

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUN 01 2017

Appeal from Colleton County

S.C. SUPREME COURT

Honorable Edgar W. Dickson, Circuit Court Judge

TIMOTHY ALLEN LEMACKS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002387

APPENDIX

LARA M. CAUDY
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

J. Benjamin Aplin
S.C. Bar No. 8729
Senior Assisitant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

INDEX

INDEX.....	i
TRIAL TRANSCRIPT (Dated February 28, 2011 – March 2, 2011).....	1
FINAL <u>ANDERS</u> BRIEF OF APPELLANT	308
SOUTH CAROLINA COURT OF APPEALS OPINION NO. 2013-UP-363 (Filed October 2, 2013)	320
APPLICATION FOR POST-CONVICTION RELIEF	322
RETURN	329
POST-CONVICTION RELIEF HEARING TRANSCRIPT (Dated October 27, 2014)	334
ORDER OF DISMISSAL	364
INDICTMENT	369

**THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:
STATE’S EXHIBIT NO. 1 (CD OF FORENSIC INTERVIEW)**

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
)
 COUNTY OF COLLETON) CASE NO.: 2010-GS-15-0916

THE STATE OF SOUTH CAROLINA,)
)
)
 v.) TRANSCRIPT OF RECORD
)
 TIMOTHY ALLEN LEMACKS,)
)
)
 DEFENDANT.)
)

FEBRUARY 28TH - MARCH 2, 2011
 WALTERBORO, SOUTH CAROLINA
 BEFORE THE HONORABLE PERRY M. BUCKNER

APPEARANCES:

ASST. SOL. CHARLES BALISH, ESQUIRE
 14TH CIRCUIT SOLICITOR'S OFFICE
 POST OFFICE BOX 1725
 WALTERBORO, SOUTH CAROLINA 29488
 Attorney for the State of South Carolina

MR. DAVID S. MATHEWS, ESQUIRE
 COLLETON COUNTY PUBLIC DEFENDER'S OFFICE
 BENSON STREET
 WALTERBORO, SOUTH CAROLINA 29488
 Attorney for the Defendant

Rebecca H. Hill
 Official Court Reporter
 522 Dowling Avenue
 Walterboro, SC 29488

INDEX

QUALIFYING QUESTIONS	5
VOIR DIRE	20
JURY SELECTION	30
PRE-TRIAL MOTIONS	
WITNESS INTIMIDATION INSTRUCTION	40
MOTION FOR SEQUESTRATION OF WITNESSES	42
MATTER WITH WITNESS, DENNIS DAVIS	46
COMPETENCY HEARING OF F.G.	48
DIRECT BY ASST. SOL. BALISH	49
CROSS BY MR. MATHEWS	52
REDIRECT BY ASST. SOL. BALISH	53
EXAMINATION BY THE COURT	54
EXAMINATION BY ASST. SOL. BALISH	55
MOTION FOR SUPPRESSION OF RECORDS OF EPIFANIO GARCIA ARREST AND CONVICTION	59
JURY SWORN	66
INSTRUCTION BY THE COURT	66
OPENING STATEMENTS	
BY ASST. SOL. BALISH	75
BY MR. MATHEWS	78
<u>WITNESS: Minor</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	80
CROSS EXAMINATION BY MR. MATHEWS	102
REDIRECT EXAMINATION BY	116
MATTER OF LAW	119
<u>WITNESS: F.G.</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	123
CROSS EXAMINATION BY MR. MATHEWS	130
<u>WITNESS: TIFFANY DAVIS</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	132
CROSS EXAMINATION BY MR. MATHEWS	146
<u>WITNESS: DR. MICHELLE AMAYA</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	157
CROSS EXAMINATION BY MR. MATHEWS	172

<u>WITNESS: MS. AKIMA JONES</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	183
CROSS EXAMINATION BY MR. MATHEWS	186
REDIRECT EXAMINATION BY ASST. SOL. BALISH	187
<u>WITNESS: EPIFANIO GARCIA</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	188
CROSS EXAMINATION BY MR. MATHEWS	203
MATTER OF LAW	204
CROSS EXAMINATION BY MR. MATHEWS CONTINUES	205
REDIRECT EXAMINATION BY ASST. SOL. BALISH	207
<u>WITNESS: DENNIS DAVIS</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	212
<u>WITNESS: DET. DORETHEA GEATHERS</u>	
DIRECT EXAMINATION BY ASST. SOL. BALISH	221
CROSS EXAMINATION BY MR. MATHEWS	224
MATTER OF LAW	
CROSS EXAMINATION BY MR. MATHEWS CONTINUES	237
REDIRECT EXAMINATION BY ASST. SOL. BALISH	248
STATE RESTS	256
DEFENDANT'S MOTION FOR DIRECTED VERDICT	257
DEFENDANT ADVISED OF FIFTH AMENDMENT RIGHTS	258
DEFENSE RESTS	264
CLOSING ARGUMENTS	
BY MR. MATHEWS	264
BY ASST. SOL. BALISH	273
JURY CHARGE	282
EXHIBITS TO JURY	298
VERDICT	299
SENTENCING	301
CERTIFICATE OF REPORTER	307

STATE EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
ONE	CD OF HOPE HAVEN INTERVIEW OF Minor	252	252

1 THE COURT: Good afternoon, ladies and gentlemen. My
2 name is Craig Brown. I'm a Circuit Court Judge from
3 Florence, traveled down here this morning to hold court with
4 you-all for this week. It's my understanding that your
5 clerk here, Ms. Grant, she's already called roll. Is that
6 correct, Ms. Grant?

7 MADAME CLERK: That's correct.

8 THE COURT: Well, we're in the process of qualifying
9 the jury for you-all to serve as jurors for a term of what's
10 called General Sessions Court. General Sessions Court is
11 known as the criminal court in this state. Now, you-all
12 have been summoned here to serve for one week this week, not
13 for a multi-week term, which you can exhale at this point
14 and be glad that you're not summoned here for a multi-week
15 term. You've been summoned for a one-week term of court.
16 Two types of court in this state. One is what's called
17 Common Pleas, which is civil court, which deals with wreck
18 cases, contract disputes, people fighting over money. And
19 the other one is what you've been summoned here today for,
20 and that's General Sessions, which is criminal court.

21 Now, roll call has already been done, and I know that
22 everybody has spoken very loud, so that this court reporter,
23 my court reporter over here, Becky, can hear what you're
24 saying. It's important that she hear what you say. This is
25 a court of record, and what's said in this courtroom is

1 taken down as part of a record. But we have -- part of the
2 jury process qualification is, it's a multi-step process.
3 You cleared hurdle number one. I'm going to carry you to
4 the finish line, okay? I'm going to carry you to the finish
5 line.

6 Now, certain questions that I must ask you, to
7 determine your qualifications to serve as jurors. State law
8 requires that I ask these questions. Some of the questions
9 that I ask you, quite frankly, may seem personal to you.
10 And it may be questions that you might not feel comfortable
11 standing up and answering. But state law requires that I
12 ask these questions. This process, ladies and gentlemen, is
13 not a process whereby we try to embarrass you. But we ask
14 you these questions because state law requires it.

15 And if I ask you a question that you do not feel
16 comfortable standing and responding to, I'm going to ask
17 that you make a mental note. Make a mental note to that
18 question, because I'm going to give you an opportunity to
19 come up and talk to me in sidebar. When I say "sidebar", to
20 the side here; or I will actually step down and talk to you
21 by the court reporter. I'll give you an opportunity to do
22 that at the conclusion of all of my questions.

23 Now, first question, ladies and gentlemen, is there any
24 member of the jury panel not a citizen of the United States?
25 If so, please stand.

1 (NO RESPONSE.)

2 THE COURT: All right. Is there any member of the jury
3 panel not a resident and citizen of Colleton County, South
4 Carolina? If so, please stand.

5 (NO RESPONSE.)

6 THE COURT: Can everybody in the back hear me okay?
7 Raise your hand in the back if you can hear me okay. Okay.
8 Next question: Is there any member of the jury panel unable
9 to read, write, speak or understand the English language?
10 If so, please stand.

11 (NO RESPONSE.)

12 THE COURT: The next question I ask is not one that
13 state law requires, but I ask this question usually anyway,
14 just to be careful. Is there any member of the jury panel
15 who believes that the person seated next to them can't
16 understand the English language? If so, raise your hand, or
17 let me know.

18 (NO RESPONSE.)

19 THE COURT: Is any member of the jury panel -- does any
20 member of the jury panel have less than a sixth grade
21 education or its equivalent? If so, please stand.

22 (NO RESPONSE.)

23 THE COURT: All right. Is there any member of the jury
24 panel unable, because of mental or physical infirmities,
25 unable to render efficient jury service this week? For

1 example, does any member of the jury panel have a medical
2 condition that would prevent you from serving on jury duty
3 this week? And before you answer that question, let me
4 explain to you. What we typically do is go about an hour
5 and a half to two hours between breaks, and you'd be asked
6 to sit for an hour and a half to two hours before we would
7 take a break.

8 So my question is whether or not there's any member of
9 the jury panel unable because of mental or physical
10 infirmities able to serve on jury duty this week. If that
11 applies to you, please stand.

12 (JUROR STANDS.)

13 THE COURT: Yes, ma'am. Your name and number?

14 JUROR: Patricia Priester, One thirty.

15 MADAME CLERK: One thirty.

16 THE COURT: Ms. Priester, are you currently under any
17 kind of doctor's care? Do you have a note for me?

18 JUROR: I got tests done, I got to have done in
19 Charleston. I'm on disability.

20 THE COURT: Okay. I'm going to make a note in my
21 record and I will get you up here at the conclusion, okay?

22 JUROR: Okay.

23 THE COURT: Thank you. All right. Anybody else?

24 (NO RESPONSE.)

25 THE COURT: My next question: Has any member of the

1 jury panel been convicted by guilty plea or trial in State
2 or Federal Court of record of a crime, punishable by
3 imprisonment for more than one year, and your civil rights
4 have not yet been restored, or have not been restored by
5 pardon, or amnesty? Punishable by more than one year?
6 Means that you could have, you could have received a
7 sentence of more than one year, regardless of what sentence
8 you actually may have received. If so, please stand.

9 (NO RESPONSE.)

10 THE COURT: All right. Is there any member --

11 JUROR: Your Honor ---

12 THE COURT: Just come up at the conclusion, okay? All
13 right. Is there any member of the jury panel a Clerk or
14 Deputy Clerk of Court, enforcement officer, probate judge,
15 county commissioner, magistrate or other county officer, or
16 employed within the walls of any courthouse? If so, please
17 stand.

18 (NO RESPONSE.)

19 THE COURT: Is there any member of the jury panel who
20 has previously served on jury duty in Circuit Court, not
21 City Court or Magistrate's Court or Federal Court, Circuit
22 Court during this calendar year? If so, please stand.

23 (NO RESPONSE.)

24 THE COURT: All right. Is there any member of the jury
25 panel who has served as a member of the Colleton County

1 Grand Jury during the past several years? If so, please
2 stand.

3 (NO RESPONSE.)

4 THE COURT: All right, ladies and gentlemen, we now
5 move to what's called jury exemptions. State law provides
6 for several exemptions to jury servers. An exemption does
7 not mean you're not qualified to serve. It simply means
8 that you have the right to say you choose not to serve.
9 First exemption, ladies and gentlemen, are those of you --
10 applies to those of you who are 65 years of age or older.
11 If you are 65 years of age or older, you are exempt from
12 jury service. Now, those of you who are 65 years of age or
13 older present a pool of tremendous talent for jury service.
14 And we in this court would urge you to serve this week, if
15 you're inclined to do so. But if you wish to be exempt, you
16 may certainly be exempt. Is there any member of the jury
17 panel who is 65 years of age or older and who wishes to be
18 exempt from jury service this week? If so, please stand.

19 (NO RESPONSE.)

20 THE COURT: Ladies and gentlemen, another exemption
21 concerns prior jury service. No person is required to serve
22 as a juror more often than once every three calendar years.
23 Therefore, if any member of the jury panel has served on
24 jury duty during the last two calendar years, you may be
25 exempt from jury service this week. Please note that this

1 exemption does not apply if your jury service was in
2 magistrates court, city court or federal court. If this
3 exemption applies to you and you wish to be exempted, please
4 stand.

5 (JUROR STANDS.)

6 THE COURT: Yes, ma'am. Your name and number.

7 JUROR: Betty Fusari, number Sixty-three.

8 THE COURT: When did you serve, Ms. Fusari?

9 JUROR: It was the first part of 2010 or the latter
10 part of 2009.

11 THE COURT: And was it in this courtroom?

12 JUROR: Yes, sir.

13 THE COURT: Do you know whether it was civil court? or
14 criminal court?

15 JUROR: I think it was criminal court.

16 THE COURT: Ms. Grant, can y'all check it?

17 MADAME CLERK: We're checking it now.

18 (BRIEF PAUSE IN COURTROOM WHILE RECORDS ARE BEING
19 CHECKED.)

20 MADAME CLERK: March the 10th of 2010.

21 THE COURT: All right. Ms. Fusari, the clerk's office
22 has checked and you did serve in March of 2010. Now as I
23 said previously, if you choose to be exempt this week, you
24 can choose to be exempt. My next question to you is: Do
25 you choose to be exempt this week?

1 JUROR: Yes, I do.

2 THE COURT: All right. You sure you don't want to stay
3 with us?

4 JUROR: No.

5 THE COURT: All right. You are free to leave, okay?
6 Thank you for being here today.

7 (JUROR EXITS COURTROOM.)

8 THE COURT: All right, ladies and gentlemen,,
9 individuals who have served as grand jurors in the last five
10 calendar years may also be exempt from jury service. If any
11 member of the jury panel has served on a grand jury during
12 the last five calendar years, you may be exempt from service
13 this week, if you choose to be exempt. Is there any --
14 excuse me. If this exemption applies to you and you wish to
15 be exempted, please stand.

16 (NO RESPONSE.)

17 THE COURT: All right. The next question, ladies and
18 gentlemen, deals with those of you who have legal custody of
19 young children. Please listen very carefully to this
20 exemption. It has several parts, all of which must apply to
21 you for you to be exempted on this basis. You may be exempt
22 from jury service if you have a child or children under the
23 age of seven years, you have legal custody of your child or
24 children, you have the principal care, custody and control
25 of your child or children, and you are unable to make

1 arrangements for the adequate care of your child or children
2 while performing jury duty. If all of these requirements
3 apply to you, then you may be exempt on this basis. If this
4 exemption applies to you and you wish to be exempted, please
5 stand.

6 (JUROR STANDS.) Yes, ma'am. Your name and number.

7 JUROR: Courtney McMillon, One fourteen.

8 THE COURT: All right, Ms. McMillon, do all of those
9 factors apply to you? Do you work outside of your home?

10 JUROR: Yes, sir.

11 THE COURT: How old is your child or children?

12 JUROR: Six, four, and ten months.

13 THE COURT: All right. Who takes care of those
14 children -- who takes care of those children while you're
15 working?

16 JUROR: My grandmother. She's on disability and she's
17 had cancer and she is in treatment.

18 THE COURT: Okay. Ms. Grant, let me ask you a
19 question.

20 (Sotto voice discussion between Clerk and Judge.)

21 THE COURT: All right, Ms. McMillon, what I'm going to
22 do, I'm going to transfer you to another term of court,
23 because you work outside of the house. I'm going to
24 transfer you over and exempt you from service, given your
25 grandmother a little bit of time to get better, so that she

1 can continue to take care of those children for you.

2 When is the next term of court?

3 MADAME CLERK: Next term is March the -- no, I'm sorry.

4 Yes, March the 28th.

5 THE COURT: When is the time after that?

6 MADAME CLERK: April 18th.

7 THE COURT: I'm going to transfer you to the week of

8 April 18th. Is that a Common Pleas term or General

9 Sessions?

10 MADAME CLERK: General Sessions.

11 THE COURT: April 18th. That will give your

12 grandmother some time to get better and make arrangements

13 then, okay?

14 JUROR: Okay.

15 THE COURT: You're free to leave.

16 (JUROR EXITS.)

17 THE COURT: All right. Is there anybody else that that

18 particular exemption applies to?

19 (NO RESPONSE.)

20 THE COURT: All right. Next question, ladies and

21 gentlemen: If you are the primary caretaker of a person 65

22 years of age or older and you are unable to provide adequate

23 care for the person while performing jury service, you may

24 be exempt from jury duty. If this exemption applies to you

25 and you wish to be exempted, please stand.

1 (NO RESPONSE.)

2 THE COURT: All right. The next exemption, ladies and
3 gentlemen, if you are the primary caretaker of a severely
4 disabled person who is unable to care for himself or herself
5 and cannot be left unattended and you are unable to provide
6 adequate care for the person while performing jury service,
7 you may be exempt from jury duty. If this exemption applies
8 to you and you wish to be exempted, please stand.

9 (NO RESPONSE.)

10 THE COURT: The next exemption, ladies and gentlemen,
11 involves those of you who may be attending school at this
12 time or working in some capacity with a school. If this
13 exemption applies to you and you wish to be exempt, we will
14 transfer your serve to another term of court at a time which
15 will not conflict with your school responsibilities. Is
16 there any member of the jury panel who is a full-time
17 student, school teacher, school crossing guard, school bus
18 driver or who serves in any other school-related function,
19 who is unable to serve on jury duty this week as a result of
20 that school involvement? If so, please stand.

21 (JUROR STANDS.)

22 THE COURT: Yes, ma'am. Your name and number.

23 JUROR: La Tarsha Kinsey ; my number is one hundred. I
24 am a full-time student attending school, and I also work in
25 the school district.

1 THE COURT: Where are you currently attending school,
2 Ms. Kinsey?

3 JUROR: The place I attend school is Grand Canyon
4 University.

5 THE COURT: We can transfer you to another term of
6 court. Would it be more convenient for you to serve in the
7 summer?

8 JUROR: Yes, sir.

9 THE COURT: All right.

10 MADAME CLERK: June the 20th.

11 THE COURT: June the 20th. We'll transfer you to a
12 term of court the week of June the 20th.

13 JUROR: That's fine.

14 THE COURT: Okay?

15 JUROR: Thank you.

16 THE COURT: Thank you.

17 (JUROR EXITS.)

18 THE COURT: All right. The next exemption, ladies and
19 gentlemen, is there any member of the jury panel who is
20 employed with the Department of Corrections at a
21 penitentiary? If so, and you'd like to be exempted, please
22 stand.

23 (NO RESPONSE.)

24 THE COURT: All right. Is there any member of the jury
25 panel who performs services for a business, commercial or

1 agricultural enterprise, in which you're so essential for
2 the operation of the enterprise, that if you were required
3 to perform jury duty, the enterprise would have to close or
4 stop functioning? If so, and you wish to be exempted,
5 please stand.

6 (NO RESPONSE.)

7 THE COURT: All right, ladies and gentlemen, that
8 concludes the statutory list, qualifications and exemptions
9 for jury service. It may be that you are qualified and no
10 exemption applies to you, but jury service this week would
11 constitute an extreme hardship on you for a particular
12 reason. I cannot permanently excuse a qualified juror from
13 jury service, but under extreme and compelling
14 circumstances, I may excuse a juror from this term of court
15 and transfer you to another term of court, particularly
16 those of you who have not previously been transferred.

17 Please understand, ladies and gentlemen, that general
18 inconvenience is not a sufficient reason to transfer you to
19 another term of court. To justify a transfer to another
20 term of court, service this week must constitute an extreme
21 hardship to you. Is there any member of the jury panel that
22 this applies to? If so, please stand.

23 (JUROR STANDS.)

24 JUROR: My name is Taylor Maxcey, juror number One
25 thirteen. I'm -- I'm on military orders, starting tomorrow

1 till Sunday.

2 THE COURT: Starting tomorrow?

3 JUROR: Yes, sir.

4 THE COURT: All right. When is --

5 MADAME CLERK: March 28th or April 18th.

6 THE COURT: March 28 or April 18th?

7 JUROR: Either one will be fine.

8 THE COURT: What's the 18th?

9 MADAME CLERK: 18th.

10 THE COURT: What is that, Common Pleas?

11 MADAME CLERK: General Sessions.

12 THE COURT: I'll transfer you to April 18th.

13 JUROR: Yes, sir.

14 THE COURT: Okay. Thank you, sir.

15 JUROR: Thank you.

16 (JUROR EXITS.)

17 THE COURT: All right, ladies and gentlemen, this is
18 now the chance for those of you who did not respond earlier
19 to any questions that I asked and those of you who may have
20 a compelling reason to request a transfer of your service to
21 another week to come forward. If you believe you are
22 disqualified or exempt from jury service, or if you have any
23 questions about whether or not you are disqualified or
24 exempt, please come forward at this time. Come behind the
25 swinging door there and stop right there. Ms. Priester,

1 this is now the time for you to come forward.

2 (JURORS COME FORWARD.)

3 JUROR: Stacey Brunson, number Twenty.

4 THE COURT: Would it be better for me to transfer him
5 to General Sessions? I'm going to transfer her. Ms. Grant,
6 I'm going to transfer her to March 28th.

7 MADAME CLERK: March 20th?

8 THE COURT: March 20th or April 18th?

9 MADAME CLERK: March 20th.

10 THE COURT: All right. Stacy Brunson to the 20th.

11 THE COURT: All right. Ladies and gentlemen, you
12 are now qualified to service as jurors this week, for this
13 term of General Sessions Court. Now, before we move forward
14 in selecting a jury in the first case that we have up for
15 trial this week, I know that some of you have been here at
16 least an hour, some of you maybe longer than that. There
17 are a couple things that we need to take care of before we
18 pick a jury. So I'm going to give you about a 15 minute
19 break. It's ten after. I'm going to ask that you be back
20 in the courtroom at 3:25. At 3:25, be back in the courtroom
21 and we will move forward at that time with selecting the
22 first jury. Thank you. Everybody else, remain seated,
23 please, except the jurors. 3:25, jurors.

24 (3:10 P.M., FEBRUARY 28, 2011, WHEREUPON THE JURY EXITS
25 THE COURTROOM; at 3:25 P.M., THE JURORS ENTER BACK INTO THE

1 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
2 RECORD.)

3 THE COURT: Mr. Balish.

4 ASST. SOL. BALISH: May it please the Court, Your
5 Honor.

6 THE COURT: Yes, sir.

7 ASST. SOL. BALISH: Your Honor, this is the State v.
8 Timothy Allen Lemacks, 2010-GS-15-916, true-billed for
9 criminal sexual conduct with a minor, age 11 years or
10 younger. May I approach?

11 THE COURT: Yes, sir.

12 ASST. SOL. BALISH: That's first degree.

13 THE COURT: What now?

14 ASST. SOL. BALISH: That's first degree, Your Honor.
15 Eleven years old.

16 THE COURT: All right. Ladies and gentlemen, we are
17 about to begin the trial of the case of the State v. Timothy
18 Allen Lemacks. Before we select the jury in this case,
19 there's several questions which I must ask you. The
20 indictment in this particular case charges Mr. Lemacks with
21 criminal sexual conduct with a minor under 11 years of age,
22 and it alleges that in Colleton County, South Carolina on or
23 about August 14, 2010, the defendant, Timothy Allen Lemacks
24 did commit a sexual battery upon a minor who was less than
25 11 years of age, to wit that he digitally penetrated Miss

1 Minor , in violation of Section 16-3-655.

2 And, ladies and gentlemen, let me tell you that this
3 indictment that I have read is not evidence. It is the
4 document -- it is the manner in which this case is brought
5 into this Court. It is the manner in which this case is
6 brought into this court. The State of South Carolina bears
7 the burden of proving Mr. Lemacks guilty beyond a reasonable
8 doubt. The State bears the burden of proving guilt beyond a
9 reasonable doubt.

10 And before we go any further, there are certain
11 questions that I must ask you. The first question is: Has
12 anyone ever been related by blood or marriage to Mr. Timothy
13 Allen Lemacks or Miss Minor ? If so, please stand.

14 (NO RESPONSE.)

15 THE COURT: All right. Is there any member of the jury
16 panel that has had a close, personal or social relationship
17 with Mr. Timothy Allen Lemacks or Miss Minor ? If
18 so, please stand.

19 (NO RESPONSE.)

20 THE COURT: Now the following, ladies and gentlemen, is
21 a list of potential witnesses in this case. Please listen
22 to this list of potential witnesses very carefully. Can the
23 lawyers approach for a minute, please?

24 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
25 AND OUT OF THE HEARING OF THE JURY.)

1 THE COURT: All right, ladies and gentlemen, the
2 following is a list of potential witnesses in this case:
3 Dorothea Geathers; Minor , also known as Minor
4 Minor ; F.G. ; Tiffany Davis; Epifanio Davis; Dr.
5 Michelle Amaya; Akima Jones; Dennis Davis; Mary Beth Hefner;
6 Scott McCoy; Darlene Hartley; Janet Lemacks; Belinda Owens;
7 Shannel Grant.

8 ASST. SOL. BALISH: Your Honor, I'm sorry. Just for
9 clarification. Epifanio Davis, also known as Epifanio
10 Garcia; F.G. , also known as F.G. . Thank
11 you, sir.

12 THE COURT: All right. The Solicitor has informed me,
13 F.G. also known as F.G. ; Epifanio Davis,
14 also known as Epifanio Garcia. Garciano; I'm sorry. Is
15 that correct?

16 ASST. SOL. BALISH: Garcia.

17 THE COURT: Garcia?

18 ASST. SOL. BALISH: Yes, sir.

19 THE COURT: Okay. I'm sorry. All right. Is there any
20 member of the jury panel related by blood or marriage to any
21 of the people I just listed? Or has anyone ever had a
22 close, personal or social relationship with any of these
23 people? If so, please stand.

24 (JUROR STANDS.)

25 JUROR: I've had a personal relationship.

1 THE COURT: Hold on a minute. First of all, I need
2 your name and number, okay?

3 JUROR: I'm sorry. It's Keeshan Brown, number
4 Nineteen.

5 THE COURT: All right. Hold on just a minute. And you
6 have a relationship with who?

7 JUROR: Akima Jones.

8 THE COURT: The fact that you have a close, personal
9 relationship with Akima Jones, would that affect your
10 ability to be fair and impartial to both the State and the
11 defense in this case?

12 JUROR: No, sir.

13 THE COURT: All right. Thank you, ma'am. You may be
14 seated.

15 (JUROR STANDS.)

16 THE COURT: Yes, ma'am. Your name and number.

17 JUROR: Lillie Bryant, number Twenty-two.

18 THE COURT: Okay.

19 JUROR: I believe -- I'm saying "I believe" because I
20 only know her by "Net"; is that Dorothea Geathers?

21 MADAME CLERK: Uh-huh.

22 JUROR: Okay. That's my cousin.

23 THE COURT: Dorothea Geathers?

24 DETECTIVE GATHERS: Yes, sir. That would be me.

25 THE COURT: Is it your first cousin? Second cousin?

1 JUROR: Neither.

2 ASST. SOL. BALISH: Detective Geathers believes they
3 are fifth cousins, Your Honor.

4 THE COURT: All right. Well, I'm going to set her
5 aside in the trial of this case. She's identified herself
6 as a family member.

7 ASST. SOL. BALISH: Thank you, sir.

8 THE COURT: I'm going to set you aside in the trial of
9 this case, okay?

10 JUROR: Thank you.

11 THE COURT: Thank you for standing. All right. At
12 this time, Mr. Balish, if you'd stand and introduce
13 yourself, followed by you, Mr. Mathews.

14 ASST. SOL. BALISH: Good afternoon. My name is Chaz
15 Balish. I'm a prosecutor for the 14th Circuit.

16 THE COURT: Mr. Mathews.

17 MR. MATHEWS: I'm Dave Mathews and I represent Mr.
18 Lemacks.

19 THE COURT: All right. Ladies and gentlemen, has any
20 member of the jury panel ever been represented by any of the
21 attorneys involved in this case? Or has any member of the
22 jury panel ever been related by blood or marriage or had a
23 close, personal or social relationship with any of the
24 attorneys involved in this case? If so, please stand.

25 (NO RESPONSE.)

1 THE COURT: Has any member of the jury panel formed or
2 expressed an opinion about any issue or matter involved in
3 this case? If so, please stand.

4 (NO RESPONSE.)

5 THE COURT: Has any member of the jury panel aware of
6 any bias or prejudice toward either the State or the
7 defendant in this case? If so, please stand.

8 (NO RESPONSE.)

9 THE COURT: Is there any member of the jury panel who
10 is a member of or contributor to any group which has as its
11 primary concern the promotion of law enforcement or victims
12 rights? These groups may include, but are not limited to:
13 MADD, SADD or CAVE, Citizens Against Violent Crime. If so,
14 please stand.

15 (NO RESPONSE.)

16 THE COURT: Does any member of the jury panel know of
17 any reason whatsoever why he or she should not serve as a
18 juror in this case, with particular emphasis being placed on
19 your ability to be fair and impartial to both the State and
20 the defendant? If so, please stand.

21 (NO RESPONSE.)

22 THE COURT: The State have any additional questions,
23 Mr. Balish?

24 ASST. SOL. BALISH: Nothing from the State, Your Honor.

25 THE COURT: Mr. Mathews?

1 MR. MATHEWS: Yes, Your Honor; just one. May we
2 approach?

3 THE COURT: Yes, sir.

4 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
5 AND OUT OF THE HEARING OF THE JURY.)

6 THE COURT: All right. Is there any member of the jury
7 panel who has been a victim of a violent crime? If so,
8 please stand.

9 (NO RESPONSE.)

10 THE COURT: Okay. Thank you. Any further questions
11 from the State?

12 ASST. SOL. BALISH: None, Your Honor.

13 THE COURT: Any additional questions? Mr. Mathews?

14 MR. MATHEWS: No, sir, Your Honor.

15 THE COURT: All right, ladies and gentlemen, we are now
16 going to move forward with selecting a jury for this case.
17 Just give us a few minutes. We're in the process of
18 generating a jury list for this case. Used to be that your
19 names were in small capsules that they placed into a bin and
20 would roll the bin around and pull your name out. But we
21 have -- our technology has gone beyond that today. But I
22 believe that we could probably do it just as quick today
23 with that drum and those capsules as the computer. But
24 computers enable us to keep up with a lot of things that we
25 ordinarily couldn't keep up with. I quite often wonder how

1 we made it without the technology of computers and cell
2 phones. I'd venture to say that life was probably a little
3 bit simpler without that technology.

4 Now while we're doing this, I'm going to go through a
5 few things with you, ladies and gentlemen. You were
6 probably told before you came in the courtroom today -- I
7 don't know of anybody that carries pagers anymore, but I
8 guess a few people might. Most people carry cell phones
9 now. When you come into the courtroom, make sure that your
10 cell phone is either off or on vibrate. The Chief Justice
11 of the Supreme Court has issued an Order which would enable
12 me or allows me to hold you in contempt, fine you if those
13 devices go off during the court session. I know that
14 everybody carries cell phones, at least most people do.

15 And I'll be the first to admit, my cell phone has gone
16 off in the courtroom before. And it went off as I was a
17 lawyer standing before a court one day, and all I could say
18 to the judge was "If you're going to put me in jail, please
19 let me make one phone call before you put me in there."
20 Thankfully, he didn't put me in jail. But I tell you,
21 that's a sinking feeling for your phone to go off in the
22 courtroom; I can promise you that.

23 Now, let me go ahead and go over a few other things
24 with you-all as well. During the course of this week of
25 court, I'm going to ask that you ladies and gentlemen not

1 have any contact with any of the parties involved, family
2 members, lawyers or possible witnesses in this case or any
3 other case. Even innocent conversations can be easily
4 misconstrued. And I'm, therefore, asking you to avoid any
5 contact. I know this is a small community. I grew up in a
6 small community, pretty good bit smaller than this
7 community, down in Kingstree, which is in Williamsburg
8 County. That's where I grew up. So that's a smaller
9 community than this. But I recognize that Walterboro is a
10 small community, and you may know people involved in this
11 case. But I'm asking you this week not to have any contact
12 whatsoever with anybody involved in this case, because I
13 don't want any potential contact to be misconstrued in any
14 way, shape or form.

15 Now another thing is, I would ask that you be prompt
16 when you're asked to be here in court. Our court system,
17 ladies and gentlemen, cannot work without you-all as jurors.
18 I am the type of judge that is very -- and I think most are
19 -- very cognizant of the fact that you-all have lives going
20 on outside of this courtroom. Having said that, we can't do
21 our jobs up here in the courtroom without you-all, and so I
22 would ask that you be prompt. I will promise you that I
23 will make every effort possible not to keep you here any
24 longer than absolutely necessary during this week. This is
25 one of the very few -- it's really the only responsibility

1 that we have as citizens anymore in this country to serve,
2 and that is jury service. We're not asked to go in the
3 military anymore. And so I would ask that you please be
4 prompt when I ask you to be here, and we will start as
5 quickly as possible. And I will keep you here -- I will not
6 keep you here anymore than I have to; I can promise you
7 that.

8 Now during this week, if an emergency occurs -- and Ms.
9 Grant may have gone over some of this with you, and I hope
10 I'm not restating some of the things that she's already gone
11 over with you. But if there is an emergency, you can give
12 your immediate family contact telephone number to the
13 clerk's office and they will know how to get in touch with
14 us up here and reach you, if an emergency were to occur.

15 Now during the course of this week, and this applies a
16 little bit more so if you're on a jury that's selected for a
17 trial this week -- well, rather than going into that right
18 now, I'll just deal with that one -- or go over it once a
19 jury has been selected.

20 Jury list has now been generated, and we are going to
21 now move forward with selecting the jury. Ms. Grant, I will
22 turn it over to you, okay?

23 MADAME CLERK: Thank you. As I call your name, please
24 come all the way up to my desk, turn and face the attorneys.
25 Bring all your belongings with you, please.

1 Number Ninety-five, Frank T. Jumper, Jr. (White male.)
2 MADAME CLERK: What say ye for the State?
3 ASST. SOL. BALISH: Please present Mr. Jumper.
4 MADAME CLERK: What say ye for the defendant?
5 MR. MATHEWS: Please swear the juror.
6 MADAME CLERK: Please have a seat in the jury box on
7 the right, please. The bailiff will show you where to sit.
8 Number One-au-two, Alberta L. Kuhnel (White Female.)
9 What say ye for the State?
10 ASST. SOL. BALISH: Please present Ms. Kuhnel.
11 MADAME CLERK: What say ye for the defendant?
12 MR. MATHEWS: Please excuse the juror from the trial.
13 MADAME CLERK: Please have a seat back with the panel.
14 Number One Fifty-one, Dawn. C. Steiner (White female.) What
15 say ye for the State?
16 ASST. SOL. BALISH: Please present Ms. Steiner.
17 MADAME CLERK: What say ye for the Defense?
18 MR. MATHEWS: Please excuse the juror from the trial of
19 this case.
20 MADAME CLERK: Please have a seat back with the panel.
21 One Sixty-one, Kimberly H. Utsey (White female.) What say
22 ye for the State?
23 ASST. SOL. BALISH: Please present Ms. Utsey.
24 MADAME CLERK: What say ye for the defendant?
25 MR. MATHEWS: Please swear the juror.

1 MADAME CLERK: Please have a seat in the jury box.

2 Number Seventy, Sharon S. Gibson (White female.) What
3 say ye for the State?

4 ASST. SOL. BALISH: Please present Ms. Gibson.

5 MADAME CLERK: What say ye for the defendant?

6 MR. MATHEWS: Please swear the juror.

7 MADAME CLERK: Please have a seat in the jury box. One
8 Seventeen, Annette L. Mixon (Black female.) What say ye for
9 the State?

10 ASST. SOL. BALISH: Please present Ms. Mixon.

11 MADAME CLERK: What say ye for the defendant?

12 MR. MATHEWS: Please swear the juror.

13 MADAME CLERK: Please have a seat in the jury box.

14 Number One Fifty-nine, Martha T. Todd (White female). What
15 say ye for the State?

16 ASST. SOL. BALISH: Please present Ms. Todd.

17 MADAME CLERK: What say ye for the defendant?

18 MR. MATHEWS: Please excuse the juror from the trial of
19 this case.

20 MADAME CLERK: Please have a seat back with the panel.

21 Twenty-four, Barbara J. Burros (White female.) What say ye
22 for the State?

23 ASST. SOL. BALISH: Please present Ms. Burros.

24 MADAME CLERK: What say ye for the defendant?

25 MR. MATHEWS: Please excuse the juror from the trial of

1 this case.

2 MADAME CLERK: Please have a seat back with the panel.
3 Eighty-six, Tiffany G. Jackson (White female.) What say ye
4 for the State?

5 ASST. SOL. BALISH: Please present Ms. Jackson.

6 MADAME CLERK: What say ye for the defendant?

7 MR. MATHEWS: Please excuse the juror from the trial of
8 this case.

9 MADAME CLERK: Please have a seat back with the panel.
10 Number Sixty, Katherine E. Frasier (Black female.) What say
11 ye for the State?

12 ASST. SOL. BALISH: Please present Ms. Frasier.

13 MADAME CLERK: What say ye for the defendant?

14 MR. MATHEWS: Please swear the juror.

15 MADAME CLERK: Please have a seat in the jury box.
16 Number Forty-four, Joseph D. Drawdy, Jr. (White male.) What
17 say ye for the State?

18 ASST. SOL. BALISH: Please present Mr. Drawdy.

19 MADAME CLERK: What say ye for the defendant?

20 MR. MATHEWS: Please swear the juror.

21 MADAME CLERK: Please have a seat in the jury box.

22 Seventeen, Brian P. Brooks (Black male.) What say ye for
23 the State?

24 ASST. SOL. BALISH: Please present Mr. Brooks.

25 MADAME CLERK: What say ye for the defendant?

1 MR. MATHEWS: Please swear the juror.

2 MADAME CLERK: Please have a seat in the jury box.

3 Number Fifteen, Johnathan R. Bostic (Black male.) What say
4 ye for the State?

5 ASST. SOL. BALISH: Please present Mr. Bostic.

6 MADAME CLERK: What say ye for the defendant?

7 MR. MATHEWS: Please swear the juror.

8 MADAME CLERK: Please have a seat in the jury box. One
9 Twenty-one, Brent C. Nelson (White male.) What say ye for
10 the State?

11 ASST. SOL. BALISH: Please present Mr. Nelson.

12 MADAME CLERK: What say ye for the defendant?

13 MR. MATHEWS: Please swear the juror.

14 MADAME CLERK: Please have a seat in the jury box. One
15 oh-three, Jim D. Lane, Jr. (White male.) What say ye for
16 the State?

17 ASST. SOL. BALISH: Please present Mr. Lane.

18 MADAME CLERK: What say ye for the defendant?

19 MR. MATHEWS: Please swear the juror.

20 MADAME CLERK: Please have a seat in the jury box. One
21 Sixty-three, Stacey M.L. Varn (White female.) What say ye
22 for the State?

23 ASST. SOL. BALISH: Please present Ms. Varn.

24 MADAME CLERK: What say ye for the defendant?

25 MR. MATHEWS: Please swear the juror.

1 MADAME CLERK: Please have a seat in the jury box.

2 Number Eleven, Susan S. Bergmann (White female.) What say
3 ye for the State?

4 ASST. SOL. BALISH: Please present Ms. Bergmann.

5 MADAME CLERK: What say ye for the defendant?

6 MR. MATHEWS: Please excuse the juror from the trial of
7 this case.

8 MADAME CLERK: Please have a seat back with the panel.
9 One Fifty-seven, Charles D. Sweat (Black male.) What say ye
10 for the State?

11 ASST. SOL. BALISH: Please present Mr. Sweat.

12 MADAME CLERK: What say ye for the defendant?

13 MR. MATHEWS: Please swear the juror.

14 MADAME CLERK: Please have a seat in the jury box.

15 Okay. Alternates. We will draw two alternates.

16 THE COURT: Two alternates.

17 MADAME CLERK: (TO THE COURT.) Strikes are two and
18 one?

19 THE COURT: One and two. State gets one; defense gets
20 two.

21 MADAME CLERK: Number Thirty, Christyne S. Cline (White
22 female.) What say ye for the State?

23 ASST. SOL. BALISH: Please present Ms. Cline.

24 MADAME CLERK: What say ye for the defendant?

25 MR. MATHEWS: Please excuse the juror from the trial of

1 this case.

2 MADAME CLERK: Please have a seat back with the panel.
3 One Seventy-four, Craig M. Wiltshire (White male.) What say
4 ye for the State?

5 ASST. SOL. BALISH: Please present Mr. Wiltshire.

6 MADAME CLERK: What say ye for the defendant?

7 MR. MATHEWS: Please swear the juror.

8 MADAME CLERK: Please have a seat in the jury box.

9 THE COURT: Ms. Grant. State wish to proceed with one
10 or two alternates. Mr. Mathews?

11 MR. MATHEWS: Your Honor, either way -- I don't expect
12 this to be a long trial, so whatever is the Court's
13 pleasure. One or two is fine.

14 THE COURT: Mr. Balish?

15 ASST. SOL. BALISH: Your Honor, the State would prefer
16 two, just because we know they're going to have to come back
17 tomorrow.

18 THE COURT: Okay.

19 MADAME CLERK: Number Fifty, Joe B. Evans (Black male.)
20 What say ye for the State?

21 ASST. SOL. BALISH: Please present Mr. Evans.

22 MADAME CLERK: What say ye for the defendant?

23 MR. MATHEWS: Please swear the juror.

24 MADAME CLERK: Please have a seat in the jury box.

25 THE COURT: Mr. Balish, can you and Mr. Mathews

1 approach?

2 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
3 AND OUT OF THE HEARING OF THE JURY.)

4 ASST. SOL. BALISH: Your Honor, no motion by the State
5 at this time.

6 THE COURT: All right. Anything with regards to jury
7 selection, Mr. Balish?

8 ASST. SOL. BALISH: Nothing further, Your Honor.

9 THE COURT: Mr. Mathews?

10 MR. MATHEWS: No, sir, Your Honor.

11 THE COURT: All right. Ladies and gentlemen, those of
12 you who are still seated in the audience, you-all have not
13 been selected to serve as jurors in this case. You've not
14 been selected as jurors in this case. At this time, those
15 of you who are seated out in the audience, I'm going to
16 excuse you for the balance of today, and ask that you call
17 back tomorrow. Ms. Grant, do they have that number?

18 MADAME CLERK: Yes, they do on the card.

19 THE COURT: Ms. Grant has informed me that you-all have
20 a card with the telephone number on it. I'm instructing
21 you-all to call that number back tomorrow after six o'clock
22 with further instructions on your responsibilities for at
23 least for Wednesday, for the rest of the week, for the rest
24 of the week. So call that number back tomorrow after six.
25 Those of you who are seated in the audience, you are free to

1 go at this time. Everybody else, please remain seated.

2 (WHEREUPON, THE REMAINING JURY PANEL EXITS THE
3 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
4 RECORD.)

5 THE COURT: Mr. Balish, you and Mr. Mathews want to
6 approach for a minute, please?

7 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
8 AND OUT OF THE HEARING OF THE JURY.)

9 THE COURT: Ladies and gentlemen, in talking with the
10 lawyers for scheduling purposes, that's what we're trying to
11 figure out up here, and as I talking to you earlier, told
12 you there would be some things that I might need to talk
13 outside of your presence about. Certain things that --
14 well, you-all have been selected as fair and impartial
15 jurors in this case, okay? We're going to start the trial
16 of this case in the morning. And we're going to start --
17 I'm going to ask that you be back in your jury room at
18 10:30, okay? At 10:30 in the morning. There are some
19 matters that we have to take up outside of your presence.
20 And we're going to be here before that, working on some
21 things. And I'm going to ask that you be back at 10:30 in
22 the jury room, so that we can start at that time.

23 I will instruct you further on this as we go throughout
24 the trial of this case. But I will go ahead and tell you,
25 ladies and gentlemen, you are the judges of the facts in

1 this case, okay? And I'm the judge of the law. And you are
2 to decide this case based upon testimony that you hear from
3 this witness stand, along with any evidence that may be
4 admitted during the course of this trial. And so there may
5 be some things that we have to do outside of your presence.
6 There may be -- for me to determine whether or not certain
7 pieces of evidence or certain testimony is admissible, okay?
8 But you're the judges of the facts. And I will further
9 instruct you on that during the course of this trial or at
10 the conclusion of the trial. What you decide in this case
11 is based simply upon what you hear from this witness stand
12 in here during the course of this trial and any evidence
13 that is admitted.

14 Now, I'm going to excuse you for the balance of today.
15 And I instructed you previously -- I know this is a small
16 community -- not to have any contact with any of the
17 witnesses or potential witnesses in this case. I'm going to
18 ask also that you not go out and try to do any kind of
19 investigation on your own. I don't think this is something
20 that would be in the newspaper or on the internet. But I'm
21 asking you and instructing you not to go out there and do
22 any investigation on your own. You're to decide this case
23 simply based upon what you hear in this courtroom, okay?

24 I'm going to ask that you be back at 10:30 in the
25 morning and we will begin the trial as promptly at that time

1 as possible. I am further instructing you not to talk about
2 this case with anybody involved in the case. I'm going to
3 further instruct you not to discuss the case with your
4 family, your friends or anybody; not your fellow jurors.
5 Discuss it with no one until you are instructed to do so,
6 okay? Until you are instructed to do so. If anybody
7 approaches you or tries to talk to you about this case,
8 please let me know immediately upon your return in the
9 morning, and I will deal with it accordingly, okay? It's
10 important that you keep an open mind about this case until
11 you are instructed to begin your deliberations on this case,
12 okay?

13 Anything further from the State before I release the
14 jury for the evening?

15 ASST. SOL. BALISH: Nothing further from the State,
16 Your Honor.

17 THE COURT: From the defense?

18 MR. MATHEWS: No, Your Honor

19 THE COURT: I'm going to let you go at this time. The
20 Bailiff back here will show you where you need to come back
21 to in the morning. And I will ask you to be back there at
22 10:30 in the morning. We'll start as promptly as possible
23 at that time. Thank you. Everybody else, remain seated,
24 please.

25 (WHEREUPON, THE JURY PANEL LEAVES THE COURTROOM FOR THE

1 EVENING. THE FOLLOWING IS HELD ON THE RECORD.)

2 THE COURT: Any addition, or exception, or objection to
3 what I've instructed the jury, Mr. Balish?

4 ASST. SOL. BALISH: No objection, Your Honor.

5 THE COURT: Mr. Mathews?

6 MR. MATHEWS: No, Your Honor.

7 THE COURT: All right. I've been informed that we have
8 some pre-trial matters to take up with regards to this case.
9 I'll ask that the lawyers involved in this case and any
10 necessary witnesses be back here at 9:30 in the morning on
11 this case, and we will deal with those issues at that time.
12 Mr. Balish, is that okay?

13 ASST. SOL. BALISH: No objection, sir.

14 THE COURT: Any objection or exception, Mr. Mathews?

15 MR. MATHEWS: No, sir.

16 THE COURT: All right. That will conclude matters as
17 it relates to this case.

18 (9:30 A.M., TUESDAY, 3-2-11, PRE-TRIAL MATTERS)

19 THE COURT: All right. We're about to begin some pre-
20 trial proceedings with regards to the State of South
21 Carolina v. Timothy Allen Lemacks. It's been brought to the
22 Court's attention some issues and concerns about possible
23 witness intimidation. Let me advise everybody, not only
24 involved in this case, but in any case, that under Section
25 16-9-340 of the South Carolina Code of Laws, witness

1 intimidation is prohibited. In fact, it is a felony
2 offense. It is a felony offense, which makes it unlawful
3 for a person by threat or force to intimidate or impede a
4 judge, magistrate, juror, witness, potential juror or
5 witness, arbiter, commissioner, or member of any commission
6 of this state or any other official of any court in the
7 discharge of his duty. As such, will destroy, impede or
8 attempt to obstruct or impede the administration of justice
9 in any Court.

