

15 (Break in proceedings.)

16 MR. SCHMECKPEPER: I apologize, I'm trying to get to
17 my notes.

18 THE COURT: Take your time.

19 MR. SCHMECKPEPER: And finally the vasectomy
20 specifically. Your Honor, I'll just rest on the record and
21 say that Strickland has got a very tough standard.
22 Applicant is free to say, "Well, counsel should have done
23 this or should have done that." Applicant's trial counsel
24 testified what his strategy was and I don't think PCR is
25 the appropriate venue to second guess that. And I would be

1 happy to answer additional questions.

2 THE COURT: Thank you very much. Reply to anything?

3 MR. SHELDON: Your Honor, just extremely brief. As to
4 the prejudice prong, when you have a trial this isn't
5 where -- it's almost -- it's very difficult to show actual
6 prejudice through other witnesses. You just have to take
7 this all as a whole and say that --

8 THE COURT: Well, let me ask you a question, though.
9 Because the issue of preservation means was the Court going
10 to likely strike down or expand the Rape Shield Statute
11 because, that's what we would have to do with it.

12 MR. SHELDON: I don't think so.

13 THE COURT: You don't think so? Then why would there
14 be any need to preserve it?

15 MR. SHELDON: They would have had to either strike
16 down the Rape Shield --

17 THE COURT: They would have to allowed that evidence.

18 MR. SHELDON: Or find one of the other non-enumerated
19 exceptions that's not listed in the statute, I think they
20 would have had to do that. But I think that there is a
21 strong possibility that would have happened had there
22 been --

23 THE COURT: Based on what?

24 MR. SHELDON: Had the child's testimony that, yes, in
25 fact, I was sleeping with someone else.

1 THE COURT: Yeah. Well, I don't see anything to
2 indicate that anywhere, and it's certainly not been the
3 case in my 22 years on the bench. I understand the
4 position defense counsel takes concerning that, but it
5 exists, it's the law and we're trying to apply. Is there
6 any case that you can show me that says the Court may be
7 leaning of expanding that and allowing that?

8 MR. SHELDON: No, Your Honor.

9 THE COURT: And therein lies the problem. I agree
10 with you for the sake of the discussion, I think you would
11 concede that too, technically Mr. Bell may have been
12 deficient in not preserving that. I understand what he was
13 thinking and I understand the rational of him, and quite
14 frankly I don't know that that really puts him -- but just
15 assume for the sake of discussion that he is ineffective,
16 or deficient. There's nothing that I have in the record in
17 this case that says there's any prejudice, because the only
18 thing there would be would be to retry it again and you get
19 to ask that maybe, maybe not, I don't know. Because what
20 would the Court have done if they said, "Well, you
21 preserved it and we affirm it," and then you're right where
22 you are now. So the bottom line in this case -- and I cut
23 you off. Anything else --

24 MR. SHELDON: No, sir.

25 THE COURT: I didn't mean you interrupt you, Mr.

1 Sheldon.

2 MR. SHELDON: No, sir, Your Honor.

3 THE COURT: Thank you very much for your patience with
4 me. I understand your position and you've presented it
5 very, very strongly and I appreciate that very much. The
6 problem that we have -- and there are just a number of
7 cases that I've read over my career and we all know it
8 is -- and you're right, Strickland is tough, and I have
9 seen it a number of times, and I think the Court has
10 alluded to that in ruling on appeals from PCR's the
11 likelihood of it changing the outcome -- I'm
12 paraphrasing -- but really is ineffective, would have it
13 have made a difference? Frankly I have to concur with Mr.
14 Bell, I understand your argument about the vasectomy, it's
15 very well put concerning the corroboration or the
16 motivation, I've been doing this, I want to be sure. The
17 problem that we have is just her being present, I don't
18 know other than to attack her credibility but that was
19 already attacked anyway under a number of things. But the
20 biggest issue, and I think Mr. Bell is correct, I really
21 do, I think that the problem was -- and that will be --
22 August the 29th we tried a mistrial that we had about three
23 weeks ago and I bet the State is going to be better
24 prepared, there's no question about it, it really does help
25 the State more so than the defense in a criminal case, just

