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**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

Appeal from Berkeley County  
Honorable Stephanie P. McDonald, Circuit Court Judge  
Appellate Case No. 2013-001976

THE STATE,

Appellant,

vs.

MARCUS GREENE,

Respondent.

**RECORD ON APPEAL**

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**SC Court of Appeals**

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 5 vs. }  
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 Defendant. }

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September 9, 2013

Moncks Corner, South Carolina

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14 B E F O R E:

The Honorable Stephanie McDonald, Judge

16

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1 PROCEEDINGS

2 THE COURT: All right. Which one do we want  
3 to take up next?

4 MS. WILLIAMS: I vote for the bifurcation,  
5 Your Honor.

6 MR. GROEBER: I would agree.

7 THE COURT: And I have read the cases and I  
8 have read the McCalley opinion dealing with the  
9 severance issue, but unfortunately they chose the  
10 220B approach and didn't write an opinion. But  
11 that's okay. That goes to the proposition that  
12 the issue is discretionary. As I understand it  
13 the concern that the defense has is the prejudice  
14 under Rule 403 that could come into play if the  
15 prior registry or prior offense -- I need y'all to  
16 articulate what it is -- were to come in through  
17 the jury before a finding had been made before as  
18 to the alleged battery itself; is that it in a  
19 nutshell?

20 MR. GROEBER: Yes, Your Honor.

21 THE COURT: Would you just put your argument  
22 on the record for me? I have read your brief.

23 MR. GROEBER: Yes. I'll keep it brief. I  
24 appreciate the Court's indulgence, I filed the  
25 brief.

1. THE COURT: I have it.

2 MR. GROEBER: The grounds are  
3 unconstitutional as written and if applied. I  
4 think the remedy for the unconstitutionality is  
5 bifurcation. The only other grounds that I failed  
6 to mention in the brief that I would like to  
7 address in oral argument is the issue about  
8 separation of powers.

9 THE COURT: Right.

10 MR. GROEBER: I hope that you have those  
11 cases that I sent you.

12 THE COURT: I do have those cases and we, in  
13 fact, argued that in a motion last week. Andrew  
14 Grimes (phonetic) argued it extensively.

15 MR. GROEBER: Okay. Well, believe it or not,  
16 I didn't get this from him.

17 THE COURT: I am not saying that you got it  
18 from him. I just meant that I just had it so I'm  
19 relatively familiar with it.

20 MR. GROEBER: I just, you know, on the  
21 separation of power specifically, if the statute  
22 requires the State to prove that he's on the  
23 register then it removes the power of the courts  
24 to enforce their rules and procedures, and  
25 specifically in this case it would be 403 and

1 403B. And so we think that that is an  
2 unconstitutional separation of power because that  
3 statute as written fringes upon the judiciary's  
4 role to interrupt -- to promulgate the rules and  
5 to interpret the rules, and especially to protect  
6 the Defendant's due process rights to a fair trial  
7 and not be prevented or for them to be and/or  
8 extremely prejudicial evidence. That is it in a  
9 nutshell.

10 THE COURT: Okay. Ms. Williams.

11 MS. WILLIAMS: Your Honor, I reviewed the  
12 Defendant's motion again before I came up here.  
13 And I guess just to frame the issue the way that I  
14 see it, and I do this respectfully because I  
15 understand the Court's concerns with the  
16 prejudicial nature of the sex offender registry.

17 THE COURT: Sure.

18 MS. WILLIAMS: If the Court finds that that  
19 element of the statute is too prejudicial for the  
20 jury to hear then I think the remedy is that it's  
21 not constitutional and that that would be the  
22 holding.

23 THE COURT: No, I don't think so, but keep  
24 going.

25 MS. WILLIAMS: I anticipated that, that is

1 why I said respectfully.

2 THE COURT: You don't have to do all of that.  
3 I understand. Make your argument.

4 MS. WILLIAMS: I think sometimes as advocates  
5 we come off as being a little too forceful so I  
6 want to make sure that you understand that.

7 THE COURT: I do.

8 MS. WILLIAMS: As Defendant he doesn't have  
9 the authority of that option.

10 THE COURT: He does in other states. It is a  
11 matter of first impression here in South Carolina  
12 as I understand it.