10 A person who violates this provision is guilty of a
11 felony, a felony. And upon conviction, must be fined not
12 more than \$10,000 or imprisoned not more than 10 years, or
13 both. That offense carries a penalty of up to \$10,000 and a
14 penalty of up to 10 years. I will make it abundantly clear
15 that witness intimidation will not be tolerated. And if it
16 occurs, you very well not only could be held in contempt by
17 this Court and put in jail, but be facing a 10-year penalty
18 under the laws of this State.

19 All right. Next issue that we have to deal with here
20 this morning involves sequestration of witnesses for the
21 purpose of this trial. Mr. Balish, happy to hear from you
22 on that issue. Is there anything that you want to add? I
23 think we addressed in large part up here in sidebar a minute
24 ago. I just want it on the record.

25 ASST. SOL. BALISH: Yes, Your Honor. The State's

1 position on the sidebar is we don't have an objection to
2 sequestration as long as Mr. Mathews, then, does not attempt
3 to use in any kind of argument the sequestration on his
4 motion to imply to the jury that anyone's conspiring in the
5 other room.

6 THE COURT: Well, as I said up here at sidebar, and Mr.
7 Mathews, it goes for all lawyers, not just Mr. Mathews.
8 Everybody knows, or you should know that arguments to the
9 jury, first of all, are not evidence. Second of all, it
10 would be, closing arguments are limited to that which is in
11 evidence and the reasonable inferences to be drawn
12 therefrom, from that which is in evidence, and it would be
13 improper to argue to a jury. And Mr. Mathews is aware of
14 this, that it would be improper to argue to the jury any
15 inferences of conspiring with the witnesses, and he knows
16 that. And if he does that, it's your job as lawyer for the
17 State to object to it and my job will be to enforce the laws
18 of this state and admonish him for doing so.

19 ASST. SOL. BALISH: Your Honor, if the Court would
20 also, as part of the sequestration order, admonish anybody
21 not to discuss the case with any other witness or with the
22 attorneys or anybody, not to discuss the case at all, if
23 they are in the same room, or otherwise.

24 THE COURT: Absolutely. That goes hand in hand. In
25 sequestration of witnesses, you are not to discuss the case

1 at all, not to discuss your testimony, not to discuss the
2 testimony of others that have been on this witness stand.
3 Is that clear, Mr. Balish?

4 ASST. SOL. BALISH: Yes, Your Honor.

5 THE COURT: And you need to instruct your witnesses as
6 such, if they're not in this courtroom.

7 ASST. SOL. BALISH: Yes, sir.

8 THE COURT: And the same goes for you, Mr. Mathews, any
9 potential witnesses that you have.

10 MR. MATHEWS: Yes, sir. And my witnesses will be
11 staying, I guess, since we don't have a room, as the
12 Solicitor's Office does, in this building, my witnesses, I
13 could either have them at the public defender's office or I
14 could have them in the defendant's room downstairs, whatever
15 is the Court's pleasure.

16 THE COURT: Well, I want you to have them in a place
17 that you can get them into this courtroom as quickly as
18 possibly without having us to sit up here and wait, or more
19 importantly, make the jury wait for several minutes, to get
20 them into this courtroom. So I think you need to have them
21 in a place that's easily as accessible as possible to get
22 them into this courtroom as quickly as possible.

23 MR. MATHEWS: We could ask if the rooms downstairs,
24 maybe, the defendant's room. I have a couple, I have Deputy
25 McCoy on home standby, if that's acceptable.

1 MADAME CLERK: Usually, the defendant's room is
2 available.

3 THE COURT: Okay. And what was that Mr. Mathews?

4 MR. MATHEWS: Your Honor, I have Deputy McCoy, it's his
5 off day. I have him on home standby. He says he can be
6 here within a half an hour. I anticipate I'd have plenty of
7 time to do that. I just wanted to make sure that's
8 acceptable.

9 THE COURT: Okay. I mean, I know you have assistants
10 that sits with you at that table. If you would advise them
11 when you believe it's necessary to call him, to make that
12 telephone call and get him here as quickly as possible.

13 MR. MATHEWS: Thank you. Your Honor, if I could just
14 take -- are you granting that motion of sequestration?

15 THE COURT: I am. Yes, sir.

16 ASST. SOL. BALISH: If I can just take a moment to
17 clear the courtroom of witnesses and instruct them where to
18 go.

19 THE COURT: Okay.

20 ASST. SOL. BALISH: Mr. Mathews will be doing the same
21 thing at this time.

22 (WHEREUPON, COUNSEL INSTRUCTS WITNESSES TO LEAVE THE
23 COURTROOM.)

24 THE COURT: Mr. Shelton, can you approach, please?

25 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE

1 RECORD.)

2 ASST. SOL. BALISH: Your Honor, may I just approach
3 real quick about a witness matter. All right. Your Honor,
4 one of my witnesses, Mr. Dennis Davis, has a medical
5 condition. He gets anxiety attacks; he's medicated for it.
6 Your Honor, if we could just kind of create some kind of
7 signal where he can let the Court know he needs to take a
8 break or he's going to lose consciousness. I can bring him
9 in here, if you would like to discuss his situation with him
10 before we bring in the little girls. He just reminded me to
11 bring it up to the Court. He's very afraid he's going to
12 pass out on the stand. But he does know ahead of time if
13 it's going to happen, and he can let you know.

14 THE COURT: All right.

15 ASST. SOL. BALISH: You want me to go get him?

16 THE COURT: Yes, that's fine.

17 (ASST. SOL. BALISH LEAVES THE COURTROOM AND RETURNS
18 WITH MR. DAVIS AS THEY APPROACH THE BENCH.)

19 ASST. SOL. BALISH: Your Honor, he just wanted the
20 Court to be aware about his anxiety, so we can come up
21 with some kind of a signal, something. He has severe
22 anxiety, Your Honor. He's just not -- I just want him to
23 get with the Judge, if he's going to pass out, so to have
24 some way to let the Court know. So before he gets up
25 there in front of the jury, I figured if we took care of

1 this now, it would be ---

2 THE COURT: Mr. Mathews?

3 MR. MATHEWS: I have no idea -- other than he was
4 present when some other people were also testifying, I don't
5 know what else -- what he's got to say, so ---

6 THE COURT: I mean, we're not going to go into any
7 testimony right now.

8 MR. MATHEWS: No. If he's got a physical condition, I
9 don't have any problem with him. That's fine, Your Honor.

10 THE COURT: Sir, if you would, state your name for the
11 record.

12 MR. DAVIS: Dennis Davis.

13 THE COURT: You can pull that microphone up, Mr. Davis.
14 Mr. Davis, it's been brought to my attention that you have a
15 medication condition, that you suffer from some anxiety
16 issues; is that correct?

17 MR. DAVIS: Yes, sir.

18 THE COURT: What kind of medication are you on?

19 MR. DAVIS: Paxil.

20 THE COURT: Sir?

21 MR. DAVIS: Paxil.

22 THE COURT: How much of that medication do you take a
23 day?

24 MR. DAVIS: I mean, do you mean milligrams? Or ---

25 THE COURT: Yeah.

1 MR. DAVIS: Twenty.

2 THE COURT: Does it affect your ability to know and
3 understand what you're doing?

4 MR. DAVIS: No, sir.

5 THE COURT: The State's indicated, Mr. Balish has
6 indicated that I guess one of the affects from this anxiety
7 as a result, it causes you to pass out?

8 MR. DAVIS: Yes, sir.

9 THE COURT: But it's something that you know beforehand
10 it's going to happen?

11 MR. DAVIS: Yes, sir.

12 THE COURT: If that is a situation that occurs while
13 you're in the courtroom or on this witness stand, you can
14 let the Court know; just look at me and raise your right
15 hand. And what I will do is place a deputy over here,
16 because I'd hate for him to fall out of this chair and get
17 hurt. Okay?

18 MR. DAVIS: Yes, sir.

19 THE COURT: That's what we'll do when he's on the
20 stand, and address it accordingly. Anything further, Mr.
21 Balish?

22 ASST. SOL. BALISH: Nothing further from the State,
23 Your Honor.

24 THE COURT: Mr. Mathews?

25 MR. MATHEWS: No, sir.

1 THE COURT: Okay. You can step down, sir.

2 ASST. SOL. BALISH: Your Honor, at this point, I'd also
3 like to -- we're going to bring in the first little girl.

4 THE COURT: Okay.

5 ASST. SOL. BALISH: I don't think we need to clear the
6 courtroom for her competency.

7 MR. MATHEWS: Has he been told that he's not to discuss
8 this case with anybody?

9 ASST. SOL. BALISH: I made a general announcement to
10 everyone in that room, for the record. No one's allowed to
11 talk about what they just said, what they're going to say,
12 or anything else about the case.

13 THE COURT: All right. Is there any problem, Mr.
14 Padgett, with us having a deputy over here by the door?

15 MR. PADGETT: No. I'll be over there. There is also a
16 chair right inside that door, if he should become ill, we
17 could escort him right through the door and place him in the
18 chair.

19 THE COURT: Well, you know, I'd like somebody over
20 there, if possible, during the trial, period, because I
21 don't want the jury to draw improper inferences from y'all
22 just coming over here when he testifies.

23 ASST. SOL. BALISH: Your Honor, if I could go get the
24 seven year old.

25 THE COURT: Yes, sir.

Competency Hearing of F.G.
Direct Examination of F.G. by Asst. Sol. Balish

1 (ASST. SOL. BALISH LEAVES THE COURTROOM TO BRING IN THE
2 WITNESS.)

3 ASST. SOL. BALISH: Your Honor, the State calls F.G.
4 F.G. , F.G. .

5 MADAM CLERK: Please come around here, young lady.
6 Raise your right hand and put your left hand on the Bible.

7 WHEREUPON, MS. F.G. IS DULY SWORN.

8 THE COURT: Come on around here.

9 DIRECT EXAMINATION

10 BY ASST. SOL. BALISH:

11 Q Good morning, F.G. . How are you this morning?

12 A Good.

13 Q Can you do me a favor and speak really loud into that
14 microphone for me?

15 A Uh-huh.

16 Q Fantastic.

17 THE COURT: F.G. , and when you answer, I need a yes or
18 no, okay? Give me a yes or no, not a uh-huh or an unh-unh,
19 okay?

20 F.G. : Yes, sir.

21 Q All right. We came in here a little earlier and we
22 practiced talking loud; do you remember that?

23 A Yes, sir.

24 Q And you did a really good job; didn't you?

25 A Yes, sir.

1 Q All right. I'm going to ask you some questions, and I
2 want you to answer as best you can, okay?
3 A Yes, sir.
4 Q First, can you tell me what your name is?
5 A F.G. .
6 Q F.G. , how old are you?
7 A Seven.
8 Q Where do you go to school?
9 A Cottageville Elementary School.
10 Q Cottageville Elementary School. What grade are you in?
11 A First.
12 Q Who's your teacher?
13 A Ms. Clintmore.
14 Q Do you like her?
15 A Yes.
16 Q Is she nice to you?
17 A Yes, sir.
18 Q Do you know what a lie is, F.G. ?
19 A Yes, sir.
20 Q What's a lie?
21 A Like if my -- my shoes are yellow, but they are not.
22 Q What color are your shoes?
23 A They're brown.
24 Q So if you said they were yellow, would that be a truth?
25 Or would that be a lie?

1 A That would be a lie.

2 Q What would the truth be about your shoes?

3 A They -- they'd be brown.

4 Q That they're brown. Is it right or wrong to tell a

5 lie?

6 A Wrong.

7 Q Do you get in trouble if you tell a lie?

8 A Yes, sir.

9 Q Do you think you can be super truthful and only tell

10 the truth today?

11 A Yes, sir.

12 Q What happens to you if you tell a lie?

13 A You would get in trouble.

14 Q F.G. , if I said that my tie right here were pink,

15 would that be true? Or is that lie?

16 A A lie.

17 Q Okay. I want you to tell the truth about my tie. What

18 color is it?

19 A Orange.

20 Q Okay. Your Honor, at this point, I would move this

21 witness to be competent.

22 THE COURT: Mr. Mathews, any questions?

23 MR. MATHEWS: Yes, sir, Your Honor. One of the things

24 in competency, of course, is they have to perceive something

25 and they have to be able to relate it, as well as understand

1 the oath. Seems to me she understands the oath. However, I
2 don't know that she's met the other elements yet, and I'd
3 like to inquire of her as to those.

4 THE COURT: Yes, sir.

5 CROSS-EXAMINATION

6 BY MR. MATHEWS:

7 Q F.G. , do you know why we're here?

8 A No, sir.

9 Q Nobody told you why you're here?

10 A Yes, sir.

11 Q Who told you why you're here?

12 A Because ---

13 THE COURT: Mr. Mathews, ask the question again.

14 Q Who told you why you're here? Who was the person that
15 told you why you were here?

16 A My mom.

17 Q Okay. And what did she tell you?

18 A She told me because -- to talk.

19 Q To talk?

20 A Yes.

21 Q Do you know what you're supposed to talk about?

22 A No, sir.

23 Q Do you know anything at all about this case?

24 A No, sir.

25 Q Is there anything that you have seen or heard or

Competency Hearing of F.G.
Redirect Examination of F.G. by Asst. Sol. Balish

1 smelled that you can tell anybody about in this case?

2 ASST. SOL. BALISH: Your Honor, I would object. I
3 don't think she understands what "in this case" means.

4 Q Okay. About why we're here?

5 A No, sir.

6 ASST. SOL. BALISH: If you want to try to rehabilitate
7 her, I'm fine.

8 MR. MATHEWS: I'm good.

9 REDIRECT EXAMINATION

10 BY ASST. SOL. BALISH:

11 Q Do you remember the last time when we met before today?

12 A Yes.

13 Q Yes. You remember where we were?

14 A Yes, sir.

15 Q Where were we?

16 A At my house.

17 Q And what were we talking about? We were talking about
18 one night when something happened. Do you remember?

19 A Yes, sir.

20 Q You do? Can you tell me? What happened that night?

21 A My sister and I and my brother, we was laying -- me and
22 my sister was laying on the ground and my sister ---

23 Q That's the night. Thank you.

24 A And then my sister told me to -- me and my sister and
25 my brother to go on top of the bunk.

1 Q And that's the night we were talking about. Do you
2 remember if somebody slept over your house that night?

3 A Yes, sir.

4 Q Who was that person?

5 A Uncle Timmy.

6 Q And is that why you're here today, to talk about this?

7 A Yes, sir.

8 ASST. SOL. BALISH: Is that good?

9 THE COURT: Mr. Mathews, I think that I've heard enough
10 for me to make a determination as to whether ---

11 MR. MATHEWS: That's fine.

12 THE COURT: --- or not this child is competent to
13 testify. Now, let me ask a question.

14 EXAMINATION

15 BY THE COURT:

16 Q F.G., you've told these two gentlemen standing there
17 in front of you, Mr. Balish and Mr. Mathews, that you know
18 the difference between telling the truth and telling a lie;
19 is that correct?

20 A Yes, sir.

21 Q All right. If I let you testify in here today, will
22 you tell the truth, if I let you testify in here today?

23 (NO RESPONSE.)

24 Q Do you want me to ask the question again? If I let you
25 testify here today, will you tell the truth?

Competency Hearing of F.G.
Re-Direct Examination of F.G. by Asst. Sol. Balish

1 ASST. SOL. BALISH: Your Honor, I don't think she
2 understands the word "testify".

3 Q If I let you come back in here another time today and
4 sit in that chair and talk, are you going to tell us the
5 truth?

6 (NO RESPONSE.)

7 Q Huh? Can you tell us the truth if I let you sit in
8 that chair and come back in here and talk again today?

9 A (NO RESPONSE.)

10 THE COURT: Okay. Anything else you want to ask her,
11 Mr. Balish?

12 ASST. SOL. BALISH: Yes, Your Honor.

13 RE-DIRECT EXAMINATION

14 BY ASST. SOL. BALISH:

15 Q F.G. , would you like a glass of water? A little sip
16 of something to drink?

17 THE COURT: Here you go. You can put it right down
18 there on that ledge right there.

19 Q F.G. , what the Judge was asking you is if you sit down
20 in that chair, can you promise everybody that you're only
21 going to tell the truth?

22 A Yes, sir.

23 Q You can? So anytime you sit in that chair, you promise
24 to tell the truth.

25 A Yes, sir.

1 Q And even if somebody told you otherwise today, only
2 tell us about what you saw or what you heard or what you
3 smelled. You promise?

4 A (NO RESPONSE.)

5 THE COURT: I need a verbal -- tell me verbally, say
6 "yes" or "no".

7 Q You promise?

8 A Yes, sir.

9 THE COURT: Okay.

10 Q Okay. When we say big words, like "testify", stuff
11 like that, and you don't understand what they mean, could
12 you raise your hand for me? Remember? Show me what they do
13 in school when you don't understand something or when you
14 know the answer to a question.

15 (The witness complies.)

16 Q That's right. Would you do that? If anybody says
17 anything to you and they don't understand, would you raise
18 your hand for me? Because sometimes I see you sitting there
19 and you just don't answer the question. But if you raise
20 your hand, now we know you don't understand. Is that okay?
21 Can you give me a "yes" or "no"? Is that okay? You raise
22 your hand whenever you don't understand?

23 A Yes, sir.

24 Q So I'm going to ask you one more time: Do you promise
25 to tell the truth whenever you're sitting in that chair?

1 A Yes, sir.

2 Q Okay. Fantastic. Thank you, F.G.

3 THE COURT: Anything else, Mr. Mathews?

4 MR. MATHEWS: No, sir.

5 THE COURT: You may step down, okay? You can get down.

6 (The witness complies.)

7 ASST. SOL. BALISH: Let me just have a second, Your
8 Honor.

9 THE COURT: Okay. We'll stand down for about five
10 minutes.

11 ASST. SOL. BALISH: Thank you, Your Honor.

12 THE COURT: Then I'll come back and I'll be happy to
13 hear from both sides of the arguments on this issue, okay?

14 (OFF THE RECORD, BRIEFLY.)

15 THE COURT: All right, Mr. Balish.

16 ASST. SOL. BALISH: Your Honor, at this point the State
17 would move that this seven year old, F.G. , be ruled
18 as competent in this case.

19 MR. MATHEWS: Preliminarily, Your Honor, I have no
20 objection. Obviously, she's got to repeat it. But if she
21 says the same thing, I think she's competent in what she's
22 said so far.

23 THE COURT: All right. Based upon what I heard here
24 today, I think it's clear -- well, first of all, under State
25 v. Green, 267 S.C. 599, there is no fixed age under the law.

1 There is no fixed age which an individual must attain in
2 order to be competent to testify as a witness.

3 A child's competency to testify depends on a showing to
4 the satisfaction of the trial judge. If a child is
5 substantially rational and responsive to the questions asked
6 and is sufficiently aware of the moral duty to tell the
7 truth and the probability of punishment if he or she lies.

8 Now, this young lady testified that she did know the
9 difference between right and wrong, that she did know what
10 truth was and what a lie was. She did testify that she
11 would get in trouble if she told a lie. And she further
12 testified that she would tell the truth if I allowed her to
13 testify. And based upon what I've heard here today, I
14 believe that she is competent to testify, and I'm going to
15 allow her to testify. I mean, credibility issues, as each
16 attorney knows, is up to the jury to determine the
17 credibility and the believability. So I'm going to allow
18 her to testify.

19 Anything further with regards to that matter?

20 ASST. SOL. BALISH: Nothing further, Your Honor.

21 THE COURT: Mr. Mathews?

22 MR. MATHEWS: No, sir.

23 THE COURT: All right. Any other pre-trial matters we
24 need to deal with, Mr. Balish?

25 ASST. SOL. BALISH: Your Honor, the State would make a

1 motion. Mr. Epifanio Garcia has a conviction over the ten
2 years. The State would move that no records of that be made.
3 It was contributing to the delinquency of a minor,
4 conviction date February 28th, 2001.

5 THE COURT: February 28th, 2001?

6 ASST. SOL. BALISH: Yes, sir. That would make it ten
7 years and one day.

8 THE COURT: Mr. Mathews?

9 MR. MATHEWS: Your Honor, the State's had this case for
10 five months and could have called it any time it liked. The
11 rule says -- I've got also an additional thing on there for
12 a different purpose. Not impeachment, but under Rule 609 it
13 says "Evidence" -- Rule 609(b), time limits says "Evidence
14 of conviction under this rule is not admissible if a period
15 of more than ten years has elapsed since the date of
16 conviction or the release of the witness from confinement
17 imposed for that conviction, whichever is the later date,
18 unless the court determines, in the interests of justice,
19 that the probative value of the conviction is supported by
20 specific facts and circumstances, substantially outweighs
21 its prejudicial end. And however, evidence of this
22 conviction more than ten years as calculated herein is not
23 admissible unless the proponent gives the adverse party
24 sufficient advance written notice of intent to use such
25 evidence, as provided by the adverse party with a fair

1 opportunity to contest the of such evidence."

2 It's being contested now. We're arguing that. It's
3 obviously -- the trial started yesterday. The witness
4 wasn't called until today. Today would have been within ten
5 years; it's one day different. Certainly, the interest of
6 justice, the case could have been called last term. You
7 know, the State has the right to sit back and clear the --
8 you know, by their own action, clear cases, then that would
9 be grossly unfair.

10 Your Honor, in addition to that, he's got a charge, but
11 not a conviction, for criminal sexual conduct. I'd like to
12 use that only for the purpose of showing a mindset in here.
13 The witness here has mentioned, Minor mentioned, both of
14 them mentioned that Mr. Lemacks' brother, Brandon, had a
15 prior -- was a pedophile, or something to that affect, that
16 he had a prior charge for criminal sexual conduct. He was
17 acquitted of that charge. In fact, it was dismissed by the
18 State. Mr. Garcia was charged and his case was also
19 dismissed.

20 And I feel like part of the reason that they were so
21 easy, ready to believe Minor in this charge is because Epi
22 had a prior rape charge, for which he was acquitted, and
23 they talked about -- again and again they talked about
24 Brandon, who was acquitted. They don't mention Epi. I
25 think that there's some -- I think this is part of the

1 reason they are so quick to believe something that the facts
2 don't support. And not for his being convicted, but for his
3 being unjustly accused, I would bring that up. Not to
4 impeach him under 609, but to show a motive. So it would
5 not be presented under 609 as to the contributing to the
6 delinquency of a minor.

7 ASST. SOL. BALISH: Your Honor, in response. First, to
8 the contributing to the delinquency, you're talking about
9 somebody who had beer in his house that a couple teenagers
10 drank. And again, Mr. Mathews has made no compelling
11 argument to this Court why except that it is over ten years,
12 other than the selection of date. It's a viable case.
13 Frankly, it's being rushed to trial, Your Honor, because of
14 the speedy motions he made.

15 Arrest was in August. He was put in jail in August.
16 So we're not talking about us waiting to bring this onto the
17 docket until the day after. It just so happened that way,
18 Your Honor. But it is over -- I'm switching the burden over
19 to him, I've heard no argument other than the Solicitor's
20 Office using it against him. Certainly, there's nothing
21 compelling or leading to evidence or testimony about there
22 being beer in the house.

23 As to the other issue that he just brought up, Your
24 Honor, frankly, it's not a conviction. It's in the third
25 degree, which has nothing to do with a minor child. And we

1 think it would be preposterous for him to attempt to bring
2 that in, and we would vehemently object to it, Your Honor.

3 I'm sorry, Your Honor. He was arrested September 24th.
4 It's now March 1st.

5 THE COURT: Mr. Mathews?

6 MR. MATHEWS: Thank you, Your Honor. It's ten years
7 and a day old. It involves minors, whether it's beer or
8 whatever. We don't know the circumstances. It says
9 "contributing to the delinquency of minors." But allowing
10 minors to have beer is not a small thing and it's
11 impeachable. But for one day, it would clearly be on the
12 State to show this. And they picked the date to try the
13 case.

14 And whether it's five months or whatever, it involves
15 minors. He was one day over ten years old. I think it is
16 compelling. And as to the other, it's not coming in under
17 609. That's not the rule that I would be intending to use
18 that for; it would be to show a motive.

19 ASST. SOL. BALISH: With regards to the arrest.

20 MR. MATHEWS: The arrest. And I think it says that he
21 was -- it says "court disposition, non-conviction." So he
22 was arrested for it. The fact that he was unjustly accused,
23 I think, makes him feel more the need to find somebody else
24 to blame. And that's the reason why they so readily
25 accepted this fantasy.

1 THE COURT: All right. Anything further, Mr. Balish?

2 ASST. SOL. BALISH: No, Your Honor.

3 THE COURT: All right. Anything further, Mr. Mathews?

4 MR. MATHEWS: No, sir.

5 THE COURT: Mr. Mathews, on this issue on this arrest,
6 you have any rule or case law you want me to look at on
7 that?

8 MR. MATHEWS: It just goes to motive. I mean, I don't
9 have any cases on it. No, sir, I don't. I stopped and I
10 tried to figure out why a witness would lie; and I'm pretty
11 sure they are. And this is why. They timed -- again, they
12 talked about Brandon's charge, and it's just a charge and
13 it's not a conviction. I guess the argument is "the apple
14 doesn't fall far from the tree." Their argument is time and
15 again, they mention it on three different occasions, on
16 three different taped occasions, that his brother was
17 charged with something. That provides the mindset for them
18 more likely to believe it. But it also -- this other prior
19 charge for rape shows that there may be some guilt or
20 something that causes them to want to expunge it somehow.

21 Ms. Garcia also said that she had been a victim of
22 rape. She says it twice, on the 911 tape and she says it on
23 the -- and she told Minor about it. And those will be
24 things that are not directly relevant, except it shows the
25 mindset and why they would do this. It explains why they

1 would so readily believe something that is so not
2 believable.

3 ASST. SOL. BALISH: Your Honor, the motive of someone
4 to lie is -- I believe what Mr. Mathews is going after here.
5 I don't think there's any case; I don't think there's any
6 rule on allowing somebody to make something up, just to
7 create a motive. I have no intention of bringing up the
8 fact that his brother was convicted of it. And the "apple
9 doesn't fall far from the tree" argument is not something I
10 intend to use. Nor should he be able to use anything like
11 this against a witness in this case. Again, we're not
12 talking about the accused; we're talking about a witness.

13 THE COURT: All right. Bear with me just a minute; I
14 want to look at something.

15 (BRIEF PAUSE IN THE COURTROOM.)

16 THE COURT: When is this witness going to testify, Mr.
17 Balish?

18 ASST. SOL. BALISH: I think he's fourth, Your Honor.

19 THE COURT: Okay. I want to look at a couple things
20 with regards to that before he -- and I'll make a ruling on
21 it before he testifies.

22 ASST. SOL. BALISH: Yes, sir.

23 THE COURT: As to the issue of the arrest -- not
24 convictions, the arrest for the CSC charges. With regards
25 to the conviction or contributing to the delinquency of a

1 minor, I'm going to allow him to cross-examine him on that.
2 I think that you could cure any -- or not cure, but address
3 those issues on direct examination. But I'm going to allow
4 it. I think it's in close proximity to the time. It is
5 close within that ten-year time period, and so I'm going to
6 allow him to ask him -- or cross-examine him on that, if you
7 do not do so on your direct. That's my ruling on that
8 issue.

9 With regards to these other arrests, I'm going to
10 reserve my ruling on that. I want to look at a couple
11 things before I make a ruling on that. Okay.

12 ASST. SOL. BALISH: Thank you, sir.

13 THE COURT: All right. Anything further, Mr. Balish,
14 before we start the trial?

15 ASST. SOL. BALISH: No, sir.

16 THE COURT: We'll take about three minutes, and then
17 we'll start.

18 MR. BEACH: We're missing ---

19 THE COURT: Missing one juror? If you-all, bailiffs,
20 will let me know when we have all the jurors, we'll get them
21 out here and start as promptly as possible. Thank you.

22 (Off the record, briefly.)

23 THE COURT: Anything further from the State before we
24 begin?

25 ASST. SOL. BALISH: Judge, can we just approach real

1 quick? I just have a question.

2 THE COURT: All right.

3 ASST. SOL. BALISH: Thank you.

4 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
5 RECORD.)

6 THE COURT: All right. Anything further from the State
7 before we bring the jury in?

8 ASST. SOL. BALISH: Nothing further from the State.

9 THE COURT: From the defense?

10 MR. MATHEWS: No, Your Honor.

11 THE COURT: If you'll bring us the jury.

12 (10:35 A.M., 3-1-11, WHEREUPON, THE JURY ENTERS THE
13 COURTROOM AND THE FOLLOWING IS HELD ON THE RECORD.)

14 THE COURT: Madame Clerk, if you would swear the jury,
15 please.

16 MADAME CLERK: Yes, sir. Ladies and gentlemen of the
17 jury, please stand and raise your right hand.

18 WHEREUPON, THE JURORS ARE DULY SWORN.

19 THE COURT: Ladies and gentlemen of the jury, thank you
20 for being here, when I asked you to be back this morning and
21 told you we'd try to start as promptly as possible, and
22 looks like we were able to do that this morning. Before we
23 go any further, some things that I want to talk to you
24 about. And as I told you yesterday before we selected the
25 jury, this is the case of the State v. Mr. Timothy Allen

1 Lemacks. And before we begin the trial, I want to tell you
2 that this trial is probably not going to be what you might
3 expect. It's going to be different than what you might
4 expect. Many people do not have the chance to attend actual
5 court sessions as you're doing now and may think from
6 watching television or movies or reading books that trials
7 are always full of high drama, intense action and riveting
8 circumstances.

9 While all of these things may be true at times, this
10 trial is not for entertainment. It is a fundamental part of
11 our democracy, a search for the truth in an effort to make
12 sure that justice is done between the parties before the
13 court. Searching for the truth and making sure that justice
14 is done is often slow, deliberate, and repetitive, the
15 opposite of what you may have seen on television or in
16 movies or read in books. This courtroom is a place of
17 honor, dedicated to the protection and preservation of
18 citizen's rights through what many have called the greatest
19 justice system ever created.

20 The attorneys appearing before you are advocates for
21 the parties they represent. But first and foremost, they
22 are officers of the court, sworn to uphold the integrity and
23 fairness of our judicial system and to help you in the
24 search for the truth. You should expect them to be
25 professional, competent and ethical in the representation of

1 their client's interests. Remember that you have taken an
2 oath to try this case and reach a fair and just verdict.
3 And you are also, ladies and gentlemen, are expected to be
4 professional, reasonable and ethical. Thank you for
5 accepting the important responsibility of jury service and
6 for your contribution to our justice system.

7 Now, what I will now say to you is intended to serve as
8 an introduction to the trial of this case. These remarks
9 are not a charge on the law in this case. I will instruct
10 you on the law applicable to this case at the end of the
11 trial before you retire to consider your verdict. This is
12 merely an explanation of the procedure that we will follow
13 in the trial, so that you may better understand what may be
14 happening.

15 The defendant is charged by an indictment filed in this
16 court with the crime of criminal sexual conduct with a
17 minor, the elements of which will be explained to you later.
18 The indictment, ladies and gentlemen, is simply the charge
19 by which the case is brought into this court. And it is not
20 in any sense evidence of any of the allegations it contains.

21 The defendant has pled not guilty to this indictment,
22 and therefore, the State has the burden of proving each of
23 the elements of the indictment, beyond a reasonable doubt.
24 And it will be your duty, ladies and gentlemen, to decide
25 whether the State has met that burden.

1 Your purposes as jurors is to find and determine the
2 facts. You are the sole judges of the facts. If at any
3 time I make any comment regarding the facts, you must
4 disregard it. You are to determine the facts from the
5 testimony you hear and the other evidence introduced in
6 Court. It is up to you to determine the inferences which
7 you feel may properly be drawn from the evidence. It is
8 especially important that you perform your duty of
9 determining the facts diligently and conscientiously,
10 because ordinarily, there is no way to correct an erroneous
11 determination of the facts by a jury.

12 On the other hand, and with equal emphases, the same
13 law that makes you the judges of the facts makes me the
14 judge of the law. The law is given by the court, is the
15 only law you may consider. You must accept and follow it,
16 even though you may disagree with it. I cannot tell you
17 what the facts are and you cannot disagree with me about
18 what the law is or should be. Your job is to take the law
19 as I give it to you and apply it to the facts as you find
20 them from the testimony of the witnesses and any other
21 evidence that is introduced.

22 After doing that, you will render your verdict, a true
23 and just verdict, under the solemn oath that you just took
24 as jurors. And until I advise you to begin your
25 deliberations, you must not discuss this case with anyone,

1 including your fellow jurors, friends, family members and
2 anyone involved in the case. After the case is submitted to
3 you, you must discuss it only in the jury room with your
4 fellow jurors. The attorneys and parties in this case have
5 been advised that they are not to talk to you at all. So if
6 you see anyone involved in this case and they do not speak
7 to you, they are not being unfriendly; they are simply
8 following my instructions.

9 During the trial, I do not believe there will be
10 anything -- and I instructed you on this yesterday -- I do
11 not believe that there will be anything in the newspapers or
12 on the internet. But I'm instructing you, if there is, that
13 you are not to read, listen to, watch any news reports about
14 this case, or do any research on your own. This includes
15 anything that may be in the newspaper, on the internet,
16 radio or television. You must not consider anything you may
17 have heard or read about the case outside the courtroom,
18 whether before or during the trial. It is important that
19 you keep an open mind and not decide any issues or issue in
20 this case until all of the evidence has been presented, the
21 parties have made their closing arguments, and I have
22 instructed you on the law in this case.

23 It is your solemn responsibility to determine the guilt
24 or innocence of the defendant, and your verdict must be
25 based solely on the evidence as it is presented to you in

1 this trial and on the law, as I instruct you during and at
2 the close of the trial.

3 Now in just a moment, the Solicitor will make what is
4 called an opening statement, in which the Solicitor will
5 explain to you the issues in this case, or at least what the
6 Solicitor thinks the issues are in this case. The attorney
7 for the defendant may also make an opening statement,
8 although he is not required to do so. What the attorneys
9 tell you during their opening statements is not evidence in
10 this case. It is only their contention as to what the
11 issues are. The evidence in this case, ladies and
12 gentlemen, will be presented to you by the testimony of
13 sworn witnesses from this witness stand and/or by exhibits
14 that may be introduced into evidence.

15 From time to time during the trial, you may hear one of
16 the lawyers say something like, "Your Honor, I believe we
17 have a question of law or a matter of law to discuss with
18 you," or "Your Honor, may we approach the bench?" Or
19 sometimes I, myself, might find it necessary to excuse you
20 from the courtroom for a short period of time, so that the
21 attorneys and I can discuss a matter of law. The reason for
22 this is because you are the judges of the facts. And
23 sometimes when I am discussing matters of law with the
24 attorneys, it may be necessary for me to make some comment
25 as to the facts in connection with the ruling on whether or

1 not a particular law applies. I am not supposed to tell you
2 what I think the facts are, so I will excuse you from the
3 courtroom while these discussions take place, so that in no
4 way will you be influenced by anything that I might say or
5 do in connection with the facts.

6 In determining what the true facts are in this case,
7 you must decide whether or not the testimony of the witness
8 is believable. It will be my responsibility to rule as a
9 matter of law as to whether certain testimony is admissible
10 at all or not. But once the testimony is admitted, whether
11 or not you believe it is solely for you to determine. In
12 deciding whether to believe a witness, you have the right to
13 consider the interest of any witness, the bias of any
14 witness, the prejudice of any witness, the opportunity for
15 the witness to have seen the matters and things about which
16 the witness may testify, and the way the witness acts on the
17 witness stand.

18 You have a right to consider anything that is in the
19 record that will help you evaluate the testimony of the
20 witnesses. That means that it is your duty, ladies and
21 gentlemen, to pay close attention to these witnesses and to
22 pay close attention to the attorneys and to the court.
23 Please don't let your thoughts wander, but give strict
24 attention to the testimony in this case, so that the end of
25 all of the testimony, after the arguments of counsel and the

1 charge on the law by the court, you will then be in a
2 position to determine what the true facts are, and to apply
3 the law to those facts and, thus, render a true and just
4 verdict.

5 It is your added duty to the individual that I appoint
6 as the foreperson, and I will appoint a foreperson later.
7 But once I appoint a foreperson, it will be that person's
8 added duty to preside in the jury room and be the jury
9 spokesperson here in the courtroom. It will also be the
10 foreperson's duty to write the verdict, but I will give you
11 further instructions about that at the conclusion of this
12 case.

13 Now, in order to preserve everyone's rights, I will
14 give the parties an opportunity to object to anything that I
15 have said.

16 Any exception to anything that I have said to the jury
17 by the State?

18 ASST. SOL. BALISH: Nothing from the State, Your Honor.

19 THE COURT: By the defense?

20 MR. MATHEWS: No, sir.

21 THE COURT: Ladies and gentlemen, we will now begin the
22 trial. Mr. Balish, you're recognized.

23 ASST. SOL. BALISH: May it please, the Court, Your
24 Honor?

25 THE COURT: Yes, sir.

2 ASST. SOL. BALISH: Ladies and gentlemen of the jury,
3 let me start by thanking each and every one of you for
4 taking time out of your busy lives and busy work schedules,
5 families, friends, whatever it is you have going on to take
6 a couple days to come in here to do your civic duty and to
7 listen. All that we ask is you listen attentively and you
8 do what you think is the right thing, fair thing.

22 You're going to hear from a little girl who was ten
23 years old at the time. She's now 11, strong and a brave
24 girl that going to get up there. She's going to tell you
25 exactly what happened that night. Mom and dad are going to

1 get up there and say what happened that night. There was a
2 barbecue with some beer and Uncle Timmy was going to spend
3 the night. It's not a big deal. Uncle Timmy had spent the
4 night before because dad and Uncle Timmy were going to go to
5 work early the next day. So, you know, eight, night o'clock
6 in the morning, it's okay for him to crash over, and he had
7 crashed before, and he'd get started work early the next
8 day.

9 The little kids, there were three of them. The little
10 girl who's going to get up there, Minor , her little sister,
11 F.G. , and E.G. , little brother. They were allowed,
12 because they had been so good that weekend in August, to
13 crash in the living room in front of the TV. Put a movie on
14 that night and they had a little sleep-out in the TV room.

15 Well, dad and Uncle Timmy did some drinking. Going to
16 hear about that, little bit of drinking, not too much. Dad
17 and mom went to bed; Uncle Timmy was going to crash on the
18 couch. Kids fell asleep, and the next thing Minor remembers
19 was Uncle Timmy laying next to her.

20 Timmy put his hand down her pants and penetrated her
21 vagina with his finger. She's going to get up there and she
22 calls it her "Lucy". Little girls have different names for
23 these things. I've never heard that one before, but she
24 calls it her "Lucy". And she's going to tell you what it
25 felt like. Nobody else was watching. No video cameras.

1 Evidence is going to show that it's just going to be her
2 word that this happened

3 Her little sister is going to get up there and she
4 recalls what happened next, what happened that night. Minor
5 scootched her body away. She was really afraid. Soon as he
6 got away from her, she woke up her brother and sister, her
7 siblings. She said, "Come on, come on, come on." She got
8 them all up on the top bunkbed. She wouldn't let any of
9 them leave, protected her siblings.

10 Uncle Timmy in the middle of the night decided to come
11 in, said, "What are you kids doing in here?" Shook the
12 bunkbed, "That didn't happen." Then, he passed out on the
13 couch.

14 Next morning, no hesitation, this strong, young girl
15 disclosed. She disclosed that night to her siblings; she
16 disclosed immediately, like exactly like she's supposed to
17 do, to mom. Mom calls the police. She disclosed to law
18 enforcement. She just went to the -- going to hear from a
19 medical doctor. It was a finger. There was no semen found.
20 There's no medical evidence in this one, thank God. But she
21 disclosed, went to MUSC. She's remained consistent.

22 Going to hear from her guidance counselor at school,
23 who noticed a difference between the Minor that left the
24 summer of fourth grade and the Minor who came back for fifth
25 grade. There's not a lot of evidence in this case, as far

1 as physical evidence. You watch CSI and you got semen, and
2 got somebody's hangnail in somebody's underwear, there isn't
3 any of that. This is Colleton County. This is not TV,
4 ladies and gentlemen.

5 But I'm going to ask you to pay close attention to what
6 you hear from that stand, especially of that little girl. I
7 want you to look her in the eye and hear what she says. I
8 want you to pay attention to how he acted the morning after
9 it happened. I want you to listen to her mom; I want you to
10 listen to her dad; I want you to listen to her grandpa. And
11 I want you to listen to what everybody says, because this is
12 a case where you're going to have to have the cumulative
13 affect because I don't have a video camera and I don't have
14 semen.

15 What we've got today is the word of a little girl and
16 the guy that acted awful funny the next day, and a girl who
17 did exactly what she's supposed to do, called the police,
18 disclosed, tell mom, keep her brothers and sisters safe.

19 Please pay close attention. And I think at the end of
20 this, you're going to find that this defendant, Uncle Timmy,
21 Timothy Lemacks, is guilty of criminal sexual conduct in the
22 first degree, for sticking his finger inside of Minor 's
23 vagina. Please listen now to what Mr. Mathews has to say.

24 MR. MATHEWS: May it please the Court?

25 THE COURT: Mr. Mathews.

1 OPENING STATEMENT

2 MR. MATHEWS: Ladies and gentlemen of the jury, as the
3 Court's already said, I'm Dave Mathews, by the way, and
4 that's Timothy Lemacks. As the Court's told you, what we
5 say is not evidence. What comes from that stand is
6 evidence. But we do want to be sort of guides to tell you
7 what you can expect, so that you can make sense of it when
8 you hear it. Mr. Balish told you that the State has the
9 burden of proof beyond a reasonable doubt, and that's not a
10 small thing.

11 One of the things in reciting the facts that Mr. Balish
12 expects to come out, that he left out, and one of the things
13 that's very important is that they indicate, the States says
14 that there were three children asleep on the floor, right
15 next to each other, scrunched together. I don't think that
16 Mr. Balish said anything about what "E.G. .," E.G. ., was
17 supposed to have said. At some point, I expect the
18 testimony will be that -- I expect Minor to come in and say
19 that Timmy walked in and shook the thing. And that at that
20 point -- at that point, E.G. , what they call E.G. ,
21 said, "Minor said that you put your fingers in her and " ---

22 ASST. SOL. BALISH: Objection, Your Honor. May we
23 approach?

24 THE COURT: Yes.

25 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD

1 AND OUT OF THE HEARING OF THE JURY.)

2 MR. MATHEWS: Your Honor?

3 THE COURT: You may continue, Mr. Mathews.

4 MR. MATHEWS: Thank you, Your Honor. I believe the
5 evidence will show that E.G. , who was there, right there,
6 when all this was supposed to have happened said, "No, it
7 didn't. No, it didn't." I believe the evidence is going to
8 show that Minor 's going to say that Timmy had really long
9 fingernails at that point, and that it hurt a bunch. But
10 there's not going to be -- I don't believe the evidence will
11 show that there's anything to corroborate this.

12 Think the evidence will show that in terms of
13 processing this, things were done properly. They took Minor
14 to a counselor to talk about this, to make a statement, and
15 she made a statement to Mary Beth Hefner. And I believe
16 that there will be some evidence from that, some
17 contradictions that a little girl who doesn't understand
18 what all is going on, you would almost expect them to make
19 some things that don't make any sense at all. It's almost
20 impossible to prove you didn't do something. And that's why
21 the State has such a strong burden of proof.

22 Just listen carefully to the testimony. Listen
23 carefully to all that's there and when you do -- just listen
24 carefully to all of it and consider during this time whether
25 something makes sense, based on what you know in life.

1 Nothing further, Your Honor.

2 THE COURT: Mr. Balish. Call your first witness.

3 ASST. SOL. BALISH: The State calls Minor .

4 MADAME CLERK: Come forward and be sworn.

5 WHEREUPON, Minor IS DULY SWORN.

6 ASST. SOL. BALISH: Minor , want a glass of water?

7 Minor : Yes, sir. Thank you.

8 THE COURT: Mr. Balish.

9 ASST. SOL. BALISH: May it please the Court, Your
10 Honor.

11 DIRECT EXAMINATION

12 BY ASST. SOL. BALISH:

13 Q Good morning.

14 A Good morning.

15 Q Minor , I'm just going to ask you some questions, okay?

16 You going to be able to talk to me? You're going to be able
17 to answer my questions?

18 A (Witness nods her head.)

19 Q When I do ask questions, you have to say "yes" or "no,"
20 because this lady right here -- she's really nice by the way
21 -- her name's Ms. Becky, she writes down -- she's talking
22 into that mask. She's saying everything that you say. And
23 she can't say somebody's nodding their head. It has to be
24 what's called a verbal response. So you have to actually
25 answer me with words; you understand?

- 1 A Yes, sir.
- 2 Q What's your name?
- 3 A Minor .
- 4 Q And how old are you?
- 5 A Eleven.
- 6 Q When's your birthday?
- 7 A , .
- 8 Q Now, people don't call you Minor ; do they?
- 9 A No, sir.
- 10 Q What do they call you?
- 11 A Minor .
- 12 Q Do you mind if I call you Minor ?
- 13 A I don't care.
- 14 Q Thank you. Minor , where do you go to school?
- 15 A Cottageville Elementary.
- 16 Q And what grade are you in?
- 17 A Fifth.
- 18 Q You get good grades?
- 19 A Yes, sir.
- 20 Q What kind of grades do you get?
- 21 A Like 85s and 90s and 100s.
- 22 Q That's fantastic. Who's your teacher?
- 23 A Ms. Hamilton.
- 24 Q She nice?
- 25 A Yes, sir.

1 Q Minor , where were you born?
2 A In Ravenel.
3 Q Is that in South Carolina?
4 A Yes, sir.
5 Q When you're in school and you know the answer to a
6 question, what are you supposed to do?
7 A Raise my hand.
8 Q And if you raise your hand, that means you know the
9 answer to the question?
10 A Not really.
11 Q What does that mean?
12 A Like if you don't get it, you're supposed to raise your
13 hand, or if you need help.
14 Q Minor , I'm going to ask you a very important question.
15 Do you know the difference between right and wrong?
16 A Yes, sir.
17 Q Tell me what the difference is.
18 A Right means it did happen or it means -- wrong means
19 that it didn't happen.
20 Q Tell me the difference, do you know what a lie is?
21 A Yes, sir.
22 Q Tell me what a lie is.
23 A A lie is something that is make-believe or it didn't
24 happen.
25 Q So if I said my tie was purple, would that be the

1 truth? Or would that be a lie?

2 A A lie.

3 Q What color is my tie?

4 A Orange.

5 Q So if I said "My tie is orange," what would that be?

6 A True. It would be true.

7 Q Minor , I need you to make me a promise here today. Can

8 you do that?

9 A Yes, sir.

10 Q I need you to promise to only tell me the truth. Can

11 you do that?

12 A Yes, sir.

13 Q Even if you think I don't want to hear that answer,

14 will you tell the truth?

15 A Yes, sir.

16 Q Even if you think that people might get mad at you,

17 will you tell the truth?

18 A Yes, sir.

19 Q You promise?

20 A Yes, sir.

21 Q Okay. Minor , I want you to tell me about a night in

22 August, a night that involved this man. Do you know this

23 guy sitting over here?

24 A Yes, sir. Yes, sir.

25 Q What do you call him?

1 A Uncle Timmy. I used to call him Uncle Timmy.

2 Q Do you remember a night that he slept over at your
3 house?

4 A Yes, sir.

5 Q I want you to start on the night before, and I just
6 want you to tell me what happened. Can you do that?

7 A Yes, sir.

8 Q Start the night before, and go slow.

9 A Okay. What happened was, my mom, my dad and Uncle
10 Timmy were outside in the back yard, and we were supposed to
11 go on to bed, because it was our bedtime, because the next
12 day was school, I guess. But we went -- went to bed and --
13 well, we were watching TV and we were in the living room.
14 And we went to sleep and then ---

15 Q I want you to slow down because I want to get just a
16 little bit more detailed, okay? I don't want you to rush
17 through it. I know you're eager to say what happened that
18 night, but let's go back a little bit. What were you guys
19 doing the night before?