1 my observation over the years. But there's no question
2 when they bring in the corroboration of where the other
3 person was that allegedly used it, I think that's probably
4 one of the most critical parts that he had to overcome.
5 And the sad part about it is his credibility is what we're
6 talking about, and when you have a challenge to his
7 credibility, which is really supported -- I agree
8 circumstantially, not directly but by the evidence, then
9 you really have attacked that. Coupled with that, the
10 presence of the witness who was there that is just -- and
11 as I understand the first trial that witness did not
12 testify, it was alluded to but not testified to as I recall
13 in the statement, but there's no question that she
14 testified in this trial, and I think that's pretty tough to
15 overcome. I don't think -- I hear you, you made your point
16 and there's a way that we'll find out whether that's
17 supported, because as I've said and I tell juries now, I
18 used to say I'm the sole judge of the law in my charge and
19 now over the years I finally realized I'm the sole judge
20 today, that's as far as it goes, because the sole judges
21 are in Columbia that will ultimately make a call on this.
22 I'll help you partly that yeah, technically, it's probably
23 not preserved, he failed to preserve it. I wonder about
24 motions in Jackson v. Denno hearings and Batson, we still
25 object to it but in this particular situation the Judge

1 said, "I'm not going to allow it," then you've got to -- as
2 a trial lawyer then you've got to figure, "Okay, how am I
3 going to approach this one?" So it's a real tough, a tough
4 situation. Those of us that have been in this pit
5 understand, it's a call that he has to make. But I will
6 give you the benefit and say, yeah, but I don't think it
7 would have changed the outcome at all and the second prong
8 fails. And therefore for those reasons I'll ask the State
9 to prepare the order primarily focusing on -- and if you
10 will address in the order that -- you can say that he was
11 acting reasonably but I think in fairness to the applicant,
12 okay, it wasn't preserved, and no question, so we don't
13 know it. And I agree with you, that's part of what trial
14 lawyers have to do and that's a tough thing to do, to try
15 it from a jury trial but also thinking in the back of my
16 head, "Okay. I've got to try for the next step too," and
17 that sometimes gets muddled. But I'll grant you on that.
18 As to the other, as to the vasectomy, I agree, I don't
19 think it was that significant, and I think the other
20 addresses -- all of the others are addressed. Thank you
21 very much. And I appreciate the manner in which you
22 presented it to me.

23 MR. SHELDON: Thank you, Your Honor.

24 MR. SCHMECKPEPER: Thank you, Your Honor. And I'll
25 share that with Mr. Sheldon.

1 THE COURT: Thank you very much. Good luck to you.

2 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins,
2 Official Court Reporter for the Sixth Judicial
3 Circuit of the State of South Carolina, do hereby
4 certify that the foregoing is a true, accurate and
5 complete transcript of the proceedings had and
6 evidence introduced in the trial of the captioned
7 case relative to appeal in the Court of Common Pleas
8 for Lancaster County, South Carolina, on the 12th
9 day of July, 2016.

10 I do further certify that am neither of kin, counsel,
11 nor interest to any party hereto.

12

13

November 4, 2016

14

15


Michael C. Watkins

16

17

Court Reporter

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STATE OF SOUTH CAROLINA,
COUNTY OF LANCASTER

) IN THE COURT OF GENERAL SESSIONS
) FILED
) OFFICE OF CLERK
) OF COURT

2012 FEB 13 PM 3:57

THE STATE

VS.

JOSEPH BRADLEY LOFTIN

DEFENDANT.

) CLERK OF COURT
) MOTION TO ALLOW EVIDENCE
) LANCASTER, SC
) 2008-GS-29-494
)
)
)
)

TO THE HONORABLE COURT

Defendant by and through his attorney, Francis L. Bell, Jr.; does hereby move for a ruling on the admissibility of certain conduct of one Minor as follows:

- A. That in late Summer, early Spring of 2007, Minor and others were discovered having pornographic material in their clubhouse.
- B. That on or about November 9, 2007, Minor along with others without permission slipped out of her home to meet with some members of the opposite sex.
- C. Unidentified male semen found in house Minor occupied.
- D. That early 2008, Minor became pregnant.

Said evidence is not intended to attack the complaining witness's character nor morality.

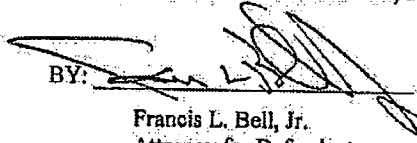
Said evidence is necessary for this Defendant, who denies any sexual conduct with complaining witness, to confront and cross examine the witness and evidence the State is attempting to use to convict, including but not limited to, the pregnancy test kit and the result of the complaining witnesses physical exam.