13 MS. WILLIAMS: And for purposes of the record  
14 I would say that it is analogous to the burglary  
15 statutes and I think the case law is very  
16 conclusive in this state. And as you read in my  
17 briefs we rely on Washington, Benton, Hamilton,  
18 and even Old Chief versus United States. And  
19 essentially courts in this jurisdiction have ruled  
20 that not only does the State have a right to prove  
21 its case if it is an element of the statute, but  
22 that we can't be forced to stipulate to that  
23 element and that we can present it to the jury.  
24 As I also said in my motion, we are mindful of  
25 some of the restraints that Old Chief put on us.

1. What we are here proposing is to have a witness  
2 testify that Mr. Greene has been found guilty  
3 pursuant to, and we would use the language  
4 specifically in the statute, which is I believe  
5 23-3-84(D).

6 Mr. Greene, actually, Your Honor, he was  
7 indicted for criminal sexual conduct with a minor,  
8 and he pled to assault and battery in the second  
9 degree and was placed on the sexual offender  
10 registry.

11 THE COURT: When was that?

12 MS. WILLIAMS: That was -- actually I have a  
13 copy of the indictment. And I would like to make  
14 that an exhibit.

15 THE COURT: That would be wonderful.

16 MS. WILLIAMS: With the Court's indulgence.

17 THE COURT: Certainly.

18 *(Whereupon, Court's Exhibit No. 1 was marked*  
19 *for identification.)*

20 MS. WILLIAMS: This was four months before  
21 this event occurred he got out, so it was March of  
22 2012.

23 THE COURT: Thank you.

24 MS. WILLIAMS: If you could just mark that as  
25 a Court's exhibit, Your Honor, for the purposes of

1 this argument.

2 THE COURT: Okay. Court's 1.

3 MS. WILLIAMS: So we would rely on those  
4 arguments as far as burglary first statute,  
5 because we do believe that they are analogous to  
6 this. This is an element of the crime. This is  
7 not 404(B) evidence, this is actually the  
8 Legislature decided that this should be an element  
9 of the crime.

10 We would ask, Your Honor, it is difficult for  
11 me to frame my next argument as far as bifurcation  
12 without understanding what you are proposing to do  
13 because I am having a hard time figuring that out,  
14 so if you could just let us know how it would be  
15 bifurcated then I could probably, you know, go  
16 from there.

17 THE COURT: Well, the proposal would be that  
18 almost in the next -- and this is, you know, still  
19 up for discussion because I haven't ruled yet.  
20 I'm still listening and I am still reading.  
21 There's some language in one of the burglary  
22 cases, I can't remember if it is Benton or Chetham  
23 (phonetic), that typically directs the application  
24 to the burglary statute. It is not just a wide  
25 range of holding to everything.

1           And as you know in the context of DUI cases  
2           there's information that is redacted on the data  
3           master form that is part of the element of the  
4           offense as I understand it. I think that's  
5           Henderson, but we need to pull that up.

6           There's also a lot of language regarding  
7           criminal sexual conduct and lewd act cases  
8           involving children and the special prejudicial  
9           effects that those situations have under 404.  
10          Much of it I think has come into context of the  
11          forensic specialist experts that really aren't  
12          allowed to opine anymore about credibility but --  
13          in the discussion about how harmful it was in that  
14          context.

15          So my point in thinking things are somewhat  
16          different under Rule 403 in this lewd act and  
17          sexual battery context arise from that. It is  
18          whether the prior incident is substantially more  
19          prejudicial. I would think that we would need to  
20          submit a special interrogatory to the jury to find  
21          if indeed there was battery. Because you have got  
22          to have the attempt to have a battery. Because I  
23          think it is attempt here. Is that not what he is  
24          charged with?

25                 MS. WILLIAMS: No, Your Honor, it is assault

1 with intent. So basically they have to find that  
2 she was in fear of an assault. And I forget the  
3 language, but it is in the jury instruction and it  
4 goes right back to the statute. But she is in  
5 fear of him committing the assault on her, with  
6 the intent to commit the sexual battery. In this  
7 case his words are -- you know, he's basically  
8 asking her for sex while he's grabbing her breast.