20 A We were riding four wheelers and playing with each
21 other. And we were with my cousin and everything.

22 Q Was it a cookout?

23 A It was a cookout.

24 Q All right. So when y'all went to bed, did you have to
25 go get a bath? Or ---

1 A No, sir.

2 Q No, sir?

3 A Because we already had -- we -- we took a bath that
4 morning.

5 Q You took a bath that morning.

6 A Yes, sir.

7 Q So if you take a bath in the morning, you don't have to
8 take another one in the evening sometimes?

9 A Sometimes we take it like -- when we just took it in
10 the morning, we -- that next day we take it again in the
11 morning.

12 Q Do you remember what you were wearing that night?

13 A I was wearing some shorts that were green and my shirt
14 with a puppy on it.

15 Q All right now, let's continue. All right. So you laid
16 down. What were you laying down doing?

17 A I was laying down because I think my sister and me were
18 talking of what we were going to do the next day. And then
19 momma came in the house and it was time for us to turn the
20 TV off and go to bed. So we went to bed. And then that's
21 when I felt Timmy, my Uncle Timmy, touching me. And when he
22 went to go get the cushion, well, he kept on pushing it real
23 hard, and I tried to scoot away. But then ---

24 Q It's okay.

25 A --- but then when he went to go get the cushion,

1 because I -- I was faced towards the TV, but the TV was off.
2 And I went to look towards, like turn around to the TV. He
3 had no idea I was awake. And then I went -- and then he
4 went to go get the cushion, because there was enough space
5 to where somebody could scoot in right beside us. And then
6 he -- he went to go get the cushion. I turned around real
7 quick to see who it was, and it was Timmy, and then I turned
8 my head real fast, to lay down. And then he went to sleep
9 because I didn't see any movement or anything. if he was
10 awake, because that way he wouldn't know that I was awake,
11 and then he was sleeping.

12 So I went and got my brother. I woke my brother and my
13 sister up and I told them, I said, "Guys, let's go in on the
14 top bunk." They're like "Why?" I said "Because Uncle Timmy
15 touched me." He's like "No, he didn't." And I'm like
16 "E.G. , just believe me, please." And because I didn't
17 want to hear from him because I was tired. And so he went
18 up to the top bunk.

19 And then I'm not sure if it was a couple minutes later,
20 I'm not sure how many, but a couple minute later, we went --
21 he went to go to the bathroom because I heard the toilet
22 flush, and then the lights were still on. And then he came
23 -- Timmy came in my room and flicked the lights on and off.
24 And he then -- he turned the lights on and he was -- he
25 squeached [sic] the bar; he wiggled the bar.

1 That's when E.G. told him, he said, "Uncle Timmy,
2 Minor said that you touched her." And I said -- I whispered
3 to him, "E.G. , lay down, just lay down. Don't talk about
4 it." And that's when Tim said, "No. I wouldn't do anything
5 like that." And as soon as he got done saying that, he ran
6 to the -- he ran to the couch.

7 Q I'm going to go back and we'll go a little bit slower,
8 okay? Now, you said you were all laying down together.

9 A Yes, sir.

10 Q Where was that? Where were you guys laying down? Were
11 you in your bedroom?

12 A In the bedroom with the bunkbeds.

13 Q At the start. You guys ---

14 A Oh, we were in ---

15 Q --- just went to bed.

16 A --- the living room.

17 Q You were in the living room. All right. Now, were you
18 on the couch all scrunched ---

19 A We were on the floor. We weren't scrunched. We were
20 spread apart to where someone could come in. Or -- like
21 that way -- because it was -- the TV was right here, my
22 sister, the big couch, the little couch. There was the TV,
23 my sister, me. But there was enough space to where someone
24 could walk through or something. And then there was the TV,
25 my sister, me, and then my brother.

1 Q All right. Well, before we get to who was exactly
2 where, why were you guys sleeping in the living room?

3 A Because -- I'm not sure. We just wanted to sleep in
4 the living room.

5 Q Were you having like a camp-out or something?

6 A Well, we -- E.G. , my brother, he planned on, because
7 we had this planned. He wanted for us, we were like camping
8 out. And before we did that, mama let us go outside and
9 roast marshmallows. And we did like we were camping.
10 Instead of us going outside, we went in the living room.

11 Q Have you ever done that before?

12 A Yes, sir. That would be about my third time.

13 Q Okay. Was it fun?

14 A Yes, sir.

15 Q I mean, up until all the craziness happened. You guys
16 having a good time?

17 A Yes, sir.

18 Q Were you getting along with ---

19 A Yes, sir.

20 Q --- E.G. and with F.G. good?

21 A Yes, sir.

22 Q Do you remember when your mom and dad came into the
23 room that night?

24 A I do remember. It was -- they didn't -- I remember
25 when my mom came into the living room.

1 Q What happened then?

2 A She told us to -- that's when she told us to turn the
3 TV off.

4 Q What were you guys watching on TV?

5 A Think it was Hannah Montana; I'm not sure.

6 Q Hannah Montana. After you shut the TV off, what did
7 you guys do next?

8 A We -- we went to bed; I went to bed.

9 Q Now, I'm a little interested in the positions of where
10 people were laying on the floor, okay? So I think what I'm
11 going to do ---

12 ASST. SOL. BALISH: Your Honor, if I could get this
13 little board over here, if it please the Court.

14 Q All right, Minor . How are you at drawing?

15 MR. MATHEWS: Your Honor, may I see what's being drawn?

16 THE COURT: Absolutely. Yes, sir.

17 ASST. SOL. BALISH: Your Honor, if I could ask her to
18 step down, please.

19 THE COURT: Yes.

20 Q Come on down, Minor .

21 (Witness complies.)

22 ASST. SOL. BALISH: Can everybody see okay?

23 DIRECT EXAMINATION CONTINUES:

24 Q All right. All right, Minor , here's what I want you to
25 do -- can you do this for me?

1 A Yes, sir.

2 Q I want you to draw your TV room.

3 A Okay.

4 Q Make a square for the room, or whatever shape it is,
5 and show me where the TV was.

6 A There was a big couch and then the little couch. And
7 then there was the TV.

8 Q I want you to make three lines of where everybody was
9 laying.

10 A This is my sister, this is me, and this is my brother.

11 Q So you're all laying right next to the other in a
12 perfect line?

13 A Yes, sir.

14 Q And you were in the middle?

15 A Yes, sir.

16 Q How much space was in-between you and everybody?

17 A It was about -- it wasn't that far.

18 Q I tell you what, why don't you show me the distance
19 between here, this is F.G. . How far were you away from
20 her?

21 A (INDICATING WITH HANDS.)

22 Q All right now, I want you to think the distance between
23 you and E.G. . Just show how you moved your body away or
24 towards it, so there was however much space in-between you
25 guys.

- 1 A (DRAWING ON POSTER BOARD.)
- 2 Q So just move your body. I want to know, if this is
- 3 E.G. 's body laying down right there, how close were you?
- 4 A Right there.
- 5 Q All right. So you're here, and there's this much space
- 6 between you. Now, go back to F.G. .
- 7 A (INDICATES ON DRAWING BOARD.)
- 8 Q So this much, okay. Now, where did Timmy lay down?
- 9 A He went between me and my brother, which was right
- 10 here. He -- he was about halfway, which is where my Lucy
- 11 was.
- 12 Q All right. Hold on a second. You just said there was
- 13 only this much space.
- 14 A Yeah.
- 15 Q How did he fit between you?
- 16 A He -- he -- I guess he just came in.
- 17 Q And when you say he was only half way, how do you mean?
- 18 Was his head by your feet? Or was his head by your head?
- 19 A His head was by my Lucy.
- 20 Q So was your head this way, up here? Was everybody's
- 21 head the same direction?
- 22 A The ---
- 23 Q So your head is here.
- 24 A Yes, sir.
- 25 Q And those are your feet on the bottom, right? So he's

1 coming in by your feet?

2 A Uh-huh.

3 Q And how far up your body, you can just point to your
4 body. How far up your body was his head?

5 A Right there (INDICATING ON POSTER BOARD.)

6 Q This is the line of where ---

7 A Timmy was.

8 Q --- Timmy was; is that right? And where is his head?

9 Put a DOT where his head is.

10 (The witness complies.)

11 Q And where was he supposed to be sleeping? And where
12 did he go back to sleep?

13 A Daddy said -- well, he was -- daddy said he -- momma
14 and daddy said he could sleep on the big couch. But instead
15 of him going on the big couch, he slept -- he went by the
16 chair, which was right over here. So, he was pretty much by
17 E.G. after all this happened.

18 THE COURT: Mr. Balish, if you would, just make sure
19 everybody in this corner can see, because I don't know if --
20 -

21 ASST. SOL. BALISH: Can y'all see that?

22 THE COURT: --- she is obstructing their view. Just
23 wanted to make sure everybody can see.

24 Q So where was he lying before? Or do you know where he
25 was lying before?

1 A The only time when I woke up was when he was touching
2 me.

3 Q You can go ahead and sit back down. Good job. You're
4 a good artist. Bet you get 100 in Art.

5 (WITNESS RETURNS TO THE WITNESS STAND.)

6 Q Minor , I want you to go back for just a second. And I
7 appreciate you drawing this because it was kind of confusing
8 how you said he was squeezing in. I want you to go back and
9 talk to me about when Uncle Timmy was touching you. When
10 you woke up, what was happening?

11 A The reason why I woke up was because he -- when he went
12 to push down on me, on my Lucy, and it was hurting really,
13 really bad. And then that's when he went -- I guess he took
14 -- he took it out, but his hand was in my underwear. And
15 then he took -- he took it out and I don't know what he did
16 after that. But then like two seconds later, he did it
17 again.

18 Q Was he laying behind -- were you laying straight on
19 your back? or on your side?

20 A I was laying on my side, facing towards the TV.

21 Q So did he have to reach his hand around you?

22 A At that time, I was flat.

23 Q All right. So tell me exactly what position you were
24 in.

25 A I was flat.

1 Q On your back.

2 A Yes, sir.

3 Q And you felt something. Did you wake up as he was

4 putting his hand in your pants?

5 A Yes, sir.

6 Q And what did you do when you felt ---

7 A I tried to move over a little bit.

8 Q Okay. What happened next?

9 A And I kept on moaning.

10 Q I'm sorry?

11 A I said I kept on moaning and groaning, like saying

12 "stop."

13 Q Okay. Did you scoot your body in any direction?

14 A I scooted it towards my sister, yes, sir.

15 Q And did you feel his finger go inside of your Lucy?

16 A Yes, sir.

17 Q How do you know? Did you feel anything -- did it hurt?

18 A Yes, sir. It hurt really, really bad.

19 Q Did you feel him spread it apart?

20 A He was moving it.

21 Q He was moving his -- what was he moving?

22 A His finger.

23 Q His finger. And you said he did it twice?

24 A He -- for -- he did it -- that's when he went back. I

25 don't know how many times he did it, but every two seconds -

1 - it was exactly two seconds -- he kept on touching me.

2 Q And how long did this last?

3 A I'm not sure.

4 Q What did you do while it was happening?

5 A I -- while it was happening, I was acting like I was
6 sleeping. But I kept scooting over until it was done
7 because I was -- I was about to roll over my sister. And
8 while that was happening, I kept on moaning and groaning and
9 saying "Stop, stop." And then he wouldn't stop. And then
10 he just stopped all of a sudden.

11 Q Now, you showed us when this started, that you were
12 this

13 far ---

14 A Yes, sir.

15 Q --- away from E.G. , and about this far away from
16 F.G. . How close were you to F.G. when this ended?

17 A I was like that close to her. Here is F.G. and here
18 is me.

19 Q So is it fair to say you were right next to her?

20 A (WITNESS NODS HEAD.)

21 Q You said "this close"?

22 A Yes, sir.

23 Q Why did he stop?

24 A I'm not sure. I kept on telling him to stop, but I
25 don't know if that was the reason. I don't know.

1 Q What did he do after he stopped?

2 A He went -- when he stopped, he went to go get the
3 cushion. As soon as -- because I was facing -- when he --
4 when he went to stop, I turned around real quick and I was
5 looking towards the TV because I was awake. And I could see
6 like the shadow of him, and he went to go get the cushion.
7 And then at that time, soon as he was getting up, I turned
8 around. And I -- I turned around and I seen him, and I
9 turned right back around and started crying.

10 Q Did he hear you cry?

11 A No, sir.

12 Q How long did you -- where did he go after he got the
13 cushion?

14 A He went to sleep.

15 Q Where?

16 A Right there by my brother.

17 Q On the ground? Or on a couch? Or ---

18 A On the ground.

19 Q On the ground.

20 A By the chair.

21 Q What did you do next?

22 A When he went to sleep, I went and got my siblings and
23 we went into my room and went on the top bunk and ---

24 Q How far is your room from the TV room?

25 A Not that far.

1 Q No? Is the bathroom between your room and the TV room?
2 Or is the bathroom -- where is the bathroom?

3 A The bathroom is between my room and my brother's room.

4 Q And where is that compared to the TV room?

5 A The living room, there's like a big, long walk ??? like
6 the hallway. And then when you go in, there's my brother's
7 room, there's the bathroom, and then here's my room.

8 Q So if you -- do you always hear people when they go to
9 the bathroom?

10 A Yes, sir, because my bedroom is right next to the
11 bathroom.

12 Q And it's right next to your room, it sounds like,
13 right?

14 A Yes, sir.

15 Q So you got -- I've got you with your brother and
16 sister. Why did you put them up on the top bunk.

17 A Because I didn't want that to happen to me anymore
18 because I was going through enough pain because it was
19 really, really hurting. And then that's when ---

20 Q But why didn't you just go up on the bunk.

21 A Because I didn't want that to happen to my brother and
22 my sister, too.

23 Q And how did you wake them up?

24 A Oh, I was like moving them, like pushing them a little
25 bit, nudging them.

1 Q You nudge them?

2 A And then I told them, I said, "Y'all come on. Let's go
3 get on the top bunk."

4 Q What did F.G. say to you?

5 A All she said was just "Why?" And that's when I told
6 them what happened, that Uncle Timmy touched me. And then
7 she said, "Oh, okay." She was half asleep. So was my
8 brother.

9 Q So you got them up and then you took them into the
10 bedroom, put them on the top bunk.

11 A Yes, sir.

12 Q What happened next? Did you guys go back to sleep?

13 A I didn't. I stayed up all night long to make sure my
14 brother and sister were okay.

15 Q Well, what happened next?

16 A My brother -- Timmy went to the bathroom and then
17 that's when he came -- I heard the toilet flush, so I turned
18 around. And that's when he came in here, came to my room.
19 And then he kept on flicking the lights on and off. And
20 then he went -- the light was on, he left it on. And then
21 he went towards my bed, my bunkbed, and he started squeaking
22 the bars.

23 Q What do you mean "squeaking the bars"?

24 A Like he -- he kept on moving them. And then it woke my
25 brother and my sister up.

- 1 Q I'm sorry, he was moving the bars?
- 2 A Yes, sir.
- 3 Q How do you mean? Show me with your hands. What was he
- 4 doing?
- 5 A He was moving them like this. (Witness demonstrates.)
- 6 Q Shaking the beds?
- 7 A Shaking the bars.
- 8 Q Did it make any noises?
- 9 A Yes, sir.
- 10 Q Did it scare you?
- 11 A It scared my sister. I felt her jump, because my hand
- 12 was on her. And she jumped.
- 13 Q What did he say while he was shaking these bars?
- 14 A He didn't say anything.
- 15 Q What did he say while he was flickering the lights on
- 16 and off?
- 17 A He didn't say anything.
- 18 Q What happened next?
- 19 A E.G. , my brother, woke up and said "Uncle Timmy,
- 20 Minor said you touched her." And he said, "No, no. I
- 21 wouldn't do anything like that." And then he went to the
- 22 couch as soon as he -- as soon as he got done saying that.
- 23 Q Who did?
- 24 A Timmy.
- 25 Q Where did your brother go?

1 A My brother stayed on the top bunk.

2 Q What about your sister?

3 A My sister, she stayed on the top bunk too. She was
4 right there beside me.

5 Q Did any of you get down before the next morning?

6 A No, sir. I wouldn't let nobody get down, unless I went
7 with them.

8 Q Let's talk about the next morning.

9 A Okay. The next morning, daddy -- my dad came in there
10 and woke me up, well, woke us up and asked us while we were
11 on the top bunk. And I didn't want to tell him because he
12 was on his way to work. He was in a rush and he was mad for
13 some reason, I think. And then he told us to go get in the
14 bed with mama, so I went in the bed with mama. We went to
15 bed with mama. And then when we went in the bed with mama,
16 he said "bye" to mama and that he loved her, and then he
17 left.

18 And then I went in there, I told mama. I kept on
19 asking mama a bunch of questions like "Was he going to come
20 school shopping with us, and was he going -- was he going to
21 work with daddy." And mama said she don't know; she don't -
22 - she didn't know. And then she said, "Why? What's wrong?"
23 And I said, "Mama, I've got to tell you something." And
24 that's when I told her the story. She started crying. And
25 then we went to my grandmother's, and then we called the

1 cops, and that's when the cops, I'm guessing, took him home
2 or did something. I'm not sure. I was in the house with my
3 uncle.

4 Q When you told your mom what happened, did you tell it
5 just like you told it right now?

6 A Yes, sir.

7 Q Who else have you told about this?

8 A Let's see. I told one of my cousins. Well, my family
9 knows, but -- Savannah, one of my friends knows, and my
10 cousin knows.

11 Q And what about the police? Did you talk to anybody at
12 the police?

13 A I didn't -- I didn't talk to nobody; my parents did.

14 Q Well, did you talk to somebody -- I think -- did you
15 talk to any doctors about it?

16 A Yes, sir.

17 Q How many?

18 A About eight, yeah.

19 Q Did you talk to Detective Geathers about it?

20 A Yes, sir.

21 Q Did you talk to me about it?

22 A Yes, sir.

23 Q So you talked to a couple people about it, right?

24 A Yes, sir.

25 Q Has anything in your mind changed from that day? Has

1 your story changed at all? Is there anything different?

2 A No, sir.

3 Q Minor , this is a really important question. It's the
4 last thing I'm going to ask you, but it's the most important
5 question. People can get into a lot of trouble if you're
6 lying about this. I know I've asked you this question
7 before. I know Detective Geathers has and I know the
8 medical people have, but this is the first time they're
9 going to hear this. I need you to be absolutely honest with
10 me that night. Did Uncle Timmy stick his finger inside of
11 your Lucy?

12 A Yes, sir.

13 Q If you'll answer any questions Mr. Mathews has, I would
14 appreciate it, okay?

15 THE COURT: Mr. Mathews, cross-examination.

16 MR. MATHEWS: Thank you.

17 CROSS-EXAMINATION

18 BY MR. MATHEWS:

19 Q Minor , you saw me earlier today, right?

20 A Yes, sir.

21 Q We didn't talk about it, but you saw me here, right?

22 A Yes, sir.

23 Q And you've talked to Mr. Balish, that fellow here. How
24 many times would you talk to him about this?

25 A I'm not sure.

1 Q You talked to him at your house.

2 A Yes, sir. Talked with him at my house and a couple
3 times over here.

4 Q And a couple times over here.

5 A Yes, sir.

6 Q And you said you talked to eight different doctors ---

7 A Yes, sir.

8 Q --- about this. Do you remember talking to a counselor
9 over in Beaufort?

10 A Yes, sir.

11 Q That's Ms. Mary Beth?

12 A Yes, sir.

13 Q When you talk about that one -- well, first of all, you
14 ever had your fingers shut in a car door before?

15 A Yes, sir.

16 Q When did that happen?

17 A It's been a long time.

18 Q I mean, how old were you?

19 A About seven.

20 Q About seven, okay. What happened?

21 A What do you mean what happened? With the car thing?

22 Q With the car, yeah.

23 A Well, me and my brother were playing and my sister, she
24 and my mom. And my brother went to close the door and he
25 didn't tell me, and my fingers got smashed into the door

1 because he closed it.

2 Q You were seven at the time?

3 A Yes, sir.

4 Q How old was your brother at the time?

5 A Three.

6 Q He was three years old. And he shut the car door on

7 your fingers?

8 A Yes, sir.

9 Q Car door's pretty heavy. Did you go to the doctor?

10 A No, ma'am -- or no, sir. No, sir.

11 Q Did you tell your mom about it?

12 A Yes, sir.

13 Q Did she put some -- did she bandage it up and ---

14 A (WITNESS NODS.)

15 Q She did? Did it bleed?

16 A No, sir.

17 Q Was it swollen up?

18 A Yes, sir. It was really, really red.

19 Q Was it probably the most painful thing you ever had

20 happen to you?

21 A Yes, sir, before this happened.

22 Q Right. Right. And did you make a sound when it

23 happened? Or you just say "My. My fingers were shut in the

24 car door"?

25 A I said "Ow." Then I started crying.

1 Q Pretty loud?

2 A Yes, sir.

3 Q You hollered it out because it hurt, right?

4 A Yes, sir.

5 Q And I think you told Ms. Mary Beth that that's how much
6 this hurt, right?

7 A Yes, sir.

8 Q Like getting your fingers shut in the car door.

9 A Yes, sir.

10 Q But you didn't shout out this time because you
11 pretending like you were asleep.

12 A Yes, sir.

13 Q Now, you said today that you stayed up all night after
14 this happened, right, because you wanted to make sure that
15 everybody was safe.

16 A Yes, sir.

17 Q But earlier you said that you woke up when you heard
18 the toilet flush; isn't that right?

19 A I didn't -- I -- I -- I stood up. Like I sat down. I
20 came up because I was laying down, and then I stood up. I
21 sat up.

22 Q Now, you told Ms. Mary Beth that you woke up when the
23 light came on, right? You didn't tell her that?

24 A No, sir.

25 Q You didn't tell her that you woke up when the light

1 came on and he shook the bed?

2 A My brother and my sister did.

3 Q You didn't tell her that?

4 A I told her that my brother and sister did.

5 Q You didn't tell her that you woke up when that
6 happened?

7 A (NO RESPONSE.)

8 Q And you told Ms. Mary Beth that you started out going
9 to sleep with F.G. holding onto your leg; didn't you?

10 A Yes, sir.

11 Q And that's not true. Is it true, that when you first
12 went to bed, that F.G. was holding onto your leg?

13 A Yes, sir.

14 Q So there was no room between you and F.G.

15 A No. There was -- she -- she was playing with my leg
16 and we weren't going to sleep. We were on our way. We were
17 -- we were going to sleep, but we weren't sleeping. She was
18 playing with my leg. And then that's when I told her, I
19 said, "F.G. , stop." And then that's when I put my leg back
20 where it was supposed to go.

21 Q What time was it when this happened?

22 A I don't know. I'm not sure.

23 Q You're not sure? Isn't it true that you told Ms. Mary
24 Beth three times that it happened between eight and nine
25 o'clock at night?

1 A No, sir.

2 Q I mean, you seemed pretty sure in that tape. You
3 remember the tape. You remember this being filmed, right?

4 A (WITNESS SHRUGS.)

5 Q Don't you remember, Ms. Mary Beth told you that it was
6 being filmed. You recognized the camera and you said,
7 "Yeah. I know the camera." You remember?

8 A I seen the camera.

9 Q So you knew that it was being recorded, right?

10 A Yes, sir.

11 Q And you were wearing -- what shirt were you wearing?

12 A ???

13 Q Okay. Is that the same or is that different from your
14 Apple Bottom Jeans shirt?

15 A I never had an Apple Bottom Jeans shirt.

16 Q You never did?

17 A No, sir.

18 Q You didn't tell Ms. Mary Beth that that's what you were
19 wearing?

20 A I told her that.

21 Q But you never had a shirt like that.

22 A I never did.

23 Q You never told her? Or you never had a shirt like
24 that?

25 A I never told her.

1 Q You never told her that.

2 A (NO RESPONSE.)

3 Q And you told Ms. Mary Beth that Timmy had really long
4 fingernails, right?

5 A Yes, sir.

6 Q You went to the doctor the same day that this was
7 supposed to have happened, right?

8 A Yes, sir.

9 Q And they looked at you down there, right?

10 A (WITNESS NODS.)

11 Q And you told Ms. Mary Beth initially, didn't you, that
12 the first person you told this, that you talked to, your
13 dad, that you talked to Epi, and you told him, "Are we going
14 -- is Timmy going to work with you? Or is he going shopping
15 with us?" You told it first to Timmy -- I mean, to your
16 dad, right?

17 A Yes, sir.

18 Q And he said, "No." He said, "No," didn't he?

19 A He said no about the school shopping. No, he said --
20 he didn't say no. He said he don't know.

21 Q But you told Ms. Mary Beth he said "no" and then you
22 went and talked to your mom.

23 A I told her that I -- I told her that he said he didn't
24 know.

25 Q Now, when you went to the doctor, you told the doctor

1 that you kept moving his hand away; isn't that true?

2 A Yes, sir.

3 Q But you didn't say that today. You said you scooched,
4 but you didn't say anything about moving his hand away; did
5 you?

6 A No, sir.

7 Q Why not?

8 A Because that wasn't in my head. I -- I -- there's some
9 things that I forgot.

10 Q And today you said that you were moaning "Stop, stop."
11 But you told Ms. Mary Beth that you never said not one word
12 to Timmy; isn't that true?

13 A I told her that I said -- I told her that I said
14 "Stop."

15 Q And you didn't say "I didn't say not one word to him"?

16 A I did not say that.

17 Q And when your mom called the -- she called 911 first,
18 right?

19 A Yes, sir.

20 Q And you were there when she called, right?

21 A Yes, sir.

22 Q And she was talking about the whole thing right in
23 front of you, right? Asking you questions and all that,
24 right?

25 A ???

1 Q Okay. Did she have -- did she talk to 91 at all when
2 you weren't there? Or you were there the whole time?

3 A I was there the whole time.

4 Q Now, when you talked to Ms. Mary Beth in Beaufort, when
5 first asked about it, you said "This boy Timmy"; didn't you?

6 A Yes, sir.

7 Q You didn't say "Uncle Timmy," you said "This boy,
8 Timmy," right?

9 A (SHAKES HEAD.)

10 Q And you said that a couple of times; didn't you?

11 A No, sir.

12 Q Do you know Timmy's mom? grandma?

13 A I know his mom.

14 Q His mom is Donna?

15 A (NO RESPONSE.)

16 Q And you've sent her instant messages before, haven't
17 you, on a computer?

18 A From Facebook, yes, sir.

19 Q On Facebook you've sent? Okay. And you sent her some
20 messages asking about Timmy when he was up in Indiana;
21 didn't you?

22 A Uh-huh.

23 Q Maybe 20 times? Could be?

24 A I'm not sure. I don't keep track of stuff. Like, I
25 don't keep track of how many times I talk to people.

1 Q When you talked Ms. Mary Beth in Beaufort, how many
2 fingers did you say that he had down there?

3 A I think it was one or two; I'm not sure.

4 Q You said one or two fingers, all the way in, right?

5 A Yes, sir.

6 Q Now, Detective Geathers, when you were talking to Ms.
7 Mary Beth from Beaufort, she was there too; wasn't she?

8 A Yes, sir.

9 Q And Ms. Mary Beth said that she was watching the whole
10 thing, right?

11 A Yes, sir.

12 Q So she was watching everything that you said during
13 that, right?

14 A Yes, sir.

15 Q You told the -- you told Ms. Mary Beth that Timmy had
16 spent the night there how many times?

17 A A couple.

18 Q Just a couple times?

19 A Yes, sir.

20 Q And that time and one other? Or a couple in addition
21 to that time?

22 A There was a couple before this happened.

23 Q Did his girlfriend April ever stay there with him?

24 A Yes, sir.

25 Q How many times?

1 A I'm not sure.

2 Q Did you tell Ms. Mary Beth that he had stayed there
3 three or four times? That she had stayed there three or
4 four times with him?

5 A Yes, sir.

6 Q Do you have friends at Cottageville Elementary?

7 A Yes, sir.

8 Q Would you say that you have more friends this year? Or
9 more friends last year?

10 A More friends this year. Because now that they know
11 what happened, they pretty much protect me.

12 Q So this is -- you tell people about this and you've got
13 more friends because.

14 A Yes, sir.

15 Q Do they feel sorry for you some?

16 A (NO RESPONSE.)

17 Q And they protect you, right? That's "yes"?

18 A Yes, sir.

19 Q And when you were sleeping there, were you sleeping
20 just on the floor? Or were you sleeping on a couch cushion?
21 What were you sleeping on?

22 A When I was sleeping -- when it happened, I was on the
23 floor.

24 Q On the floor. Was there anything underneath you? I
25 mean, the floor, obviously, but was there a blanket or

1 anything?

2 A Yes, sir.

3 Q What kind of blanket?

4 A I'm not sure.

5 Q That's what you were on. Was anything on top of you?

6 A My -- at that time?

7 Q Nothing.

8 A Because it was hot.

9 Q It was hot, so there was not any -- okay. So you had
10 something --

11 A It was clothes on me.

12 Q You had your clothes on. But you had nothing
13 underneath you, but you had -- you had something underneath
14 you, but nothing over you.

15 A No, sir.

16 Q Okay. All right. Now, didn't you tell Ms. Mary Beth
17 that you had a Hannah Montana blanket on top of you?

18 A That was under me.

19 Q You're sure?

20 A Yes, sir.

21 Q Now, you talked to her about three weeks after this
22 happened? or a month?

23 A I'm not sure.

24 Q But it was sooner than now, obviously, right? So it
25 was closer to when it happened.

1 A Yes, sir.

2 Q But you're real sure today.

3 A Yes, sir.

4 Q Okay. No blanket on top of you for sure.

5 A No, sir. There was only a blanket on my brother and on

6 my sister. There was nothing on me. My Hannah Montana

7 blanket was under me, but it wasn't on me.

8 Q So blanket on your brother, blanket on your sister,

9 blanket underneath you, right?

10 A Yes, sir.

11 Q Did Timmy ever spend the night when he wasn't with his

12 girlfriend?

13 A I'm not sure.

14 Q Didn't you tell Ms. Mary Beth at 20 minutes and 34

15 seconds into the interview that that's the first time he

16 ever had spent the night unless he had his girlfriend with

17 him?

18 A I don't know.

19 Q Could have been, but you don't know?

20 A I don't remember.

21 Q Now, where did you usually stay when Timmy spent the

22 night?

23 A In my room.

24 Q With the door locked? or open?

25 A Open.

1 Q Never had it locked?

2 A No, sir.

3 Q And you told Ms. Mary Beth too that when you woke up in
4 the morning, he was on the couch; is that right?

5 A Yes, sir.

6 Q But you just told -- you just told these folks a little
7 while ago that you didn't go to sleep at all.

8 A No. When -- when I got up, he was on the couch, when I
9 got out of my bed.

10 Q And you told her that you went back to bed. "So when I
11 woke up to use the bathroom." So you told Ms. Mary Beth at
12 33 minutes and 3 seconds into the tape again that you woke
13 up another time; is that right?

14 A No, sir.

15 Q Didn't happen?

16 A I had been awake the whole time. I was awake.

17 Q So if you told that to Ms. Mary Beth, you were
18 mistaken, right?

19 A Yes, sir. And I never said anything about time. I
20 didn't ---

21 Q You never did. You never said anything about time.
22 You're sure ---

23 A Not ---

24 Q --- about that?

25 A --- about time.

1 Q Never did.

2 A I swear to God.

3 MR. MATHEWS: One moment, Your Honor.

4 THE COURT: Yes, sir.

5 (BRIEF PAUSE IN THE COURTROOM.)

6 MR. MATHEWS: Nothing further, Your Honor.

7 THE COURT: Redirect?

8 ASST. SOL. BALISH: May it please the Court.

9 REDIRECT EXAMINATION

10 BY ASST. SOL. BALISH:

11 Q Doing okay, Tab? I'm just going to ask you a couple
12 more questions. You're almost done, okay? Can you handle
13 it? You want a quick drink of water or something?

14 A I'm fine.

15 Q Minor , that day that you met with that doctor, Ms. Mary
16 Beth, do you remember exactly everything that you said that
17 day?

18 A No, sir. But I know I didn't say anything about time,
19 and I -- I don't have an Apple Bottom Jeans shirt.

20 Q So there's a chance that, you know, you might have got
21 a couple things mixed up here today.

22 A Yes, sir.

23 Q Let me ask you this. There's some really important
24 things that we got to make sure you're not getting mixed up,
25 okay? The most important thing about that night is what

1 Uncle Timmy did to you. Did he stick his finger inside your
2 Lucy?

3 A Yes, sir.

4 Q Let me ask you something else. What was your
5 relationship like with Uncle Timmy before that night? Did
6 you like him?

7 A I loved him. I thought -- well, he was my favorite
8 uncle as far as my mom and my dad.

9 Q Yeah. Does it make you sad that this happened?

10 A (NODS HEAD.)

11 THE COURT: Need a verbal response.

12 A Yes, sir.

13 Q You said to Mr. Mathews that it made you get more
14 friends.

15 A It made me get friends after I told them.

16 Q After you told them. What did it do to your friendship
17 to Uncle Timmy?

18 A After this happened, it -- I just -- I felt like I lost
19 myself.

20 Q Were you mom and dad good friend with Uncle Timmy
21 before?

22 A Yes, sir.

23 Q Did you like it that your mom and dad had good friends

24 ---

25 A Yes, sir.

1 Q --- like Uncle Timmy? What did this do to the
2 friendship that your mom and dad had with Uncle Timmy?

3 A I don't know what it did to them, but it made me feel
4 like it was my fault.

5 Q Do you wish this never happened?

6 A Yes, sir.

7 THE COURT: Mr. Mathews, any re-cross?

8 MR. MATHEWS: Your Honor, at this point, if I may
9 approach the bench. I've got one question. I may not have
10 anything further.

11 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
12 AND OUT OF THE HEARING OF THE JURY.)

13 THE COURT: Anything further, Mr. Mathews?

14 MR. MATHEWS: No, sir.

15 THE COURT: You may step down. All right. Ladies and
16 gentlemen, rather than call our next witness, I'm not
17 exactly sure how long our next witness will take. We've
18 been going about an hour and fifteen minutes. I'm going to
19 allow you to step to your jury room for about ten minutes.
20 I'll give you a break about ten minutes. I want to instruct
21 you again not to discuss the case at all, not to discuss the
22 case at all. And we'll get you back out here and we'll
23 continue with the case, okay? Thank you.

24 THE COURT: All right. Anything, Mr. Balish, before we
25 take a break for a few minutes?

1 ASST. SOL. BALISH: Nothing from the State, Your Honor.

2 THE COURT: From the defense?

3 MR. MATHEWS: No, sir.

4 THE COURT: I'm going to go ahead on this issue about
5 cross-examination of -- is it Garsant?

6 ASST. SOL. BALISH: Garcia.

7 THE COURT: Garcia.

8 ASST. SOL. BALISH: Garcia.

9 THE COURT: The issue of cross-examination of Mr.
10 Garcia, relating to prior arrests, I'm not going to allow
11 you, Mr. Mathews, to go into that. I'm not going to allow
12 you to go into it. I recognize in my research in looking at
13 this issue, certainly understand the right to meaningful
14 cross-examination on behalf of your client is included in
15 the 6th Amendment to our Constitution. The scope of cross-
16 examination of a witness is to test his or her credibility.
17 And you talked about motive earlier, and the motive would
18 be, from my understanding of what your argument was, to show
19 the motive of these children as to why they may misrepresent
20 or accuse your client.

21 I do not believe -- I mean, Rule 609 clearly discusses
22 convictions. We're not talking about a conviction here of
23 Mr. Garcia. And furthermore, under Rule 608, under Rule 608
24 (b), that talks about specific instances of conduct.
25 They're not allowed, unless it's probative of truthfulness

1 or untruthfulness. And I don't believe that that would be
2 the case here and, therefore, I'm not going to allow you to
3 go into that with Mr. Garcia.

4
5 MR. MATHEWS: Your Honor, I understand the Court's rule
6 and I won't argue it anymore. It was to the witness's
7 motive that I would ask that question, not to the -- not to
8 the victim's motive. ??? their propensity to believe it.
9 But I understand the Court's ruling.

10 THE COURT: Well, that's my ruling, and that's the
11 conclusion on that issue, okay?

12 MR. MATHEWS: Yes, sir.

13 THE COURT: We'll stand at ease for about ten minutes.

14 (Off the record at 11:48 A.M.; back on the record at
15 12:00 P.M.)

16 THE COURT: Who's your next witness?

17 ASST. SOL. BALISH: My next witness, Your Honor, is
18 going to be F.G. , the seven year old.

19 THE COURT: Okay.

20 ASST. SOL. BALISH: I don't anticipate, if she's able
21 to testify at all, it will be more than ten minutes by me.

22 THE COURT: Okay. Who, after that?

23 ASST. SOL. BALISH: We'll get into Ms. Tiffany Davis
24 and then Mr. ---

25 THE COURT: How long is Ms. Davis going to be?

1 ASST. SOL. BALISH: I'd expect her to be a good 20
2 minutes, and cross, I don't know.

3 THE COURT: Well, I just don't -- I mean, I don't mind
4 going without, you know, skipping lunch, but I'm not going
5 to do that. I see Mr. Mathews over there grimacing. I'm
6 not going to skip lunch. But I just don't want us to get
7 into some testimony and try to break it right in the middle
8 of testimony at 1:00 or 1:15. I'm just trying to get an
9 idea. I mean, I typically like to run until about one
10 before I take lunch break. And I'm not trying to limit you
11 in any way, or you, Mr. Mathews, on your cross-examination.
12 But I just want to kind of have an idea before we get down
13 that path and too far down that path.

14 ASST. SOL. BALISH: Your Honor, what I might be able to
15 do is I could do -- I could do the little girl, and then
16 I'll do the doctor, Dr. Amaya from MUSC. That should be a
17 considerably shorter period of time.

18 THE COURT: Well, I mean, you try your case and call
19 your witnesses as you see fit. I just want an idea so that
20 I can make a determination of what we need to do. I'm not
21 telling you to call witnesses out of order. We can proceed
22 and see how we get, okay?

23 ASST. SOL. BALISH: Yes, sir.

24 THE COURT: Anything before we bring the jury in, Mr.
25 Balish?

1 ASST. SOL. BALISH: Nothing, Your Honor.

2 THE COURT: Mr. Mathews?

3 MR. MATHEWS: No, sir.

4 THE COURT: All right. Bring us the jury, please, sir.

5 (12:05 A.M., WHEREUPON, THE JURY ENTERS THE COURTROOM

6 AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE RECORD.)

7 THE COURT: Ms. Sharon Gibson. I'm going to ask that
8 you and this young man here on the end switch places. I'm
9 going to appoint you as the foreperson for this trial. Now,
10 everybody else, other than Ms. Gibson -- or Ms. Gibson is
11 the only one that has assigned seating, other than my two
12 alternates down here. Y'all are seated, I think, in the
13 correct place. Mr. -- is it Wilkshire? Okay. And Mr.
14 Evans.

15 JUROR: Yes, sir.

16 THE COURT: Mr. Wilkshire and Mr. Evans, y'all can
17 switch seats if you want to when you come in and out, but
18 y'all need to stay in those two seats, okay? Nobody else
19 has assigned seating. You can sit down. Nobody else has
20 assigned seating, other than Ms. Gibson and my two
21 alternates that need to stay in those two seats.

22 All right. Mr. Balish, you may continue.

23 ASST. SOL. BALISH: Yes, sir. The State calls F.G.

24 F.G. . If I could go get her, please, Your Honor.

25 (WHEREUPON, Mr. Balish leaves to get the witness.)

1 MADAME CLERK: Please come forward to be sworn. Place
2 your left hand on the Bible and raise your right, please.

3 WHEREUPON, F.G. is duly sworn.

4 MADAME CLERK: Speak a little louder and have a seat up
5 there on the witness stand.

6 ASST. SOL. BALISH: Do you think you could please get a
7 glass of water?

8 MR. PADGETT: I got her a glass right down here.

9 ASST. SOL. BALISH: Oh, is that hers? I thought that
10 was Minor 's. All right. So now you've got a glass of
11 water. May it please the Court, Your Honor?

12 THE COURT: Yes, sir.

13 DIRECT EXAMINATION

14 BY ASST. SOL. BALISH:

15 Q Good morning, F.G. . How are you today?

16 A Good.

17 Q You remember earlier today we talked about talking loud
18 and into the microphone? Remember, you got to say "yes" or
19 "no". You can do this, right? Got to say "yes" or "no".
20 Can you do that?

21 A Yes.

22 Q All right. You're great. Now I want to see, what's
23 your favorite color?

24 A Pink.

25 Q Pink? That's a great favorite color. What's your

1 name?

2 A F.G. .

3 Q F.G. what?

4 A F.G. .

5 Q F.G. . Now, F.G. , I'm going to ask you some

6 questions, and I just want you to just answer them as best

7 you can, okay?

8 A Okay.

9 Q F.G. , how old are you?

10 A Seven.

11 A Seven years old. What grade are you in?

12 Q First.

13 A And what school do you go to?

14 Q Cottageville Elementary School.

15 A Do you like it there?

16 Q Yes.

17 A Who's your teacher?

18 A Ms. Clintworth.

19 Q Yeah? What do you think about Ms. Clintworth? Do you

20 think she's nice?

21 A Yes, sir.

22 Q Yeah? Do you like going to school?

23 A Yes, sir.

24 Q Yeah? F.G. , do you know the difference between the

25 truth and a lie?

1 A Yeah.

2 Q Yeah. If I said to you "This tie is purple," is that
3 the truth? Or is that a lie?

4 A A lie.

5 Q Well, if I wanted to tell the truth, what color would I
6 call this?

7 A Orange.

8 Q You sure?

9 A (NODS HEAD.)

10 Q You got to say something out loud. Are you sure this
11 is orange?

12 A Yes.

13 Q You're pretty good about colors, F.G. . Is it right or
14 wrong to tell a lie?

15 A Wrong.

16 Q Do you promise while you're here, you're going to tell
17 the truth?

18 A (NO RESPONSE.)

19 Q Got to say "yes" or "no." Will you tell the truth
20 today?

21 A I don't know.

22 Q You don't know if you're going to tell the truth?
23 Well, will you only tell the truth? You look at me and just
24 tell the truth, okay?

25 A (NO RESPONSE.)

1 Q You okay, darling? How about this, who's your best
2 friend? What's her name? You don't have a best friend?
3 A No.
4 Q No? Who do you like to -- what do you like to watch on
5 TV?
6 A Sponge Bob.
7 Q Sponge Bob, Square Pants?
8 A Yeah.
9 Q Do you like Sponge Bob or Patrick better?
10 A Sponge Bob.
11 Q Why? Patrick's funnier; isn't he? Yeah?
12 A Yes.
13 Q What's so funny about Patrick?
14 A That ---
15 Q He's kind of stupid; isn't he?
16 A Yes.
17 Q Is he always getting into trouble?
18 A Yes.
19 Q Do you remember one time when Patrick told a lie and he
20 got into trouble?
21 A Yes.
22 Q You know, that's what happens when you get in trouble,
23 right?
24 A Yes.
25 Q So if you tell a lie today, will you get in trouble?

1 A Yes.

2 Q So you're going to tell the truth?

3 A Yes.

4 Q Okay. Thank you. I appreciate you telling the truth.

5 F.G. , I'm going to ask you to talk, okay? And just pretend
6 that there's nobody in here, because I know this is tough.

7 You're so strong. I don't know a lot of seven year olds as
8 powerful as you, to come in here and tell the truth like

9 this. Okay. But what I want you to do is I want you to
10 tell the story of why we're here.

11 There was a night in August when Uncle Timmy slept over
12 at your house. And I'm not going to stop you. And you can
13 close your eyes and remember as good as you can, and pretend
14 nobody's here. Pretend you're telling your mom, okay? But
15 I want you to tell the truth. All right. Go ahead. You're
16 pretending just you and your mom. I'll be in the
17 background. Can you tell me what happened that night? Can
18 you tell me, were you having a sleep-out that night?

19 A On the ground.

20 Q On the ground? Yeah? Who was sleeping on the ground
21 with you?

22 A My sister.

23 Q What's her name?

24 A Minor .

25 Q Yeah. Do you call her Minor ? Or do you call her

1 Minor ?

2 A Minor and Minor .

3 Q And who else?

4 A Timmy. Timmy.

5 Q Timmy was sleeping on the floor with you?

6 A Right beside Minor .

7 Q Beside Minor ? Do you remember when Timmy got on the

8 floor by Minor ?

9 A No, sir.

10 Q How do you know Timmy was on the floor by Minor ?

11 A Because I woke -- one time I woke -- I -- I woke up and

12 I went to the bathroom and she was right beside -- he was

13 right beside Minor .

14 Q Okay. Do you remember anything else that happened that

15 night?

16 A Uh-uh. That's all.

17 Q That's all from sleeping. Did somebody wake you up?

18 A Uh-huh. Yes, Minor did.

19 Q Yeah, what happened?

20 A She told us to go on the top bunk.

21 Q Did she say -- did you ask her why?

22 A Yes.

23 Q So what did you do after she said that?

24 A I just went on the top bunk.

25 Q Oh. What happened next?

- 1 A That's all I can remember.
- 2 Q That's all? Did somebody come in the room in the
3 middle of the night after you were on the bunk?
- 4 A Yes.
- 5 Q Who?
- 6 A Uncle Timmy.
- 7 Q What did he do?
- 8 A He -- he was -- and he said -- I don't know what he
9 said.
- 10 Q You don't remember? It's okay if you don't remember.
11 You said exactly the right thing. It's more important to
12 say "I don't remember" than to make something up, right?
13 You're doing a great job today. Do you remember anything
14 else about what Uncle Timmy did when he came in the room?
- 15 A That's all I know.
- 16 Q That's all you know? Do you remember him talking to
17 anybody? Not what he said, but did he say something?
- 18 A Uh-huh.
- 19 Q Do you remember, did he do anything to the bed?
- 20 A Yes.
- 21 Q What did he do?
- 22 A Shook it.
- 23 Q He shook the bed? What did he do after he was done
24 shaking the bed?
- 25 A He went back in the -- I mean, in the living room.

1 Q Were you scared?

2 A Not really.

3 Q Fantastic.

4 A A little bit, but not a lot.

5 Q You know what, F.G. , you've done such a great job
6 answering my question. Really appreciate it. There's a guy
7 over there; his name is Mr. Dave. He's going to ask you a
8 couple questions, and I want you to do your best to answer
9 his questions, okay?

10 A Okay.

11 Q Just be sure to tell the truth, okay?

12 THE COURT: Mr. Mathews.

13 MR. MATHEWS: May it please the Court?

14 CROSS-EXAMINATION

15 BY MR. MATHEWS:

16 Q Hi, F.G. . How are you today?

17 A Good.

18 Q You've got a brother named -- you call him E.G. ?

19 A Yes, sir.

20 Q How old is E.G. ?

21 A He's eight or nine; I don't know how old he is.

22 Q Eight or nine? But he's older than you are.

23 A Yes.

24 Q Do you know what grade he's in?

25 A No, sir.

1 Q Does he go to Cottageville also?

2 A Yes, sir.

3 Q And he's a grade higher -- he's more grades up than you
4 are.

5 A Yes, sir.

6 Q Did he say anything that night, your brother?

7 A Yes, sir.

8 Q What did he say?

9 A He said, "Timmy, he put his hand in Minor 's" -- he
10 said, "Minor said" --

11 ASST. SOL. BALISH: Your Honor.

12 THE COURT: Hold on a minute, okay? Hold on a minute.
13 Don't say anything else.

14 ASST. SOL. BALISH: That would be hearsay, Your Honor.

15 THE COURT: Objection sustained. Don't answer that
16 question, okay? Let him ask you another question.

17 MR. MATHEWS: Okay. All right.

18 Q Where is your brother today?

19 A He at my nana's house.

20 Q At your nana's house? He's not in school today?

21 A No, sir.

22 Q I don't have anything further, Your Honor.

23 THE COURT: Thank you.

24 ASST. SOL. BALISH: If I can approach and bring her
25 down, Your Honor. I have nothing further.

1 (WITNESS EXITS.)