February 13, 2012

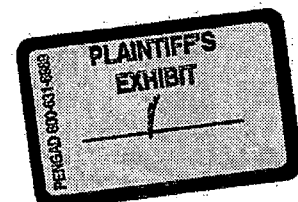
Lancaster, South Carolina

Respectfully submitted,

BELL, TINDAL & FREELAND, P.A.

BY: 

Francis L. Bell, Jr.
Attorney for Defendant
P.O. Box 867
Lancaster, SC 29721
(803)283-8476



STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

Joseph Bradley Loftin,
S.C.D.C. No. 349868

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-29-0619

ORDER OF DISMISSAL
(with prejudice)

FILED
OFFICE OF CLERK
OF COURT
2017 MAR -2 AM 11:51
CLERK OF COURT
LANCASTER, SC

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 8, 2015. Respondent made its Return on or about July 7, 2015. An evidentiary hearing into the matter was convened on July 12, 2016, at the Lancaster County Courthouse, before the Honorable R. Markley Dennis. Loftin was present and was represented by Nathan Sheldon, Esquire. Respondent was represented by Patrick Schneckpeper, Esquire, of the South Carolina Attorney General's Office.

Loftin testified on his own behalf at the evidentiary hearing. Loftin's father, John Loftin, and trial counsel, Francis Bell, Esquire, also testified. This Court has before it a copy the trial transcript, the records of the Lancaster County Clerk of Court regarding the subject convictions, appellate records, Loftin's records from the South Carolina Department of Corrections, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Loftin is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lancaster County. Loftin was indicted at the

EMD

April 2008 of the Lancaster County grand jury for second degree criminal sexual conduct with a minor (2008-GS-29-0494), and at the February 2012 term of the Lancaster County Grand Jury for committing a lewd act on a minor (2012-GS-29-0206). He was represented by Francis Bell, Esquire. On February 16, 2012, Loftin proceeded to trial before the Honorable Brooks P. Goldsmith, and was convicted as indicted. Judge Goldsmith sentenced Loftin to concurrent terms of twelve years imprisonment for criminal sexual conduct, and ten years for lewd act.

A notice of appeal was filed on Loftin's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Loftin's conviction. State v. Loftin Op. No. 2014-UP-472 (filed December 17, 2014). The Remittitur was issued on January 6, 2015.

Allegations

In his application for post-conviction relief, Loftin alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Actual innocence
 - b. Brady violation
2. Due Process violations
 - a. Improper Grand Jury empanelment
 - b. Prosecutorial misconduct.

At the evidentiary hearing, Loftin proceeded on the allegation that counsel was ineffective in failing to properly preserve his motion to introduce evidence of the victims alleged sexual activities with others; failing to elicit testimony from witnesses that the victim's mother was present when Loftin underwent his vasectomy; and failure to request a competency evaluation.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the

¹ At the hearing Loftin also alleged, for the first time, that Judge Goldsmith had a conflict of interest. That allegation was subsequently abandoned.

RMG/2

witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject guilty plea, Loftin's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2015), this Court makes the following findings of fact based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

Loftin has raised various claims of ineffective assistance of counsel. In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, (1984); Butler, 286 S.C. 441, 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. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test 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, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

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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 Supreme Court of the United States has held that an attorney's advice on whether to reject a plea offer is subject to a Strickland-type ineffective assistance claim. Lafler v. Cooper, 132 S.Ct. 1376, 1383, 182 L.Ed.2d 398 (2012). In order to show prejudice on such a claim, an applicant must show that there is a "reasonable probability that the plea offer would have been presented to the court (i.e., that the [applicant] would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." Id. at 1385.²

Failure to Preserve

Lofin first alleged counsel was ineffective for failing to properly preserve his motion to introduce evidence of the victim's alleged sexual activity (specifically, with persons other than Lofin). He argued counsel could have used the information to argue alternate explanations for why a pregnancy test was purchased for the victim, as well as for her penetration-related physical injuries. Given the substantial corroborative evidence supporting the victim's version of events, as well as the severe credibility problems with Lofin's trial testimony, this Court finds he has failed to meet his burden to prove ineffective assistance of counsel.