9 THE COURT: That is what they have got to  
10 find. They have to find that element before they  
11 even need to get to the registry part. I  
12 understand you want them to find because he has  
13 been on the registry before that they are going to  
14 convict him of this. That is exactly what 404  
15 doesn't allow you to do.

16 MS. WILLIAMS: Okay. If you could explain to  
17 me, you want to present interrogatories to the  
18 jury about the assault or about the sexual  
19 battery? I just got a little confused.

20 THE COURT: Let me just read you the statute.  
21 That might alleviate some of this. I'm not even  
22 getting into the charge yet because I don't quite  
23 think that we are there yet. But some of it will  
24 be related to the jury charge.

25 MS. WILLIAMS: And that is another point,

1 Your Honor, just to put on the record. But I  
2 think that the cases state that with a jury  
3 instruction, just tempering the prior conviction  
4 and explaining to the jury how they can consider  
5 that.

6 THE COURT: In a burglary case, yes, you are  
7 right, it does say that.

8 MS. WILLIAMS: In a burglary case.

9 THE COURT: Okay. Assault with intent to  
10 commit criminal sexual conduct with a minor. The  
11 first element is the intent to engage in the  
12 sexual battery with the victim. And then the  
13 regular application when it's not intent,  
14 16-3-659(A), it says, A sexual battery. Okay? Do  
15 you need to pull your statute?

16 MS. WILLIAMS: Well, it is assault with  
17 intent, not attempted. I think that there are two  
18 separate -- two separate things.

19 THE COURT: That is not what we are arguing  
20 about right now.

21 MS. WILLIAMS: The two elements are --  
22 there's three elements. That she is under the age  
23 of 16, that sexual battery committed, in this  
24 case, with intent to commit sexual battery and  
25 that he's been convicted under 23-3-340(C) or (B).

1 THE COURT: Exactly that is my point. You  
2 have to have all three of them for that  
3 Subsection. You have to find the first two. I  
4 mean, it doesn't matter what order they get to  
5 find the element unless we give it to them in a  
6 different order.

7 If they find that she is under 16 -- I mean,  
8 I think that you are fighting about how old she is  
9 as well, if she was under 11 also, so that is why  
10 we are not under A in the first place. But if she  
11 was under 16 and committed the battery, or here,  
12 assaulted with intent to commit the battery, and  
13 then the registry. I mean, all the registry part  
14 gets you in the Legislature's wisdom was the under  
15 16 as opposed to under 11.

16 And I think that that must have been some  
17 creative compromise. I wasn't there, but there  
18 were concerns probably about statutory issues and  
19 age. But even if the Legislature intended for  
20 there to be -- I think it's well within the  
21 Legislature's purview to put the third element on  
22 it being the prior registry or the prior  
23 conviction. That doesn't mean that a jury has to  
24 hear that before they hear the other two elements.  
25 It is a cart-before-the-horse situation.

1 I know y'all want to put it in that he was on  
2 the registry. Heck, I am sure y'all want to put  
3 in on the phone call that he has some problem  
4 going on in Georgia too, but that is what says 403  
5 says that you can't do. And I'm not going to find  
6 the statute in 403 inconsistent. What I'm going  
7 to probably find is that under the facts of this  
8 case I need to sever that particular issue in my  
9 discretion under Rule 42(b) of the Rules of Civil  
10 Procedure which apply to the criminal rule.

11 MS. WILLIAMS: So, you are saying that it's  
12 not the statute it is this case -- it is not the  
13 fact that it's this statute that has that element  
14 in it, you are saying that --

15 THE COURT: It is the statute as applied in  
16 certain circumstances. If we need to take a break  
17 and I'll look at Henderson and the data master  
18 section we can certainly do that.

19 MS. WILLIAMS: I'm not questioning the  
20 Court's understanding of the law. I'm trying to  
21 understand how you propose to do that.

22 THE COURT: We are not at that point. We  
23 haven't even gotten to the jury charge or verdict  
24 form. We haven't even gone over y'all's voir dire  
25 yet. I'm trying to rule on a motion and we are

1 getting into extraneous matters.

2 MS. WILLIAMS: This might be the subject of  
3 an interlocutory appeal and in order for us to do  
4 that we need to understand why the Court proposes  
5 to accomplish this, because depending on that we  
6 may not have an issue. That is the reason that  
7 I'm asking.