2 ASST. SOL. BALISH: Your Honor, the State calls Tiffany
3 Davis.

4 WHEREUPON, Tiffany Davis is duly sworn.

5 MADAME CLERK: State your full name for the record.

6 MS. DAVIS: My name is Tiffany Davis.

7 ASST. SOL. BALISH: May it please the Court, Your
8 Honor?

9 THE COURT: Yes, sir.

10 DIRECT EXAMINATION

11 BY ASST. SOL. BALISH:

12 Q Good afternoon, Ms. Davis.

13 A Hi.

14 Q How are you today?

15 A Doing fairly well.

16 Q What do you do for a living?

17 A I'm a stay-at-home mom. But while I stay at home, I
18 volunteer at my children's school.

19 Q And how long have you lived in the Colleton County
20 area?

21 A I'd say about five years.

22 Q Five years?

23 A Yes, sir.

24 Q Have you always lived at the same address?

25 A Yes, sir.

1 Q What address is that?

2 A .

3 Q What county is that in?

4 A Colleton County.

5 Q It's in Colleton County. I know that sounds like a
6 strange question, but I have to ask it. Are you married?

7 A Common Law.

8 Q Common Law married. And what relationship do you have
9 to Minor ?

10 A She's my daughter.

11 Q Who are your other children?

12 A F.G. and a son, E.G. .

13 Q E.G. . You call E.G. E.G. sometimes?

14 A I do.

15 Q Let's talk a little bit about E.G. . Is E.G. here
16 today?

17 A No, sir.

18 Q Where do your children go to school?

19 A Cottageville Elementary.

20 Q But you said you lived in Walterboro, right?

21 A Uh-huh.

22 Q Why do they go to school in Cottageville?

23 A Because my son is ADD and ADHD, and he's also blind in
24 one eye. So being that Northside Elementary didn't carry
25 the classes that he needed, they just transferred him to

1 Cottageville. And being that I take them back and forth to
2 school, it wasn't a problem because the bus wouldn't have to
3 come get them.

4 Q Do you remember when we met with E.G. ? I was there
5 with you at the same time. Do you remember that day? I
6 believe we were here.

7 A Here. Yes, sir.

8 Q Was E.G. able to remain consistent in telling the
9 truth?

10 A No, sir.

11 Q Did I tell you that that was going to be a problem?

12 A Yes, sir.

13 Q Why is E.G. not here today?

14 A Because he -- he knows the truth. He's just a very,
15 very on-the-go child. He will switch from one subject to
16 the other in a heartbeat and lose you. He cannot stay on
17 one subject; he can't focus. But he does know the
18 difference between a lie and the truth.

19 Q Does he get things mixed up in his head?

20 A Very much so, yes, sir. There is so much going on up
21 there, that poor child doesn't know what to do.

22 Q I appreciate that. Let's go back to August of last
23 night, you know the night in question. I want you to start
24 the day before, the night before, and I want you to very
25 slowly. Let's take it one step at a time; please don't rush

1 through. Just give me your rendition of what happened.

2 A Well, as far as that afternoon, it was your average
3 afternoon. The kids were playing, everything was going as
4 always. Mr. Lemacks came over. And my husband and him had
5 had a couple of drinks. They was grilling; they were
6 drinking a few beers. There was just an average day. That
7 night, they were, like I said, having a couple beers.

8 Q What's a couple beers?

9 A A couple beers, as far as to me, a couple beers is
10 three or four. That's me; that's my general idea of a
11 couple of beers. I, myself, don't drink beer, so -- so
12 anyways, they were outside doing what men do best, talking
13 around the grill, you know, talk about the day and stuff
14 like that. And the night had progressed and it was time for
15 my children to get washed up and lay down.

16 Well, being that they were good the entire week, and
17 not just because of that, but just because it's their house
18 and I'm the mother, they got to stay in the living room.
19 They could sleep in the living room. It's a privilege,
20 because they get to stay up and do stuff like that. So
21 anyways, I bathed them. They got a bite to eat, or
22 whatever, and they were told to go to bed.

23 Now, we were outside. The three of us, Mr. Lemacks, me
24 and my husband were outside. Minor , my son and my
25 daughter were all in the living room. At first, they were

1 not on the floor. At first, they were just gallivanting
2 around. So I went in there, told them, "All right, guys,
3 it's time to lay down. It's time to get settled; it's
4 getting late." Then I went back out there with my husband
5 and Mr. Lemacks.

6 So as, like I said, I -- I'd say give or take a hour.
7 I don't -- I'm not really sure on the time. I said, "All
8 right, y'all, this is all on y'all. I'm going to bed. I'm
9 tired." And my husband said, "All right, baby. Well, I'll
10 be there in a little while. We got to work tomorrow, so
11 it's not going to be a late night." So I said, "Okay."

12 Well, I went back in there with my children. They were
13 laying down. They had the TV on at the time. I don't know
14 exactly what they were watching, but they were laying down,
15 according to what Minor had said. And I went and laid in
16 my bed, turned my TV on. Drifted off, woke up, my husband
17 coming in the door. And now, from what I can gather, I
18 think he had to tell them to turn the TV off. I'm not sure.

19 Q And let's not talk about what you might have said or
20 somebody may have said.

21 A Okay.

22 Q Okay. Let's just stick to what you actually saw and
23 what actually --

24 A Okay. Well after that, that was it. The only time I
25 went back out there, when my husband came back in was to

1 reassure that everything was off, coffee pot, everything was
2 off, and then I, myself, went back to bed and I went to
3 sleep.

4 Q What's the next thing you remember?

5 A Next thing I remember is waking up to hearing my
6 husband getting dressed in the bathroom and him going out
7 there and waking up Mr. Lemacks and trying to wake him up.
8 First when he went out there, he tried to wake him up.
9 Apparently, he didn't get up.

10 Q Why was he trying to wake him up?

11 A They were fixing to go do a job there in our area where
12 we live at.

13 Q Why did he spend the night, Mr. Lemacks?

14 A Being that I'm the only one in the household with a
15 license -- neither Mr. Lemacks has one, nor my husband --
16 I'm the one that has to -- you know, I mean, Mr. Lemacks can
17 walk, but that's so early in the morning. So my husband
18 just said, "All right. Why don't you just chill for the
19 night?" It wasn't uncommon. You know, I mean, wasn't
20 nothing out of the ordinary. And he also told him, "There's
21 two bedrooms back there, Bo, and they both got cable. They
22 both got satellite. You are more than welcome to chill back
23 there, because the kids are going to be in the living room."

24 Q So what were the two bedrooms? Whose bedrooms were
25 available?

1 A My son, E.G. , and my two daughter's room, F.G. and
2 Minor .

3 Q Did they have beds in those rooms?

4 A Yes, sir. My daughter's got two, got a bunkbed, and my
5 son's got a bed with a drawer on the bottom.

6 Q Would a full-size adult fit in either one of those
7 beds?

8 A Yes, sir.

9 Q You said it wasn't out of the ordinary. Did you always
10 call him Mr. Lemacks?

11 A No.

12 Q What did you call him?

13 A I call him Timmy, but I used to call him my brother.

14 Q So, you said it wasn't uncommon for him to stay over?

15 A No, sir.

16 Q How many times has he stayed over before? Just give me
17 a rough number.

18 A Without the whole -- this is not including him living
19 with us, right? Him and his girlfriend.

20 Q He lived with you?

21 A Yes, sir. Him and his girlfriend lived with us, before
22 this had happened.

23 Q All right. So let's go to the next morning.

24 A Well the next morning, like I said, my husband went
25 back there and that's when he came into the room and he said

1 they -- the kids were in there on the top bunk, for some
2 reason, and I don't know why, but I sent them back here with
3 you. I said, "All right." And he said, "Timmy won't get
4 up." I tried to wake him up, but he won't get up. I'm
5 going to go with your dad, get the tools together, then I'll
6 come back and get him. And I said, "All right." So me and
7 the kids just stayed in my bed. Like I said, we had
8 satellite in every bedroom.

9 Q Let's come back for a second. You said that Timmy
10 wouldn't get up.

11 A Yes, sir.

12 Q You testified that he stayed with you --

13 A Several times.

14 Q Common, several, he lived with you?

15 A Yes.

16 Q Have you ever seen Timmy not get up?

17 A No, sir. Because Mr. Lemacks never wanted to put
18 himself in a predicament that my husband would not like,
19 because that was my husband's best friend.

20 Q What do you mean, a predicament he wouldn't like?

21 A As far as, if a man in a woman are left in a room
22 together, things can be said, jealousy can occur. In a
23 sense, things can happen, but it would be bad in my
24 husband's eyes or in his girlfriend's eyes, or whatever the
25 case may be.

1 Q So would you call it out of the ordinary that he did
2 not get up that morning?

3 A Yes, sir. I would call it very strange.

4 Q Did that strike you in any way?

5 A Yes, sir. Immediately, my mommy signs went off.

6 Q What happened next?

7 A Next, then, like I said, we were still half asleep,
8 laid in the bed, watching TV. I -- I don't know exact time.
9 I go -- we go to get up and Minor approaches me and says,
10 "Mama, is Uncle Timmy going school shopping with us?" I
11 didn't think anything of it because Mr. Lemacks always goes
12 with us places. You know, I mean, he is my husband's best
13 friend. I said, "No, baby, not that I know of. I think
14 it's just going to be me and you and your sister and your
15 brother. I think daddy's just going to stay," because he
16 had to work. Well, and she -- she kept asking and I was
17 like, "Why?" And immediately, like I said before, my mommy
18 senses went off. She gave me that look and she said, "Mama,
19 I got something to tell you." And I said, "Okay. What is
20 it?" So she asked her brother and her sister to stay in the
21 bedroom right here with me and me and her went in the
22 bathroom. So anyways, that's when she proceeded to tell me
23 what Mr. Lemacks did to her.

24 Q What did she say?

25 A She told me that when she was laying on the -- this

1 weren't her exact words. She said, "Mama, Timmy -- Uncle
2 Timmy touched me." And I said, "Excuse me?" And she said
3 "Uncle Timmy touched me." I said, "What do you mean, he
4 touched you, Minor ? Explain to mama. Tell me." Because
5 she is a child and things happen. And she said, "Mama, he
6 stick his hands in my pants and he moved his finger around."
7 And for about 20 seconds, I was floored. I had to gather
8 myself. I didn't know who I was or who was around me. I
9 did not know anything.

10 So I proceeded to ask more question, to get further
11 into detail with her. "Minor , are you absolutely sure?"
12 And she said, "Yes, ma'am." While she was saying all this,
13 she was crying; she was upset. And I had no reason to
14 believe she would make up anything like that. So after we
15 talked some more, she went into, you know, further details
16 with it as far as he had touched her and, you know, she had
17 tried to get up and all this other stuff.

18 And then after that I didn't -- I wasn't quite sure on
19 what to do first. Whether to take her to the doctor or call
20 -- you know, call -- call the police. So I went to my
21 mom's, which was not even a trailer away from me. I
22 gathered all my children -- we were all still in our night
23 clothes -- and we walked over there to my mother's. And
24 when I went to my mother's, she was still trying to get --
25 she was still trying to get out of the shower, not clothed.

1 So we were there talking to her and she's naked.

2 And so we walk in and she turns around and she sees
3 that look on my face and the look on my daughter's face, and
4 she knew right off the rip there was something wrong. I
5 said, "Mama, I got something to tell you. I need your
6 help." So as soon as I told her that, she had to gather
7 herself and we had to gather Minor . And then after that,
8 we called the police, we involved calling the law. I told
9 my mom, "Okay. Mama, I've got to get my husband, Epi, and
10 my father, Dennis, over here before I get the law out here."

11 Q Why?

12 A Because my husband will kill him with his bare hand.

13 Q So you called the law?

14 A I called the law. And three officers came out. And I
15 asked for an extra one, if I'm not mistaken, I think,
16 because I told them, "He's going to kill him. My husband is
17 going to kill him. He's still at home. He's still at my
18 house on the couch." At this time, Mr. Lemacks was still on
19 the couch asleep. He was not awake; he did not move. He
20 didn't flinch; he didn't do anything. About the time me and
21 my kids were talking, rustling around in the kitchen, and we
22 went -- no movement whatsoever. The same spot, he stayed.
23 So the police officers came out there. And when they came
24 out there, they asked what had happened.

25 Q Did you talk to the police?

1 A Uh-huh.

2 Q Did you tell them what you just told us?

3 A I told them the same exact thing that I just told
4 y'all, what my daughter told me.

5 Q And what did you do next?

6 A The next thing for me to do was to gather her, keep
7 her. And they told me to keep her in the same clothes, her
8 same night clothes. So I went home, threw myself together,
9 and then we went straight to the hospital up here in
10 Colleton County.

11 Q From there?

12 A And from then when we got in there, they said they
13 didn't have the facility. I guess they didn't know how, I
14 don't know, to deal with a minor. So they sent me straight
15 to MUSC.

16 Q Did you go to MUSC?

17 A I went straight there. We didn't stop for food. We
18 didn't stop for anything. We went straight to MUSC. While
19 at MUSC, when I walked in the door, they automatically knew
20 who we were and what we were coming for, because Colleton
21 Medical made the call. So we got taken back there. When we
22 got taken back there, I got asked questions; she got asked
23 questions, which is pretty much the same thing we're going
24 through now. She got examined.

25 Q How has this affected your relationship with Mr.

1 Lemacks?

2 A I used to love that man like he was my brother. Mr.
3 Lemacks wasn't just a friend to my husband. It was nice to
4 see that my husband had somebody that he could relate to in
5 many ways, as a man. I mean, it -- it -- it really has
6 destroyed -- he was a really, really close friend of ours, a
7 really close friend.

8 Q Was he a close friend to your children?

9 A Yes, he was. That's why they called him Uncle Timmy,
10 because he's not in my family.

11 Q Is there any reason that your children, any of them,
12 Minor included, would have to make this accusation that you
13 are?

14 A No, sir. That's what's flooring me is I do not
15 understand why, why she would lie about something like that.
16 I never -- I don't know. She loves him to death. They all
17 love him.

18 Q So do you believe her?

19 A Yes, I believe her with 100 percent of what's in my
20 body and hers. I believe everything that's coming out of
21 that baby's mouth.

22 Q Now, did she ever argue with Timmy before?

23 A Many a times, playing and just being mean.

24 Q With Uncle Timmy.

25 A Uh-huh. With Uncle Timmy, yes.

1 Q The day before this happened, were they at odds over
2 anything?

3 A Not that I was aware of, no, sir. He's always -- he's
4 like a parent; he's like a uncle, "Don't do that. You know
5 you're going to fall if you do that," you know what I mean?
6 So of course she's going to have something to say. She had
7 something to say to me.

8 Q I'm going to answer any questions -- you know, I do
9 have one more. Did something like this happen to you when
10 you were a kid?

11 A Yes, it did.

12 Q How did that affect you in dealing with your daughter?

13 A At the time, what took place with me, my parents asked
14 because I was 16 years old, and they asked me what did I
15 want to do. I didn't know. I didn't want -- I didn't want
16 the law called. I didn't want to go through pretty much
17 this. I didn't want to feel ashamed. I didn't want to feel
18 like my family hated me. I didn't want to be called a liar,
19 even though it happened anyway.

20 Q So what did you do to your daughter?

21 A I comforted her. I told her from right off the rip, "I
22 believe you. I believe you," because that's what I dealt
23 with, everybody not believing me, all the adults.

24 Q Did you pressure her in any way to press charges?

25 A No, sir. I did not; I did not. I let this child talk.

1 I heard everything she said, and I asked her, "How do you
2 feel about -- how does it make you feel? What do you want
3 mama to do to fix it?"

4 Q Did you tell her the consequences of her lying in this
5 situation?

6 A Yes, sir, I sure did. And I reassure her, not just of
7 this situation, but any situation.

8 Q And do you believe your daughter?

9 A Yes, I do believe her.

10 Q And if you'll answer any questions Mr. Mathews has.

11 A Not a problem.

12 MR. MATHEWS: Please the court.

13 THE COURT: Yes, sir.

14 CROSS-EXAMINATION

15 BY MR. MATHEWS:

16 Q Ms. Davis, to tell a lie in a situation like this is
17 about the worst thing you could do; isn't it?

18 A Yes, sir.

19 Q And if you swear to God, that's especially bad; isn't
20 it?

21 A Yes, sir.

22 Q I notice you're wearing a cross. So to swear to God,
23 that would be especially bad.

24 A Yes, sir.

25 Q You said this happened to you when you were 16?

1 A Yes, sir.

2 Q And did you ever get justice for that?

3 A No, sir.

4 Q How do you feel about that? I mean, you don't like it;
5 do you?

6 A Of course not.

7 Q I mean, is that something that's been nagging at you
8 for a long time?

9 A No, sir. I put it in its place. I seek counseling. I
10 did what I had to do to deal with myself.

11 Q But you say that Timmy was like family.

12 A Yes, sir.

13 Q Your husband's best friend.

14 A Yes, sir.

15 Q Did you or Epi ever bother to ask Timmy what happened?

16 A As far as?

17 Q As far as anything happening?

18 A No, sir.

19 Q Did you talk to him?

20 A I was -- I was instructed not to ask -- not to tell him
21 anything. When I -- when I called the law, they told me not
22 to talk to him.

23 Q No. I mean before you called the law.

24 A No, sir.

25 Q So you just -- you and the whole family just walked

1 right past him. And your best friend, somebody who lived
2 with you, you didn't ask?

3 A I sure didn't, because that's my child.

4 Q I understand, okay. So he's like family, but he's not
5 really like family.

6 A When it comes to my child, no, whether you're blood or
7 not.

8 Q When you told your parents about what happened when you
9 were 16, did they believe you?

10 A Yes, they did.

11 Q And they asked you what you wanted to do?

12 A Yes, sir.

13 Q And you said I don't want to call the police.

14 A No, sir. Because I knew my little brother and my
15 little cousins would be ripped away from their family, and I
16 didn't want that to happen. I'm the oldest cousin out of
17 many people, many little cousins.

18 Q You were worried that if you had said anything, it
19 would break up your family?

20 A It would break them up, yes, sir. I was 16 at the
21 time. If I would have known then what I know now, then I
22 would have.

23 Q You called 9-1-1 with the family around, right?

24 A Yes, sir.

25 Q And you made the entire call, describing what happened,

1 in front of Minor , right?

2 A I think at one time she -- no, no. There was times she
3 wasn't there. There was times she was still in the bathroom
4 with my mother and there was -- it was just a big chaos.

5 Q So if you heard something like that, that was not true.

6 A As far as what?

7 Q As far as Minor wasn't there the whole time.

8 A The whole time, no.

9 Q So then, anything to the contrary, that would be --
10 that would be a lie.

11 A Yes, sir.

12 Q And you told Epi about this. You talked about it
13 before you called the law, right?

14 A No, sir. The law was on the way when I talked to my
15 husband.

16 Q Okay.

17 A My father -- because they wasn't that far away from us.

18 Q Well now, wasn't he supposed to go to work?

19 A Uh-huh.

20 Q Why did he not go to work?

21 A Are you talking about my husband?

22 Q I'm talking about Epi.

23 A He -- because he had to come back and get Mr. Lemacks.

24 And at the time, they were getting tools and taking them to
25 the -- the -- the job they were working at. Then he was

1 going to come back and get Mr. Lemacks up again. And he
2 wasn't working because I called him. They wasn't working at
3 the time. They were taking tools to the job site.

4 Q And you say that when Epi noticed -- Epi thought it was
5 unusual that the kids weren't in the living room where he
6 left them, right?

7 A Yes, sir.

8 Q And because of that, he went back to their room to
9 check on them, right?

10 A Uh-huh.

11 Q And he woke them up when he saw them then, right?

12 A As far as I know, yes, sir. This is what I was told.
13 This is not what I seen with my own eyes.

14 Q There wasn't anything nefarious about it. They weren't
15 where they were supposed to be, so he went back to check on
16 them.

17 A Exactly.

18 Q Like a good family member would do.

19 A Yes, sir.

20 Q What time did you go to bed the first time that night?

21 A I have no, sir -- no -- no -- no idea.

22 Q Was it closer to four in the morning? Or was it closer
23 to eight o'clock at night?

24 A It wasn't four in the morning. I -- I give or take
25 ten, eleven. I mean, if you want me to guess, I'd say

- 1 Eleven.
- 2 Q Your best estimate, I mean, what was on TV?
- 3 A Between 10:30 and 11. I wasn't watching TV.
- 4 Q Okay. Between 10:30 and 11 you --
- 5 A Yes.
- 6 Q -- went to bed.
- 7 A I'd say, yes, sir.
- 8 Q And at 10:30 or 11, you went to bed and the kids were
- 9 watching TV, right?
- 10 A Yes, sir.
- 11 Q And Epi and Timmy were still drinking?
- 12 A Yes, sir.
- 13 Q Do you know what time they went to bed?
- 14 A I have no idea, no, sir.
- 15 Q You don't know what time Epi came to bed?
- 16 A No, sir.
- 17 Q Could it have been two in the morning?
- 18 A I doubt it very seriously, but it could have been, yes,
- 19 sir.
- 20 Q And you went out at one point to tell them to turn the
- 21 TV off.
- 22 A The children.
- 23 Q Right. Okay. Was that before or after Epi had come to
- 24 bed? A That was before.
- 25 Q Before, okay.

1 A Let me gather myself. I think it was -- I think it was
2 before he came to bed, yeah. Before he came to bed, because
3 when -- when Mr. Lemacks and -- Mr. Lemacks and my husband
4 came in, the kids -- it was -- it was dark time; their
5 lights were out. The only thing that was on was the
6 computer and I think like my laundry room.

7 Q And the TV, right? You came and said "Turn that off."

8 A Yeah, the TV. I meant as far as lights in the house.

9 Q Do you remember when Minor got her fingers -- you were
10 here when Minor testified, right?

11 A Yes, sir.

12 Q Do you remember when she got her fingers shut in the
13 car door?

14 A Yes, sir.

15 Q Were they swollen up pretty good?

16 A Yes, sir. They were nice and red.

17 Q Was she obviously -- I mean, was she crying out?

18 A Yes, sir.

19 Q It was one of the most painful things you can have
20 happen, right?

21 A I'd say so, yes, sir, as a child.

22 Q Have you ever had that happen to you?

23 A Several times.

24 Q Yeah? What was your -- what was your reaction?

25 A I cried and screamed. It hurt. I feel like I broke my

1 fingers.

2 MR. MATHEWS: One moment, Your Honor. That may be it.
3 I need to check.

4 THE COURT: Yes, sir.

5 Q Do you remember going to Hope Haven and listening to
6 Mary Beth Hefner and your daughter? And Detective Geathers
7 was there, right? Right there?

8 A Yes. I'm sorry. We've been to several different
9 places, so I'm trying to remember what exactly is what.
10 Okay. Yes, sir. I do know now what you're talking about.

11 Q You were watching the whole interview?

12 A (SHAKES HEAD.)

13 Q No?

14 A Uh-uh. I wasn't allowed to watch.

15 Q You were not allowed to watch?

16 A The interview, no. We -- I had to sit -- when they
17 took her back, they took her back there and they talked to
18 her theirselves (SIC). I was not allowed to be in there with
19 her.

20 Q I see. I understand that. You weren't watching it on
21 a closed-circuit TV?

22 A Unh-unh.

23 Q No. So you don't have any idea what ---

24 A I have no clue what they said back there.

25 Q I guess in September, I guess about a month after this

1 was supposed to have happened, Minor turned 11, right?

2 A Yes, sir.

3 Q And y'all had a big party?

4 A We had a pool party, yes, sir.

5 Q And you let -- now, Minor 's got a boyfriend for about
6 two years now, right?

7 A Yes, sir.

8 Q Jordan?

9 A Uh-huh. Jordan Smith.

10 Q And at that party, isn't it true that you let Jordan
11 spend the night, but didn't tell Epi about it?

12 A No, it's not.

13 Q Jordan's never spent the night over at your --

14 A Yes, Jordan has stayed the night, but my husband is the
15 one that had the say so over it. My husband runs the house.
16 Nothing happens without his okay.

17 Q So you didn't trick him.

18 A No.

19 Q You don't go over him saying "The rules are going to
20 change now. It's going to be different around here now."

21 A No. Not -- not that I was aware of. Not that I can
22 recall, no.

23 Q How many times has Jordan spent the night over at
24 y'all's house?

25 A Twice. And he wasn't by himself; it was as a group.

1 There was a bunch of kids, as a sleep over, males and
2 females.

3 Q And, okay, you took Minor to MUSC.

4 A Yes, sir.

5 Q And you took Minor to Beaufort, to Hope Haven.

6 A Yes, sir. I have also taken her to a place in
7 Dorchester.

8 Q You have?

9 A The Summerville area.

10 Q What's the name of that place?

11 A I cannot remember. I've only been there one time,
12 because once Ms. Geathers got with me and I found out we
13 were going to Hope Haven, I no longer went to Summerville.
14 There was no point in me going two of the same places. And
15 that was -- it was easier for me with Ms. Geathers. That's
16 why I was kind of confused at first.

17 Q Did you tell -- so you told the law -- you told
18 Detective Geathers that you went to this other place.

19 A Yeah. She knew I was aware of this other place I had
20 went to. MUSC is the one that told me this is the next step
21 I needed to take, which was the -- the same type of place
22 that I went to with Ms. Geathers. But that was originally
23 the first place that I had ever taken Minor , because MUSC
24 told me to. So I did what I was told.

25 Q When you found out -- when Minor came and told you

1 about this ---

2 A Yes, sir.

3 Q --- and I think you told the people at 9-1-1 this, too

4 ---

5 A Yes, sir.

6 Q --- you questioned both your other kids thoroughly.

7 A Yes, I did.

8 Q And including your son, including E.G. , right?

9 A Yes, I did.

10 Q Okay. Why did you ask him about it?

11 A Because he was there and because -- why not? Why?

12 Q There's nothing wrong with his hearing, I guess, right?

13 A No. There's nothing wrong with his hearing.

14 Q And he can feel things.

15 A Yes. And he still has one good eye to see out of.

16 Q And so he can still see, can still perceive things?

17 A Oh, yes, sir, very well.

18 Q When he talks to you, can understand what he's saying?

19 A Yes, sir.

20 Q What grade is he in?

21 A He's in the third grade, but he is also in self-
22 contained.

23 Q I understand.

24 A And he gets shadowed or neighborhooded, or whatever
25 they call it, to other classes.

1 Q But what he had to tell you was important, and that's
2 why you asked?

3 A Of course.

4 MR. MATHEWS: Nothing further, Your Honor.

5 THE COURT: Mr. Balish?

6 ASST. SOL. BALISH: Nothing further from the State.

7 THE COURT: All right, ma'am, you may step down.

8 (WITNESS STEPS DOWN.)

9 THE COURT: Lawyers approach now.

10 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
11 AND OUT OF THE HEARING OF THE JURY.)

12 THE COURT: Mr. Balish?

13 ASST. SOL. BALISH: The State calls Dr. Amaya.

14 MADAME CLERK: Please come forward to be sworn. Place
15 your left hand on the Bible and raise your right.

16 WHEREUPON, DR. MICHELLE AMAYA IS DULY SWORN.

17 MADAME CLERK: Please have a seat on the witness stand.
18 State your full name after you're seated.

19 DR. AMAYA: My name's Michelle Amaya.

20 DIRECT EXAMINATION

21 BY ASST. SOL. BALISH:

22 Q Good afternoon, Dr. Amaya. Can you tell me your
23 occupation?

24 A Yes. I'm a pediatrician at MUSC, Medical University of
25 South Carolina.

1 Q Are you licensed in this state?

2 A Yes, sir, I am.

3 Q How long have you held a license in South Carolina?

4 A In South Carolina, I've been here -- this is my third
5 year. But I've been practicing medicine for about 20 years.

6 Q Where did you practice previously?

7 A Initially, I was in North Carolina, then I was in
8 Birmingham, Alabama for 15 years. And was recruited up here
9 by the Medical University. They asked me to come up here.

10 Q What medical college did you attend?

11 A I went to the University of North Carolina at Chapel
12 Hill.

13 Q Tarheel. What is the nature of your practice, or
14 specialization?

15 A I have two board certifications. I was trained as a
16 general Pediatrician and a General Academic Pediatrician.
17 So I did a Fellowship in General Pediatrics, and I did a
18 Masters in Public Health at the School of Public Health.
19 And then I was doing a lot of child abuse work and child
20 abuse consults, and so I had my training doing that. And
21 recently, the American Board of Pediatrics made available,
22 or it became a Board-Certified specialty. So I sat for the
23 very first exam that was ever offered and I passed it.

24 And so now I have a general pediatric practice where I
25 see -- about ten percent of my patients are like newborn

1 nursery patients, kids who come for a sick visit or a well
2 child visit. I do some teaching with the residents. And
3 the rest of my practice is all related to assessing and
4 evaluating children and their families where there's
5 concerns that there may have been abuse of any kind.

6 Q And what's the name of this?

7 A Specialty?

8 Q The specialty?

9 A Child Abuse Pediatrics.

10 Q Child Abuse Pediatrics. What special studies were
11 involved in your passing that test? What extra education
12 did you get to get that specialty?

13 A Well, you only -- some people are eligible to take it,
14 based on your experience, like what kind of patients you've
15 seen or what kind of training you've had. So, just because
16 you've taken care of children that have been abused, they
17 have pretty stringent guidelines about who was allowed to
18 sit for the exam, which was kind of surprising, because
19 you'd think that anyone who paid their money could take the
20 test. And if you failed that, that would be that. But they
21 were very strict about the Board. The American Board of
22 Pediatrics is strict about who they allowed to take it.

23 So a lot of it had to do with you had to spend at least
24 50 percent of your time for five years, at least five years
25 practicing in the field of child abuse and neglect. And

1 then you had to have a number of supervisors who would stand
2 up for you and say that you practiced with the skill and
3 with the standard of care. And so, of course, I had to get
4 the chairman of several of the universities where I had
5 worked at to write letters for me, so that I'd be allowed to
6 sit for the exam. And then I had to pass the exam. And so
7 you have to study for several months, of course, to review
8 all of the key issues related to passing the exam. And so -
9 --

10 Q Approximately, how many children have you seen who have
11 either been the victim or alleged victims of child abuse?

12 A That's a good question. In general pediatric practice
13 over the last 20 years, I've probably seen -- well, I've
14 seen more than 10,000 kids total. And a lot of those
15 children that I've seen have had some concern related to
16 neglect, like they've had medical neglect because they --
17 like they didn't get their medications like they were --
18 they should have, or they got way behind on their shots.
19 Sometimes because they couldn't help it. But then, and also
20 because of concerns of possible abuse related to those kids.

21 But I would say, specifically, the ones that I kept
22 track of, I know that I kept track of on our database, more
23 than 3,000 kids that I've seen specifically for the concern
24 of child abuse and neglect. But it's probably more.

25 ASST. SOL. BALISH: Your Honor, at this time, the State

1 would offer Dr. Michele Amaya as an expert in Child Abuse
2 Pediatrics.

3 THE COURT: Mr. Mathews?

4 MR. MATHEWS: A couple questions. Sounds fine.

5 CROSS-EXAMINATION

6 BY MR. MATHEWS:

7 Q Dr. Amaya, you've testified in court, I guess, before?

8 A Yes, sir.

9 Q About how many times?

10 A About 25 times over the 20 years or so.

11 Q Okay. All right. Have you ---

12 A Maybe 30.

13 Q What percentage of the time have you testified in
14 family court? or circuit court? Or what different courts
15 have you testified in?

16 A Family Court or Circuit Court are the only courts I've
17 testified in.

18 Q And have you, in Circuit Court, what percentage of
19 those times did you testify for the State?

20 A The majority, but not all. In fact, the first case I
21 testified for in the State of South Carolina was for the
22 defense.

23 MR. MATHEWS: Your Honor, I have no questions. She
24 sounds qualified.

25 THE COURT: No objection by the defense?

1 MR. MATHEWS: No, sir

2 THE COURT: All right. Before you go any further, Mr.
3 Balish, let me instruct the jury on this.

4 Ladies and gentlemen of the jury, normally, a person
5 cannot give opinion testimony. Normally when a person
6 testifies, they must testify as to what they either saw,
7 heard, or sensed by smell, or something of that nature.
8 However, there is an exception when someone is qualified
9 because of education or experience. They are permitted to
10 give their opinion in certain areas of the Court, if the
11 Court qualifies them that way. This witness has been
12 qualified or will be qualified in the area of child abuse
13 pediatrics, to give opinion testimony in that area. That
14 does not mean that you must accept the opinion, but it is
15 evidence for you to use in any way that you see fit, and
16 give the weight and credibility you believe is appropriate.
17 Mr. Balish.

18 ASST. SOL. BALISH: May it please the Court.

19 DIRECT EXAMINATION CONTINUES

20 BY ASST. SOL. BALISH:

21 Q Dr. Amaya, first let me -- forgot to thank you at the
22 beginning. I know you're very busy working at MUSC. Thank
23 you very much for driving down to Walterboro for this trial
24 today. Did you have occasion to see a patient by the name
25 of Minor ?

1 A Yes, I did.

2 Q Can you tell me the circumstances surrounding that
3 visit?

4 A Certainly. She was -- first came to the Medical
5 University of South Carolina, Pediatric Emergency Room, for
6 complaints of being sexually assaulted. And we run -- our
7 division runs a team that's responsive to when any child,
8 meaning somebody under the age of 18, has a concern that
9 they present to the University, so they can hopefully have
10 excellent care. And so the on-call person on that night was
11 one of our nurses that works for our division, who was
12 consulted by the emergency room and is supervised by the two
13 attending physicians, myself and Dr. Abel. So I was
14 supervising her.

15 So once she responded to the initial visit, I reviewed
16 her work with her, signed off on it, and the child was
17 referred for a follow-up visit, as per our standard, within
18 two weeks of the initial injury and for follow-up, just to
19 see extent of injury, any worries of infection, etc., and
20 how the child was recovering or recovering from what had
21 happened.

22 Q On this initial visit in August, you said you were the
23 attending physician?

24 A Right. So I was on-call, but I was on-call from home
25 because I had had a nurse -- a nurse who had gone in to --

1 to collect an evidence kit, as requested by the detective
2 from Colleton County.

3 Q Was anything found in this evidence collection?

4 A How do you mean? Like what was --

5 Q The results of the testing that were done that day?

6 A I can tell you the medical testing and the results of
7 the history and the physical. The actual kit that's
8 collected and sent to the South Carolina Law Enforcement
9 Division, we don't get those results; the law enforcement
10 people get the results. So I do not have those results.

11 Q Can you tell me whatever results or whatever ---

12 A Certainly.

13 Q --- that you have?

14 A Certainly. So the emergency room physician saw the
15 child first. She was noted to be very upset, tearful. And
16 they went ahead and they called -- they had already gotten a
17 request from law enforcement to collect the evidence kit,
18 and that entails about a two- to three-hour process where
19 you go through and ask question. You get the consent forms.
20 You sort of go through what happened. You want the child to
21 tell you in their own words, if they can. But we don't do a
22 lot of time -- spending a lot of times asking questions to
23 the children because it's a big of an art to asking children
24 questions in a way that's open and not leadings. You don't
25 want to lead them to say anything. So that is reserved for

1 the Child Advocacy Center, a special place where kids are
2 interviewed.

3 They called the same nurse to come see her, Ms. Kerr,
4 and Ms. Kerr talked to her and she was able to say what had
5 happened to her and gave pretty clear evidence. She was
6 believable, because she was tearful, but she was ---

7 MR. MATHEWS: Objection, Your Honor.

8 THE COURT: Hold on a minute. Yes, sir.

9 MR. MATHEWS: Your Honor, first of all, she wasn't the
10 ---

11 THE COURT: Hold on. Counsel approach.

12 (Off-the-record discussion.)

13 THE COURT: All right. Ladies and gentlemen of the
14 jury, I have sustained the objection of defense counsel.
15 Let the record reflect that the last response of Dr. Amaya
16 be stricken from the record and you are not to consider that
17 response by her in any way, shape or form in your
18 deliberations. Mr. Mathews, anything further that you would
19 like me to add?

20 MR. MATHEWS: No, sir.

21 THE COURT: Okay. Mr. Balish, you may continue.

22 ASST. SOL. BALISH: Thank you, Your Honor.

23 Q Without talking about believability, I just want you to
24 go into what happened at the intake. Was Minor able to
25 disclose what happened that day?

1 A Yes. She made statement to the emergency room
2 physicians. But she also made statement to the same nurse,
3 collecting the evidence.

4 Q And what was that statement?

5 A May I check the record specifically?

6 MR. MATHEWS: Your Honor, as to time and place of the
7 incident, I think that's within the bounds. Anything beyond
8 that, I do not.

9 THE COURT: Mr. Balish?

10 ASST. SOL. BALISH: Your Honor, for purposes of medical
11 treatment ---

12 MR. MATHEWS: That's all I need to say on it, Your
13 Honor.

14 ASST. SOL. BALISH: I can understand the nature of the
15 objection, Your Honor.

16 THE COURT: You may continue, Dr. Amaya.

17 A Okay. This was on August 14th at the Peds Emergency
18 Room. The child was asked to give history. And per the
19 patient report, the patient reports she was sleeping on the
20 floor with sister and brother when she felt her uncle trying
21 to touch her privates. She tried to push his hand away.
22 And then he put his finger inside her, and that it hurt.
23 She moved over to her sister. Then, he fell asleep.

24 She got her sister and brother up; then went into her
25 bunk -- went in to her bunkbed. Her dad woke patient and

1 siblings up in the morning and put them in the mom's bed.
2 The patient told the mom while she was in bed with mom, and
3 mom took the patient to her grandmother's house and called
4 9-1-1. 9-1-1 referred the patient to Colleton Hospital, and
5 the child -- and then they were referred on to MUSC from
6 there.

7 Q I want to talk about hurt. "It hurt," she said.
8 You've dealt with, I believe you testified, over 3,000
9 children in abuse. How many of them had their vagina
10 penetrated digitally? Just give me a rough -- have you
11 dealt with patients before who have had digital penetration
12 issues?

13 A Yes.

14 Q Have you dealt with any children of Minor 's age,
15 approximately ten years old?

16 A Yes.

17 Q Does it hurt?

18 A It -- it can hurt, yes.

19 Q And can it hurt a lot?

20 A Yes.

21 Q Have you heard it described in different ways? If you
22 can give me some level of how much hurt can be associated
23 with this.

24 A Some of the children have come and had to go straight
25 to the OR because they were bleeding out and would have died

1 without having operation. So they -- they were being
2 treated with morphine and stuff in the ER. But that's a
3 minority of the cases.

4 Q Was she bleeding?

5 A No. None reported.

6 Q Was there any signs of physical abuse on Minor ?

7 A At the time she was in the ER?

8 Q Yes.

9 A Not at that time, no.

10 Q Were there any signs any time thereafter?

11 A When she came back for a two-week followup, there was
12 no signs either.

13 Q Is that normal?

14 A Yes, sir.

15 Q Can you explain that?

16 A Yes, sir. Pre-pubertal children, there's a -- well,
17 let me start with this. There are many forms of sexual
18 abuse. Some of it has to do with touching, some of it has
19 to do with touching on the outside of the skin, some has to
20 do with touching further in. There's several layers to go
21 through. And even for a child, the opening of the child's
22 vagina for a finger or an object to go in, doesn't
23 necessarily cause a tearing of any kind of tissue. There's
24 a natural opening there. The other thing is, it's sort of
25 somewhat similar to the tissue of the mouth in that there's

1 a lot of stretch. And so that if the skin is touched,
2 there's a little bit of give, and it doesn't necessarily
3 have to be penetration, like all the way to the child's
4 internal organs in order for penetration to occur.

5 Children who have not started having puberty yet, the
6 tissues, especially the vaginal, perivaginal tissues, they
7 are more sensitive, especially on the outer part where the
8 tissue is very pink. Not the plain skin, but the mucosal
9 skin, can be very sensitive. Once a child starts, a girl
10 child, starts to make estrogen, it's a wonderful chemical.
11 It's part of puberty and -- and development. And it causes
12 some -- a little bit of -- how should I -- it's not really
13 anesthesia; it's not numbing. It just makes the tissue a
14 little tougher and it's not as sensitive to being touched on
15 the outside.

16 So in this particular case, our patient here has
17 developed -- has -- has started some development, and so I
18 think it may have also caused her to have a little bit more
19 resilience from -- from the being touched. Does that mean
20 it didn't hurt? No. It just means that that area can heal
21 very rapidly. And most of the cases -- even we've had, you
22 know, looked at a bunch of studies around the country,
23 looking at children who have sustained penetration, and not
24 just by a finger but by a penis or a dildo or some other
25 kind of object. Surprisingly, a majority of those cases, in

1 some series, up to 98 percent -- 98 percent of those cases,
2 there was no physical findings at the time the children
3 presented. Now, all those children didn't necessarily
4 present within 12 hours, but they usually presented within
5 three weeks, and there was no tearing, no signs of anything
6 at the time, but they were seen.

7 There's also been studies of pubertal girls,
8 specifically who were pregnant, who've been examined and to
9 see what signs they have of having penetration. So they've
10 definitely had sex; they are pregnant. And only two percent
11 of those cases had positive findings in that case series.
12 So there's lots of different forms of touching sexual, etc.
13 Some things leave marks, some things don't.

14 Q Thank you. Is it normal for a child not to yell out
15 while abuse is happening?

16 A Yes.

17 Q The opposite, is it normal for a person to start
18 screaming or to yell out when they are being abused?

19 A It's possible. It's more common not to yell out. Most
20 people who later -- most people who disclose being abused
21 disclose much later than when it actually occurred. In
22 fact, there's -- the majority of people experience abuse
23 don't tell it for years. And there is a certain percentage
24 of people who never tell. Men, in particular, tend to not -
25 - males tend to not tell; but there is a large number of

1 females who never tell.

2 So, of that, there certainly are people who tell right
3 away, but it's more common not to. And most of those -- and
4 they -- they keep it quiet for numbers of reasons.

5 Q So would it be out of the ordinary the night that this
6 happened for it to hurt, but her not to scream?

7 A That would be normal.

8 Q And for her to then go to the hospital that day, but
9 you to have no findings?

10 A That -- that would be expected in the nature of what
11 she disclosed.

12 Q Okay. So is that because it was digital?

13 A Partly because it was digital and also because it was
14 maybe eight to eleven hours afterwards. So even if she had
15 had some redness or irritation, it -- it would have been
16 expected to receded by then.

17 Q Is it also normal not to have any DNA or anything else
18 in the panties or about her body with the digital
19 penetration?

20 A Yes, because DNA is especially from -- most recoverable
21 from saliva, or semen, vaginal secretions. If -- I guess if
22 the tables had been turned and if the suspect had been
23 brought in for a suspect kit, there would have been probably
24 a higher chance of recovery of her DNA on the suspect. But
25 we don't have a great protocol for that in the state of

1 South Carolina.

2 Q If the suspect was allowed over their house and he had
3 touched her hair, could he have gotten DNA on his hand that
4 way?

5 A Yes.

6 Q So there would be -- there's no specific DNA to the
7 vagina?

8 A No, that's you -- your DNA is all of you.

9 Q Okay. If you'll just answer any questions Mr. Mathews
10 has, please.

11 A Certainly.

12 THE COURT: Mr. Mathews.

13 MR. MATHEWS: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. MATHEWS:

16 Q Dr. Amaya, you indicate that some people come in with
17 severe problems, I mean, bleeding and all that sort of
18 stuff.

19 A They do occasionally, uh-huh.

20 Q Now, was there any problem at all -- I know you
21 indicate that in a great majority of cases, it's not. Was
22 there any indication at all of anything unusual physically
23 with Minor ?

24 A She's crying.

25 Q I understand. I mean, physically. I'm talking about

1 the vagina. Was there any -- there's no indication of any
2 tearing or cuts or anything like that?

3 A No. There was none.

4 Q Now, did you do this exam yourself?

5 A No, I did not.

6 Q So you're basically reporting on what somebody else
7 wrote.

8 A Yes. The nurse that was operating under my license.

9 Q Oh, under your license.

10 A Uh-huh.

11 Q So obviously, if she messes up, you're in trouble,
12 right?

13 A Right. Plus, though, we have a, you know, pretty
14 strict protocol for maintaining standards of excellence at
15 the center. So we -- the children, when they come in,
16 digital photography is used with explanation and consent of
17 the family. And those are used for quality assurance, in
18 particular. And I reviewed the images, so ---

19 Q You reviewed the images. And all those images indicate
20 that everything was normal.

21 A Yes, sir.

22 Q All right. So you can't necessarily rule out -- but
23 there's nothing in the physical examination, there's nothing
24 in the vagina that indicates anything happened. You just
25 can't rule it out because sometimes you see that; a lot of

1 times you see that, right?

2 A Exactly.

3 Q What's your understanding of how many fingers went into
4 Minor ?

5 A I don't know.

6 Q Would it make a difference?

7 A Possibly, but not necessarily. It may or may not.

8 Sometimes -- well, I'll just leave it there. It may or may
9 not make a difference.

10 Q Okay. I mean, you would expect if someone just barely
11 caught the tip of one finger in, it would be less likely
12 that you would see anything than if somebody got two enters
13 in, right?

14 A Two entire fingers. How do you mean?

15 Q I mean two fingers inserted into a vagina. Wouldn't
16 you be more likely to see a trauma from that than you would
17 the tip of one finger?

18 A Inserted to the rim? Inserted all the way to the -- to
19 the child's cervix? What do you mean inserted?

20 Q Far in enough where somebody would say "They put two
21 fingers in there."

22 A Well, to me, if this is the opening, two fingers can go
23 -- be placed right here and be painful and the fingers are
24 not all the way in. So one finger versus two fingers may or
25 may not make much of a difference. If the fingers go all

1 the way in and they're big, fat fingers ---

2 Q Yeah.

3 A --- it certainly can cause stretching and it could
4 cause tearing. But because of the presence of estrogen, it
5 protects from tearing.

6 Q Would it protect against tearing if the assailant had
7 long fingernails?

8 A It depends the amount of force that was used.

9 Q I understand. If it was as hard as you could. If
10 somebody pressed down just as hard as they could.

11 A Well, it depends if they pressed down versus if they
12 were slicing, like if they were digging on purpose with
13 their fingernails.

14 Q This is pretty easy. I'm just asking, is it more
15 likely you would see a cut or a tear if somebody had long
16 fingernails than if they did not?

17 A Well, yes, it's facilitating if they had long
18 fingernails. But you can also make cuts if they have
19 shorter fingernails. So I can't really give you a
20 probability on that.

21 Q So long fingernails, they don't mean anything at all,
22 right?

23 A Well, I mean, I think ---

24 Q I'm trying to get a feel. This sounds pretty obvious
25 to me, but, I mean, you're the one with the education and

1 experience. I'm just trying to get an idea. You're saying
2 there's no difference if you've got long fingernails than if
3 you don't?