This Court find that counsel failed to properly preserve for appellate review the issue of whether or not the victim's alleged sexual activity with persons other than Lofin was admissible.

² The proper remedy, where an applicant has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea, is to order the State to reoffer the plea agreement, and then, if petitioner accepted the offer, the state trial court could exercise its discretion regarding whether to resentence. Id. at 1391.

RMT 4

However, Loftin failed to meet his burden to show prejudice. Specifically, a review of the record – alongside counsel’s credible testimony – indicates that Loftin’s credibility was irreparably harmed by evidence regarding the purchase of a pregnancy test for the victim.

Counsel said that he was

“scared to death” of the pregnancy test “because [Loftin] would not admit that he bought it, and I wasn’t with him, but the evidence strongly indicated that he would be the one to purchase the thing. And therefore when the jury came back in the second trial and wanted to rehear that part of the testimony my heart hit my foot because I was so scared to death of that one piece of evidence.”

PCR Tr. p. 11-12. This Court agrees. Given the importance of credibility in this case, the defects in Loftin’s own testimony were practically insurmountable.

Additionally, the victim’s testimony was strongly corroborated by another witness who was present for portions of the abuse, saw Loftin offer the victim money if she allowed him to sexually abuse her, and subsequently heard them kissing in the next room. In light of Loftin’s credibility problems, as well as the substantial corroborative evidence in support of the victim’s version of events, this Court finds he has failed to meet his burden to prove ineffective assistance of counsel. This allegation is therefore denied and dismissed.

Failure to introduce evidence that the victim’s mother was present during vasectomy

Loftin next alleges counsel was ineffective for failing to elicit testimony that Virginia Threatt, the victim’s mother, was present during his vasectomy, arguing it would have refuted the State’s theory that he got it so he could avoid getting the victim pregnant.

This allegation is also without merit. Counsel testified credibly that he did not view the vasectomy issue as a crucial piece of evidence. Moreover, Ms. Threatt’s testimony did not suggest she was unaware Loftin was getting a vasectomy; rather, she was caught off-guard by his decision to undergo the procedure. Loftin has failed to plausibly establish that Ms. Threatt’s

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presence during a significant medical procedure has anything to do with whether she was initially caught off guard by his decision to undergo that procedure in the first place. A more likely explanation is that Ms. Threatt went to support her partner, even if she did not entirely understand his reasoning. In any event, this Court will not assist Loftin in meeting his burden – where he has otherwise failed to do so³ – by engaging in rampant speculation. This allegation is therefore denied and dismissed.

Competency

To the extent Loftin's testimony could be construed to have alleged counsel was ineffective for failing to request a competency evaluation, he has also failed to meet his burden. Counsel's credible testimony indicates he had no competency questions in this case. PCR Tr. p. 59. Counsel may reasonably rely on his own observations in determining whether a competency evaluation is necessary. Jeter v. State, 308 S.C. 230, 233, 417 S.E.2d 594, 596 (1992). Loftin's contrary self-serving testimony is entirely not credible.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Loftin failed to present any evidence regarding such allegations. Accordingly, the Court finds any such allegations are abandoned.

³ Particularly considering the substantial corroborative evidence supporting the victim's testimony and Loftin's credibility problems, discussed above.

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CONCLUSION

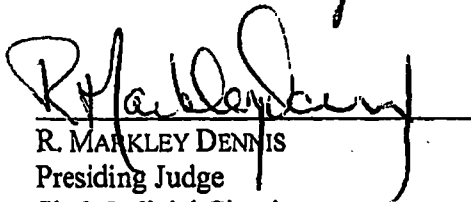
Based on the foregoing, this Court finds that Loftin has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Loftin must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Loftin's counsel to file and serve notice of appeal. Loftin's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Loftin must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 9th day of February, 2017.