8 THE COURT: I think that I have told you. I  
9 think that I have answered the question.

10 MS. WILLIAMS: So could you just tell me how  
11 you propose to let the jury just hear the first  
12 two elements? Would it be they would get a jury  
13 verdict form for the first two elements, and then  
14 once they came back and that happened we would  
15 then have to prove the next element?

16 THE COURT: That is how a bifurcation works.

17 MS. WILLIAMS: So --

18 THE COURT: The only witness that you  
19 wouldn't put up if we go this route -- I haven't  
20 said that we are going to, I'm still reading law.  
21 The only witness that you wouldn't put up before  
22 they reached a determination is the registry  
23 person, okay. Because think of it like the old  
24 logic classes, it is A and then B. If they don't  
25 find that it's an assault with intent to commit a

1 sexual battery occurred, they never have to get to  
2 B because they didn't get past A. It is done this  
3 way in civil trials all of the time.

4 MS. WILLIAMS: I understand that. But I just  
5 don't know that this statute lays out that you  
6 first have to find one element before you find  
7 another.

8 THE COURT: It doesn't. The statute doesn't  
9 say how you have to find the element, but you have  
10 to prove the elements of the offense. The  
11 elements of the offense here are the assault with  
12 intent to commit the sexual battery, the victim  
13 being under the age of 16, and the registry. But  
14 there's no harm to anyone in having a jury  
15 consider the first two elements, and if they find  
16 that the State has met its burden on the first two  
17 elements then letting them consider the third.

18 There's irreparable harm if it's found  
19 substantially more prejudicial to the Defendant if  
20 we don't permit them to do it that way and it's  
21 determined to be improper. Okay?

22 MS. WILLIAMS: I understand that, but in a  
23 burglary case if the person is on trial for  
24 stealing from someone's home and the jury finds  
25 out that they have stolen from someone else's

1' home, that is very prejudicial.

2. THE COURT: Okay.

3 MS. WILLIAMS: Yet the Court has said that  
4 that is okay.

5 THE COURT: And I think that they have also  
6 said that criminal sexual misconduct cases and  
7 lewd act cases are different. But I can find  
8 y'all a cite on that too. But in the meantime I  
9 want to quit arguing over things that we don't  
10 need to argue about right now for purposes of the  
11 motion that is on the floor.

12 MS. WILLIAMS: Well, once we know how you  
13 propose to do it then we can make the decision on  
14 the appeal.

15 THE COURT: That is fine.

16 MS. WILLIAMS: And then I guess we can go  
17 along with the other motions, and if I can just  
18 have the night to think about it. But I just,  
19 again, need to understand, you are proposing two  
20 different verdict forms?

21 THE COURT: Yeah, that is how bifurcation  
22 generally works.

23 MS. WILLIAMS: So they would get all of the  
24 elements of the criminal sexual conduct in the  
25 third degree and they could get two of the

1 elements for the criminal sexual conduct and  
2 assault with intent to commit criminal sexual  
3 conduct in the first degree. And then when they  
4 came back and said, Okay, we have found all of the  
5 elements for this one, we have found two of the  
6 elements for this one, then we could then call  
7 another witness?

8 THE COURT: Exactly.

9 MS. WILLIAMS: And we would be already done  
10 with directed verdict motions, or that would come  
11 afterwards?

12 THE COURT: Well, as I see it nothing goes to  
13 the jury until the State has presented its case  
14 and had a chance for directed verdict motion and  
15 the Defense has presented a case, if it wants to,  
16 and had a chance for directed verdict motion. And  
17 then if the State needs to reply and had a chance  
18 for a directed verdict motion, then the charges go  
19 to the jury. Okay?

20 And if there's a problem with the verdict  
21 form when it comes back there would be another  
22 chance for anyone to put any matter of law on the  
23 record that they wanted to. And we can make sure  
24 that you preserve everything as we go.

25 If they, for example, this is just a

1. hypothetical situation, if they found him guilty  
2 of criminal sexual conduct with a minor in the  
3 third degree and found him guilty of assault with  
4 intent to engage in sexual battery and the age of  
5 the child, which would be established, if they  
6 find him, yes, as to the two elements on that, and  
7 guilty or not guilty, then the little verdict form  
8 goes with just the one question: Do you the jury  
9 find that he was registered as a sex offender  
10 prior to, blank, whatever the effective date is.