4 A Well, there ---

5 ASST. SOL. BALISH: Your Honor.

6 A --- there is a difference, but the -- I think the
7 question ---

8 THE COURT: Hold on a minute. Hold on a minute, okay?

9 ASST. SOL. BALISH: I think this is asked and answered,
10 Your Honor.

11 THE COURT: It's cross-examination; I'm going to allow
12 it. Go ahead, Mr. Mathews. Go ahead, Doctor.

13 A I'm trying to think in terms of just biomechanics, in
14 general. And just because there's -- there's a possibility,
15 it doesn't mean that there's a probability that it would
16 occur. Does that make sense? So, for example, if there are
17 long fingernails, it does allow for the possibility that
18 there would be scratching. But just because there's long
19 fingernails, does not mean that there will be scratching.

20 Q It makes it more likely, but it isn't a sure thing?.

21 A I -- I would say yes to that.

22 Q All right. Obviously, you weren't there, obviously.
23 That's correct?

24 A In the emergency room, I was not there. I was there at
25 the follow-up clinic appointment.

1 Q And the one thing that you have on the history for sure
2 is that she pushed the hand away. That's in the report.
3 Because even though you didn't hear it, the people you --
4 the people that work for you said it, it must be so?

5 A They write down what they hear.

6 Q But clearly, the report indicates she pushed the hand
7 away.

8 A "She tried to push his hand away" is what it says on
9 the report.

10 Q And you indicate that it would be far more likely if
11 law enforcement had been able to, or had, if anybody
12 bothered to check for DNA under the assailant's hand, if
13 there were an assailant, you know, you have a better chance
14 of getting DNA from that.

15 A Right. Because you're looking at liquid, mucosal
16 secretions versus dry skin, fingers, so ---

17 Q Okay. All right. And you indicate -- what percentage
18 of people, do you think, that immediately report, as opposed
19 to delay report in instance of abuse?

20 A People? Or children?

21 Q Children.

22 A I -- I don't have a paper to tell you those figures. I
23 know they're available. But I would say a minority, say
24 less than a third of them, probably way less than that.

25 Q Way less than a third. And it's because of shame and

1 some other things. Have you ever found anybody that got a
2 secondary benefit from reporting a abuse -- got a secondary
3 benefit from reporting abuse?

4 A There are some. Like if you look -- they -- what's his
5 name? Oats from Australia, he did a series on long-term
6 follow-up of ten years. In most of those cases, they were
7 very -- there weren't very many, surprisingly, and most of
8 those occurred in the context of being coached by a parent
9 who had something to gain from it, like a custody issue.

10 Q Have you ever heard of somebody more friends from
11 saying they had been abused, if they had?

12 A No. I haven't really heard that much.

13 Q No kid has ever told you they had more friends as a
14 result?

15 A No. There's usually more stigma issues related to it.

16 Q So that would be a surprising new thing.

17 A It's not inconceivable, but it's not a -- it's not a
18 typical thing I've heard.

19 Q How about if the -- you mentioned something about
20 coaching. How frequently do you see -- can people bond over
21 this? Can different folks say "my friend got abused and I
22 got abused" or something like that? Can there be bonding on
23 that basis?

24 A I imagine so; but that's sort of outside my area.

25 Q Okay. All right. So anyway, you looked at some

1 pictures and read what your underlings mentioned; is that
2 right?

3 A Uh-huh.

4 Q Okay. All right. And the best you can say at this
5 point is that you can't rule it out, but there's nothing --
6 there is nothing in the physical examination of the vagina
7 that indicates anything happened. You just can't rule it
8 out. That accurate?

9 A That's accurate. And her findings were consistent with
10 her -- her disclosure.

11 Q Did she tell you -- who did she tell about how many
12 fingers were inserted? Is there any evidence of that? Any
13 indication at all?

14 A There wasn't anything about number of fingers. It just
15 said "put his finger."

16 Q His finger.

17 A Uh-huh.

18 Q Singular.

19 A That's what it said. But this was not the forensic
20 interviewer. And so the person did not try to clarify or
21 get more detail. They just listen, write it down, move on.

22 Q I see. So a forensic interview, would that be somebody
23 like Hope Haven?

24 A Yes, sir.

25 Q They're the ones that really have -- they do more in-

1 depth interviews than you guys do.

2 A Yes, sir.

3 Q And in terms of what happened, they're better to talk
4 to than you guys.

5 A Well, there's the issue of excited utterance at the
6 time the person comes in. It's just happened, been recent.
7 The doctors there or the nurse practitioners there collect
8 information. So they usually give information because they
9 want to be sure of what happened. But they're not -- the
10 person who wrote this down was not a forensic interviewer.
11 So they didn't try to get into more detail of time, place,
12 color, nuance, numbers.

13 Q Okay. Somebody like -- do you know Mary Beth Hefner?

14 A I do not.

15 MR. MATHEWS: I don't have anything else, Your Honor.

16 THE COURT: Thank you, Mr. Mathews. Any redirect?

17 ASST. SOL. BALISH: Your Honor, the State would just
18 ask that she be excused from the trial of this case, so she
19 may go back to MUSC.

20 THE COURT: Any objection, Mr. Mathews?

21 MR. MATHEWS: No, sir.

22 THE COURT: All right. Ma'am, you may step down.

23 DR. AMAYA: Thank you very much.

24 (WITNESS EXITS THE COURTROOM.)

25 THE COURT: Ladies and gentlemen of the jury, we are

1 now going to take a break. I'm sure you're probably
2 wondering whether or not we were going to eat lunch today.
3 I'm going to give you a break at this time and allow you to
4 go eat lunch. I want to instruct you again while you're on
5 your break not to discuss this case, not to do any
6 independent investigation. You'll decide this case based
7 solely upon what you hear in this courtroom. I will
8 instruct you not to discuss the case and not to do any
9 independent investigation on your own until you are
10 instructed to do so. You-all are excused. I would ask that
11 you be back in your jury room at 2:30. At 2:30, we will
12 start and will continue with the case at that time. Thank
13 you. Everybody else, remain seated, please.

14 (WHEREUPON THE JURY EXITS THE COURTROOM.)

15 THE COURT: All right. Anything further before we
16 break for lunch? Mr. Mathews?

17 MR. MATHEWS: No, sir.

18 THE COURT: How many other witnesses do you anticipate
19 calling, Mr. Balish?

20 ASST. SOL. BALISH: Four, Your Honor.

21 THE COURT: Four?

22 ASST. SOL. BALISH: Yes, sir.

23 THE COURT: Okay. All right. 2:30.

24 (WHEREUPON, COURT IS RECESSED FOR LUNCH.)

25 (2:35 P.M., 3-1-2011, WHEREUPON THE JURY ENTERS THE

1 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
2 RECORD.)

3 THE COURT: Thank you-all for being back when I asked
4 you to be back. I hope you had a good lunch; hope you had
5 enough time to get you something to eat and are ready to
6 work this afternoon. We're going to proceed with this case
7 at this time. Mr. Balish, you're recognized. If you'll
8 call your next witness.

9 ASST. SOL. BALISH: Yes, sir. The State calls Akima
10 Jones. Your Honor, I'll go get her.

11 (BRIEF PAUSE IN THE COURTROOM.)

12 MADAME CLERK: Please come forward and be sworn.
13 Please place left hand on the Bible and raise your right.

14 WHEREUPON, MS. AKIMA JONES WAS DULY SWORN.

15 MADAME CLERK: Please have a seat on the witness stand
16 and state your full name for the record.

17 THE COURT: Pull the mic where you can speak into it.

18 JUROR: Okay.

19 THE COURT: Okay.

20 ASST. SOL. BALISH: May it please the Court, Your
21 Honor?

22 THE COURT: Yes, sir.

23 DIRECT EXAMINATION

24 BY ASST. SOL. BALISH:

25 Q Ms. Jones, if you could just state your full name for

1 the record, please.

2 A Akima Jones.

3 Q Ms. Jones, what do you do for a living?

4 A I'm a guidance counselor, Cottageville Elementary.

5 Q How long have you been there?

6 A Four years.

7 Q And what do you do as a guidance counselor?

8 A I do it all. I talk to students, counsel them on
9 different things. Group counseling. I do everything.

10 Q When you say everything, are there occasions where you
11 will talk to a child one-on-one?

12 A Yes.

13 Q Children come to you -- why would be -- why would a
14 child come to you?

15 A Sometimes there may be a situation going on at home and
16 they feel comfortable speaking to me about the home
17 situation.

18 Q How do you establish a relationship with the kids at
19 your school?

20 A At the beginning of the year, I will introduce myself
21 to all the students. I go in the classroom on a weekly
22 basis and do classroom guidance. I'm very visible in the
23 school, so the kids pretty much know me.

24 Q Do you know Minor ?

25 A I do.

1 Q Do you see her in the courtroom today?

2 A Yes.

3 Q Where is she?

4 A Sitting right down there.

5 Q And have you had an opportunity to get to know her over

6 the last couple years?

7 A Yes.

8 Q At a point in time, did Minor disclose something

9 to you ---

10 A She did.

11 Q --- that something had happened to her? Did she say

12 when it happened?

13 A I want to say over the summer, I believe. Last summer.

14 Q Did she say where it happened?

15 A At her home.

16 Q Was this in a one-on-one session with you?

17 A Yes. Uh-huh.

18 Q Let me ask you this: What grade was -- you say it

19 happened over the summer. What grade was Minor going into?

20 A She would have been going into the fifth grade.

21 Q So did you know her during fourth grade?

22 A I did.

23 Q Did you notice a change in behavior? Did you notice

24 what you would consider an abnormal change in behavior in

25 Minor ?

1 A I did, yes.

2 Q Can you explain that?

3 A In fourth grade, Minor was -- Minor was very
4 involved. She would do, like, cheerleading. She was just a
5 happy-go-lucky child. When she came back after the summer,
6 she seemed to be a bit withdrawn. She wasn't participating
7 in as much activities as she used to.

8 Q Is that normal for a girl, in your experience, going
9 from fourth to fifth grade?

10 A No.

11 Q How many times did you meet with Minor ? How many times
12 have you had the opportunity to sit and talk with her?

13 A Throughout -- since I've known her?

14 Q Since you've known her, yes.

15 A Individually, I'd say about four -- well, I can't say.
16 Individually, it's been a couple of times, and also in group
17 settings as well.

18 Q Would you say you talked to her more individually
19 before or after the summer?

20 A After the summer, yes.

21 Q Substantially more? Give me an idea of how many
22 before; how many after.

23 A Before, I would say maybe two times, fourth grade.
24 Fifth grade, it's been several, probably about five or six
25 individual. And like I said, some as far as in a group.

1 Q Thank you, Ms. Jones. If you'll answer any questions
2 Mr. Mathews has.

3 THE COURT: Mr. Mathews, cross examination.

4 MR. MATHEWS: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MR. MATHEWS:

7 Q Ms. Jones, how are you doing today?

8 A Good. How are you?

9 Q Doing all right. Did you have any particular -- did
10 she address any particular problems or talk about any
11 particular problems last year? Or were those routine
12 things, in fourth grade?

13 A Routine things.

14 Q So she didn't complain about bullying or anything like
15 that?

16 A Not really, no.

17 Q So if it was going on, she didn't tell you about it.

18 A Right.

19 Q And did you notice -- do you keep track of ???or is it
20 in your description to notice whether people have --
21 students have more or fewer friends?

22 A Say that again.

23 Q Did you notice any drop off in her friends in doing
24 into fifth grade? Did she have about the same number of
25 friends? Or more or less? Or that's not in your -- that's

1 not what you do?

2 A Right. It's not really. I know that she's had more
3 problems, I mean as far as with -- since in the fifth grade.

4 Q I don't have anything further, Your Honor.

5 THE COURT: Mr. Balish?

6 REDIRECT EXAMINATION

7 BY MR. BALISH

8 Q What do you mean, more problems?

9 A Now she seem -- like I said before, she seems to be
10 more withdrawn now. And she's also very -- how do I say it
11 -- she's paranoid a lot. You know, it seems like she thinks
12 that people are out to get her, that type thing, and she
13 also cries a lot. I mean, she's very -- she's sad.

14 ASST. SOL. BALISH: Nothing further.

15 THE COURT: Mr. Mathews, any re-cross?

16 MR. MATHEWS: No, sir.

17 THE COURT: Thank you, ma'am. You may step down.

18 WITNESS: Okay. Thank you.

19 ASST. SOL. BALISH: Your Honor, I would ask that Ms.
20 Jones be excused so she can get back to the children at
21 Cottageville Elementary School.

22 THE COURT: Any objection, Mr. Mathews?

23 MR. MATHEWS: No, sir.

24 THE COURT: All right. You are excused.

25 MS. JONES: Thank you.

1 THE COURT: You have no further obligations under your
2 subpoena. Thank you.

3 MS. JONES: All right. Thank you.

4 ASST. SOL. BALISH: Epifanio Garcia.

5 MADAME CLERK: Please come forward to be sworn. Place
6 your left hand on the Bible and raise your right.

7 WHEREUPON, MR. EPIFANIO GARCIA WAS DULY SWORN.

8 MADAME CLERK: Please have a seat on the witness stand
9 and state your full name for the record after you're seated.

10 WITNESS: My name's Epifanio Garcia.

11 ASST. SOL. BALISH: May it please the Court, Your
12 Honor?

13 THE COURT: Yes, sir.

14 DIRECT EXAMINATION

15 BY ASST. SOL. BALISH:

16 Q Mr. Garcia, where are you from?

17 A I'm from -- I was born in Florida, raised in Ravenel.

18 Q So how long have you lived in South Carolina?

19 A South Carolina, about -- since I was three.

20 Q Okay. How old are you now?

21 A I'm 37 or 38, somewhere around there.

22 Q What do you do for work?

23 A I do construction, siding, mainly. And on the weekends
24 I do side work as far as remodeling trailers. Anything I
25 can do just to pay the bills.

- 1 Q Yes, sir. Do you see your wife here with us today?
- 2 A Yep.
- 3 Q Can you point her out?
- 4 A She's right there; so-called wife.
- 5 Q Yes, so-called wife. What about your daughter, the
- 6 girl that you consider your daughter?
- 7 A She's right here.
- 8 Q And what's her name?
- 9 A Minor .
- 10 Q How long have you known Minor ?
- 11 A Minor , all her life.
- 12 Q Yeah?
- 13 A All her life.
- 14 Q Now, you said you do work on the side, fixing trailers
- 15 and whatnot. Who do you do that work with?
- 16 A I do that with my father-in-law.
- 17 Q Give me an idea where y'all do that kind of work.
- 18 A Right there about -- where I live at, there's like
- 19 trailers all around me, about 100 feet far from each other.
- 20 I remodel trailers there.
- 21 Q All within that one trailer park ---
- 22 A Yeah.
- 23 Q --- where you live?
- 24 A Yeah.
- 25 Q You help do this? Or whose ---

1 A I -- I work for Les Jordan.

2 Q And who's Les Jordan?

3 A He's the property -- the owner.

4 Q The owner?

5 A Yeah.

6 Q Who else does work with Les Jordan? Anybody else in

7 your family?

8 A No, that's it. Timmy Lemacks used to work with us,

9 before he -- before he, you know, he moved. Moved to

10 Indiana.

11 Q There was a day in August that we all know about; you

12 know the day I'm talking about. It started as -- I want you

13 to start the night before.

14 A Night before.

15 Q The day before.

16 A The day before.

17 Q At the barbecue. I just want you to start telling us

18 what happened. What was going on that day?

19 A Well, you know, we got off work. You know, I got off

20 work, walk home, because I walk about from here to the road

21 home every day. And, you know, Timmy Lemacks, he's always

22 at -- at -- my mother-in-law waiting on me to, you know, get

23 off work, because pretty much he was my best friend. And we

24 drank beer, you know, every Friday. So -- and we drank beer

25 and hang out, you know, like guys, you know, have a cookout,

1 feed the kids, you know.

2 Q You said you walked home and Timmy would be waiting at
3 your father-in-law's ---

4 A Yeah. He was at my father-in-law's house.

5 Q How far is your father-in-law's house ---

6 A A hundred feet.

7 Q Hundred feet.

8 A From my house.

9 Q So was he waiting there that Friday?

10 A Yeah. He was waiting there.

11 Q What did you guys do once you saw each other?

12 A He walked over because he knows I didn't allow no man
13 in my house when I wasn't home, because he knew how I am.

14 Q What did you guys do that night?

15 A That night, we drank beer, cooked, talked about work
16 the next day and talked about a bunch of side work coming
17 up, you know, that I was going to need his help.

18 Q What do you mean, work the next day?

19 A Next day, my father-in-law was supposed to redo sheet
20 rock on a trailer. And my father-in-law wakes me up and
21 eight o'clock every day. Or, you know, he tells me to be
22 ready at eight o'clock. And since it's not my regular work,
23 I kind of drag, you know, because it's right -- 100 yards
24 right there, you know.

25 Q So the plan was for you, your father-in-law, and Mr.

1 Lemacks to work the next day?

2 A Yep. As far as I knew.

3 Q All right. What else happened that night? How much
4 did you drink?

5 A Well, we -- we had a case. And whenever I looked the
6 next day, I know we had about ten or nine beers left in the
7 refrigerator.

8 Q So about how many did each one of you drink?

9 A Pretty much about the same, you know.

10 Q About a half a dozen each?

11 A Uh-huh. Pretty much.

12 Q Let me ask you this ---

13 A I had -- I had -- on the way home from work, I had
14 already a, you know, 22 ounces.

15 Q Alcohol affects people differently. Would you say you
16 drink regular?

17 A No. I drink only, like, maybe, once a weekend, or
18 something like that.

19 Q What does six beers do to you?

20 A Six beers, nothing.

21 Q So would you say that you were relatively sober that
22 night?

23 A No, I had a -- you know, I had a buzz, yes. Six beers
24 give me a buzz. But not as far as I'm -- like before I slow
25 down in my drinking, I was, you know, throw a blanket on me

1 outside whatever; I'm good.

2 Q All right. Was Mr. Lemacks buzzed?

3 A He was buzzed, yes, sir. We both were buzzed. I mean,
4 we're talking, having a good time.

5 Q What happened next?

6 A What happened next? Well, you know, we were talking,
7 partying. Me and him were outside talking and, you know, I
8 told Timmy, "Well, you know, you're going to help me in the
9 morning, you know. He said, "That's fine, I can help you."
10 We're inside in the -- in the kitchen still talking, you
11 know. When we get buzzed, we started rambling and rambling
12 and rambling, you know, because I ain't seen him -- he ain't
13 been back about -- back from Indiana for about maybe a
14 month, I think. I'm not sure. But we started just talking
15 about things he's done out there and things I've been doing
16 down here, you know, as far as not having no -- no friends,
17 because he was my only male friend I had, you know, pretty
18 much, I trusted, you know.

19 Q Where was your wife and the kids at this point?

20 A My -- my wife was -- oh, the kids were in the living
21 room watching TV. And my lady, she was cleaning up.

22 Q She's cleaning up.

23 A You know, pretty much putting the scraps away. You
24 know, after they finish eating, you know, they leave a mess,
25 you know.

1 Q What happened next?

2 A Next, well, it was getting late. I told Timmy, "Well,
3 I'm going to bed, Bo, you know. I got work in the morning."
4 "Okay. Okay." I was getting dressed in my room, ready --
5 ready for bed and he come out there, "You mind if I spend
6 the night?" I said, "No, no, I don't care," because he's
7 spent the night before.

8 Q Was it a ordinary occurrence?

9 A Yeah, it's -- you know, I didn't think nothing of it.

10 Q What did you tell him?

11 A Say, "Yeah. Go ahead. Stay the night."

12 Q Where did you tell him to sleep?

13 A I told him -- well, I told him to hit the bed right
14 there. I told him just -- he knew where to sleep.

15 Q Where was that?

16 A In the bedrooms or wherever. Either of my kids weren't
17 in there.

18 Q About what time was that?

19 A About 11, 11:30, something like that.

20 Q So at this point, where are the children?

21 A This point, they were laying in the floor in the living
22 room.

23 Q Were all of them?

24 A All three of them, yeah. They sleep together.

25 Q Was the TV on or off?

1 A At the time, it was on.

2 Q All right. So what happened next?

3 A We got ready for bed and the kids were already in bed.

4 You know, cut the TV off. Mr. Lemacks was -- was in the --

5 either in the bedroom or in the -- on the living room couch.

6 Q You don't remember which one?

7 A I don't remember which one. But, you know, I did tell

8 him he could spend the night.

9 Q So did anything happen in the middle of the night? Do
10 you remember anything?

11 A No. That's the thing. I left my door open. My dogs -

12 - I got three big dogs that wake me up at night when

13 something, you know -- my kids yell in the middle of the

14 night or something, my dogs usually wake me up. Yeah, I

15 got, you know, pretty much big dogs.

16 Q So you didn't year any yelling.

17 A I didn't hear nothing.

18 Q Nothing. What happened the next morning?

19 A Next morning, well, I got up, got ready for work,

20 because, you know, my father-in-law called me and I had to

21 get up to go to work. And I was, you know, I was cussing

22 under my breath, you know, didn't want to get up. But I got

23 up anyhow, whether or not, whether I like it or not. So got

24 up, got ready, went over there to the couch, woke up Tim.

25 "Tim, you know, we got to go to work." He turned around,

1 looked at me, and then turned back around. I thought,
2 "Well, I guess he don't want to work." So by that time, I
3 didn't see my kids on the floor; I went to the back bedroom
4 and seem them on the -- on top of the -- the bunkbed, all
5 three of them.

6 Q Let me get back to you not waking up Tim. Now, you
7 said he had spent the night before at your house.

8 A Uh-huh.

9 Q On previous occasions when he had spent the night, was
10 there ever work to get done the next morning?

11 A Yeah, yeah. He always got up.

12 Q Was there ever an issue where he did not get up when
13 you woke him up the next morning?

14 A No.

15 Q Had you ever drank as much or more than you drank the
16 night before?

17 A What do you mean? He ---

18 Q At other times when he slept over and woke up the next
19 morning, like you said ---

20 A Oh, yeah, we drunk more than that night.

21 Q I'm sorry. So you drank more or less the other nights?

22 A Before this night happened, other weekends, we drunk
23 more. Because at that time, I had more money and I bought
24 some, too, you know. We both got it together and bought
25 more beer.

1 Q So it wasn't -- do you think he was hung over the next
2 morning? Did he look hung over to you?

3 A He might have been. I -- I can't tell you whether he
4 was or not. But he looked at me; he turned around. I guess
5 that told me, you know, I guess he don't want to work.

6 Q Well, what did you think about that?

7 A At the time, I wasn't thinking. I said, "Well, I got
8 to go, because my father-in-law waiting on me. You know, we
9 got to go to work; we got to go to work, you know."

10 Q All right. So what happened next? Continue on with
11 your story.

12 A I looked over there; my kids weren't on the floor. So
13 I go in the back bedroom, found them on the -- on the top
14 bunk of the bunkbeds. And I was like, "I thought mom put
15 you in the living room. What are y'all doing back here?
16 It's like, you know, what? Get -- get in the bed with
17 mama." So they all got up, got in bed with mama. I kissed
18 them all. I said, "Well, I got to go. Love you. Bye."

19 Q Where did you go?

20 A I went to my father-in-laws and load up tools, or he
21 had tools ready or whatever. And he picked me up and we
22 went to work.

23 Q All right. How far again is your father-in-law's house
24 ---

25 A Hundred foot.

1 Q How far is the place where you went to work?
2 A About 150.
3 Q About 150 feet from whose house? Your house or ---
4 A My house.
5 Q --- your father-in-law's?
6 A From my house.
7 Q Is it further from your father-in-law's house or ---
8 A Yeah, yeah.
9 Q So we're talking about everything being within ---
10 A Yeah.
11 Q --- 200 feet of each other.
12 A Exactly.
13 Q Could you have walked to that house ---
14 A Yeah.
15 Q --- that you were fixing?
16 A Yeah. I walk all the time.
17 Q So you were working in the neighborhood?
18 A Uh-huh.
19 Q All right. Tell me what happened next.
20 A All right. Where was I?
21 Q You were loading up tools.
22 A Yeah, loading up tools. And finally made it to the --
23 to the -- to the trailer we were working on, until -- we --
24 we were working already, about 30 minutes already passing.
25 I mean, we were working. And then my father-in-law got a

1 phone call from over there. I don't know whether it was
2 Tiffany or who calling, saying, you know, we got to come to
3 the house.

4 Q You can't say what somebody told your father-in-law,
5 because you didn't actually hear it. So, just tell me ---

6 A Well, he told me ---

7 Q --- what your father-in-law did.

8 A --- "We got to get to the house. We got to go to my
9 house. Something happened."

10 Q What did you do next?

11 A We got in the truck and went over there.

12 Q All right. And when you got there, what happened?

13 A Tiffany met me, crying, and I said, "What's wrong?
14 What's wrong with you?" She told me "Minor -- Minor was
15 touched by Timmy." I said, "What? What do you mean?" And
16 then that time, like "Timmy touched her." I was like -- and
17 I seen Minor . I said, "Where's my baby at? "Where's
18 Minor ?" And she come up crying. And that's whenever I
19 grabbed her and told her I was sorry. Said, "I'm sorry.
20 I'm sorry." Told her "I'm sorry."

21 Q Why were you sorry?

22 A Because I -- I feel like it's my fault. I should have
23 watched it better. I shouldn't have let nobody stay, I
24 guess. My bad judgment, I guess.

25 Q What did you do after you saw your daughter and made

1 sure she was ---

2 A I tried to go over there.

3 Q Why?

4 A To hurt him.

5 Q Somebody stop you?

6 A Yeah.

7 Q Who?

8 A My father-in-law, my mother-in-law, my -- my old lady
9 and my kids.

10 Q How did they stop you?

11 A They told me I didn't have to go. "Don't go over
12 there." They grabbed my arms and all and said, "I don't --"
13 they didn't want me be in jail.

14 Q Why didn't you go over there?

15 A After they said that, I was thinking too, I didn't want
16 to be locked up.

17 Q If you would have gone over there, what would you have
18 done to him?

19 A I probably kicked him in his groins, grabbed him by the
20 hair, threw him out of my -- my house. I don't know. I
21 might have sicked my dog at him.

22 Q Now, Mr. Garcia, about ten years ago, you had an issue
23 with the law; isn't ---

24 A Yeah.

25 Q --- that true? More than ten years ago, I think;

1 wasn't it?

2 A I think so. I'm not sure.

3 Q Can you tell me what happened back then?

4 A All right. Well, it was my place. Me and my buddy
5 were renting from a person. I was home and it was a Friday
6 and we drank, you know. I brought a bottle of liquor, put
7 in my house. Next thing you know, my brother showed up, my
8 younger brother, now. And then he had some friends with
9 him. And by that time, we were drinking; I was drinking.
10 And my -- my roommate was drinking with me. Next thing you
11 know, I called my girlfriend, that's Tiffany, and talked to
12 her on the phone. And ended up that night being at my -- my
13 brother -- brother's house that lives like maybe a quarter
14 mile away in Ravenel, and was there the whole time.

15 So next thing, you know -- you know, the cops showed
16 up, looking for me and took me to jail for tickets. Then
17 found out in jail what they wanted to get me for. So I told
18 them, you know, yeah, it's my liquor. It is my house, my
19 liquor, but I -- I left. They -- they told me that I should
20 have locked it up.

21 Q So ---

22 A I told them I put it in my room.

23 Q --- were kids -- were you ---

24 A They got into it. They got into the bottles.

25 Q Under-age kids got into your --

1 A They got into my liquor.

2 Q And you were charged with --

3 A The liquor was still mine.

4 Q -- contributing to the delinquency of a minor?

5 A Uh-huh.

6 Q All right. And that was how long ago?

7 A Ten years, twelve years.

8 Q Did you ever get in trouble before or after that?

9 A No, just speeding -- no, I wasn't even speeding, then.
10 I wasn't even driving.

11 Q So, no other issues with the law at any point?

12 A Not that I know of.

13 Q Okay. All right.

14 A I got a bad head, but, you know, as far as memory, you
15 know. But I do remember things just as far as my -- way
16 back, my childhood stuff, no, I don't remember too much of
17 all that.

18 Q Okay. All right. Well, listen, if you'll answer any
19 questions that Mr. Mathews has ---

20 A Uh-huh.

21 Q --- I'd appreciate it.

22 A That's no problem.

23 THE COURT: Mr. Mathews, cross-examination?

24 MR. MATHEWS: Thank you, Your Honor.

25 CROSS-EXAMINATION

1 BY MR. MATHEWS:

2 Q Mr. Garcia, Mr. Balish just asked you that -- asked you
3 whether you've had any other issues with the law at any
4 time.

5 A Uh-huh.

6 Q Okay? Not whether you've been convicted of anything,
7 but he asked --

8 THE COURT: Hold on a ---

9 Q --- and you said "no."

10 THE COURT: --- minute, Mr. Mathews. I need a "yes" or
11 a "no" response.

12 WITNESS: Yes.

13 THE COURT: Okay. Continue, Mr. Mathews. Thank you.

14 Q So you've never been arrested for anything else.

15 A Yes, I have, I think.

16 Q What's that?

17 ASST. SOL. BALISH: Objection.

18 THE COURT: Hold on. Hold on.

19 MR. MATHEWS: Mr. Balish opened the door, Your Honor,
20 by asking that question.

21 THE COURT: All right. Ladies and gentlemen of the
22 jury, I'm going to have to ask you to step to the jury room
23 for a minute while we take up a matter of law. Please do
24 not discuss the case. Thank you.

25 (3:00 P.M., MARCH 1ST, 2011, WHEREUPON THE JURY EXITS

1 THE COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
2 RECORD.)

3 THE COURT: All right, Mr. Mathews.

4 MR. MATHEWS: Thank you, Your Honor. Mr. Balish has
5 objected and that's an improper impeachment form. However,
6 Mr. Balish asked the question, "You've had no other issues
7 with the law of any kind." That's not asking whether he had
8 a prior record. It implies that he's never been arrested.
9 It implies things that are not true. And, Your Honor, if he
10 had not asked that question, I would not have been able to
11 ask this question. But since he opened the door, the
12 implication the jury has right now is that he's never been
13 arrested, he's never been in any trouble, and that's not
14 true.

15 THE COURT: Mr. Balish?

16 ASST. SOL. BALISH: Your Honor, well, I didn't say have
17 you been in any trouble with the law before. I was clearly
18 talking about the conviction that he had just admitted to
19 doing, hadn't been convicted of anything else. Further, it
20 would be entirely prejudicial to this witness for Mr.
21 Mathews to say that he had been arrested for criminal sexual
22 conduct, Your Honor. Something that he was -- so charges
23 that were dismissed against him, it would lead the jury
24 absolutely down the wrong path. I don't know all of the
25 circumstances surrounding the arrest. I -- I don't think

1 Mr. Mathews is either. I think it's a phishing expedition.
2 I think it's entirely prejudicial, Your Honor. I don't
3 think the door was open that far, Your Honor.

4 THE COURT: Anything else you want to tell me, Mr.
5 Mathews?

6 MR. MATHEWS: Your Honor, the implication right now is
7 that he has never been in any -- never been arrested; he's
8 never been in any trouble. And that's not a fair
9 implication.

10 ASST. SOL. BALISH: First off, it's not relevant to
11 this case. And second of all, I didn't ask him if he had
12 been arrested, Your Honor.

13 MR. MATHEWS: Your Honor ---

14 THE COURT: Well, hold on. I've heard all I need to
15 hear to make a ruling on this. I'm going to allow you to
16 ask him whether or not he's been in any other trouble. I
17 think you did, Mr. Balish, open the door, because you did
18 imply, or infer, as to whether or not he had been in any
19 other trouble with the law. I think you did open the door;
20 but what I am not going to allow you to do, Mr. Mathews, is
21 go into what those arrests were for, okay? He can answer the
22 question that he was arrested for something else. Mr.
23 Balish, I'll let you decide how you want to re-direct,
24 whether or not he's been convicted of anything. But I'm not
25 letting you get into what those actual arrests were for.

1 All right. That's my ruling on that.

2 ASST. SOL. BALISH: Thank you.

3 MR. MATHEWS: Thank you, Your Honor.

4 THE COURT: We'll stand down for about five minutes,
5 then we'll pick back up.

6 (Off the record, briefly.)

7 THE COURT: Anything further from the State, before I
8 bring in the jury?

9 ASST. SOL. BALISH: Nothing, Your Honor.

10 THE COURT: Are you ready to proceed, Mr. Mathews?

11 MR. MATHEWS: I think so, Your Honor. Let me just ask
12 Mr. Balish and I'll ask the Court. Would it be permissible
13 under the Court's ruling to ask him whether or not he was
14 unjustly accused and let him answer however he will? And
15 then I'll accept his answer, whatever it is.

16 THE COURT: Mr. Balish?

17 ASST. SOL. BALISH: Your Honor, I thought your ruling
18 was to ask had he been arrested, yes or no, and move on.

19 THE COURT: That is my ruling, Mr. Mathews.

20 MR. MATHEWS: Your Honor, he's been arrested several
21 other times. Can I ask him how many times he's been
22 arrested?

23 THE COURT: You can ask him that. But we're not
24 getting into what he's been arrested for anything such as
25 that.

1 MR. MATHEWS: Thank you, Your Honor.

2 THE COURT: All right. Anything further before we
3 bring the jury back in?

4 ASST. SOL. BALISH: Nothing from the State, Your Honor.

5 MR. MATHEWS: No, sir.

6 THE COURT: All right. Bring us the jury, please, sir.

7 (3:08 P.M., 3-1-11, WHEREUPON THE JURY ENTERS THE
8 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
9 RECORD.)

10 THE COURT: Mr. Mathews.

11 MR. MATHEWS: Thank you, Your Honor.

12 CROSS-EXAMINATION CONTINUES

13 BY MR. MATHEWS:

14 Q Mr. Garcia, Mr. Balish asked you if you'd ever had any
15 other issues with the law of any kind. In fact, you have
16 been arrested; have you not?

17 A Yes.

18 Q How many times?

19 A Far as in Walterboro County, one time.

20 Q Anywhere.

21 A It's about five times, maybe.

22 Q But your only conviction is for ---

23 A That one, yeah, yes, sir.

24 Q Contributing to the delinquency of a minor?

25 A Yes, sir.

1 Q And you indicated that you walked out in the living
2 room and you didn't see the kids.

3 A Uh-huh.

4 Q And ---

5 A Yes, sir.

6 Q --- that's not where you left them, so you were
7 concerned and went back to check on them.

8 A That's because I wondered where my kids was, yes, sir.

9 Q They weren't where they were supposed to be?

10 A Yes, sir.

11 Q So caring about them, you went to check on them?

12 A Yeah.

13 Q And ---

14 A Yes, sir.

15 Q --- you saw them, you woke them up, sent them to their
16 mom's room.

17 A Yeah, exactly. Because I was leaving Timmy there,
18 because I had to go.

19 Q Before you went to work, did Minor ask you -- Minor
20 asked you, in fact, whether or not Timmy was going to go to
21 work with you or go shopping with them.

22 A Yes, sir.

23 Q And you told her, "No."

24 A Said, "No, he ain't going shopping with her."

25 Q Now, Minor was kind of infatuated with Timmy; was she

1 not?

2 A Yes.

3 Q She would send instant messages asking where Dear Timmy
4 was, and so forth?

5 A Say what now?

6 Q When he was in Indiana, she sent instant messages,
7 Facebook messages asking where her Dear Timmy was.

8 A Oh, yes, yes.

9 Q Had kind of a crush on him?

10 A Very much. You could say that. She looked up to him,
11 because you -- you got everything in front of you. We used
12 to help -- help him and his girlfriend whenever they were --
13 they were together.

14 Q I understand. Were you present when -- you were
15 present when Tiffany called 9-1-1, were you not?

16 A Yes, sir. I was outside. Because I told them, you
17 know, get the cops before I get over there.

18 Q So you told her, "Get the police over here, so that I
19 don't go over there"?

20 A It -- it was kind of -- that day was real -- I don't
21 know how you say it. But it was real difficult. Didn't
22 nobody know what to do. But I did, but, you know, I did
23 what I wanted to do. But, yeah, they decided to call the
24 cops.

25 Q You were present with Tiffany when y'all met Deputy

1 McCoy; is that right?

2 A Officers?

3 Q The officers ---

4 A Yes, sir.

5 Q --- when they came out.

6 A Matter of fact, we met him in -- in-between my yard and

7 my father-in-law's yard and my neighbor's yard.

8 Q And during that talk, you said that Minor said she

9 stopped because she told Timmy it hurt.

10 A Yes.

11 Q Where do the kids usually sleep when Timmy spends the

12 night?

13 A Usually, it all depends. They sleep in the bedroom or

14 sometime they have bad nightmares. They sleep together

15 everywhere they go, either living room or either Minor 's

16 room, because my boy, he don't like sleeping by ???hisself.

17 He's the only boy and he's got a room by hisself, but he

18 don't want to be in there. So he stays with -- with his

19 sisters.

20 Q Was Minor allowed to have boys over at night at your

21 house?

22 A Where?

23 Q At your house.

24 A At night?

25 Q At night.

1 A No. No, sir. Unless -- just recently, since she
2 turned 11, she's had her cousin over there with her.

3 Q But other than that, no boys over ---

4 A No.

5 Q --- other than her cousin.

6 A Yes.

7 Q That you know of?

8 A At one time, too, there was her boyfriend that spend
9 the night one time.

10 Q How did you feel about that?

11 A Oh, I didn't like it one bit.

12 Q When did you find out?

13 A Oh, I already knew they were -- they hadn't talked to
14 me, but I was -- you know me, I was shitting already.

15 Q Okay. So, they talked to you after-the-fact?

16 THE COURT: Hold on a minute. Watch your language,
17 okay?

18 MR. GARCIA: Okay.

19 Q Sorry, Mr. Garcia. So, you didn't find out until after
20 you were upset?

21 A Yes, sir. They mentioned it to me what was happening.
22 I said, "Yeah, oh, yeah, okay."

23 MR. MATHEWS: One moment, Your Honor, if I may.

24 (BRIEF PAUSE IN THE COURTROOM.)

25 MR. MATHEWS: Nothing further, Your Honor.

1 THE COURT: Mr. Balish, any redirect?

2 ASST. SOL. BALISH: Nothing further from the State,
3 Your Honor.

4 THE COURT: Sir, you may step down.

5 WITNESS Thank you.

6 THE COURT: Thank you.

7 (MR. GARCIA STEPS DOWN.)

8 ASST. SOL. BALISH: State calls Mr. Dennis Davis.

9 MADAME CLERK: Mr. Davis, please come forward and be
10 sworn. Please come forward, put your left hand on the
11 Bible, raise your right.

12 WHEREUPON, MR. DENNIS DAVIS WAS DULY SWORN.

13 MADAME CLERK: Please have a seat on the witness stand,
14 and after you are seated, state your full name for the
15 record.

16 WITNESS: Dennis D. Davis.

17 ASST. SOL. BALISH: May it please the Court, Your
18 Honor?

19 THE COURT: Yes, sir.

20 DIRECT EXAMINATION

21 BY ASST. SOL. BALISH:

22 Q Good afternoon, Mr. Davis.

23 A Good evening.

24 Q Can you tell me, where do you live?

25 A , Walterboro.

1 Q And are any of your family members in the courtroom
2 today?

3 A Yes.

4 Q And who's in the family -- who is in the courtroom?

5 A Minor , Tiffany, my daughter, and Marie, my wife.

6 Q Who's Marie?

7 A Right there, that lady ---

8 Q What relation to you? She's your what?

9 A Wife. My wife.

10 Q She's your wife?

11 A Uh-huh.

12 Q All right. Do you see -- and how far away do you live
13 from them?

14 A Approximately, 100 feet.

15 Q About 100 feet. And I'm going to get right into it.
16 I'm not going to beat around the bush with what you've done
17 your whole life and everything else. Do you remember back
18 to the incident that involved Mr. Lemacks in August 2010?

19 A Yes, sir.

20 Q Can you describe me that morning?

21 A Okay. Around ---

22 Q Anything that you recollect.

23 A --- 8:30 in the morning, we were loading up some tools,
24 a drill, hammer, nails, things like that, we were doing to
25 use on the job and ---

1 Q Who's we?

2 A Well, I was, excuse me. At -- at my residence. And I
3 was going to meet them over there.

4 Q Who's them?

5 A Epi and Timmy.

6 Q And do you see Timmy in the courtroom?

7 A Yes, sir.

8 Q Can you point him out for me?

9 A Right over there.

10 ASST. SOL. BALISH: Let the record reflect that he's
11 sitting next to Mr. Mathews.

12 Q All right. So what happened? You said that you were
13 loading everything up yourself.

14 A Yes, sir.

15 Q All right. And what were the tools that you were
16 preparing?

17 A Power drill, a -- a saw, nails, screws, hammer.

18 Q What were you going to do?

19 A It was drywall and flooring, I believe.

20 Q And where were you going to do it?

21 A In a mobile home in the back, behind where we live.

22 Q About how far away?

23 A Three hundred feet.

24 Q And just continue with your story. What happened next?
25 Loading up.

1 A As I was loading, I think my daughter and my
2 granddaughter came by and said some things were wrong. They
3 went into the house. And I let them handle that. And I --
4 I seen Epi in my neighbor's yard. And I went over to where
5 he was at and he told me a little bit what went on. And
6 then things changed to me trying to -- to keeping him calm.
7 So he wouldn't get ---

8 Q Let me go back a little bit. When did you first see
9 Epi that morning?

10 A That would be around -- well, right at nine, I believe.

11 Q All right. What was your conversation with Epi that
12 morning?

13 A What was taking place, had taken place over at his
14 house, or their house.

15 Q So you didn't see him before you started talking about
16 that? You didn't go to the job ---

17 A No.

18 Q --- site or anything?

19 A No, he wasn't with me. I was at my house. The tools
20 were at my house.

21 Q Okay. Did you and Epi go to a job site together?

22 A Have we ever went to the job site together?

23 Q No. That morning.

24 A Yeah. Later on that morning. Uh-huh. Well, actually,
25 I think after -- after the police left.

1 Q After the police left you went there?

2 A Uh-huh.

3 Q All right. At some point in the morning, was Epi
4 supposed to meet you?

5 A Yes, sir, at my house.

6 Q And Timmy?

7 A Yeah, at my house.

8 Q Did neither one of them ever show up? Or did one of
9 them show up?

10 A Well, I -- I seen Epi in the yard between his house and
11 my house.

12 Q And did you converse with him?

13 A Yes, I did.

14 Q What was that conversation like?

15 A About what was going on in the house. That was heated,
16 heated, you know.

17 ASST. SOL. BALISH: Beg the Court's indulgence.

18 THE COURT: (TO WITNESS) You need a drink of water?

19 WITNESS: Oh, no, I'm good.

20 Q All right. Not going to be much longer. So I want to
21 go back to you loading up the tools. After you were done
22 loading up the tools, did you get in the truck?

23 A No, sir, I didn't get in the truck.

24 Q You never got in the truck?

25 A No. Unh-unh.

1 Q Okay. You said that you needed to -- your job changed,
2 or something, to holding him back. What do you mean?

3 A Holding?

4 Q You said after -- what happened after you saw Epi?

5 A Oh, I went up to talk to him.

6 Q What happened?

7 A We sat over there in my neighbor's yard and talked a
8 little bit, about what was going on. And under the
9 circumstances, I didn't want him to get upset and cause more
10 trouble.

11 Q What did you say to him?

12 A "Epi, you're going to have to be rational and let the
13 police handle this."

14 Q Did it work?

15 A Yes, sir.

16 Q Did you calm him down effectively?

17 A Yes, sir. Uh-huh.

18 Q When you went up there, was he upset?

19 A Oh, yeah. He was upset.

20 Q Tell me what was he doing that made you believe he was
21 upset?

22 A The way he was acting, talking, motions, you know, body
23 motions.

24 Q What was he doing?

25 A Hands moving. Mostly talking. You could tell he was

- 1 mad by his facial expression.
- 2 Q Was he loud?
- 3 A Yeah. Uh-huh.
- 4 Q What did he want to do?
- 5 A Hurt him.
- 6 Q He wanted to hurt him?
- 7 A Uh-huh.
- 8 Q Were you there when the law got there?
- 9 A Yes, sir.
- 10 Q What happened next?
- 11 A I went to my daughter's trailer to make sure -- they
- 12 have pit bulls; I made sure they was put up. And then I
- 13 went over to the couch where -- where Mr. Lemacks was at and
- 14 I woke him up.
- 15 Q You woke up Mr. Lemacks?
- 16 A Uh-huh.
- 17 Q What happened?
- 18 A He just turned over. He was asleep, facing toward the
- 19 wall. He turned over and asked me what was going on.
- 20 Q Let me ask you, he was supposed to meet you that
- 21 morning; wasn't he?
- 22 A Yes, sir.
- 23 Q Had he ever worked with you before?
- 24 A Oh, yeah. Uh-huh.
- 25 Q Has he ever slept in before?

- 1 A Not like that, no. Unh-unh.
- 2 Q So if he was supposed to meet you in the past, was he
- 3 on time?
- 4 A Yes, sir.
- 5 Q To your knowledge, had he ever spent the night at the
- 6 Davis house, the Garcia/Davis house?
- 7 A Yeah. He's been there before.
- 8 Q Did he ever work the next morning after he spent the
- 9 night?
- 10 A Oh, yeah.
- 11 Q Was he on time?
- 12 A Uh-huh.
- 13 Q Was it out of the ordinary that he was still on the
- 14 couch?
- 15 A Yes, I would think so.
- 16 Q What was his condition like?
- 17 A Disoriented.
- 18 Q Like he was hung over?
- 19 A Hung over.
- 20 Q How do you know? I mean, describe how he looked.
- 21 A Red face. Well, not squinty-eyed, I would say watery
- 22 eyes. It's signs of somebody had been drinking. Uh-huh.
- 23 Q What did he say to you?
- 24 A He just wanted to know what was going on.
- 25 Q What did you say?

1 A I said there's some people outside to see you. You
2 need to come on and get up. Uh-huh.

3 Q And then what happened?

4 A The policemen came in and I had to go out.

5 Q What did you do after the policemen came in?

6 A Went back outside with Epi.

7 Q All right. What did you do with Epi?

8 A Just talked some more. Sitting around make sure, you
9 know, everything was fine, and that it was good.

10 Q If you'll answer any questions Mr. Mathews has.

11 A That's fine. That's fine.

12 THE COURT: Mr. Mathews.

13 MR. MATHEWS: No questions, Your Honor.

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

15 (WITNESS STEPS DOWN.)

16 ASST. SOL. BALISH: May it please the Court, Your
17 Honor?

18 THE COURT: Yes, sir.

19 ASST. SOL. BALISH: The State calls Dorothea Geathers.

20 MADAME CLERK: Please place your left hand on the Bible
21 and raise your right.

22 WHEREUPON, DET. GEATHERS IS DULY SWORN.

23 MS. GEATHERS: Dorothea Jeanette Geathers, G-E-A-T-H-E-
24 R-S.

25 DIRECT EXAMINATION

1 ASST. SOL. BALISH:

2 Q Det. Geathers, what do you do for a living?

3 A Work for Colleton County Sheriff's Office.

4 Q In what capacity?

5 A Detective.

6 Q How long have you been in law enforcement?

7 A Seven years in law enforcement, eight months as
8 detective.

9 Q All right. What did you do before law enforcement?

10 A Well, jailer is still law enforcement. I worked at
11 Dayco for 17 years, SCDC, jail, transport, road patrol, SRO,
12 then Detective.

13 Q Gotcha. Are you from Colleton County?

14 A I am. I was born in Charleston County.

15 Q I want to talk a little bit about the procedure that
16 the Sheriff's Office used that day. Did you investigate
17 this case?