 R. MARKLEY DENNIS
 Presiding Judge
 Sixth Judicial Circuit

Markley Dennis, South Carolina

RMDJ/1

Lancaster County

Jeff Hammond
Clerk of Court

Clerk of Court of Lancaster County
Post Office Box 1809
Lancaster, S.C. 29721

Phone (803) 285-1581
Fax (803) 416-9388

STATE OF SOUTH CAROLINA
COUNTY OF LANCASTER

IN THE COURT OF COMMON PLEAS
6TH JUDICIAL CIRCUIT

Joseph Bradley Loftin #349868

Applicant

VS

State of South Carolina

Respondent

CERTIFICATE OF SERVICE

CASE# 2015-CP-29-00619

I certify that, on March 2, 2017, I served a copy of the Order of Dismissal by mailing to him at his last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Joseph Bradley Loftin #349868
Allendale Correction Institution
PO Box 1151
Fairfax, SC 29827

Alicia A Olive
Assistant Attorney General
PO Box 11549
Columbia, SC 29211-1549

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CLERK OF COURT
LANCASTER, SC

3.2.17
Date

Jeff Hammond
Signature

WITNESSES

Adams - LCSO #08-00317

J. Crump

ARREST WARRANT NUMBER/DOA

K123753 (DOA-2-13-08)

ACTION OF GRAND JURY

TRUE BILL

T.D. Hammond

Foreperson of Grand Jury

Date: APR 3 2008

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2008-GS-29-494

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

APRIL TERM 2008

THE STATE

vs.

Joseph Bradley Loftin

Indictment for

**Criminal Sexual Conduct with a Minor
Second Degree**

SC Code: § 16-3-655(B)(1), (C)(3)

CDR Code: 0396

Class: Felony C

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

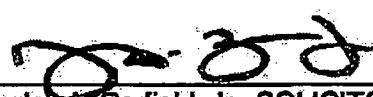
INDICTMENT

At a Court of General Sessions, convened on April 3, 2008, the Grand Jurors of Lancaster County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE

That Joseph Bradley Loftin did in Lancaster County, on or about August 2007 through December 2007, engage in sexual battery with [REDACTED] victim, a minor 14 years of age or less but at least 11 years of age, in violation of Section 16-3-655(B)(1), (C)(3) of the Code of Laws of South Carolina.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Douglas A. Barfield, Jr., SOLICITOR

WITNESSES

Adams-LCSO #08-00317

DTCB

ARREST WARRANT NUMBER/DOA

K123753 (DOA-2/13/08)

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date:

OCT 13 2011

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2008-GS-29-494

**The State of South Carolina
County of Lancaster**

COURT OF GENERAL SESSIONS

OCTOBER TERM 2011

**THE STATE
vs.**

Joseph Bradley Loftin

**Amended
Indictment for**

**Criminal Sexual Conduct with a Minor
Second Degree**

SC Code: § 16-3-655(B)(1), (C)(3)
CDR Code: 0396
Class: Felony C

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STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

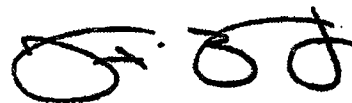
INDICTMENT

At a Court of General Sessions, convened on October 13, 2011, the Grand Jurors of Lancaster County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR SECOND DEGREE

That Joseph Bradley Loftin did in Lancaster County, on or about August 2007 through December 31 2007, engage in sexual battery with a minor 14 years of age or less but at least 11 years of age, to wit: sexual battery as defined in section 16-3-651 upon or with [REDACTED] victim, date of birth [REDACTED], in violation of section 16-3-655(B)(1), (C)(3) S.C. Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Douglas A. Barfield, Jr., SOLICITOR

WITNESSES

Adams-LCSO #08-00317

E. J. Carter

ARREST WARRANT NUMBER/DOA

DI (Reference K123753)

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

FEB 9 2012

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012-GS-29-206

The State of South Carolina

County of Lancaster

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2012

THE STATE

vs.

Joseph Bradley Loftin

Indictment for

Committing a Lewd Act Upon a Child

SC Code: § 16-15-140

CDR Code: 2468

Class: Felony, D

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STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER)

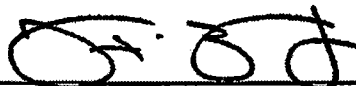
INDICTMENT

At a Court of General Sessions, convened on February 9, 2012, the Grand Jurors of Lancaster County present upon their oath:

COMMITTING A LEWD ACT UPON A CHILD

That Joseph Bradley Loftin, a person over the age of fourteen (14) did in Lancaster County on or about August 2007 through December 31 2007, willfully and unlawfully commit a lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen (16) years, to wit: [REDACTED] victim, date of birth [REDACTED] with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desire of himself or of said child, [REDACTED] victim in violation of §16-15-140, *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.



Douglas A. Barfield, Jr., SOLICITOR