18 A Yes, sir, I did.

19 Q Did you have an opportunity to talk to the witnesses,
20 Ms. Davis and Mr. Garcia, in this case?

21 A I did.

22 Q Were you aware that road patrol officer was dispatched
23 to their residence?

24 A Yes, sir.

25 Q Can you tell me what they did that day from a policing

1 standpoint?

2 A Yes, road patrol was dispatched to in
3 reference to sexual assault. Scott McCoy was the first
4 officer to arrive, along with Justin Bennett and Mr.
5 Williams. What I gathered was they spoke with the mother,
6 then they spoke with Mr. Timothy in reference to this case.
7 They did not make an arrest in this case at that time.

8 Q All right. Was there a female officer present?

9 A No, sir, there was not.

10 Q Did any of the male officers speak with the victim in
11 this case, Minor ?

12 A No, sir.

13 Q What is the standard procedure? Where does Minor go to
14 talk to someone?

15 A Minor went to MUSC and spoke with medical forensic rape
16 crisis advocate there and she also went to Hope Haven Rape
17 Crisis Center to speak with them as well.

18 Q You said that Mr. Lemacks wasn't arrested on the scene?

19 A No, he was not.

20 Q Okay. What changed in the case that made you later,
21 then, arrest him?

22 A What changed in the case, Mr. Lemacks wasn't arrested
23 then. You really want to hear everybody's side of the story
24 first, before you make an arrest. Yes, there was probable
25 cause to make an arrest then, but an arrest wasn't made.

1 But my thing as -- when I became lead detective, I wanted to
2 hear all sides of it, get the forensic interview back, speak
3 with the victim, speak with the victim's mom, and then
4 that's when I made my arrest, after I had gathered all my
5 evidence.

6 Q All right. So, you did further investigation,
7 thereafter?

8 A Yes, sir.

9 Q And what further investigation did you do? You said
10 some of it just now. Did you talk to Hope Haven?

11 A Yes, sir. I spoke with Hope Haven when I got my
12 forensic interview back from Hope Haven, MUSC, and also what
13 Minor stated, disclosed to both, and that was enough
14 evidence right there to make my arrest.

15 Q Did you, at any time during the course of the
16 investigation or after the arrest, talk to anybody at the --
17 the other witnesses that we talked to, Ms. Jones at the
18 school?

19 A Yes, I went to the school and spoke with Ms. Jones
20 before.

21 Q Okay. Let me ask you a little bit about the arrest
22 itself. Where did you find the defendant?

23 A Timothy was at his mom's residence on . He
24 was in the bedroom. I think it was his bedroom. He was in
25 a bedroom at his mother's residence playing a video game.

1 Q Did he give you any trouble?

2 A He did not.

3 Q Okay. I'm going to let Mr. Mathews go ahead and ask
4 you some questions if you would answer anything that he
5 asks. I appreciate that.

6 A Yes, sir.

7 THE COURT: Mr. Mathews?

8 CROSS-EXAMINATION

9 BY MR. MATHEWS:

10 Q Det. Geathers, Mr. Lemacks has always denied doing
11 this, has he not?

12 A Yes, sir.

13 Q You were present at Hope Haven when Mary Beth Hefner
14 interviewed Minor , were you not?

15 A Yes, sir.

16 Q And you watched the entire thing?

17 A Yes, sir.

18 Q Have you seen the videotape of that interview?

19 A Yes, sir.

20 Q It is an accurate rendition of the interview that you
21 saw?

22 A Yes, sir.

23 Q Okay. Do you remember the specifics or would you need
24 the video to refresh your collection?

25 A Specifics on what?

1 Q Specifics on the things that Minor said.

2 A I can answer you to the best of my knowledge, sir.

3 Q Okay. And if -- and if -- if you need any help, we can
4 run the video if you'd like. Isn't it true, Det. Geathers,
5 that Minor said at that time, that whatever happened,
6 happened between 8:00 and 9:00 p.m.?

7 A I don't recall that, sir.

8 Q You would need the video for that?

9 A (NO RESPONSE.)

10 Q It would be in the video if she did ---

11 A Yes, everything that she stated is in the video.

12 Q Okay. All right. And were you present at the time she
13 said she was wearing -- when she described what she was
14 wearing at the time?

15 A I was there throughout the whole interview, sir.

16 Q And didn't she say she was wearing an apple bottom
17 jeans shirt?

18 A I don't recall that. I was there throughout the whole
19 interview. I was just -- my purpose was to see what she
20 disclosed.

21 Q I see. Okay. And at that interview, didn't she
22 indicate that she was underneath the blanket and not on top
23 of it?

24 A I don't recall that, sir.

25 MR. MATHEWS: Your Honor, I'd like to refresh her

1 recollection, to go ahead and run the videotape and let's
2 see if that refreshes Det. Geathers recollection.

3 THE COURT: Mr. Balish?

4 ASST. SOL. BALISH: Your Honor, if he would like to
5 introduce that into evidence, the State would have no
6 objection.

7 MR. MATHEWS: No, sir. I don't want to introduce it
8 into evidence. I would like to refresh her recollection
9 with it and show it to her.

10 THE COURT: Ladies and gentlemen of the jury, I'm going
11 to have to ask you to step to the jury room for a minute
12 while we take up a matter of law. Please do not discuss the
13 case until you are instructed to do so. Thank you.

14 (3:32 P.M., 03-01-11, WHEREUPON THE JURY EXITS THE
15 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
16 RECORD.)

17 THE COURT: All right, Mr. Mathews?

18 MR. MATHEWS: Your Honor, she was present for the
19 interview, watched the entire thing, and Mr. Balish would,
20 obviously, love for me to introduce it into evidence,
21 because I'd lose my last argument. I can understand. I'd
22 do the same thing. If I could trick me into introducing
23 something into evidence that I don't need to, I'd like to do
24 it, too. However, she was present during this interview and
25 it would be in the scope and normal cross-examination of

1 what was observed.

2 THE COURT: Mr. Balish?

3 ASST. SOL. BALISH: Your Honor, she was not in the
4 interview room. She was in another room with a closed
5 circuit TV. Her purpose there was limited to facilitate the
6 interview, not to take part in the interview. Again, I
7 think she could probably authenticate that it happened at
8 that time and it's a true and accurate depiction of what
9 happened in that room, but as far as the details of it, I
10 don't think she could testify to it as she was not in the
11 interview room.

12 I think if Mr. Mathews, like I said, if he wants to
13 introduce it into evidence, again, he'll lose his last
14 argument, but I have no objection to that, Your Honor. As
15 far as rehabilitating, Your Honor, I just don't think it's
16 proper.

17 THE COURT: Anything else, Mr. Mathews?

18 MR. MATHEWS: I'll await the Court's ruling before I
19 make my next ---

20 ASST. SOL. BALISH: I also think, Your Honor, it would
21 be hearsay.

22 MR. MATHEWS: Your Honor, I sought to introduce this
23 during Minor 's interview and was told that was not the
24 proper time, and I'm just looking for the proper way to
25 introduce this evidence in the proper fashion. I wasn't

1 permitted to introduce it during Minor 's interview and I'd
2 just like to do it during the cross-examination of Det.
3 Geathers.

4 THE COURT: Anything further, Mr. Balish?

5 ASST. SOL. BALISH: Like I said, Your Honor, I would
6 say that it's hearsay, on top of everything else.

7 THE COURT: All right. I want to stand down for a
8 minute. I want to look at something. I'll come back in and
9 make my ruling.

10 (OFF THE RECORD, BRIEFLY.)

11 THE COURT: Mr. Mathews, is it your intention to play
12 the tape in its entirety?

13 MR. MATHEWS: Your Honor, what I had intended to do, if
14 I am permitted to use this cross-examination, I would go
15 through it much like a deposition. I'd ask questions,
16 specifically, particularly, the ones that Minor has
17 testified in the manner contrary. There is one section in
18 any event, that Mr. Balish and I have talked about that if
19 it were shown in its entirety, we would want to redact one
20 particular part that refers to something we both agree is
21 prejudicial. But my inclination would be to ask if I'm able
22 to use it just as cross-examination to pick out, it would
23 probably be a fair number of pieces of it. I'd ask a
24 question. I'd ask -- I'd ask what did she say she was
25 wearing? and I might read, because I handwrote all of this

1 stuff out, along with the times that it was all done. My
2 intention would be to use it as a deposition. For example,
3 did she indicate my dad and this boy named Timmy were having
4 a couple of drinks? You know, did she say that? Yes, she
5 did. If it's not contradictory, then I guess I couldn't use
6 it that way. So, just in terms of repeating stuff she has
7 already admitted to saying. I wouldn't use that particular
8 thing, because on cross-examination she admitted that she
9 had said that. So, I wouldn't need to ask that part.

10 On parts where she said that she was on direct
11 examination she said that she was awake all night. There
12 are at least four different references in here where she
13 said she woke up, and so I would intend to read those as
14 didn't she say at 11 minutes and 28 seconds into it that she
15 woke up when she had to use the bathroom, for example.

16 I admit that it would be a bit tedious.

17 THE COURT: Well, let me ask you this. If this witness
18 was allowed to view the tape and respond to your questions,
19 use the tape for purposes of refreshing her memory and to
20 answer your questions, pursuant to that, would that cure any
21 issues that you have?

22 MR. MATHEWS: Yes, sir. And I don't have any problem,
23 although I lose a good bit in doing this. I don't have any
24 problem of making a photocopy of my transcript of it to help
25 and give it to Mr. Balish; and I'm giving up a lot to do

1 that because I'm telling trial strategy and all of that.
2 He's looked at it and I think he'd find -- and giving a copy
3 to Ms. Geathers and doing it tomorrow morning.

4 THE COURT: Well, I want to make sure that your client
5 -- that I'm being abundantly fair to him ---

6 MR. MATHEWS: Yes, sir.

7 THE COURT: --- in this process. Now, in going back,
8 you did specifically ask about playing that and I did have
9 to go back and look at my notes during Minor 's testimony,
10 and from my recollection, your request to play the tape was
11 made after redirect. That would have been on recross.

12 WITNESS: I think that's accurate, Your Honor.

13 THE COURT: It was after redirect, but it was on
14 recross.

15 MR. MATHEWS: We discussed it at sidebar and I think it
16 was then.

17 THE COURT: And that's when I denied, I told you at
18 sidebar that it would not be appropriate to play it at that
19 time. I'd like to look at the video for one thing. In
20 addition, what I'm going to do, is I'm going to let the jury
21 go for the day. I'm going to ask Det. Geathers; is that
22 right ---

23 MADAME CLERK: Yes, sir.

24 THE COURT: --- to review this video and be prepared to
25 answer your questions on cross-examination. Give her an

1 opportunity, she was there, give her a chance to review the
2 video, refresh her recollection, and allow you to proceed
3 accordingly.

4 MR. MATHEWS: Thank you, Your Honor.

5 THE COURT: Now, I don't think you can publish the
6 video without it going into evidence, okay? And if you do
7 that, then I think you do lose your last argument.

8 WITNESS: Yes, sir.

9 THE COURT: But I want your client to have a fair bite
10 here and I think that's the appropriate manner to handle
11 this.

12 MR. MATHEWS: Thank you, Your Honor.

13 ASST. SOL. BALISH: Your Honor, if I could respond
14 briefly.

15 THE COURT: Yes, sir.

16 ASST. SOL. BALISH: 612 is specific to refreshing
17 writing. For the record, this is a video we're talking
18 about here, so that's my first issue. Second, by allowing
19 him to impeach Minor through the testimony of Det.
20 Geathers, it takes away the State's ability to rehabilitate,
21 to say to Minor , what were you thinking at that time?

22 THE COURT: Well, why don't you recall her to the
23 stand, then?

24 ASST. SOL. BALISH: If Mr. Mathews would like to
25 introduce it as evidence, I will recall her to the stand.

1 THE COURT: Well, she can look at it. He can question
2 her. She was there. If you want to recall her to the stand
3 to rehabilitate her, you are welcome to do that.

4 ASST. SOL. BALISH: Yes, sir.

5 THE COURT: Okay.

6 ASST. SOL. BALISH: As to the issue of it being hearsay
7 and not for writing ---

8 THE COURT: We're not playing it.

9 ASST. SOL. BALISH: Okay.

10 THE COURT: We're not playing it.

11 ASST. SOL. BALISH: But her testifying that somebody
12 else said to somebody else ---

13 THE COURT: She's not testifying as to what somebody
14 else said. He's asking her on cross-examination, did she
15 say so-and-so? It's a yes or no response.

16 ASST. SOL. BALISH: Yes, sir.

17 MR. MATHEWS: Your Honor, if I could approach, I've got
18 a copy of the video. Yeah, that's the same. Yeah, that's
19 fine.

20 THE COURT: All right. I'm going to bring the jury back
21 in and I'm going to let them go for the balance of the day
22 so we can look at this issue. Bring us the jury, please,
23 sir.

24 (4:12 P.M., 3-1-11, THE JURY ENTERS THE COURTROOM AND
25 THE FOLLOWING IS HELD ON THE RECORD.)

1 THE COURT: All right. Ladies and gentlemen of the
2 jury, what we're going to do, or what I'm going to do is I'm
3 going to let you go for the balance of today. There's some
4 additional matters that we've got to get cleared up, that we
5 have to get cleared up outside of your presence. So rather
6 than keep you sitting back there while we deal with those
7 issues, I told you on the outset, I wasn't going to keep you
8 here any longer than I have to. And I don't like having you
9 sit back there and wait on us, while we're dealing with some
10 legal issues out here.

11 So what I'm going to do is I'm going to cut you loose
12 for the balance of today. I'm going to ask that you be back
13 in the jury room at 9:30 in the morning, and we will start
14 at that time. During your overnight recess, I want to
15 instruct you again not to discuss the case with anybody
16 until you're instructed to do so, and do not do any
17 independent investigation on your own.

18 You-all are free to go for this evening. Please be
19 back in your jury room at 9:30 in the morning.

20 (4:16 P.M., 3-1-11, WHEREUPON THE JURY EXITS THE
21 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
22 RECORD.)

23 THE COURT: Anything else from the State?

24 ASST. SOL. BALISH: Nothing further from the State,
25 Your Honor.

1 THE COURT: Mr. Mathews?

2 MR. MATHEWS: No, Your Honor.

3 THE COURT: Any requests to charge in this case, if
4 you'd have them to me at nine o'clock in the morning.

5 ASST. SOL. BALISH: Yes, sir.

6 THE COURT: Is this your last witness, Mr. Balish?

7 ASST. SOL. BALISH: Yes, sir.

8 THE COURT: Other than unless you call Minor back?

9 ASST. SOL. BALISH: Yes, sir.

10 THE COURT: Okay. All right. You may step down,
11 Detective Geathers.

12 WITNESS: Yes, sir.

13 ASST. SOL. BALISH: Just so the Court knows, I am going
14 to have to discuss briefly with Detective Geathers, just for
15 purposes of obtaining another video tape for her to watch
16 and for myself, just because I've given the Court my copy.
17 So that's the only discussion I'll have with her about the
18 case, Your Honor.

19 (9:30 A.M., WEDNESDAY, MARCH 2, 2011, WHEREUPON COURT
20 RECONVENES AND THE FOLLOWING IS HELD ON THE RECORD.)

21 THE COURT: All right. Before we bring the jury in,
22 let the record reflect that I had a charge conference in
23 chambers with the attorney for State and attorney for the
24 defendant. And from my understanding, I will give you an
25 opportunity at the conclusion after the charge. But from my

1 understanding, no objection to the charge that I've
2 prepared. Is that correct, Mr. Balish?

3 ASST. SOL. BALISH: No objection from the State, Your
4 Honor. THE COURT: Is that correct, Mr. Mathews?

5 MR. MATHEWS: It is, Your Honor.

6 THE COURT: Would you-all approach and look at the
7 proposed verdict form?

8 (WHEREUPON, A BENCH CONFERENCE WAS HELD.)

9 ASST. SOL. BALISH: That's fine, Your Honor.

10 MR. MATHEWS: Yes, sir.

11 THE COURT: No objection to the proposed verdict form?

12 ASST. SOL. BALISH: No objection from the State.

13 THE COURT: All right. Before we bring the jury in,
14 Mr. Balish, I think you indicated that you wanted to put
15 some objection on the record as to my ruling yesterday, I
16 think.

17 ASST. SOL. BALISH: Yes, Your Honor. As to the ruling
18 that Mr. Mathews may have Detective Geathers refresh her
19 memory on the videotape, the State objects. Rule 12,
20 refreshing a memory is specific to a writing. We're not
21 talking about writing; you were talking about a videotape.
22 Furthermore, she was not part of this interview, not present
23 in the room where the interview happened, not the
24 interviewer.

25 The State's position is she was not refreshing her

1 memory entirely. She could have also been gaining new
2 knowledge when she was in that room. We don't know how
3 close attention she was paying. If there was somebody else
4 in the room she could have been talking to, and she might
5 have missed something that was said.

6 Further, the State believes that this would be pitting
7 witnesses against each other. And finally, we believe any
8 question Mr. Mathews asks of this witness where it is "Did
9 she say?" in this video, would be clear hearsay, Your Honor.
10 Just wanted to put those objections on the record, rather
11 than doing it every -- every question while the jury is in
12 the room.

13 THE COURT: All right. Anything from you, Mr. Mathews?

14 MR. MATHEWS: Prior and consistent statement, Your
15 Honor. I have nothing.

16 THE COURT: All right. I stand by my prior ruling, and
17 I'm going to allow it. Anything else before we bring the
18 jury in?

19 ASST. SOL. BALISH: Nothing from the State, Your Honor.

20 THE COURT: All right. If Detective Geathers would
21 come back around and take the stand.

22 (DET. GEATHERS TAKES THE STAND.)

23 THE COURT: It's how we left it yesterday and that's
24 how I want them to come back in.

25 DET. GEATHERS: Yes, sir.

1 THE COURT: Okay?

2 DET. GEATHERS: Good morning.

3 THE COURT: Good morning. How are you? Now I'll
4 remind you that you're still under oath, okay?

5 WITNESS: Yes, sir.

6 THE COURT: Nothing further, please bring us the jury.

7 (9:35 A.M., 3-2-11, WHEREUPON THE JURY ENTERS THE
8 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
9 RECORD.)

10 THE COURT: Good morning, ladies and gentlemen, I hope
11 that you all had a good evening last night. We are now
12 going to continue the trial of this case. Mr. Mathews?

13 CROSS-EXAMINATION

14 BY MR. MATHEWS:

15 Q Det. Geathers, did you sleep okay?

16 A Yes, sir.

17 Q Before we left yesterday, I had asked whether or not
18 you were present in watching a Hope Haven interview with
19 Minor ; is that correct?

20 A That's correct.

21 Q And you were present?

22 A Yes, sir.

23 Q Were you present during the entire interview?

24 A Yes, sir.

25 Q Okay. And was a DVD made of that interview?

1 A Yes, sir.

2 Q You were asked yesterday to review that video, were you
3 not?

4 A Yes, sir.

5 Q And did you do that?

6 A I did.

7 Q Okay. During the course of that, do you recall whether
8 Minor said she was wearing an apple bottom jeans t-shirt?

9 A At that time, that statement she made ---

10 Q She did make that statement?

11 A She made the statement in court yesterday, that's
12 correct; but as far as me listening -- looking at the DVD
13 last night, I don't know -- I don't remember her saying
14 that. She could have said it, but I didn't watch it or bend
15 and listen at every word and take notes of it.

16 Q You watched the video ---

17 A I did, sir, yes, I did.

18 Q Okay. And you don't -- you watched the video and you
19 don't remember her saying she was wearing an apple bottom
20 jeans t-shirt?

21 A She could have said it, sir. I'm not saying she didn't
22 say it.

23 Q Did she say it?

24 A She could have said it.

25 Q You watched the video?

1 A I did, sir.

2 Q And you were present during the interview?

3 A Yes, sir.

4 Q In fact, she said she was wearing an apple bottom jeans
5 t-shirt, didn't she?

6 ASST. SOL. BALISH: Your Honor, I believe this is asked
7 and answered.

8 THE COURT: Sustained. Mr. Mathews?

9 MR. MATHEWS: I'm getting an evasive answer. I just
10 want a direct answer, Your Honor.

11 A Ask the question again, please.

12 Q I'm sorry. Okay, did she, in fact, said she was
13 wearing, at the time this happened, an apple bottom -- an
14 apple bottom jeans t-shirt, didn't she?

15 A She could have stated ---

16 ASST. SOL. BALISH: Your Honor ---

17 THE COURT: Hold on a minute. Hold on a minute.

18 ASST. SOL. BALISH: The witness has already said she
19 doesn't recall exactly what she said. It's asked and
20 answered, and Your Honor has already sustained the
21 objection.

22 THE COURT: Mr. Mathews, I've sustained the objection.
23 Please move on.

24 Q Det. Geathers, how did you understand the order that
25 you were given to review the tape?

1 A Mr. Mathews told me to watch the video and ---

2 Q I didn't, the judge did.

3 A Right, the judge asked to watch the video, in which I
4 did. He didn't state -- he didn't tell me to remember
5 everything on the video, but I watched the video and I
6 listened very carefully, yes, sir.

7 Q You listened very carefully?

8 A Yes.

9 Q And you don't remember her saying 16 minutes and 57
10 seconds into it that she was wearing the apple bottom jeans
11 t-shirt?

12 A Mr. Mathews, I didn't time it for 16 minutes, sir.

13 ASST. SOL. BALISH: Your Honor ---

14 A --- I just watched the video ---

15 ASST. SOL. BALISH: He's just asked the same question.

16 MR. MATHEWS: Your Honor, this is cross-examination.

17 THE COURT: Continue, Mr. Mathews.

18 MR. MATHEWS: Thank you, Your Honor.

19 Q Go ahead.

20 A I didn't -- at 16 minutes, you stated, I wasn't keeping
21 up with the time. I did watch the video, sir. And if she
22 did state something in reference to apple bottom jeans -- I
23 don't -- I watched it.

24 Q Okay. You were present during her testimony?

25 A Yes, sir, I was.

1 Q All right. And you heard her testify that she didn't
2 own such a shirt?

3 A I was here. I heard her state what she stated, yes,
4 sir.

5 Q Okay. So you knew that would be an important thing to
6 look for, right?

7 A The judge didn't state it to me to listen for apple
8 bottom jeans -- or apple bottom shirt. He told me to watch
9 the video, sir.

10 Q All right. In fact, she also said during the course of
11 that interview that she didn't say not one word to Timmy
12 during the course of this; isn't that true?

13 A Repeat that again.

14 Q That she said during the course of this, "I didn't say
15 not one word to Timmy during this."

16 A You're talking about during -- when she was up here?

17 Q When she -- no. When she's recording how this was
18 supposed to have happened. When she's giving her story as
19 to how this was supposed to happen, she said, "I didn't say
20 not one word to Timmy."

21 A That was on the video or on the stand?

22 Q I'm asking you -- on the stand, she said she did say
23 something. On the video and in the interview that you were
24 present for, she said she didn't say anything; isn't that
25 true?

1 A She stated on the stand that she said "stop".

2 Q I didn't ask you -- that's right, she did say that on
3 the stand. But when she was talking in front of you in
4 Beaufort at Hope Haven, she said she didn't say one word;
5 isn't that the truth?

6 A At Hope Haven, sir, there are two rooms. She's in an
7 interview room with the psychiatrist. I'm in an interview
8 room with her, which we're talking back and forth.
9 Everything that Minor stated to them, I'm not sitting,
10 watching everything. But what she could have said, she
11 could have said it. I didn't hear her say it.

12 Q Okay. You didn't hear her say it?

13 A In here, she stated ---

14 Q I know what she said in here. I'm asking you what's in
15 that. I'm asking you what you saw. What she said in your
16 presence, and I'm asking you a simple question. You've
17 heard the testimony and I'm asking you to tell the truth
18 today.

19 A I am telling the truth, sir.

20 Q And you don't remember after watching that? Nothing
21 refreshes your recollection?

22 A I could have missed that point where she stated that,
23 but I did watch the video.

24 Q What was your purpose in being in Beaufort at Hope
25 Haven?

1 A To collect all the evidence, collect all the facts in
2 this case.

3 Q To collect facts?

4 A Yes, sir.

5 Q Okay. Did you make any notes during the interview?

6 A I did not, sir.

7 Q Okay. What was your -- you were collecting facts, but
8 you're not paying attention. You weren't paying attention,
9 then; were you paying attention at home last night when the
10 judge ordered you to look at it? Were you paying attention?

11 A Mr. Mathews, yes, sir, I was.

12 Q But you don't remember?

13 A I don't.

14 Q Okay. And during the course of the interview in
15 Beaufort, that you were present for, and taking evidence, in
16 fact, she said her Hannah Montana blanket was on top of her,
17 not that she was on top of it, as she testified
18 inconsistently here yesterday; isn't that the truth?

19 A She stated something in reference to Hannah Montana.

20 Q Okay. All right. But you don't remember if she said
21 it was on top of her or she was on top of it. That's your
22 testimony here under oath?

23 A She stated there was a Hannah Montanan blanket. It's
24 something she loves.

25 Q Okay. But whether it was on her or she was on it, you

1 don't know?

2 A It was something in reference to a purple blanket. It
3 could have been Hannah Montana; I don't know. Purple rug,
4 purple Hannah Montana blanket; I don't know, sir.

5 Q You are a detective?

6 A Yes, I am, sir.

7 Q And during the course of that, your job is to take note
8 of important details, right?

9 A That's correct.

10 Q And it's not an important detail whether a blanket is
11 on top of somebody or whether they're not on top of a
12 blanket? To you that's not an important detail?

13 A If she said the blanket was on her, the blanket could
14 have been on her. It's very important to me to take notes
15 of everything, sir.

16 Q So that you'll remember, right?

17 A In this case, a blanket is not as important as getting
18 all the other information that I'm trying ---

19 Q --- such as what they're ---

20 A --- to obtain. ---

21 Q --- wearing, right?

22 A She also stated that she was wearing her bras and
23 panties, short and a shirt.

24 Q You remember that, but the kind of shirt, even though
25 it was a big deal, and she said she didn't own one, that's

1 not important?

2 A She doesn't own what?

3 Q An apple bottom shirt. That's what she said yesterday.

4 A I have no knowledge of what kind of clothes Ms. Minor
5 wears. I don't know whether it's Apple Bottom, Baby Phat,
6 all these name brands; I don't know. I'm not into that,
7 sir.

8 Q Okay. And ---

9 A If I missed -- if I missed something in reference to
10 Apple Bottom, I do apologize.

11 Q Missed the -- you missed it the first time and then you
12 missed it last night, right?

13 A I watched the video, sir.

14 Q And in fact, in her video at Hope Haven where you were
15 present taking notes -- or not taking notes, but there, the
16 details are important. She, in fact, said twice that this
17 happened, she's not sure exactly, but somewhere between 8:00
18 and 9:00, pretty sure between 8:00 and 9:00 at night; is
19 that right?

20 A Watched the video, sir; yes, I did. Yes, I was there.

21 Q I understand and that's what she said twice, in fact,
22 that it was somewhere between 8:00 and 9:00 at night; is
23 that right?

24 A She stated a time.

25 Q She stated a time?

1 A Yes, she did.

2 THE COURT: Hold on just a moment, Mr. Mathews. (TO
3 DET. GEATHERES.) If you know the answer to the question,
4 answer the question. If you don't know the answer to the
5 question, say you don't know the answer to the question. If
6 he asks you a specific question that you answer with a
7 specific response.

8 A Mr. Mathews, she did say the time, but the time she
9 stated I don't know.

10 Q And she also said that she woke up at least three times
11 that night. Once to get up -- once when she says that Timmy
12 woke her up through this searing pain or whatever, and the
13 second time is when she got up to go to the bathroom, and
14 the third time when Epi woke her up. That's what she said
15 in Beaufort; is that correct?

16 A I don't know, sir, how many times she -- she said she
17 got up in reference to the matter. She stated she got up
18 and got her sister and brothers up.

19 Q Was woke up. I'm asking ---

20 A She woke her sisters and brother up, that was twice.

21 Q I understand. That she woke up, not she didn't wake
22 up. She woke them up, that's another time, but she woke up
23 when this happened, and then later on, afterwards, she woke
24 up to go to the bathroom, right? She got her sibs up, put
25 them to bed, then she woke up and went to the bathroom.

1 Another time, she woke up. She hadn't been awake. She woke
2 up, right?

3 A Yes, she stated that Timmy woke her up once.

4 Q Uh-huh.

5 A She woke up and got her sister and brother up off the
6 floor and got on the bunk.

7 Q Okay. And then she woke up for herself to go to the
8 bathroom another time; is that correct? And that's where
9 she said she saw Timmy on the floor, or something like that,
10 later on; is that correct?

11 A That's correct, sir.

12 Q And then she woke up again in the morning when her
13 father woke her up?

14 A Yeah, she stated her father woke her up.

15 Q How soon -- this was supposed to have happened on
16 August 14th, somewhere around in there?

17 A That's correct, sir.

18 Q And when did you get the case?

19 A I got the case a week after.

20 Q A week after?

21 A Yes, sir.

22 Q Do you know why nobody bothered to check Timmy for DNA
23 or anything like that?

24 A No, sir. I don't know why they didn't.

25 MR. MATHEWS: I don't have any further questions, Your

1 Honor.

2 THE COURT: Mr. Balish?

3 REDIRECT EXAMINATION

4 BY ASST. SOL. BALISH:

5 Q Det. Geathers, how long was that video that you
6 reviewed last night?

7 A Forty-three minutes, sir.

8 Q What do you remember from it?

9 A I observed Minor answering all the questions for Ms.
10 Mary Beth. She stated she was talking about the incident,
11 she was talking about her family. She was talking about a
12 party she had after her birthday and her friends she had
13 over.

14 Q What room did she say it happened in?

15 A She stated it happened in the living room.

16 Q Did she mention who did it?

17 A Yes, she did.

18 Q Who did she say did it?

19 A She said "Uncle Timmy".

20 Q Did she say what Uncle Timmy did to her?

21 A Yes, she did.

22 Q What did she say?

23 A She stated that she was on the floor and Uncle Timmy
24 got between her and her sister and put his hand inside her
25 panties and put his finger in her vagina; her "Lucy" she

1 calls it.

2 Q Did -- do you recall how many times on the video she
3 remained consistent in that story?

4 A She was consistent every time that she stated it. She
5 never ---

6 Q Do you have a number? How many times do you remember?

7 A No, sir, I don't remember.

8 Q All right. How many interviews had you been present at
9 where Minor has talked about this incident?

10 A I want to say three times.

11 Q Okay. How many other interviews are you aware of, have
12 seen video recordings, writing, medical reports, or anything
13 else?

14 A Repeat that.

15 Q How many other, outside of the three that you've been
16 present for, how many other interviews or disclosures have
17 you seen medical reports? Have you seen a videotape on?
18 Have you read an incident report on?

19 A Three other times, sir.

20 Q Three other times? So, then six times. Was she ever
21 inconsistent that this defendant stuck his fingers inside of
22 her "Lucy"?

23 A That's correct, she was consistent with it.

24 Q Was she ever inconsistent that it happened in the
25 living room?

1 A Yes.

2 Q She was inconsistent?

3 A She stated it happened. She was consistent with it.

4 Q Did she ever -- was she ever inconsistent that he laid
5 down next to her?

6 A That's correct, sir. She stated ---

7 Q At all times?

8 A Yes, sir.

9 Q What about waking up of the brother and sister?

10 A Yeah, she stated that as well, and all the times were -
11 --

12 Q All six times?

13 A Yes, sir.

14 Q What about the immediate disclosure to her siblings
15 that night? Did she ever say she didn't tell any of them?

16 A No, she did not say she didn't say anything.

17 Q Give me a percentage of consistency. In all six of
18 these interviews, would you say more or less than 95 percent
19 of her testimony has been consistent?

20 A Ninety-five percent.

21 Q More or less than 98 percent?

22 A Ninety-eight percent. She's been consistent with all
23 her stories.

24 Q Is it possible in this video she said she wasn't sure
25 what she had on. She thinks it was Apple Bottom t-shirt.

1 A She said that she think, but I really wasn't paying
2 attention to the apple bottom part of it.

3 Q But is it possible she could have said that?

4 A It's possible; she could have said she had apple bottom
5 jean shirt.

6 Q When asked about the time, is it possible that she
7 said, I don't remember. I guess I'd have to say 8:00 or
8 9:00?

9 A That's correct.

10 Q Is it a possibility that she said that?

11 A Yes, sir.

12 Q And you were present for this?

13 A Yes, sir.

14 Q For this entire DVD?

15 A Yes, sir.

16 ASST. SOL. BALISH: Your Honor, at this point, the
17 State would move into evidence the DVD of the forensic
18 interview done at Hope Haven, the video in its entirety.

19 THE COURT: Mr. Mathews?

20 MR. MATHEWS: Subject to one minute -- no objection
21 except for that one minute that we discussed at sidebar.

22 THE COURT: Lawyers approach.

23 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE RECORD
24 AND OUT OF THE HEARING OF THE JURY.)

25 THE COURT: All right. Admitted into evidence, subject

1 to Mr. Mathews' objection.

2 (STATE'S EXHIBIT NUMBER ONE RECEIVED INTO EVIDENCE.)

3 THE COURT: Ladies and gentlemen, you're fixing to see
4 the video interview. The parties have stipulated and agreed
5 that a portion of this video is not admissible. Therefore,
6 a portion of it will not be shown, but that which the Court
7 and the parties believe is important, is what you will see
8 here today. Anything further, Mr. Balish?

9 ASST. SOL. BALISH: No, sir.

10 THE COURT: Mr. Mathews?

11 MR. MATHEWS: No, sir, Your Honor.

12 THE COURT: You may proceed, Mr. Balish.

13 (VIDEO BEGINS 10:30 A.M. - VIDEO ENDS 11:13 A.M.)

14 THE COURT: Mr. Balish, you may continue.

15 REDIRECT EXAMINATION

16 BY ASST. SOL. BALISH:

17 Q That video, obviously, there were a couple of things in
18 there that was not consistent with her testimony; but other
19 than those three or four things, has her consistency been
20 the same throughout the six videos you've seen?

21 A Yes, sir.

22 Q And the abuse was the same?

23 A Yes, sir.

24 Q The fact that he laid behind her and stuck his finger
25 in her "Lucy" was the same?

1 A Yes, sir.

2 Q The fact that he went between her and E.G. , did that
3 remain the same in all the interviews?

4 A Yes, sir.

5 Q Okay. Let me call your attention to 17:15, this is the
6 part where they talk about this Apple Bottom jean t-shirt.

7 A lot of talk about the Apple Bottom jean t-shirt. Did she
8 know right away what she wore?

9 A She stated she didn't remember, but she think it was
10 the Apple Bottom jean t-shirt.

11 Q Did she say she owned them?

12 A She didn't say whether she owned them or not.

13 Q Okay. So, is it conceivable that they were her
14 cousins?

15 A Could have.

16 Q Okay. Let's talk about the time. They originally
17 started talking about time in this thing, what did she say?

18 A She said it was between 8:00 and 9:00 because they
19 normally go to bed between 8:30 and 9:00.

20 Q Was she sure about that?

21 A She wasn't sure of it, she just gave a time.

22 ASST. SOL. BALISH: I'm going to play that section one
23 more time.

24 (VIDEO PLAYS.)

25 Q What did she say there? Did she say, "If I'm not

1 mistaken...she guessed around 8:00 or 9:00?

2 A Yes, sir.

3 Q So that was the time what happened? The abuse or she
4 thought ---

5 A That's what time she thought she went to sleep.

6 Q You ever pulled an all-nighter?

7 A Say that again, sir.

8 Q You ever pulled an all-nighter? You know, high school,
9 college, studied for a test?

10 A Yes, sir.

11 Q You ever stayed up all night, maybe you dozed here or
12 there, but don't remember?

13 A Yes, sir.

14 Q Been confused and disoriented during the night?

15 A Yes, sir.

16 Q Had anything stressful or traumatic happen to you in
17 the middle of the night?

18 A Oh, yes, sir.

19 Q Been confused about when you were asleep or when you
20 were awake?

21 A Yes, sir.

22 Q Would you say that would be normal behavior for a
23 child?

24 A Yes, it is.

25 Q Have you ever fallen asleep with your blanket on top of

1 you?

2 A I have.

3 Q You ever wake up with your blanket underneath you?

4 A Yes, sir.

5 Q Det. Geathers, I know you said you watched this video
6 last night, paid attention, and now you've had the
7 opportunity to replay it for you and the jury. When you
8 were watching it, what are the things that stood out the
9 most to you? What were you paying the most attention to as
10 you were watching the video? You testified to Mr. Mathews
11 that you are a detective. It was your job to pay attention
12 to details. What kind of details did you pay attention to
13 when you watched this?

14 A I was basically listening for Minor 's statement. I was
15 listening to make sure she was consistent with what she
16 stated to me. I was watching her, watching her actions,
17 listening to how she answered her questions. I was really
18 watching her to make sure I get a good, clear shot of
19 everything she was stating.

20 Q What is the most important things that you got out of
21 that video?

22 A I was listening for the Apple Bottom jeans because Mr.
23 Mathews mentioned it and I was also listening for the time,
24 because he asked for it.

25 Q I don't mean the time right now. I mean, last night

1 when you were watching it, or previous when you were
2 watching the original?

3 A I was just making sure everything was consistent what
4 she already disclosed.

5 Q What specific instances were you looking at? What did
6 you want to hear to make sure that you had enough evidence
7 to go get an arrest?

8 A When she stated that Uncle Timmy touched her "Lucy".

9 Q If you'll answer any questions that Mr. Mathews has,
10 please.

11 A Yes, sir.

12 THE COURT: Mr. Mathews?

13 MR. MATHEWS: No questions, Your Honor.

14 THE COURT: All right. You may step down, Detective.

15 THE COURT: Mr. Balish?

16 ASST. SOL. BALISH: Your Honor, at this time, the State
17 would rest its case.

18 THE COURT: All right. Thank you. All right. Ladies
19 and gentlemen, the State has presented its case to you-all.
20 Now at this time, there's some matters of law that we have
21 to take up. I'm going to ask that you step to the jury room
22 while we take up these matters of law, and I'll get you back
23 out here and we will continue with the case. Once again,
24 you're not to discuss the case until you are instructed to
25 do so, okay?

1 (11:18 A.M., 3-2-11, WHEREUPON THE JURY EXITS THE
2 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
3 RECORD.)

4 THE COURT: All right. Mr. Mathews.

5 MR. MATHEWS: Thank you, Your Honor. Your Honor, at
6 this point I'd move for a direct verdict of acquittal on the
7 basis of the evidence taken, in the light most favorable,
8 the State failed to establish the elements, and I would ask
9 that.

10 THE COURT: Mr. Balish, anything in response?

11 ASST. SOL. BALISH: Your Honor, I think it's pretty
12 obvious and we've had testimony that he was behind her and
13 stuck his hand inside her vagina.

14 THE COURT: All right. As attorneys are well aware,
15 when ruling on a motion for directed verdict, trial court is
16 concerned with the existence or non-existence of evidence,
17 not its weight, not its weight. Based on the testimony that
18 I've heard during the course of this trial, Court will
19 respectfully deny defendant's motion for directed verdict.

20 MR. MATHEWS: And Your Honor, to save time, I suppose,
21 if the Court may want to inquire of Mr. Lemacks, whether he
22 intends to testify. But my understanding is he's not going
23 to. But if the Court would like to inquire. We don't
24 intend to put up a case at this point, to save the jury some
25 time, I would like to rest the case. Immediately

1 thereafter, I'd just like to renew my motion for a directed
2 verdict to that.

3 THE COURT: Okay. You can just put it on the record at
4 that time, that you would like to renew your previous motion
5 at the conclusion of the State's case. I will so note for
6 the record.

7 ASST. SOL. BALISH: Your Honor, the State would just
8 request, after you're done speaking with Mr. Lemacks, that
9 the witnesses that are outside be allowed to come in to hear
10 the closing arguments, once everything is rested.

11 THE COURT: Any objection?

12 MR. MATHEWS: At the conclusion, Your Honor, all
13 subpoenas are dissolved and anybody that wants -- anybody
14 can come up, I guess.

15 THE COURT: At this time, I'm going to advise Mr.
16 Lemacks of his rights. If he would come around. Ms. Grant,
17 if you'd place him under oath, please.

18 (MR. LEMACKS COMES AROUND TO THE CLERK.)

19 WHEREUPON, MR. TIMOTHY LEMACKS WAS DULY SWORN.

20 MADAME CLERK: Thank you. You may be seated.

21 THE COURT: Mr. Timothy Allen Lemacks, at this time,
22 I'm going to explain to you certain of your rights. If you
23 do not understand anything I say, please let me know. If
24 you want me to explain anything in more detail, please let
25 me know. Do you understand that?

1 MR. LEMACKS: Yes, sir.

2 THE COURT: And we've now reached the stage of the
3 trial where you may present your defense. You have the
4 right to claim the protections given to you by the 5th
5 Amendment to the Constitution of the United States. This
6 amendment states, in part, that "No person shall be
7 compelled in any criminal case to be a witness against
8 himself." This means that you cannot be required to testify
9 in this case. You have the right to testify on your own
10 behalf. However, no one can make you testify. This is a
11 personal right, and no one can waive this right except you.

12 If you decide to testify, you will be subject to the
13 same rules that govern other witnesses, and you may be
14 examined and cross-examined on any relevant issue in this
15 case. In addition, if you have any convictions involving
16 dishonesty or false statements or for crimes punishable by
17 imprisonment for more than one year, and this Court
18 determines that the probative value of admitting this
19 evidence outweighs its prejudicial affect to you, the
20 Solicitor will be able to introduce your record to attack
21 your credibility.

22 If you decide to testify, this decision on your part
23 must be freely, voluntarily and intelligently made, with
24 knowledge of the protections given to you by the 5th
25 Amendment and the consequences of your decision to testify.

1 If you decide not to testify, I will instruct the jurors
2 that they cannot give the fact that you did not testify any
3 consideration whatsoever, and that there is to be absolutely
4 no prejudice to you because you did not testify.

5 It is left entirely up to you whether or not you
6 testify. You may talk with your attorney, your family and
7 friends or anyone else, but the final decision will be left
8 entirely up to you. Do you understand what I've explained
9 to you?

10 MR. LEMACKS: Yes, sir.

11 THE COURT: Do you have any questions about what I've
12 explained to you?

13 MR. LEMACKS: No, sir.

14 THE COURT: Have you discussed with your lawyer whether
15 you should or should not testify?

16 MR. LEMACKS: I choose not to.

17 THE COURT: All right. That's my next question, well,
18 do you need to talk to your lawyer anymore about your right?

19 MR. LEMACKS: No, sir.

20 THE COURT: Do you wish to testify?

21 MR. LEMACKS: No, sir.

22 THE COURT: All right. Anything further, Mr. Mathews?

23 MR. MATHEWS: No, sir, Your Honor.

24 THE COURT: Mr. Balish?

25 ASST. SOL. BALISH: Nothing from the State, Your Honor.

1 THE COURT: All right. You may sit back down, Mr.
2 Lemacks. (WITNESS SITS DOWN.)

3 THE COURT: All right. Closing argument. How long
4 would you expect, Mr. Balish?

5 ASST. SOL. BALISH: I would say 15 minutes would be
6 safe, Your Honor.

7 THE COURT: You going to open on the law?

8 ASST. SOL. BALISH: I'll just do it all at once.

9 THE COURT: Okay. But I mean, you're going to do it
10 all at once. He's got closing argument; he's got final
11 argument, okay? Mr. Mathews, how long do you expect?

12 MR. MATHEWS: Maybe 25 minutes at the most. Might be a
13 little longer than 15. I hope not. I don't want to lose
14 them.

15 THE COURT: Okay. I just remind the lawyers, I mean,
16 make sure that you keep your arguments limited to that which
17 is in evidence and the reasonable inferences to be drawn
18 therefrom. You have a duty and responsibility, obviously,
19 to represent your clients, and would rather not you have to
20 object during closing arguments. But again, you got to make
21 your -- you got to do what you believe is in the best
22 interest of your client. And that's why I'm reminding you
23 to keep your arguments within that which is in evidence and
24 the reasonable inferences to be drawn therefrom.

25 Is that clear, Mr. Balish?

1 ASST. SOL. BALISH: Yes, sir. And, Your Honor ---

2 THE COURT: Mr. Mathews?

3 MR. MATHEWS: Yes, sir.

4 ASST. SOL. BALISH: --- the State would also request
5 where any party was accessible to both the State and
6 defense. There's no reason that Mr. Mathews could not have
7 called a person, that you refused to let that defense
8 counsel comment on the State's failure to call that witness.
9 The case law for that is State v. Charping 333 S.C. 124.
10 I'm sorry I can't print anything or I would have printed it
11 out, Your Honor.

12 THE COURT: Mr. Mathews?

13 MR. MATHEWS: Your Honor, I think that's the subject of
14 fair comment as far as, I think Mr. Balish can mention that.
15 I imagine he's going to ask why, why I didn't call the
16 child, as far as that goes, the other, the brother. And
17 they explained why they didn't call him, as far as that
18 goes, and certainly, that's in evidence as to why they
19 didn't call him. And I'm just going to comment on this is
20 why they said they didn't call him, because that's in
21 evidence. That's not ---

22 ASST. SOL. BALISH: I don't have a problem with that.
23 With a small child, I don't have a problem. My issue would
24 be with the other police officers involved, with anybody on
25 his witness list, Ms. Hefner from the video. You know, that

1 one child, I don't have a problem with.

2 MR. MATHEWS: That's a fight for another day. I don't
3 intend to.

4 THE COURT: Okay. All right. Anything further, Mr.
5 Balish?

6 ASST. SOL. BALISH: Nothing further, Your Honor.

7 THE COURT: Mr. Mathews?

8 MR. MATHEWS: All right. We'll take about five
9 minutes, and then we will move into closing arguments. And
10 I would ask that during closing arguments and the charge
11 that nobody get up, don't let anybody in and out of the
12 courtroom. I don't want the jury to be distracted during
13 that process. The entire process should probably take about
14 an hour.

15 (Off the record, briefly.)

16 THE COURT: All right, Mr. Balish. State ready to
17 proceed now?

18 ASST. SOL. BALISH: Yes, Your Honor.

19 THE COURT: Mr. Mathews, you ready to proceed?

20 MR. MATHEWS: Yes, sir, Your Honor.

21 THE COURT: All right. Bring us the jury, please, sir.

22 (11:35 A.M., 3-2-11, WHEREUPON THE JURY ENTERS THE
23 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
24 RECORD.)

25 THE COURT: Mr. Mathews?

1 MR. MATHEWS: The defense rests, Your Honor.

2 THE COURT: All right. Ladies and gentlemen, you have
3 heard all the testimony and evidence in this case. We are
4 now going to move forward with closing arguments. Let me
5 remind you again that closing arguments are not evidence;
6 they're not evidence, all right?

7 Mr. Mathews, you want to, for the record, renew you --

8 MR. MATHEWS: Yes, yes. I renew my prior motions, Your
9 Honor.

10 THE COURT: Prior rulings are the same. Mr. Balish,
11 you're recognized for closing argument.

12 ASST. SOL. BALISH: May it please the Court, Your
13 Honor.

14 CLOSING ARGUMENT

15 BY ASST. SOL. BALISH:

16 Ladies and gentlemen, let me start by saying thank you.
17 Needless to say, we lawyers, we watched the whole time, make
18 sure you're paying attention, and you did. Paid close
19 attention to everything that went up on that stand. Paid
20 close attention to everything that everyone in this case
21 testified to. Paid close attention to me and Mr. Mathews,
22 close attention to the Judge and everybody else who talked.
23 It means a lot to us in the criminal justice system because
24 without y'all, we can't try cases. And so thank you.

25 Like I told you at the beginning, it's a tough case.

1 Something like this happens, doesn't happen under a video
2 camera. Something like this happens, there's usually not a
3 whole bunch of eyewitnesses, saw a finger go inside of a
4 Lucy. That's the testimony of a strong young lady, a girl
5 who stood up, got on that stand and testified as to what
6 happened to her.

7 She said this guy, Uncle Timmy, stuck his finger inside
8 of her Lucy. Said it on the stand; a video interview of
9 her. Detective Geathers testified that there's six
10 interviews. Not 80 percent, 99 percent, everything she says
11 made consistent every time she has told the story.

12 Mr. Mathews has been mincing words, been throwing some
13 red herrings at you. All the Apple Bottom jeans, have you
14 ever owned one? Was it yours? Were you wearing it? Were
15 you not wearing it? When we looked at the video -- you can
16 have a look at that video again, if you want -- see, she
17 wasn't a hundred percent sure what she was wearing. She was
18 answering as best she could.

19 Watch the little girl here; watch the little girl here.
20 Over and over what you're going to see, she's consistent on
21 all of the important things that you would expect somebody
22 to remember about that night. Thought she went to bed maybe
23 eight or nine o'clock, but she was guessing. She said that
24 in the video. She wasn't 100 percent sure what time. She
25 wasn't 100 percent sure what she wore. What she did know is

1 somebody stuck their hand down her pants and fondled her
2 vagina. That's what we're here for today. Not what color
3 pants somebody's wearing, not what time it happened. She
4 woke up out of a daze.

5 Now, Detective Geathers has had all-nighters. I mean,
6 she doesn't know if she's awake, coming out of it, going
7 into it. It's a situation where something traumatic happens
8 in the middle of the night. This is a ten year old little
9 girl we're talking about. Can't remember what I wore last
10 week.

11 The Judge is going to talk to you. He's going to
12 explain the law on this case; that's his job. We ask that
13 you listen to him. And he's going to talk a little bit on
14 reasonable doubt. He's going to say you've got to be firmly
15 convinced of his guilt, firmly convinced.

16 Well, think about what we got here. Got a little girl
17 who consistently, six times, said the same story, with the
18 exception of maybe what she was wearing, something little
19 here or there, time.

20 But we've also got that little girl immediately
21 disclosed; that's rare. Doctor said when she testified just
22 how rare that was. She immediately disclosed to her brother
23 and sister. What did she do? What any big sibling, what
24 any big brother or big sister do? She gathered them up.
25 And where does a child feel safest? In own bedroom on the

1 top bunk, right? She gathered them up and she took them to
2 their safe spot. Why? Think about that for a second. Why?
3 She was scared. She didn't want Timmy to do it again to
4 her. And what else did she say? She didn't want Timmy to
5 do it to her brother or sister.

6 Now, again, Mr. Mathews is going to make a big deal
7 about that E.G. , E.G. , oh, he said he didn't
8 believe her. But all the testimony was, he was asleep when
9 this was happening. He was asleep on the floor. If one of
10 your siblings woke you up and said, "Hey, Uncle Timmy
11 molested me," you'd say "I'm going back to sleep; you're
12 crazy," right? Of course. But it's going to be a big deal.

13 And his mom talked about E.G. . His mom talked
14 about why he wasn't here; gets things mixed up in his head
15 sometimes. He didn't feel comfortable. So E.G. 's not
16 here. That's true, and I'm sure Mr. Mathews is going to
17 make a big deal about us missing one of the three kids.

18 Let's talk about that other little girl, F.G. . Let's
19 talk about what a big girl she is. What did she do? She
20 didn't hesitate. She jumped up on that stand right there.
21 And you heard the seven year old. You didn't hear her say
22 "he stuck his hand in my sister's Lucy." You heard her say
23 "got up to go to the bathroom, and Uncle Timmy was laying
24 next to Minor ." Think about that for a second. That's
25 corroboration.

1 That's what happened. He laid down next to where Minor
2 was probably still asleep at that point. F.G. gets up; she
3 goes to the bathroom; she comes and lays back down. Next
4 thing you know, her sister is waking her up saying, "Let's
5 go to the top bunk." A seven year old little girl.

6 Remember that when she got up to go to the bathroom,
7 that man is lying next to her sister. Oh, yeah, Mr. Mathews
8 is going to bring up some big deal about her not being more
9 popular in school, and how many friends last year and how
10 many more friends this year. But what did she say about Mr.
11 Lemacks? He's an uncle to her. Sending her messages on
12 Facebook when he was in Indiana; that's how much she loved
13 this guy. He's her dad's best friend. Every Friday, he
14 came over. She destroyed their relationship. Said she shed
15 many tears about that.

16 So her best interest now is all of a sudden to destroy
17 this relationship? No. She had to stand up big-chested on
18 there. That morning, she had to get big-chested and she had
19 to tell her parents something that she probably knew was
20 horrible and would affect the relationship of a man who she
21 once loved, somebody who she consider an uncle. Even Epi
22 said their relationship was that of like a child and her
23 uncle. In one fell swoop, he laid down next to her, stuck
24 his finger inside of her, and he destroyed it.

25 He's going to make a big deal about how much it hurt.

1 She didn't scream out. She said it hurt like getting your
2 hand caught in a door. I don't have a vagina; I don't know
3 how much it hurts when you get molested when you're ten or
4 eleven years old. But I imagine it's pretty darn traumatic.
5 And that doctor said it can hurt. It can hurt a lot. She's
6 seen trauma; she's seen people bleeding out. But she also
7 said in some 95 percent of the cases, there's no signs of
8 trauma at all, despite the pain that she testified could
9 happen.

10 She said he had long fingernails. Mr. Mathews
11 questioned the heck out of her about those long fingernails.
12 And what did she say? She said there's a difference between
13 probability and possibility; didn't she? Might feel like
14 the guy's got long fingernails, if you're never had
15 fingernails in your vagina. Who knows if he has long
16 fingernails or short fingernails. But what she said was --
17 and Minor wasn't sure how many fingers were inside of her;
18 you saw it on the video. What's the big deal made about one
19 finger, two finger? Well, you saw her; she didn't know.
20 She's never had fingers inside of her before. She never had
21 nails inside of her before.

22 Eighty-five percent of pregnant women showed no
23 physical signs of sexual activity. Eighty-five percent of
24 women who were sexually abused -- no question they were
25 sexually abused -- showed no signs of sexual activity,

1 despite clear abuse, they are now pregnant.

2 Yes, there were no medical findings. Thank God. Thank
3 God they didn't find semen in that little girl's panties.
4 Six interviews Detective Geathers witnessed. Consistency
5 through all of them. Consistency with mom; consistency with
6 law enforcement; consistency with doctor after doctor after
7 doctor, remained consistent.

8 This is what we ask. This is what Detective Geathers
9 looked for before she made the arrest. Remember, they
10 didn't arrest him that day. No, they had to do an
11 investigation.

12 Let's not take a few statements out of context. Few
13 statements, taken clearly out of context as red herrings, to
14 throw you off of what really happened this day. Doesn't
15 matter; isn't important. That's what you have to think.
16 Was she absolutely consistent on the things that were most
17 important?

18 Now, let's talk about the corroboration. We talked
19 about that little seven year old that got up here. Let's
20 talk about how he acted inconsistently with the other times
21 that he'd spent the night. He always got up for work;
22 always got up for work the next morning. This time he
23 didn't. Got up; he was red-faced, hung over. He drank more
24 in the past. Shoot, they drank a lot more than that in the
25 past, is the testimony that you've heard, but he still got

1 up. This day, something was different. This day, Mr.
2 Lemacks stayed on the couch. Why? What changed?

3 Let's talk some more about change. What did Ms. Jones
4 say? She saw Minor when she was in the fourth grade; she
5 saw Minor when she was in the fifth grade. Guidance
6 counselor, knows the kids at her school; she saw changes.
7 Saw changes in a child's behavior. Changes that the doctor
8 said were consistent with somebody who had been through
9 abuse of this nature. She cries easier; she gets upset; she
10 goes sees the counselor more often.

11 Nobody's in a room when this happens except for two
12 people, usually. Person who does it; person gets it done
13 to. There's no video cameras you have to look at it here.
14 So you have to look at the testimony that came from that
15 stand. The consistency that came from that stand. The
16 consistency of the video. Doctor said the medical report.
17 Look at the story of how it stays the same over and over.

18 And then look at the corroboration. Seven year old saw
19 him sleeping right next to her. Didn't get up like he was
20 supposed to the next day. Her behavior is changed in a way
21 that's consistent with somebody who's been abused. That's
22 all the support we have in this case. And that's what I ask
23 you to look at. Whether or not she dozed off and came to
24 and fell asleep, she got her brother and sister up and then
25 tried to protect them.

1 Mr. Garcia said they were on that top bunk. What
2 blanket was on top of somebody or underneath somebody when
3 they went to bed or when they got up? This is a ten year
4 old little girl. She saw his reflection in the TV, as he
5 laid on his side beside her, put his hand inside of her
6 panties and fondled her vagina. That's what you need to
7 remember when you go back there.

8 We're not talking about is there a possibility of
9 something else happening. We're talking about being firmly
10 convinced that this happened this way. The State believes
11 that it is proven case, beyond reasonable doubt, that
12 everyone of you should be firmly convinced, based on the
13 testimony of Minor , her parents, F.G. , Detective Geathers,
14 based on all that testimony, we think we've painted a pretty
15 clear picture that should leave everyone of you firmly
16 convinced of this defendant's guilt.

17 When I'm done, Mr. Mathews is going to get up, and he's
18 a heck of a lawyer. I've worked with him before. We've
19 tried cases before, and he's very good at what he does. And
20 what he's going to try to do is he's going to try to throw
21 you every red herring in the book. Well, she got this mixed
22 up, maybe she got that mixed up too. But I want you to see
23 through that. I want you to see beyond that and look at
24 what's consistent and what's important in this case, that
25 that man, a trusted friend of this family, in the middle of

1 the night woke that girl up by sticking his finger inside of
2 her.

3 Ladies and gentlemen, I ask you to come back with a
4 guilty verdict today, because I believe you should be firmly
5 convinced of that man's guilt. Please listen to anything
6 Mr. Mathews has to say.

7 THE COURT: Mr. Mathews.

8 MR. MATHEWS: Thank you, Your Honor.

9 CLOSING ARGUMENT

10 BY MR. MATHEWS:

11 Madam Foreman, ladies and gentlemen of the jury, I
12 don't know whether it's a compliment or an insult to be so
13 told that I'm competent and I will throw red herrings your
14 way. The Judge told you at the beginning of this that you
15 could expect the attorneys to act ethically and we do. You
16 won't be getting any red herrings from me. You'll be
17 getting details, and the lack of details. There are a lot
18 of things that Mr. Balish said, and some of them make sense
19 and some of them don't.

20 Why do these details make a difference? Well, we got
21 one of the answers right at the beginning, when Mr. Balish
22 said that when describing these things, she didn't know what
23 to look for because she'd never had fingers in her vagina
24 before, that Minor had never had that.

25 When you looked at the videotape of -- which by the way

1 only because Detective Geathers could not remember the
2 details of the thing that she was watching, and watched
3 again last night. That's the only reason that it was
4 introduced by the State. That's the only reason; Mr. Balish
5 says as much. You had a chance to see an interview that
6 took place four months ago. You had a chance to look at
7 that and you had a chance to see.

8 What are some of the details? Never had fingers inside
9 her before? If she'd had that kind of sexual experience
10 before, she would have been able to describe some things
11 that anybody who has had that experience would know. One of
12 which is, there is some approaching. When Mary Beth Hefner
13 asked three times, "What's the first thing you felt? What's
14 the first thing you recognized when you were awake?" Why
15 did she ask it three times? Because even if it happened,
16 you would expect to hear something like "I felt him over me.
17 I felt his hand on my leg. I felt him pulling up or pulling
18 down my underwear and my panties, my panties and my pants."

19 The first thing she said she remembers is having
20 fingers inside her vagina. Nothing, nothing lead up to
21 that. And if you haven't had that experience, you wouldn't
22 know how to describe it. You wouldn't know how to describe
23 someone caressing your leg or touching it or anything like
24 that. But that happens. It happens every time. You don't
25 just suddenly end up in that spot. And if you did, if

1 the first thing you notice, if you woke up from a dead sleep
2 to something inside of you, something that feels like
3 fingers shut -- and on the stand, I think she said a car
4 door. I asked car door and she said car door, and that her
5 little brother had shut the car door on her. On the earlier
6 tape, she had said just "door." But either way, if you wake
7 up and that's the first thing that you feel, something that
8 intense, you don't know to be quiet.

9 When Minor 's mother testified, she said it happened to
10 her and she screamed. When you get your hand shut in a car
11 door or a door, you scream. It's not a voluntary response.
12 It's not a matter of saying "Oh, my. I need to suppress
13 this because of the circumstances." If you feel that kind
14 of searing pain, if that's the first thing you feel, I don't
15 care who you are, you're going to scream. And the reason I
16 asked about that, and Mr. Balish is absolutely right, I am
17 going to make a big deal. But of course I'm going to make a
18 big deal about that, who wouldn't? If that's the first
19 thing you feel -- and Mr. Balish said we don't have a
20 videotape of this going on. We don't get to see. No one
21 else is usually in the room. Well, in this case, two people
22 were in the room when this is supposed to have happened.
23 One of them so close that she said he had her arms around --
24 Minor said that F.G. 's arms were around her leg.

25 Now, I'm not sure if that's so. And that may have been

1 so. That probably was true. If that's so, won't one of
2 them -- you take a pillow and set it down and sit between
3 people that are two feet apart. How is it that no one woke
4 up? How is it?

5 How is it when -- Epi loves Minor I think everybody
6 in here has some feelings of some affection for her. She is
7 a cute little girl and she is going through a lot now.
8 Everybody wants to protect her. But you don't protect
9 somebody by covering stuff up, ignoring facts. That's not
10 the truth, and that's not what you teach somebody.

11 Epi said his bedroom door was open and dogs were
12 roaming through the house. Normally, things like this don't
13 happen in a room with people sitting right there. Don't
14 happen with a bedroom door open and dogs roaming the house.
15 And it didn't happen this time. It's not -- maybe it was a
16 dream; I don't know. I don't know. I was not there. But I
17 can tell you that these details are important. And they're
18 not important because of what happened. They're important
19 because how Minor responded. She's trying to please her
20 mother; she's trying to please everybody. And as a result -
21 - one of the things that Mary Beth Hefner asked at the
22 beginning, "I don't want you to make anything up, Minor ."
23 If you don't know something, say you don't know." But she
24 didn't want to do that.

25 What difference does it make what shirt you're wearing?

1 It doesn't make any difference at all, unless you're making
2 it up to fill in gaps that you don't remember. If you're
3 too scared or so much wanting to please and so much wanting
4 to keep the story straight, so you don't let anybody down,
5 Apple Bottom Jeans shirt, she was adamant. And this is the
6 thing, it wasn't -- the details themselves aren't important
7 as to how she reacted. She was adamant, "I don't even own a
8 shirt like that." That's what she said from the stand. But
9 Mary Beth Hefner, she thought about it. And you saw her
10 demeanor through all this. She thought about it and that's
11 what she came up with. She just made it up. Whether
12 the cover was on her or not, that actually does make a
13 difference, and it makes a difference because it's one more
14 thing that Timmy Lemacks would have had to do in order to
15 make this happen. And she was adamant, "My brother was
16 covered; my sister was covered, but I was on top of my
17 blanket." She was adamant because I don't know why. And
18 the thing is, it doesn't matter, but it matters if you're
19 trying to make things up.

20 It matters in that case, too, because it's one more
21 thing that Timmy would have had -- and we don't have any
22 idea of how -- did his fingers come in from above? From
23 below? That's why Mary Beth Hefner asked three times,
24 "What's the first thing that you felt? Did any other part -
25 - did any other part of him touch any other part of you?"

1 It's disembodied fingers right there. And it's not a matter
2 of "This is all I know. Gosh, it was so traumatic." And it
3 had -- this experience is traumatic.

4 But you saw how -- one of the things that Dr. Amaya --
5 and like I said, she didn't initially examine. I don't know
6 how much weight you want to give to her testimony. But the
7 one thing she said is "People don't like to report this kind
8 of thing." You can expect everything to be normal, and
9 that's got to be some strange world where if everything's
10 normal, then something bad happened. But that may be true.
11 But the one thing she did say is that most people, because
12 they're ashamed or embarrassed or whatever, don't say
13 anything; that's unusual.

14 But when Mary Beth Hefner asked at the beginning -- you
15 know, she actually had to interrupt Minor because Minor
16 wanted to barrel on in. And she said, "Well, would you like
17 to tell me about it?" And she said, "I'd love to." That's
18 fine; it's good. You should always tell about bad things
19 that happen. But you shouldn't tell lies and you shouldn't
20 make things up and you shouldn't try to fill in gaps if you
21 don't know.

22 On the time, who cares? As far as why somebody would
23 come up with that and say between eight and nine when, you
24 know, one thing's clear, you know, mom says went to bed
25 probably 10:30 or whatever; dad says, you know, maybe 11:30

1 or something like that, and the TV is still on. Maybe she
2 felt like she did something wrong because she was still up.
3 My bedtime is nine -- she said in the video "My bedtime is
4 8:30 and the TV's got to be off by nine." And so that's
5 probably why she came up with that. That's a guess; I don't
6 know. But I know it isn't -- I know that then, because she
7 wanted to please, apparently, she said it was between eight
8 and nine because that's something that would make sense,
9 because that's when you're supposed to go to bed. But it
10 isn't the truth. And it doesn't matter what time it was.
11 If she had just said, "I don't know. Gosh, I don't know, it
12 was like" -- but she was trying -- she was trying to protect
13 her parents, probably. Probably, I don't know. But I know
14 it isn't true.

15 And the thing that bothered me most, to listen to all
16 this is that all she had to say is "I'm not sure what time."
17 That's when she said when she was asked on the stand what
18 time was it, she said, "I don't know." It doesn't matter,
19 but she said eight and nine before. And I asked her again
20 about the time. She said, "I swear to God that I didn't say
21 anything about time. I swear to God."

22 I ask mom, is that a bad thing? And mom hadn't seen
23 the videotape. Mom said, "I believe everything that came
24 out of that baby's mouth." And I believe that she believes
25 it. There's no question that Minor 's parents love her.

1 There's no question about that. But you don't help somebody
2 by helping them lie. You don't help somebody by adding to
3 things, by making stuff up. You don't help anybody by doing
4 that.

5 This is all about inconsistent statements that amount
6 to something, that amount to something. I stayed up all
7 night. I don't care; doesn't matter. She wants to please.
8 She says, "I wanted to protect my brother and sister."
9 Well, that's noble, but she didn't stay up all night. She
10 was ten; she's eleven now. She didn't stay up all night, and
11 she told counsel she didn't stay up all night. She woke up
12 three times. Of course she went to sleep. It doesn't
13 matter, but it matters that she lied about it.

14 If this had happened, then you would have heard
15 something in the details about how the hand got to be there,
16 not disembodied fingers, if it had happened. If you need a
17 reason for doubt, this is not close. This is not close.
18 This is a sad and tragic thing. However, it goes sad and
19 tragic, because people that have cared about each other are
20 now not friends.

21 Epi said that Minor had a crush on Timmy. Both Minor
22 and mom and dad all said that she sent Facebook messages to
23 Timothy's mom when he was away in Indiana. And the first
24 thing that she described in the interview -- how did she
25 describe Timmy Lemacks in the interview with Mary Beth

1 Hefner? She didn't start out saying "Uncle Timmy". She
2 said "This boy, this boy, Timmy." That's consistent with a
3 crush. And I don't know if it's a dream; I don't know. I
4 know that this is far short beyond a reasonable doubt, far
5 short.

6 And if you've got plenty of reasons. You've got plenty
7 of reasons, if you need them. But the main thing is, none
8 of us are able to prove we didn't do something, none of us.
9 That's something you heard. I think Epi said he's got one
10 prior conviction; he's been arrested five times. He seems
11 like a caring dad. He was dooped when Jordan spent the
12 night over or whatever. But he seems like he cares. And if
13 he was charged five times and convicted once, well, more
14 power to him. But that's what you got to do, if you got a
15 doubt. That's what you got to do.

16 This is not about, if you're 60 percent sure, 50
17 percent sure that something happened, but you're not really,
18 really sure, the law is, you've got to give the defendant
19 the burden of that, because nobody can prove what happened
20 on any given time to a mathematical certainty. But if
21 you've got a reasonable doubt, which you do, these
22 inconsistent statements are enough, you have to find him not
23 guilty.

24 Thank you, Your Honor.

25 JURY CHARGE

1 THE COURT: Thank you. All right. Ladies and
2 gentlemen, it's now my duty as the trial judge, under the
3 Constitution of this state, to charge and instruct you on
4 the law applicable to this case. It is your duty as jurors,
5 ladies and gentlemen, to accept and apply the law, as I will
6 state it to you. Furthermore, it is your exclusive duty to
7 decide all the issues of fact in this case and to determine
8 the effect, value, weight and truth of the evidence.

9 Both the State and the defendant have the right to
10 expect that you will carefully consider and evaluate the
11 evidence and apply the law of this case, so that in the end,
12 both the State of South Carolina and the defendant will
13 receive a fair and impartial trial.

14 I want you to understand, ladies and gentlemen, that
15 when I use the word "defendant," I refer to Mr. Timothy
16 Allen Lemacks. Furthermore, it is important to understand
17 that the State of South Carolina has charged the defendant
18 with the offense known as first degree criminal sexual
19 conduct with a minor. To this case, the defendant has
20 entered a plea of "not guilty." This plea of not guilty
21 places the burden of proof on the state, to prove the guilt
22 of the defendant to you, the jury, beyond a reasonable
23 doubt.

24 I remind you that the fact that the defendant was
25 arrested, charged, and indicted in this case is not evidence

1 in this case and cannot be considered by you as evidence of
2 guilt in this case. Nor does it create any presumption or
3 inference of guilt. The indictment is simply the formal,
4 written instrument which contained the charges made against
5 the defendant. It is the formal document by which this case
6 is brought into this court.

7 It is vital to understand that the defendant is
8 presumed under the law to be innocent of this charge. The
9 defendant has no obligation to prove his innocence. It is a
10 fundamental rule of our law that a defendant, irrespective
11 of the seriousness of the charge against him, is always
12 presumed innocent of the crimes for which he is charged,
13 unless and until his guilt has been proven by evidence that
14 satisfies you, the jury, beyond a reasonable doubt.

15 The presumption of innocence is not a mere legal theory
16 or a legal phrase. The presumption of innocence is very
17 important, and you need to understand that this presumption
18 accompanies the defendant from the time of his arrest and
19 appearance in this court and continues with the defendant,
20 even after you retire to the jury room to deliberate. In
21 other words, the defendant receives the benefit of the
22 presumption of innocence until the very end of this trial
23 when you, the jury, will deliberate upon the evidence and
24 decide whether the State has proven his guilt beyond a
25 reasonable doubt.

1 Proof beyond a reasonable doubt is proof that leaves
2 you, ladies and gentlemen, firmly convinced of the
3 defendant's guilt. There are very few things in this world
4 that we know with absolute certainty. So even in criminal
5 cases, the law does not require proof that overcomes every
6 possible doubt. However, if based on your consideration of
7 the evidence, you are firmly convinced that the defendant is
8 guilty of the crime charged, you must find him guilty. If,
9 on the other hand, you think there is a real possibility
10 that he is not guilty, you must give him the benefit of the
11 doubt and find him not guilty.

12 Jurors, please understand that a reasonable doubt may
13 arise from evidence which has been presented in the case or
14 from the lack of evidence in the case. It is your
15 responsibility to determine whether or not reasonable doubt
16 exists as to the guilt of this defendant. And I charge you,
17 that the defendant is entitled to every reasonable doubt
18 arising in the whole case. ??? any issues of fact essential
19 to conviction and a verdict of guilty, you have a reasonable
20 doubt as to how that issue should be resolved. It would be
21 your duty to resolve that reasonable doubt in favor of the
22 defendant.

23 Thus in summary, it is important to understand that a
24 defendant is not required to prove his innocence. Instead,
25 the State is required by law to prove every essential

1 element of the offense charged against the defendant by
2 evidence, which satisfies you of his guilt beyond a
3 reasonable doubt. Only then can you convict the defendant
4 and find him guilty.

5 There are two types of evidence which are generally
6 presented during a trial: Direct evidence and
7 circumstantial evidence. Direct evidence is the testimony
8 of a person who claims to have actual knowledge of a fact,
9 such as an eyewitness. It is evidence which immediately
10 establishes the main fact to be proved.

11 Circumstantial evidence is proof of a chain of facts
12 and circumstances, indicating the existence of a fact. It
13 is evidence which immediately establishes collateral facts
14 from which the main fact may be inferred. Circumstantial
15 evidence is based on inference and not on personal knowledge
16 or observation. The law makes absolutely no distinction
17 between the weight or value to be given to either direct or
18 circumstantial evidence. Nor is a greater degree of
19 certainty required of circumstantial evidence than of direct
20 evidence. You should weigh all of the evidence in this
21 case. If, after weighing all of the evidence, you are not
22 convinced of the guilt of the defendant beyond a reasonable
23 doubt, you must find the defendant not guilty.

24 Now during this trial, ladies and gentlemen, you and I
25 have had separate duties to perform. As the trial judge, it

1 is my responsibility to preside over this trial, and I also
2 have the duty to rule upon the admissibility of the evidence
3 offered during the process of this trial.

4 In that regard, you are to consider only the competent
5 evidence before you, and you are to disregard from your mind
6 any testimony ordered stricken from the record of this case
7 during the progress of this trial, if there was any. And
8 you are to consider only the testimony which has been
9 presented from the witness stand, together, with any
10 exhibits admitted into the record of this case, and any
11 stipulations of counsel made into the record, if there were
12 any.

13 Furthermore, I have the additional duty to charge you
14 on the applicable law in this case. And in that regard, I
15 am the sole judge of the law of this case. It is your duty
16 to accept and apply the law, as I state it to you. If you
17 have any preconceived ideas as to what the law is or what
18 the law ought to be, and it does not agree with what I tell
19 you the law is, you are obligated under your oath to abandon
20 these preconceptions, because you are sworn to accept the
21 law, precisely as I state it to you.

22 In this trial, you are the sole and exclusive judge of
23 the facts, and I am the judge of the law. Do not infer that
24 I have any opinion about the facts in this case from
25 anything I have said during the course of this trial in

1 ruling upon the admissibility of evidence, or otherwise, or
2 from anything that I say during the course of this charge to
3 you. In this regard, the law simply does not permit me to
4 have an opinion about the facts.

5 As jurors, it is your duty alone to determine the
6 effect, value, weight and truth of the evidence presented
7 during the course of this trial. In determining what the
8 facts in this case are, you must judge the credibility,
9 which simply means the believability of the witnesses, and
10 the value of weight to be given to their testimony. You
11 alone must decide the force, effect, and truth of the
12 testimony.

13 In making this decision, there are many things you may
14 and should take in consideration, such as, the appearance
15 and manner of the witness on the stand, the characteristic
16 often referred to as the demeanor of the witness. Was the
17 witness forthright? or hesitant? Was the witness' testimony
18 consistent? Or did it contain discrepancies? What was the
19 ability of the witness to know the facts about which he or
20 she testified? Did the witness have a cause, a reason to be
21 biased and prejudiced in favor of the testimony he or she
22 gave? Was the testimony of the witness corroborated or made
23 stronger by other testimony and evidence? Or was it made
24 weaker or impeached by such other testimony in evidence?

25 As jurors, please understand, you have the right to

1 believe a small portion of a witness' testimony and discard
2 the larger portion or vice versa. You may believe all of
3 the witness' testimony, or none. You may believe the
4 testimony of a single witness, against that of many
5 witnesses, or the other way around.

6 In exercising your mental processes in attempting to
7 decide the truth, the law simply requires that you exercise
8 your good judgment, your common sense, your sense of logic
9 and reason, and your life experiences. You then apply these
10 attributes to the evidence and apply the law as I stated to
11 you and, thus, arrive at a verdict.

12 Now, ladies and gentlemen, I want you to know that a
13 person who has a past criminal record is competent to
14 testify during a trial. A past record does not affect the
15 ability of that witness to testify. The past record may
16 only be considered by you, if at all, in determining the
17 witness' believability. Remember, you are the sole judges
18 of the facts in this case and of the believability of any
19 and all of the witnesses.

20 You have also heard testimony from children. Where a
21 witness is a child, you must determine, as with any witness,
22 whether that testimony is believable. In deciding
23 believability, you may consider not only matters that I have
24 already discussed with you, but you may also consider the
25 age of the child. The child's ability to observe and

1 remember facts, and the child's ability to understand and
2 answer questions. Because young children may not fully
3 understand what is happening here, it is up to you to decide
4 whether the child understood the seriousness of appearing as
5 a witness at this criminal trial; whether the child
6 understood the questions; whether the child has a good
7 memory; and whether the child understands the difference
8 between lying and telling the truth.

9 In addition, young children may be influenced by the
10 way that questions are asked. It is up to you, ladies and
11 gentlemen, to decide whether the child understood the
12 questions asked.

13 You also heard testimony from an expert witness. I
14 instruct you that the rules of evidence ordinarily do not
15 permit witnesses to testify to opinions or conclusions. An
16 exception to this rule exists for witnesses we call expert
17 witnesses. A witness who by education and experience has
18 become expert in some art, science, profession or calling,
19 may state an opinion as to relevant and material matter in
20 which the witness claims to be an expert, and may also state
21 the reasons for the opinion.

22 You should consider any expert opinion received in
23 evidence in this case, and like any other evidence, give it
24 the weight you think it deserves. If you decide that the
25 opinion of an expert witness is not based on sufficient

1 education and experience, or if you conclude that the
2 reasons given in support of the opinion are not sound, or
3 that the opinion is outweighed by other evidence, you may
4 disregard the opinion entirely.

5 An expert witness' testimony is to be given no greater
6 weight than that of other witnesses, simply because the
7 witness is an expert. Further, you are not required to
8 accept an expert's opinion, even though it is not
9 contradicted.

10 And during the course of the trial, you also heard
11 testimony of a police officer. Please understand that the
12 testimony of a police officer is not entitled to more weight
13 than that of any other witness. You are the sole judges of
14 the credibility of a witness, and you are not to give more
15 weight to a police officer's testimony, solely because he or
16 she is a police officer. Rather, you should judge an
17 officer's testimony by the same standards that you apply to
18 all other witnesses.

19 And there's been evidence presented that a witness made
20 a prior statement, which is not consistent with the witness'
21 present testimony. You may use this evidence to decide
22 whether to believe the witness. You may also use evidence
23 of the earlier contradictory statements to determine the
24 truth of those statements. It is up to you to decide
25 whether to believe the earlier statements or the testimony

1 given at trial.

2 If a witness is shown to have knowingly testified
3 untruthfully concerning any material matter, you may
4 consider this in determining whether to trust the witness'
5 testimony as to other matters. You may reject all testimony
6 of that witness, or give all or part of the testimony the
7 weight you think it deserves.

8 I also want to instruct you and emphasize that the fact
9 the defendant did not testify is not a factor to be
10 considered by you in any way in your deliberations and in
11 your consideration on the question of the guilt or the
12 innocence of the defendant. It must not be considered by
13 you in any manner whatsoever. A defendant has the
14 constitutional right to remain silent, and the assertion of
15 this right must not be considered by you in your
16 deliberations.

17 I repeat, under your oath, you are to draw no
18 conclusions whatsoever from the fact that the defendant in
19 this case did not testify. The fact that this defendant did
20 not testify should not even be discussed in the jury room.
21 The burden of proof, as I have stated, is on the State. The
22 defendant is not required to prove his innocence. The
23 burden of proof remains on the State to prove guilt, beyond
24 a reasonable doubt.

25 Now, ladies and gentlemen, in order for the State to

1 establish criminal liability, criminal intent is required.
2 For example, the mental state required to be proven by the
3 State for a particular crime might be purpose, intent,
4 knowledge, recklessness or criminal negligence. Criminal
5 intent must be proven by the State beyond a reasonable
6 doubt.

7 Criminal intent is always a matter that must be
8 determined by the jury from the circumstances surrounding
9 the situation. There is no way to prove intent to a
10 mathematical certainty. There is no way that medical
11 science can dissect a person's brain and determine what the
12 person had in mind. So the law says that criminal intent
13 may be inferred from the circumstances shown to have
14 existed. This is how you make a determination of whether or
15 not the element requiring intent was present.

16 It is not necessary to establish intent by direct and
17 positive evidence, but intent may be established by
18 inference in the same way as any other fact, by taking into
19 consideration the acts of the parties and all the facts and
20 circumstances of the case.

21 Criminal intent is a mental state, a conscious
22 wrongdoing. It is up to you to determine what the defendant
23 intended to do, based on the circumstances shown to have
24 existed. Criminal intent can rise from action or a failure
25 to act. It may arise from negligence, recklessness, or an

1 indifference to duty or to consequences that is considered
2 by the law to be the equivalent of criminal intent.

3 The defendant is charged with first degree criminal
4 sexual conduct with a minor. The State must prove beyond a
5 reasonable doubt that the defendant engaged in a sexual
6 battery with the victim. A sexual battery is sexual
7 intercourse, cunnilingus, fellatio, anal intercourse or any
8 intrusion, however slight of any part of a person's body or
9 of any object into the genital or anal openings of another
10 person's body, except when the intrusions is accomplished
11 for medically-recognized treatment or diagnostic purposes.

12 The State must then prove beyond a reasonable doubt
13 that the victim was less than 11 years old at the time of
14 the sexual battery. Consent, willingness, indifference or
15 ignorance on the part of the minor, if any, as to what was
16 taking place does not in any way affect the charge of
17 criminal sexual conduct with a minor, because an unmarried
18 woman under the age of 14 cannot legally consent to sexual
19 intercourse.

20 Now, ladies and gentlemen, I am drawing near to the end
21 of my charge, and I want you to clearly understand that you
22 are not partisans for or advocates for the State of South
23 Carolina or this defendant. You do not serve as jurors to
24 reward your friends or punish your enemies.

25 In this regard, you have been selected by both the

1 State and the defendant to be fair and impartial jurors. It
2 is your duty, by your joint deliberations, to determine the
3 truth in this case, giving to this defendant the benefit of
4 every reasonable doubt on each and every issue. Then, to
5 the facts which you determine to be true, you should take
6 and apply the law which has been given to you by this Court,
7 and thus arrive at a verdict which speaks the truth in this
8 case. In fact, the word "verdict," which has a Latin
9 derivative means "a true saying." Thus, when you have
10 accomplished these responsibilities, you will have satisfied
11 your oath as jurors, and you will have discharged your duty
12 to this Court.

13 Now, Madam Forelady, I'm going to send a verdict form
14 back with you to the jury room. When the jury arrive at a
15 verdict as to the charge in this case, you, Madam Forelady,
16 will write your verdict on this form. If the State has
17 failed to prove the guilt of this defendant beyond a
18 reasonable doubt, your verdict will be two words, "not
19 guilty." Likewise, if the State has proved the guilty of
20 this defendant beyond a reasonable doubt, your verdict will
21 be one word, "guilty."

22 Madam Forelady, once a decision has been made, check
23 whichever verdict is the verdict of the jury. The verdict
24 that you render in this case, ladies and gentlemen, must be
25 the verdict of each and every juror. It must be your

1 unanimous verdict. All 12 jurors must agree on the verdict,
2 which you authorize the forelady to write for the jury.

3 Now, Madam Forelady and members of the jury, I want you
4 to further understand that the order in which the choices of
5 verdict appear on the verdict form are not suggestive of any
6 verdict on the part of this Court. The verdict in this case
7 is to be determined by you, the jury, not the Court.

8 Furthermore, ladies and gentlemen, please understand
9 that even though I have given the verdict form to the
10 forelady, it is not her verdict alone. It is the verdict of
11 all 12 of you, and I emphasize to you-all, it must be
12 unanimous.

13 Now, ladies and gentlemen, I'm also going to give you a
14 copy of these instructions in written form. During your
15 deliberations, you may refer to the instructions to guide
16 your decision-making. You must consider the instructions as
17 a whole, and not follow some and ignore others. Please
18 return these instructions to the Court at the time your
19 verdict is rendered.

20 At this time, ladies and gentlemen, I'm going to ask
21 you to retire to the jury room, but do not begin your
22 deliberations until you are told to do so. The law requires
23 that I consult with the attorneys, to make sure that I have
24 not left anything out of these instructions. After I have
25 checked with the attorneys, the bailiff will bring the

1 verdict form to you, along with any evidence, and instruct
2 you to begin your deliberations. And I will say that the
3 only piece of evidence that was admitted into evidence was
4 the video; is that correct, Mr. Balish?

5 ASST. SOL. BALISH: Yes, Your Honor.

6 THE COURT: And I have consulted with the attorneys,
7 and the video will remain in the courtroom. And if you-all
8 need to see that again, we'll bring you back in the
9 courtroom to watch that, if necessary. But that will remain
10 in the courtroom. But after I check with the attorneys, the
11 verdict form will be brought to you, and you will be
12 instructed to begin your deliberations.

13 Also, during your deliberations, should you have any
14 questions, Madam Forelady, it will be your responsibility to
15 write those questions on a piece of paper, date and sign the
16 question of the jury, and send it out with the bailiff, and
17 he will get it to me as quickly as possible. The bailiffs
18 will please make sure that there is paper and pencil in the
19 jury room, if that necessity should arise.

20 Once you've reached a verdict, ladies and gentlemen,
21 please knock on the jury room door and ask the bailiff to
22 advise the Court that you've reached a verdict, and we will
23 get you back into the Courtroom as promptly as possible.

24 And before I ask you to retire to the jury room, does
25 everybody on the jury feel okay?

1 (JURORS NOD.)

2 THE COURT: All right. I'm going to ask you to retire
3 to the jury room at this time, everyone. But do not --
4 again, do not begin your deliberations until you are
5 instructed to do so. Thank you.

6 (12:28 P.M., 3-2-11, WHEREUPON, THE JURY EXITS THE
7 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
8 RECORD.)

9 THE COURT: All right. Any addition, exception,
10 objection to the charge by the State?

11 ASST. SOL. BALISH: Sir, only that the alternates went
12 back there as well.

13 THE COURT: I'm going to get ---

14 ASST. SOL. BALISH: Yes, Your Honor.

15 THE COURT: I send them all back. Make sure they're
16 feeling okay. I send them all back.

17 ASST. SOL. BALISH: Yes, sir.

18 THE COURT: And then I'll go back and I'm going to go
19 to the door right there.

20 ASST. SOL. BALISH: Yes, sir. No objections.

21 THE COURT: But, yeah, I will get the alternates out.
22 No question about that. Mr. Mathews, any objection?

23 MR. MATHEWS: No, sir.

24 THE COURT: Anything further from the State or the
25 defense before ---

1 ASST. SOL. BALISH: No. Nothing from the State, Your
2 Honor.

3 THE COURT: Mr. Mathews?

4 MR. MATHEWS: Nothing further, Your Honor.

5 THE COURT: That's the verdict form and the jury
6 charge. If you will pull Mr. Wiltshire out and Mr. Evans
7 out.

8 BAILIFF: Okay, sir.

9 THE COURT: When you go in, pull them out. Give them
10 the verdict form and the jury charge. And instruct them
11 that they can begin their deliberations.

12 BAILIFF: Yes, sir.

13 THE COURT: If you'll ask the alternates to come in
14 here, please, okay?

15 BAILIFF: Yes, sir.

16 (12:30 P.M., BAILIFF TAKES VERDICT FORM INTO JURY.)

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

18 (WHEREUPON, THE COURT TAKES UP OTHER NON-JURY MATTERS
19 WHILE AWAITING A VERDICT.)

20 (1:58 P.M., WHEREUPON, THE JURY INFORMS THE BAILIFF
21 THAT THEY HAVE REACHED A VERDICT IN THE TRIAL OF THIS CASE.)

22 THE COURT: All right. I have been informed that the
23 jury has reached a verdict. Before the jury comes back in,
24 I have spoken with the lawyers, the attorney for the State
25 as well, the attorney for the defense, conveying to parties

1 involved to keep emotions in check.

2 MR. MATHEWS: I have, Your Honor.

3 THE COURT: Mr. Balish?

4 ASST. SOL. BALISH: Yes, Your Honor, I have.

5 THE COURT: Failure to keep your emotions in check
6 could result, and more than like will result, in this Court
7 holding you in contempt, the result in this Court sentencing
8 you to a term of incarceration. If anybody in this
9 courtroom right now does not believe that they can keep
10 their emotions in check from the return of the verdict, now
11 is your time to leave.

12 All right. If you'll bring us the jury, please, sir.

13 (2:00 P.M., 3-2-11, WHEREUPON THE JURY ENTERS THE
14 COURTROOM AND THE FOLLOWING PROCEEDINGS ARE HELD ON THE
15 RECORD.)

16 THE COURT: Madame Clerk, you may publish the verdict.

17 MADAME CLERK: Indictment Number 2010-GS-15-916, State
18 of South Carolina v. Timothy Allen Lemacks. As to the
19 charge of first degree criminal sexual conduct with a minor,
20 we, the jury, unanimously find the defendant, Timothy Allen
21 Lemacks, guilty. Signed by Foreperson, Sharon S. Gibson.

22 If this is your verdict, please raise your right hand.

23 (TWELVE JURORS RAISE THEIR HANDS.)

24 MADAME CLERK: Thank you. You may put them down.

25 THE COURT: Any request from the defense as far as

1 polling the jury, Mr. Mathews?

2 MR. MATHEWS: No, sir.

3 THE COURT: All right. Ladies and gentlemen of the
4 jury, you have fulfilled your responsibilities and
5 obligations, jury duty, in serving in this case, and I want
6 to thank you on behalf of the court system and for this
7 county. At this time, you-all are excused for the balance
8 of the week. I've been told there are not going to be
9 anymore trials this week and you-all are excused. You don't
10 have to call back after six o'clock tonight to find out what
11 your responsibilities are with regards to the rest of this
12 week.

13 I want to thank you for your service. You-all are free
14 to leave at this time. However, if you want to remain and
15 stay, it is now my responsibility now, once you-all return a
16 verdict, to hand down sentence. And that's what this Court
17 will do at this time. If you want to leave now, you're free
18 to leave. If you wish to do so, okay? Jury is leaving.
19 Everybody else, please remain seated.

20 (THEREFORE, SOME JURORS LEAVE THE COURTROOM.)

21 (2:20 P.M., SENTENCING IN THE TRIAL OF THE CASE.)

22 THE COURT: Mr. Balish, is there anything that you-all
23 need to do for purposes of sentencing?

24 ASST. SOL. BALISH: No. If I could just have a brief
25 word with the family, check to see if anyone would like to

1 speak.

2 THE COURT: Okay.

3 (BRIEF PAUSE IN THE COURTROOM.)

4 ASST. SOL. BALISH: We're ready to proceed, Your Honor.

5 THE COURT: Sentence sheet?

6 ASST. SOL. BALISH: Yes, sir. May I approach, Your
7 Honor?

8 THE COURT: Yes, sir. Mr. Mathews, if you'd bring your
9 client around.

10 (MR. MATHEWS AND MR. LEMACKS APPROACH.)

11 THE COURT: Mr. Balish?

12 ASST. SOL. BALISH: Yes, sir.

13 THE COURT: Be happy to hear from the State.

14 ASST. SOL. BALISH: Your Honor, during the course of
15 this trial, I think you've seen what happened that night.
16 The man who was entrusted, became a family member of these
17 people, took advantage of them and of their daughter. I've
18 had the opportunity to get to know this family; they're good
19 people. They call her at the school the "volunteer of the
20 year." The girls are sweet as can be. And what this man
21 has done to her is going to remain with her the rest of her
22 life. It's going to remain with her mom and her dad. Her
23 dad is -- I'm pushing him really hard to get counseling. He
24 absolutely blames himself. A seven-year-old little girl had
25 to come testify, in addition to her sister, who had to stand

1 up.

2 Your Honor, this has traumatized this family in a way
3 that a prison sentence will never traumatize him. I ask the
4 Court for jail time. I ask him to be put away, so that he
5 can reflect on his actions and what they've done to this
6 family, Your Honor.

7 Would you like to hear his prior record?

8 THE COURT: Yes, sir.

9 ASST. SOL. BALISH: He has a '03 and an '08 possession
10 of marijuana and an open container. Nothing felony, Your
11 Honor.

12 THE COURT: Anybody on behalf of the family want to
13 speak, Mr. Balish?

14 ASST. SOL. BALISH: At this time, no one. I talked to
15 the family. They were mulling it over, Your Honor. I just
16 don't think they're capable to speak here this morning.

17 THE COURT: All right, Mr. Mathews. I'll turn it over
18 to you, sir. State's finished.

19 MR. MATHEWS: Your Honor, Mr. Lemacks has adamantly
20 denied this from the beginning. He's told anybody that will
21 listen, he did not do this. Other than two possession of
22 marijuana, the way the law is written, I don't know what the
23 Court can do. I think he's -- I think the law is pretty
24 clear that he's got to get a lot of time, and that's the way
25 it's written. So there's really not -- I can ask the Court

1 not to give him life in prison, and that's about all I can
2 ask. Like I said, he's been adamant that he did not do
3 this.

4 But the jury has taken a quick lunch, an hour and a
5 half, to come to this conclusion, which is not much time at
6 all. And so they didn't have any hesitation in doing it.
7 Obviously, I did something wrong. But just whatever mercy
8 the Courts will show, which under the statute, doesn't allow
9 much.

10 THE COURT: If your client wishes to say anything, Mr.
11 Mathews, he's not required to do so and I don't want him to
12 say anything that would hurt him with regards to this issue
13 that may be out there. Does he wish to say anything?

14 MR. MATHEWS: No, sir.

15 THE COURT: How long has he been in jail?

16 MR. MATHEWS: Five months.

17 THE COURT: Five months?

18 ASST. SOL. BALISH: September 23rd, Your Honor. I
19 apologize, Your Honor, September 24th.

20 THE COURT: I'm going to give him credit for five
21 months. The statute under which he's been convicted,
22 Section 16-3-655, criminal sexual conduct with a minor.
23 Penalty for that under Subsection (A)(1), for someone who is
24 convicted of this crime and pleads guilty to this crime,
25 states, "If a person convicted is guilty of a felony and

1 upon conviction, must be imprisoned for a mandatory, minimum
2 of 25 years, no part of which may be suspended or probation
3 granted, or must be imprisoned for life."

4 State have a position on sentencing with regard to the
5 way the statute reads? Statute read, the way I read it, is
6 25 years or life.

7 ASST. SOL. BALISH: Yes, sir. Needless to say, we
8 didn't notice for LWOP. We're not seeking life without the
9 possibility of parole.

10 THE COURT: I mean, LWOP wouldn't apply. I mean, my
11 reading of the statute is either 25 or life.

12 ASST. SOL. BALISH: Yes, sir. I think our position
13 would be 25, Your Honor.

14 THE COURT: Anything you want to say, Mr. Mathews?

15 MR. MATHEWS: I don't think there's any room in the
16 statute, Your Honor.

17 THE COURT: I mean, I don't think there's any room for
18 me to give him anything in-between 25 and life. I mean,
19 I've researched this issue before. There is a case out
20 there that the ---

21 ASST. SOL. BALISH: Your Honor ---

22 THE COURT: --- judge handed down a sentence of 30
23 years. I think on the sentence sheet, it said 20; is that
24 correct? And they remanded the case; it's in force for 30
25 years. Noticed no case law out there on discussion of that

1 issue within the statute. I think there's an error in the
2 statute. Balish?

3 ASST. SOL. BALISH: I agree. I agree with the Court's
4 interpretation.

5 THE COURT: Mr. Mathews?

6 MR. MATHEWS: I don't think it's a particularly well-
7 grafted statute and ---

8 THE COURT: I didn't say that. I just said ---

9 MR. MATHEWS: I mean, I ---

10 THE COURT: I mean, I think it's an either/or
11 proposition, and that's my reading of the statute.

12 MR. MATHEWS: I agree. That's what it sounds like to
13 me. I don't know. I mean, I'd ask for probation for him.
14 Obviously, the statute doesn't allow for that.

15 THE COURT: The statute clearly says that probation is
16 not an option.

17 MR. MATHEWS: So, Your Honor, the only thing I can ask
18 is not to give him life.

19 THE COURT: Well, what I'm going to do, pursuant to the
20 statute, and my reading of the statute, Indictment 2010-GS-
21 15-916, I don't think I have any option. I think it's
22 either 25 years or life. And that's something I think that
23 our legislature needs to address. If it's their intention
24 for there to be some discretion between 25 and life, that
25 needs to be drafted into the statute.

1 So the sentence of this Court on Indictment 2010-GS-
2 15-916 is that the defendant be committed to the State
3 Department of Corrections for a period of 25 years, and
4 giving him credit for the five months that he's done.
5 Anything further from the State.

6 ASST. SOL. BALISH: Nothing further from the State,
7 Your Honor.

8 THE COURT: From the defense?

9 MR. MATHEWS: No, sir.

10 THE COURT: Good luck to you, Mr. Lemacks.

11 Anything further from the State?

12 ASST. SOL. BALISH: Nothing from the State, Your Honor.

13 THE COURT: From the defense?

14 MR. MATHEWS: No, sir.

15 THE COURT: All right. We will stand at ease for 15
16 minutes. Everybody remain seated. I want to ask the jury
17 if they would return to the jury room for just a minute, and
18 I will excuse you-all at that time. Okay? You'll return to
19 the jury room for just a minute. Everybody else, remain
20 seated.

21 (2:35 P.M., 3-2-11, WHEREUPON, THE JURY EXITS THE
22 COURTROOM AND THE TRIAL IN THIS CASE IS ENDED.

23

24

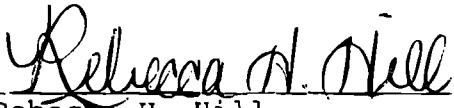
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON) CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the trial proceedings had in the captioned case, in the Court of General Sessions for Colleton County, South Carolina, on the 28th day of February through March 2nd and 3rd, 2011.

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

April 9, 2011


Rebecca H. Hill,
Official Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY LEMACKS,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1 •
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT	5
CONCLUSION.....	8
PETITION TO BE RELIEVED AS COUNSEL	9
CERTIFICATE OF COUNSEL	10

TABLE OF AUTHORITIES**Cases**

Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002) 6, 7

State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002).....6, 7 .

Rules

Rule 801, SCRE 5, 6, 7 .

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing the doctor to testify that the complaining witness said her uncle put his finger inside her and that it hurt which went beyond time and place, and violated Rule 801(d)(1)(D)?

STATEMENT OF THE CASE

On January 24, 2011, the Colleton County Grand Jury indicted Timothy Allen Lemacks on the charge of criminal sexual conduct first degree with a minor under 11 years of age (CSC). On February 28 – March 2, 2011, Lemacks proceeded to trial before the Honorable D. Craig Brown and a jury. Lemacks was represented by David S. Matthews, and the state was represented by Charles Balish, assistant solicitor. The jury returned a verdict of guilty as charged. Judge Brown sentenced Lemacks to twenty-five years in prison. Lemacks' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in allowing the doctor to testify that the complaining witness said her uncle put his finger inside her and that it hurt which went beyond time and place, and violated Rule 801(d)(1)(D).

Timothy Lemacks and the parents of the prosecuting witness were the best of friends. The mother's testimony was that the three children, which included the girl, her younger brother and younger sister, loved Lemacks. R. 132, ll. 11 – 25; R. 133, ll. 1 – 14; R. 144, ll. 1 – 25.

On August 14, 2010, after work, Lemacks came over as he frequently did for a cookout. He spent the night because he was going to help the girl's father with work the next morning. R. 188, ll. 14 – 25; R. 189, ll. 1 – 25; R. 190, ll. 1 – 25; R. 191, ll. 1 – 25; Indictment.

The children were allowed to sleep in the living room because they had been good the entire week. R. 135, ll. 1 – 25. The girl, who was age ten at the time, testified that Lemacks lay down beside her during the night on the floor. He put his hands in her panties and put his finger inside her "Lucy" (vagina). R. 80, ll. 11 – 25; R. 81, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 25; R. 93, ll. 1 – 17; R. 94, ll. 1 – 25; R. 95, ll. 1 – 25.

When Lemacks went to sleep, the girl took her two younger siblings and went to the top bunk of her bunk bed. R. 86, ll. 1 – 25; R. 87, ll. 1 – 12. The next morning, the girl told her mother who called 911. Lemacks was arrested a few weeks later after the investigation was completed. R. 222, ll. 1 – 25; R. 223, ll. 1 – 25. Detective Geathers testified that Lemacks always denied doing this. R. 224, ll. 8 – 12.

Dr. Michelle Amaya, the Child Abuse Pediatrician from MUSC, testified that her medical team saw the girl when she came to the emergency room (ER) at MUSC after the

incident. Dr. Amaya was the attending physician on call so she supervised the nurse, Ms. Kerr, who saw the girl after the ER doctor saw her, and sent the girl to the sexual assault team. R. 162, ll. 19 – 25; R. 163, ll. 1 – 25; R. 164, ll. 1 – 25. In describing the incident, Dr. Amaya said that the nurse said the girl was tearful and believable. Defense counsel objected which the judge sustained, and instructed the jury to disregard the doctor's last statement. R. 165, ll. 1 – 25.

The doctor then testified that the girl made a statement to the ER doctor and to the sexual assault nurse, Ms. Kerr. R. 166, ll. 1 – 5. Defense counsel then argued:

Your Honor, as to time and place of the incident, I think that's within the bounds. Anything beyond that, I do not.

Re. 166, ll. 6 – 8.

The solicitor said he understood the nature of the objection, and this was for the purpose of medical treatment. R. 166, ll. 9 – 15.

Dr. Amaya then testified that the girl gave a history of the events at the Peds ER. The doctor said the patient report indicated that the girl said she was sleeping with her sister and brother on the floor. She felt her uncle trying to touch her privates. He put his finger inside her, and it hurt. She moved away, and he fell asleep. R. 166, ll. 16 – 23.

Rule 801(d) (1) (D), SCRE provides that sexual assault victim's prior consistent statements limited to time and place of alleged incident are not hearsay, if victim testifies at trial and is subject to cross-examination; allows other witnesses to testify that victim complained of assault, but only as to time and place; it specifically circumscribes such testimony by excluding details or particulars. State v. Jeffcoat, 350 S.C. 392, 565 S.E.2d 321 (Ct. App. 2002); citing Rule 801(d) (1) (D), SCRE; Sanchez v. State, 351 S.C. 270, 569 S.E.2d 363 (2002).

In State v. Jeffcoat, *supra*, the Court ruled that Rule 801(d) (1) (D) does not allow a witness to testify as to identity of alleged perpetrator if the victim testifies. In Sanchez v. State, *supra*, the Supreme Court ruled that trial counsel was ineffective for not objecting to the testimony of the mother and father of the child victim that Sanchez was the perpetrator because it was hearsay testimony since it went beyond time and place.

The trial judge erred in allowing the doctor to testify that the victim said her uncle did this, and to describe the details of how it hurt. The girl told the trial court during her testimony that she called Lemacks "Uncle Timmy." R. 83, ll. 21 – 25; R. 84, ll. 1 – 3.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of April, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TIMOTHY LEMACKS,

APPELLANT

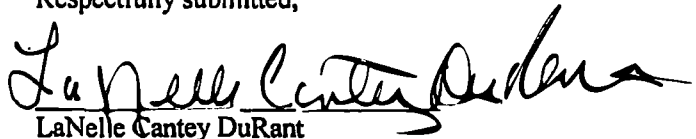
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Timothy Lemacks states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge D. Craig Brown, which was held on March 3, 2011, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 . (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Timothy Lemacks.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

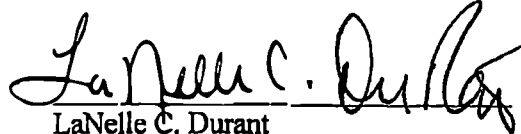
ATTORNEY FOR APPELLANT

This 2nd day of April, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 2nd, 2012

A handwritten signature in black ink, appearing to read "LaNelle C. Durant", written over a horizontal line.

LaNelle C. Durant
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Colleton County
D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

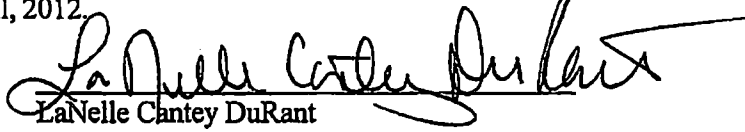
V.

TIMOTHY LEMACKS,

APPELLANT

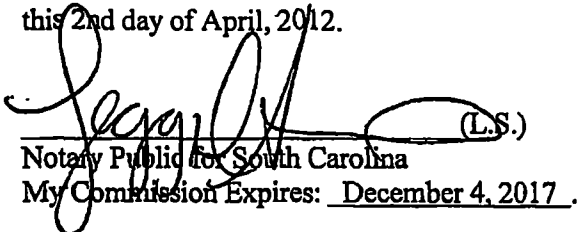
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a true copy of the Anders brief of Appellant and Record on Appeal on Timothy Lemacks, #345057 at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 2nd day of April, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of April, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: December 4, 2017.

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

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

The State, Respondent,

v.

Timothy Lemacks, Appellant.

Appellate Case No. 2011-187129

Appeal From Colleton County
D. Craig Brown, Circuit Court Judge

Unpublished Opinion No. 2013-UP-363
Submitted September 1, 2013 – Filed October 2, 2013

APPEAL DISMISSED

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General Salley W. Elliott,
both of Columbia, for Respondent.

PER CURIAM: Dismissed after review pursuant to *Anders v. California*, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.¹

APPEAL DISMISSED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

ALW
14

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Colleton)Timothy Allen Lemacks #345057
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

14-CP-15-1163

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention M^c Cormuck Correctional Institution
2. Name and location of Court which imposed sentence Colleton County General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-15-0916
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) March 2, 2011
 - (b) 25 Years

Revised 3/2003

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals - Direct Appeal _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. S.C. Court of Appeals: Dismissed _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 7, 2013 _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Police never tested me for DNA evidence, Just took "Victims" word.
- (b) No DNA or Visual evidence present during use of Rape Kit
- (c) Rushed to trial

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

- (a) Police didn't test me for DNA even after I told them too.
- (b) Dr. Michelle Amaya stated on the stand that there was no signs of physical abuse
- (c) David S. Mathews, my lawyer, put in for a Speedy Trial without my knowledge

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

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

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

(a) the specific nature thereof:

- i. Final ANDERS Brief
- ii. _____
- iii. _____
- iv. _____

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

- i. Colleton County Court of Appeals
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Trial court err in allowing doctor to testify and violated Rule 801(d)(1)(D)
- ii. _____
- iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. April 2, 2012
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

No

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

- (a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) My lawyer didn't bring up on appeal
- (b) _____
- (c) _____

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. David S. Mathews, 115 Benson Street, Walterboro, S.C. 29488
 - ii. LaNelle C. DuRant, 1330 Lady Street Suite 401, Columbia S.C. 29201-3332
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Direct Appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

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

[Signature]

SWORN to and subscribed before me this 3rd
day of January, 2014

[Signature] (L.S.)
Notary Public

My Commission Expires: Feb 28, 2018

2014 FEB 25 PM 1:20
PATRICIA D. GRANT
COLLETON COUNTY
COMMON PLEAS

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

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

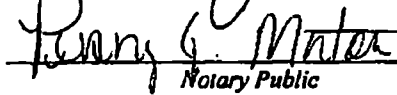
- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this

3rd day of January, 2017.


Notary Public

My Commission Expires: Feb 28, 2018

PAINTERS GRANT
 COLLETON COUNTY
 COMMON PLEAS
 2014 FEB 25 PM 1:29

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
	)	
	)	2014-CP-15-0163
	)	
Timothy A. Lemacks, #345057,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed February 25, 2014, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders January 2011 term of the Colleton County Grand Jury for criminal sexual conduct with a minor- first degree. The Applicant was represented by David Mathews, Esquire.

The Applicant proceeded to trial and was convicted. On March 2, 2011, the Applicant was sentenced by the Honorable D. Craig Brown to confinement for a period of twenty-five (25) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Lanelle Durant, Esquire, of the Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Lemacks, No. 2013-UP-363 (S.C. Ct. App. October 2, 2013). The Remittitur was issued on October 18, 2013.

Attached herewith and incorporated herein are the records of the Colleton County Clerk of Court regarding the subject conviction and the Applicant's records from the South Carolina Department of Corrections. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

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

1. Police never tested me for DNA.
2. No DNA or visual evidence present during the use of rape kit.
3. Rushed to trial, David Mathews put in for a speedy trial without my knowledge.

III.

The Respondent construes the Applicant's complaints about his attorney David Mathews as an allegation of ineffective assistance of counsel. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent construes the Applicant's remaining allegations as challenges to the sufficiency of the evidence presented by the State during the Applicant's trial. The post-conviction relief court cannot consider the sufficiency of the evidence against a convicted defendant. S.C. Code Ann. § 17-27-20(a)(6) (1985). The Uniform Post-Conviction Procedure Act is not a substitute for remedies that were available before and during the original trial or by review on motion for a new trial or on appeal. Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975). Therefore, the Court should summarily dismiss this ground for relief.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held and this Court summarily dismiss the Applicant's claims challenging the sufficiency of the evidence against him.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

ASHLEIGH R. WILSON
Assistant Attorney General

By: APW
ATTORNEYS FOR RESPONDENT

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

Aug 20, 2014.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	
	)	
	)	2014-CP-15-0163
	)	
TIMOTHY LEMACKS, #345057	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Tristan M. Shaffer
4701 Oleander Drive
Myrtle Beach, SC 29577

DATED this 21th day of August, 2014


 Anne Henley, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
14TH JUDICIAL CIRCUIT
COUNTY OF COLLETON
COURT OF COMMON PLEAS
CASE NUMBER 2014-GS-15-00163

TIMOTHY ALLEN LEMACKS

APPLICANT

VERSUS

OCTOBER 27, 2014

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING
BEAUFORT, SOUTH CAROLINA

STATE OF SOUTH CAROLINA

B E F O R E:

HON. EDGAR W. DICKSON, JUDGE

WANDA H. ROWE, CVR-M
OFFICIAL COURT REPORTER

APPEARANCES

ON BEHALF OF APPLICANT
TIMOTHY ALLEN LEMACKS:

HON. TRISTAN M. SHAFFER
AXELROD & ASSOCIATES, P.A.
604 SIXTEENTH AVENUE NORTH
MYRTLE BEACH, SOUTH CAROLINA 29577
TELEPHONE 843-916-9300
tristan@gotaxelrod.com

ON BEHALF OF
STATE OF SOUTH CAROLINA:

HON. ASHLEIGH R. WILSON
ASSISTANT ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SOUTH CAROLINA 29211-1549
TELEPHONE 803-734-3693
awilson@scag.gov

INDEX

Caption.....	1
Appearances.....	2
Index.....	3
By the Court.....	4

DAVID MATTHEWS

Direct Examination	
By Mr. Shaffer.....	8
Cross-examination	
By Ms. Wilson.....	20
Re-direct Examination	
By Mr. Shaffer.....	27
Applicant Rests.....	28
By the Court.....	28

ATTACHMENTS

Certificate of Reporter.....	30
Keyword Index	

EXHIBITS

No exhibits were admitted.

10-27-14 LEMACKS

POST-CONVICTION RELIEF HEARING

1 BEGINNING 11:52 A.M.

2 BY THE COURT:

3 THE COURT: All right. We're on the record. This
4 is Mr. Timothy Allen Lemacks.

5 MS. WILSON: Yes, your Honor. This is Ashleigh
6 Wilson, for the State of South Carolina. Timothy
7 Lemacks versus State --

8 THE COURT: Lemacks.

9 MS. WILSON: Lemacks. Thank you. Versus the State
10 of South Carolina, Docket Number 2014-CP-15-00163. Mr.
11 Lemacks was indicted January of 2011 for one count of
12 criminal sexual conduct with a minor in the first
13 degree. That's Indictment Number 2010-GS-15-00916. Mr.
14 Lemacks was -- proceeded to trial, and was convicted on
15 March 2, 2011. He received a 25-year sentence, and he
16 proceeded to trial before Judge Craig Brown. He was
17 represented at trial by Mr. David Matthews. He had an
18 appeal, which was dismissed, after the Court -- a court
19 -- after the Court of Appeals reviewed it, pursuant to
20 *Anders*, and his appeal was dismissed October 2, 2013. A
21 remittitur was issued October 18, 2013, and he got his
22 application for post-conviction relief on February 25,
23 2014. The State's has filed its return. It's my
24 understanding from Mr. Shaffer, who is here, and also,
25 Mr. Lemacks is here, for the record, that he submitted

10-27-14 LEMACKS

POST-CONVICTION RELIEF HEARING

1 some amended applications. I'm not sure if a formal
2 amendment has been filed, but just, at this point, I
3 have not seen it. And we would just ask that he
4 enumerate those in the record, so the State can evaluate
5 whether or not they're prepared to proceed on those.

6 THE COURT: Okay.

7 MR. SHAFFER: And your Honor, I apologize. I guess
8 my standard practice is, sort of, not to do formal
9 amendments, and generally just tell the A.G. what's
10 going on, and then amend verbally at the time of the
11 hearing. And the 19th and -- and -- I don't doubt that
12 she didn't get it -- I had sent a -- something to her
13 email account on the 19th involving amendments. The
14 amendments are that, in addition to the ones raised
15 previously, that trial counsel was ineffective for
16 failing to object to Michelle Amos's (phonetic spell)
17 testimony to statements made by the alleged victim that
18 are outside of time and place. That occurred at
19 Transcript Page 165 through 167.

20 THE COURT: Okay.

21 MR. SHAFFER: The next one is that trial counsel
22 was ineffective for failing to object to Tiffany Davis's
23 testimony of statements that were made by the alleged
24 victim that were outside of time and place. And that is
25 Transcript 139 through 142.

10-27-14 LEMACKS

POST-CONVICTION RELIEF HEARING

1 Then, that trial counsel was ineffective for
2 failing to object to Epifa -- I apologize, it's
3 E/p/i/f/a/n/i/o --

4 THE COURT: Epifanio.

5 MR. SHAFFER: -- Garcia, conveying that the victim
6 identified Applicant to her. And that's obviously
7 hearsay, outside of time and place, and that's
8 Transcript 199, Lines 13 through 20.

9 That trial counsel was ineffective for failing to
10 object to Detective Dortehea Gathers, who conveyed
11 hearsay statements made by the victim, giving specific
12 facts about the case that were outside of time and
13 place. And that's Transcript 248 through 251. Also,
14 Transcript Page 253; and also, Transcript 255 through
15 256.

16 The next allegation is that trial counsel was
17 ineffective for failing to object to the State's
18 attacks, basically, the ad hominem attacks on trial
19 counsel during closing argument. Those took place on
20 272.

21 Then, that trial counsel was -- another allegation
22 was that trial counsel was ineffective for eliciting
23 hearsay from the victim's sister, on Page -- on
24 Transcript Page 131. And that trial counsel was
25 ineffective in allowing Tiffany Davis to discuss that it

10-27-14 LEMACKS

POST-CONVICTION RELIEF HEARING

1 had previously happened to her as a child. And that's
2 Transcript 145 through 146. I believe that was the
3 mother. Those are all the new allegations, your Honor.

4 THE COURT: Is the State ready to proceed on those
5 allegations?

6 MS. WILSON: Well, no, your Honor, but I probably
7 can resolve that, if you would just give me one second
8 to speak to Mr. Matthews about it.

9 THE COURT: Okay. I'll give you a second.

10 OFF THE RECORD 12:00 P.M.

11 BACK ON THE RECORD 12:05 P.M.

12 MS. WILSON: Your Honor, the State's ready to
13 proceed. Thank you.

14 THE COURT: All right. Mr. Shaffer.

15 MR. SHAFFER: Applicant would call David Matthews.

16 THE COURT: Mr. Matthews. Just for the record,
17 we've got to do it.

18 DAVID MATTHEWS: Yes, sir.

19 MADAM CLERK: Do you solemnly swear or affirm that
20 the testimony you give to the Court in this trial shall
21 be the truth, so help you God?

22 DAVID MATTHEWS: I do.

23 THE COURT: Okay. All right.

24 THE COURT: All right. Mr. Shaffer, as soon as he
25 gets comfortable up there, I'm going to let you get

10-27-14 LEMACKS PCR

DIRECT - DAVID MATTHEWS

1 started.

2 MR. SHAFFER: Thank you.

3 THE COURT: Yes, sir.

4 DAVID MATTHEWS

5 DIRECT EXAMINATION, BY MR. SHAFFER:

6 Q Mr. Matthews, you represented Mr. Lemacks?

7 A Mr. Lemacks, I did.

8 Q And tell us a little bit about the allegations
9 against him.

10 A The State contended that he put his -- was sleeping
11 on a couch at a friend's house, got off the couch in the
12 middle of the night, and laid down with a girl and put
13 his hand -- his niece, I guess, and put his hands down
14 her pants.

15 Q Okay. Was it a biological niece or just?

16 A I don't remember.

17 Q Okay. Now, did they have any physical evidence
18 that he had done this?

19 A No.

20 Q Okay. Any DNA?

21 A No.

22 Q Anything like that? Okay. So, essentially, it was
23 a little girl's story versus his story, right?

24 A Little girl's story and a brother.

25 Q Okay.

1 A A little boy.

2 Q Okay.

3 A Testified that he was down on the floor with --
4 with his sister.

5 Q All right. And the little boy, he was in the room,
6 correct?

7 A Right. They had said that he had been -- the
8 parents or somebody asked him to stay over there. He
9 slept on the couch, and I -- I don't know if it was -- I
10 guess it was just two of them, the brother and sister on
11 the floor. It might have been three, but I think it was
12 two. Brother and sister were sleeping on sleeping bags,
13 or, you know, a little palette or something like that,
14 on the floor, next to the couch.

15 Q Okay. And so, essentially, the little boy
16 testified that he had seen him laying there, but not
17 seen him actually putting his hands down her pants. Is
18 that right?

19 A That was a point of some contention, actually. I
20 didn't, based on the -- my recollection is the incident
21 report, he didn't have much to say one way or the other,
22 and I was kind of surprised that -- when the State
23 presented him as a witness. I had asked for some
24 access, I think, to talk to him ahead of time, and
25 wasn't given any. I discussed with Timothy whether or

10-27-14 LEMACKS PCR

DIRECT - DAVID MATTHEWS

1 not he would -- I talked to the Solicitor, and said that
2 I didn't think it was -- that this was right to do, and
3 that -- he said if you'd stipulate that -- that he was
4 on the floor with the girl, that he wouldn't call the
5 witness. And I asked Timothy about that, and he said he
6 would not stipulate to that. And so, it went forward.

7 Q Okay. And there were several people who were not
8 the minors who testified as witnesses in this trial,
9 right?

10 A I'm sure, yeah.

11 Q Okay. Do you recall what happened the next day,
12 whenever this came to light, for the adults, at least?

13 A The next day following the incident, or the next --

14 Q Following the incident, yes.

15 A My recollection, generally -- okay. I -- no, I
16 don't.

17 Q Okay. Do you have a copy of the transcript?

18 A I was just looking at Ms. Wilson's copy. I'm sure
19 I do in my briefcase. His Honor has handed me a copy.
20 I'm ready.

21 Q If you could, turn to Page 165 through -- or Page
22 165 of the transcript.

23 A Okay.

24 Q Okay. And this is the testimony of the doctor,
25 correct?

1 A I'm catching up here. Okay.

2 Q Do you recall who the doctor was?

3 A I'm reading that it says Dr. Maya.

4 Q Okay. Was she from MUSC? Is that the proper

5 doctor?

6 A Whatever it says.

7 Q Okay.

8 A I mean, whatever recollection I have is from

9 looking at this document.

10 Q Okay. Now, if you could, look through the next two

11 pages.

12 A Okay. What --

13 Q Okay.

14 A Okay.

15 Q During that, Dr. Maya testifies to statements made

16 by the alleged victim. Is that right?

17 A I'm looking at -- let's see. Let's see. You're

18 looking at 166, Line 1:

19 *Yes, she made a statement to the emergency*

20 *room physicians; but she also made a statement*

21 *that it was the same nurse collecting the*

22 *evidence.*

23 And the question is:

24 *What was that statement?*

25 *May I check the record specifically?*

1 And then, at Line 6, I object:

2 Your Honor, as to time and place of the
3 incident, I think it's within bounds. Anything
4 beyond that, I do not.

5 Q Okay. And so, you did object to time -- to limit
6 it to time and place, correct?

7 A It appears that I did.

8 Q Okay. What happened after that?

9 A Your Honor, for purposes of medical treatment,
10 that's all I need to say on it. Your Honor,
11 I can understand the nature of the objection.
12 You just want me to just keep reading?

13 Q Yeah. You said you understand the nature of the
14 objection.

15 A That's the -- Assistant Solicitor Ballard says:
16 I understand the nature of the objection,
17 your Honor. You may continue Dr. Maya.

18 Q Now, does the Judge ever specifically rule on that
19 objection?

20 A I -- I don't see it. Let's see. Well, it looks
21 like, on Page 165:

22 All right. Ladies and gentlemen of the
23 jury, I sustained the objection.

24 I don't know what objection. He sustained
25 something on Page 165:

1 *Let the record reflect, the last*
2 *response of Dr. Maya be stricken from the*
3 *record, and not considered a response.*

4 So, I don't -- let's see. I think I -- if -- if
5 Chas tried to go into it again, I maybe -- I don't know
6 whether I renewed it or not. I mean, I -- I think I
7 said something. I think he'd ruled earlier.

8 Q And on the next two pages, did you attempt to go
9 into information that was beyond the scope of time and
10 place?

11 A *It hurt*, she said. Okay. This is -- I guess
12 that's Chas, since it's a question. Yeah, I probably
13 should have objected to that, again, and I did not. It
14 doesn't look like I did.

15 Q Okay. And if you could, turn to Page 139. It
16 would be 139 through 142.

17 A Okay. Okay. What -- what -- what should I have
18 objected to that I didn't? If you'd just tell me.

19 Q And I apologize. I actually do not have a copy of
20 the transcript with me.

21 A I mean, I've looked at it, and there are several
22 things that I should have objected to, but I didn't. I
23 mean, this may be one of them.

24 Q Now, she -- this is Tiffany Davis testifying,
25 correct?

1 A It appears so, yes.

2 Q Okay. And she testifies to -- basically, she
3 recites the victim's account of the incident. Is that
4 right?

5 A Seems to, yes.

6 Q Okay. And she identified the defendant in it?

7 A I think she's talking about -- yeah, right. *Timmy*
8 *won't get up.*

9 Q Okay.

10 COURT REPORTER: I'm sorry, what was your?

11 A Timmy.

12 COURT REPORTER: *Won't get up.*

13 A Let's see. Looking at Page 139, Lines 3 through 4,
14 I said:

15 *All right.*

16 And he said:

17 *Timmy won't get up.*

18 Or she -- I guess that should -- yeah, should be
19 *she said*, or is that the -- must be the son.

20 A Okay.

21 Q But essentially, she's recanting specifics about
22 the event that are outside of time and place?

23 A Yeah, yes.

24 Q Okay. If you could turn now, to Page 199, and
25 review Lines 13 through 20.

1 A *Tiffany met me crying, and I said, 'what's wrong;*
2 *what's wrong with you'?* She told me, '*victim*
3 *-- victim was touched by Timmy. I said, 'what;*
4 *what do you mean'?* And then, that time, like,
5 *Timmy touched her. I was like, I had seen the*
6 *victim. I said, 'where's my baby at'?* Where's --
7 I don't know why it -- oh, this says *victim*, but I
8 -- that -- I don't -- that doesn't sound right. But,
9 *anyway.*

10 Q And it's a redacted transcript you're looking at.

11 A Okay. All right. Just so I -- yeah, I don't
12 recall anybody -- real people don't talk that way, and
13 it didn't sound familiar. So, you're telling me that
14 that's -- I'm not imagining that.

15 Q Okay.

16 A Okay.

17 Q But if it was the girl, the alleged victim in this
18 case, where it said *victim*, if her name was placed
19 there, do you believe --

20 A I probably should have objected, and it doesn't
21 look like I did.

22 Q Okay. And if you could also look at Pages 248
23 through 251.

24 A Looks like I didn't do it again. I should have
25 objected there, looks like.

10-27-14 LEMACKS PCR

DIRECT - DAVID MATTHEWS

1 Q Okay. And then, if you could flip over to Page
2 253.

3 A Okay. What am I looking at?

4 Q And on Page 253, it actually says -- she stated
5 that -- and I'm looking at Line 9 through 10 -- she's
6 talking about what the victim stated her clothes were.

7 A Oh, right.

8 Q Do you find that objectionable?

9 A Yeah. I -- I -- seems like my recollection is
10 that, whether that was objectionable or not, my -- my
11 recollection is that -- that -- that she said she was
12 wearing something that she clearly wasn't. So, I -- if
13 I'm -- if my memory serves right, I wanted them to get
14 into that, even though it was hearsay. That's my
15 recollection.

16 Q Now, if you could turn to 255 through 256. And on
17 255, they're talking about the Apple Bottom jeans again.

18 A Okay.

19 Q But you stated you had wanted them to get into
20 that. Is that right?

21 A Apple Bottom Jean tee shirt, as opposed to Apple
22 Bottom -- the one thing. Let's see. Right now, you
23 are --

24 Q So, I guess, more importantly, if you could, could
25 you go to 256.

1 A Okay.

2 Q And then, on 256, she actually identifies -- or the
3 hearsay person says -- or excuse me, the witness
4 actually testifies that the victim had said Timmy
5 touched her Lucy.

6 A Okay. I see that.

7 Q And you would agree that that was objectionable, as
8 well?

9 A I should have objected to that, and I did not.

10 Q Okay. And if you could, turn to 131.

11 A Okay.

12 Q Okay.

13 A He said, *Timmy put his hand in victim*. Again,
14 probably, that didn't actually say *victim*.

15 Q Okay.

16 A And he said, *victim said* -- is that what you're
17 talking about?

18 Q Yeah. And you elicited that statement, correct?

19 A Yeah. And Chas said that's hearsay.

20 Q Okay.

21 A So, the -- the prosecutor objected to my attempt to
22 elicit hearsay.

23 Q Okay.

24 A So, apparently, there's hearsay all over the place.

25 Q Okay. Now, if you could, flip to -- and you would

10-27-14 LEMACKS PCR

DIRECT - DAVID MATTHEWS

1 agree that many of those parts I just pointed out were
2 objectionable, right?

3 A Yes.

4 Q Okay. If you could, turn to Page 272. It should
5 be the Solicitor's closing argument.

6 A Okay. All right.

7 Q And if you could, review, just to yourself -- well,
8 you can read out loud, 17 through --

9 A Yeah. Chas used to do that stuff all the time.
10 And any time you -- when he -- when he says, Mr.
11 Matthews is a good lawyer, he's given you a red herring,
12 and all that sort of stuff, you know, I always -- I
13 mean, that was -- you wonder -- I wonder, sometimes, how
14 -- I mean, I think I made a decision. I didn't like it.
15 Chas used to do that stuff all the time, and I didn't
16 like it. Usually, it didn't work very well for him. It
17 -- he generally, you know -- but I always have some
18 hesitation, unless something is really awful, I've got
19 some problem with objecting to somebody's final -- their
20 summary, their closing argument. Unless it's something
21 -- unless they're introducing new facts that are truly
22 awful, I generally don't object, because I don't -- I
23 don't want to look like -- it's just a matter of trial
24 strategy. I don't think it's very -- I don't think it's
25 smart.

1 Q Okay.

2 A You know, I've -- I made some mistakes. I don't
3 know that that was one of them.

4 Q Okay. But you would agree that some of the other
5 things with the hearsay is probably a mistake?

6 A Yes. I probably should have objected to those.

7 COURT REPORTER: I'm sorry, *was probably?*

8 Q A mistake.

9 A Yes. Yes, it probably was a mistake. I should
10 have objected.

11 Q Okay. And you had previously stated that this was
12 basically a credibility case, right? It hinged on
13 credibility?

14 A Right, and -- right. That's right. And I mean,
15 one of the -- we talked some about whether or not -- I
16 mean, in terms of showing the motivation to do this.
17 And I think that, you know, our thought was, or my
18 thought was that the -- why the child would make this
19 stuff up is that mama put her up to it, because her --
20 another family member, Brandon Hartley, I had
21 represented, and got acquitted for the same offense, and
22 the family was upset about that and wanted to get him.
23 But how do you get into that? I mean, you know, you --
24 if you do that, you're telling the jury that the whole
25 -- like, the whole family are pedophiles, you know. So,

10-27-14 LEMACKS PCR

CROSS - DAVID MATTHEWS

1 anyway. Yeah, I -- I made some mistakes.

2 Q Okay.

3 MR. SHAFFER: Court's indulgence.

4 THE COURT: Okay.

5 MR. SHAFFER: No further questions.

6 THE COURT: All right. Anything on cross-
7 examination.

8 MS. WILSON: Yes, your Honor. Begging the Court's
9 indulgence.

10 THE COURT: Okay.

11 DAVID MATTHEWS

12 CROSS-EXAMINATION, BY MS. WILSON:

13 Q Mr. Matthews, you gave some testimony at the start
14 about the victim, the victim's brother, and his
15 testimony about whether or not he saw Mr. Lemacks on the
16 floor or on the couch, or whatever the sleeping
17 arrangement was?

18 A Right, right, right.

19 Q It's correct that her brother didn't actually
20 testify at the trial. Is that correct?

21 A Whatever the transcript says.

22 Q Okay. Do you have your copy?

23 A I have the Judge's copy.

24 Q Okay. The Judge's copy. Well, would you mind
25 flipping to the index in the front, to see if --

1 A Let's see.

2 THE COURT: What is the Judge -- what was the
3 victim's brother's name? just so I'll have it.

4 MS. WILSON: I believe he was E.G. .

5 THE COURT: Okay.

6 MS. WILSON: I believe he was a E.G. .

7 BY MS. WILSON:

8 A Let's see.

9 Q In the transcript on Page 2, it reflects the
10 victim's testimony, and it reflects a minor, and that
11 minor was her sister.

12 A Oh.

13 Q Because I have the unredacted version.

14 A Oh, well, maybe the sister is who I was talking
15 about. I don't know. I mean, I know that there were
16 two people out there. One of them, I -- I know I asked
17 to talk to one of them. I might have said brother, and
18 meant sister. It's been a long time ago. I know that
19 one of them -- one of them, I asked whether Chas was
20 going to call as a witness, because the -- it may have
21 been the brother. And because I thought that might be
22 helpful, I couldn't, you know, I -- and Chas said that
23 the kid, you know, you ask him what day it is, and he
24 says, orange, you know, or something like that; that
25 he's just nuts. I don't recall. I may have said

10-27-14 LEMACKS PCR

CROSS - DAVID MATTHEWS

1 brother, and meant -- there was a sibling there.

2 Q Okay.

3 A And you know, that says it's redacted to say minor.
4 Yeah. That's -- I -- you know, and whatever it says in
5 there.

6 Q Okay. And with regard to Dr. Maya's testimony that
7 Mr. Shaffer pointed out, based on the record that you
8 reviewed, you objected to that testimony?

9 A Yes.

10 Q And the Court allowed the -- after your objection,
11 the Court allowed the testimony to proceed. Is that
12 correct?

13 A It appears so.

14 Q And then, Mr. Shaffer also pointed out -- pointed
15 out several portions of the testimony from Officer
16 Gathers, who was, I guess, kind of, the officer
17 investigating the crime.

18 A Right.

19 Q And do you recall that Officer Gathers, basically,
20 when she was recounting what the victim said, that she
21 was trying to explain that as a basis of her
22 investigation and what resulted in, ultimately, the
23 defendant being arrested? Does that sound correct to
24 you; that, when she recounted --

25 A Yeah, that's -- that's typically how it's -- how

1 it's done, and I don't -- sometimes, it's just a matter
2 of how far they go. You know, you can present a little
3 bit, not for the truth of the matter, but why you're
4 investigating it. And that may have been what she was
5 saying. I don't -- I don't know. I mean, I -- there
6 were some objections I should have made, and I don't
7 know whether that was one of them or not.

8 Q Okay. And when we were talking about Officer
9 Gathers' testimony on Page 253, you testified that you
10 wanted to get into a little bit of that testimony to
11 kind of point out some of the inconsistencies of the
12 victim's statement. Can you expound on that?

13 A Not really. I mean, whatever is in here. I mean,
14 like I said, it's been a while ago. I mean, I know
15 that, generally speaking, I want to get into why
16 somebody's lying, if they're lying, if they're just
17 mistaken. I mean, why -- why would the little -- why
18 would a girl say this if it didn't happen? And you
19 know, the most common reason you see that is because
20 they -- somebody puts them up to it, or they want to be
21 cool, and somebody else has made an allegation, or
22 whatever.

23 Q Um-hmm.

24 A And you know, I don't -- you know, there were --
25 the inconsistency that I remember, if I am remembering

10-27-14 LEMACKS PCR

CROSS - DAVID MATTHEWS

1 it correctly, is whether she was on top of the covers or
2 under the covers, or something like that. That, to me,
3 was a bigger problem than -- I don't remember why the
4 jeans -- or the Apple Bottom jeans, or whatever, I don't
5 remember why it's significant. I mean, presumably,
6 there should be something in the transcript to indicate
7 that, but I don't recall. But, I mean, if I'm getting
8 into that, I did it for some -- probably to show
9 inconsistencies, but I -- I had a reason.

10 Q Okay. And then, Mr. Shaffer also pointed out the
11 Solicitor's closing on Page 272.

12 A Right.

13 Q And it's your testimony today that you decided not
14 to object, kind of, on a strategic basis?

15 A Right.

16 Q Okay. And was it also part of your strategy, I
17 guess, not to -- you didn't necessarily want to
18 highlight or bring certain things to the jury's
19 attention during the closing? Is that right?

20 A Well, you know, that's -- that's -- that's right.
21 I mean, it's -- although, I think juries probably do a
22 pretty good -- my ex-wife was on a jury panel one time,
23 and I asked, it sounds like they really do listen to
24 what the judge says, which is an amazing thing. They
25 actually don't regard things if they're asked not to

1 regard.

2 I used to feel like, if it was said and you repeat
3 it, that all you're doing is drawing attention to that.
4 That still may be true, but. But yeah, I mean, that's
5 my rationale. I mean, if -- if it's -- and it's like I
6 said, Chas and I used to go round and round about that.
7 He's not there anymore, but. You know, I -- I
8 mentioned his failure to call witnesses and stuff, and
9 he'd object to it. This is -- that's -- I didn't -- I
10 didn't think it would be helpful.

11 Q Okay. And also, you talk about, on Page 134 of the
12 record, where you were questioning the victim's sister
13 on cross-examination.

14 A Which --

15 Q And you were eliciting some testimony, and the
16 Solicitor objected. Could you kind of briefly review
17 that line of questioning? starting with the victim. It
18 starts on Page -- your cross-examination starts on Page
19 130.

20 A Okay.

21 Q If you'd just briefly read your cross-examination
22 on 130 and 131.

23 A Okay. I looked at it earlier. In think, in terms
24 of her getting into her -- her stuff --

25 Q Um-hmm.

10-27-14 LEMACKS PCR

CROSS - DAVID MATTHEWS

1 A I mean, again, there were -- people get what they
2 get from somewhere. I mean, one way they get it is
3 because it happened. Another way they get it is because
4 they, you know, they have somebody else that reported
5 it, and got some positive reinforcement for it. Or, and
6 a lot of times, with, you know, you've got a -- somebody
7 that's not the actual, quote, victim, close quote, is --
8 has got an ax to grind. And I think in that one, I
9 wanted to solicit from her that she had been a victim
10 before, and that might be a way that mother and daughter
11 bond. But it also might be there's some unresolved
12 issues, feelings of injustice.

13 And one of the, you know -- that's -- that's one
14 way -- her prior abuse may have compelled her to look
15 for something that wasn't there, and the daughter
16 responded, because, you know, she wanted to please her
17 mom.

18 Q Okay.

19 A You know, and another is that -- that -- that
20 Brandon had been acquitted for doing the same sort of
21 thing; and that the family felt that they needed some
22 justice somewhere; and if it wasn't going to be against
23 Brandon, it was going to be against Tim. But you know,
24 that's probably -- I got into that to show that that
25 would be some motivation. Obviously, I didn't do a good

1 enough job, because the jury didn't, you know, they
2 didn't -- they found him guilty.

3 Q And just for clarity of the record, your comments
4 were, as to why you -- why you allowed testimony with
5 regard -- with regard to the mother's prior molestation,
6 or to this particular child, because --

7 A To the mother, as to the child. I just -- I should
8 have made an objection, and I didn't.

9 Q Okay.

10 MS. WILSON: Beg the Court's indulgence.

11 THE COURT: Take your time.

12 MS. WILSON: Thank you, your Honor.

13 THE COURT: All right. Anything on re-direct?

14 MR. SHAFFER: Yes, your Honor.

15 DAVID MATTHEWS

16 RE-DIRECT EXAMINATION, BY MR. SHAFFER:

17 Q Now, Ms. Wilson talked to you about -- a little bit
18 about the trial strategy, and strategic reasons for
19 letting some of the hearsay in.

20 A Right.

21 Q Are you saying that you had a strategic --
22 strategic reason for letting all the hearsay in?

23 A No, I'm not. I made some mistakes. Some of them,
24 I should have objected, and I did not. I mean, some of
25 the hearsay -- I objected to Dr. Maya. Might should

10-27-14 LEMACKS PCR

1 have said it again, although I think it -- I thought it
2 was clear enough on there.

3 As to the other adults testifying to things that --
4 that the child had told, I probably should have objected
5 to that, and I did not.

6 MR. SHAFFER: Okay. No further questions.

7 THE COURT: Anything on re-cross?

8 MS. WILSON: No, your Honor.

9 THE COURT: You may step down, Mr. Matthews. Thank
10 you, sir.

11 DAVID MATTHEWS: Thank you.

12 THE COURT: All right. Mr. Shaffer.

13 MR. SHAFFER: Your Honor, if you'll give me just a
14 second to speak to my client.

15 THE COURT: Sure.

16 MR. SHAFFER: Your Honor, Applicant rests, at this
17 point.

18 APPLICANT RESTS.

19 BY THE COURT:

20 THE COURT: Okay. Any witnesses on behalf of the
21 State?

22 MS. WILSON: Nothing from the State.

23 THE COURT: All right. What I'll do is, I'll
24 review the transcript, and I'll get back with you all by
25 this evening.

10-27-14 LEMACKS PCR

1 MS. WILSON: Thank you.

2 MR. SHAFFER: Thank you, your Honor.

3 THE COURT: Okay. Thank you all.

4 APPLICANT LEMACKS: Thank you, your Honor.

5 THE COURT: Thank you, sir.

END PROCEEDING 12:49 P.M.

10-27-14 LEMACKS PCR

CERTIFICATE OF REPORTER
OCTOBER 27, 2014 TRANSCRIPT OF
POST-CONVICTION RELIEF HEARING
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing October 27, 2014, Transcript of Post-conviction Relief Hearing is a true, accurate, and complete record of the proceedings had on said date, in the case of Timothy Allen Lemacks versus State of South Carolina, Beaufort County, South Carolina, Court of Common Pleas, Case Number 2014-GS-15-00163; that no exhibits were admitted; that I am of neither kin, counsel, nor interest to any party hereto.

This Certificate of Reporter contains my original signature and is attached to the copy of the transcript requested by SCCID. Pursuant to SCACR 607, requests for copies of this transcript must be made to the court reporter. Unauthorized copying of this transcript is prohibited.

Witness my signature January 3, 2017.



Wanda H. Rowe, CVR-M
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON

Timothy A. Lemacks, #345057,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

2014-CP-15-0163

ORDER OF DISMISSAL

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2015 DEC 21 AM 9:48

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 25, 2014. Respondent made its Return on August 20, 2014. An evidentiary hearing into the matter was convened on October 27, 2014, at the Beaufort County Courthouse. Tristan M. Shaffer, Esquire represented the Applicant. Ashleigh Wilson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, Applicant testified on his own behalf. David Matthews, Esquire also testified. This Court had before it a copy of the records of the Colleton County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. The Applicant was indicted at the January 2011 term of the Colleton County Grand Jury for criminal sexual conduct with a minor- first degree. The Applicant was represented by David Mathews, Esquire.

The Applicant proceeded to trial and was convicted. On March 2, 2011, the Applicant was sentenced by the Honorable D. Craig Brown to confinement for a period of twenty-five (25) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by Lanelle Durant, Esquire, of the South Carolina Office of Appellate Defense. The Applicant's convictions and sentences were affirmed by the Court of Appeals. State v. Lemacks, No. 2013-UP-363 (S.C. Ct. App. October 2, 2013). The Remittitur was issued on October 18, 2013.

In his original application, the Applicant alleges he is being held unlawfully for the following reasons:

1. Police never tested me for DNA.
2. No DNA or visual evidence present during the use of rape kit.
3. Rushed to trial, David Mathews put in for a speedy trial without my knowledge.

At the PCR hearing, Applicant, through counsel, verbally amended his application to include claims of ineffective assistance of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP).

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

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 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.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court had a copy of the Clerk's records and has read the trial transcript, all of which assists the Court in judging the witnesses' credibility.

The Court finds that Applicant was not deprived of effective assistance of counsel. Overall, defense counsel's decisions and conduct were appropriate under the circumstances and did not fall below professional norms of reasonableness. Although there was some testimony during the trial that

defense counsel should have objected to for hearsay, the Court finds that the evidence against Applicant was overwhelming and the lack of proper objections would not have changed the outcome of the trial. Therefore, this application for post-conviction relief is denied.

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on Applicant's behalf. Applicant's attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED!

Edgar W. Dickson
Presiding Circuit Court Judge
Fourteenth Judicial Circuit

December 15, 2015

Orangeburg, South Carolina

WITNESSES

Geathers (CSO)

ARREST WARRANT NUMBER

M-103457

September 24, 2010

ACTION OF GRAND JURY
TRUE BILL

person of Grand Jury

Date: 1/24/2011

VERDICT

Guilty

Sharon Gibson

Foreperson of Petit Jury

Date:

INDICT.DOT

DOCKET NO. 2010-GS-15-0916

The State of South Carolina
County of Colleton

COURT OF GENERAL SESSIONS

January, Term 2011

THE STATE

vs.

Timothy Allen Lemacks

Indictment for

Criminal sexual conduct with minor - Age 11
years or youngerSC Code: 16-03-0655(1)
CDR Code: 0385COLLETON COUNTY
GENERAL SESSIONS COURT
2011 JAN 24 PM 2:24

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF Colleton)

2010-GS-15-0916

At a Court of General Sessions, convened on January 24, 2011, the Grand Jurors of Colleton County present upon their oath:

Criminal sexual conduct with minor – Under 11 years of age

That in Colleton County, South Carolina, on or about August 14, 2010, the Defendant, Timothy Allen Lemacks, date of birth _____, did commit a sexual battery upon a minor who was less than eleven years of age, to wit: he digitally penetrated Minor _____, date of birth _____, in violation of Section 16-3-655, 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.



Isaac M. Stone
Solicitor

TRUE BILL