11 Truly y'all are supposed to craft the verdict  
12 forms, so that would be most helpful. I tend to  
13 write my own but I always like it when lawyers  
14 take the opportunity to do that. They don't  
15 always do it.

16 MS. WILLIAMS: And then after the second time  
17 that they come back we would have another round of  
18 procedural, you know, whether or not the directed  
19 verdict motions or any other procedural motions  
20 from both sides and whatever?

21 THE COURT: It would be over at that point.  
22 I don't do directed verdict motions after the jury  
23 has come back.

24 MS. WILLIAMS: Wouldn't there be more  
25 testimony though, I mean, after the first round?

1 THE COURT: You rest at that point. I don't  
2 imagine that the Defense would have anyone to put  
3 up in that regard unless there is some record  
4 error that we have with the registry.

5 MS. WILLIAMS: So you are proposing that we  
6 have a trial, they get some of the stuff and go  
7 back there. And then we have another part of the  
8 trial, more testimony, and then they go back  
9 again?

10 THE COURT: Let me pull you an article on  
11 bifurcation/trifurcation and --

12 MS. WILLIAMS: I came from Arkansas and we  
13 had bifurcated trials.

14 THE COURT: Okay.

15 MS. WILLIAMS: I just need to understand  
16 specifically how you are proposing to do it in  
17 this context so I can relay that information and  
18 analyze whether this is an issue that is  
19 appropriate for that.

20 THE COURT: Okay.

21 MS. WILLIAMS: So that -- you know, in all  
22 fairness to the Court it doesn't sound like, you  
23 know, you have figured all of that out yet. And I  
24 don't mean that in a bad way.

25 THE COURT: I mean, I think pretty much what

1 I said is the way that it would be done in the  
2 most streamline fashion, and that is the way that  
3 they do it in Vermont.

4 MS. WILLIAMS: Okay. Is the Court at all  
5 concerned that certain elements would be given  
6 more emphasis than others in the statute?

7 THE COURT: No.

8 MS. WILLIAMS: That they would be getting two  
9 of them and then just be getting one?

10 THE COURT: No. If that were a problem no  
11 one would ever have bifurcation.

12 MS. WILLIAMS: All right.

13 THE COURT: Okay. Now, with respect to the  
14 actual merits of the motion, do you not want to  
15 argue to me about Rule 403 or is your position  
16 simply because of Benton and Washington and the  
17 way that the Courts have construed the burglary  
18 statute, that that analysis should apply here as  
19 well?

20 MS. WILLIAMS: Well, I think that I covered  
21 in my motion, Your Honor, what we are proposing to  
22 do. I mean, the State is not proposing that we  
23 get into any of the facts of the previous  
24 conviction. And we are mindful of James in  
25 particular that really hampers what you can do.

1 And I think that the Court, the appellate courts,  
2 have taken into account whether this is  
3 beneficial.

4 THE COURT: Is that cite to James in your  
5 briefs?

6 MS. WILLIAMS: It is, Your Honor, State  
7 versus James.

8 MR. GROEBER: I have an extra copy.

9 THE COURT: Okay, thanks, if you do I would  
10 love it.

11 MS. WILLIAMS: In that case they are trying  
12 eight separate convictions and the Court looks to  
13 Big Chief and others and say, You know, you need  
14 to try to satisfy the elements of the statute but  
15 without putting so much evidence in that it's  
16 overly prejudicial.

17 THE COURT: Right.

18 MS. WILLIAMS: And that is why what we are  
19 proposing to do is not -- State v. James, I'll  
20 give you the cite, Your Honor.

21 THE COURT: Okay.

22 MS. WILLIAMS: 355 South Carolina 325.

23 THE COURT: All right, thank you.

24 MS. WILLIAMS: And it is a 2003 case.

25 THE COURT: All right.

1 MS. WILLIAMS: What we are proposing to do is  
2 not getting into the facts. The other case  
3 involved a child as well. But we are not going to  
4 get into the facts as well, we are not going to  
5 get into what he was convicted of or that the  
6 judge decided to put him on the sex offender  
7 registry, we are basically just looking to the  
8 language of the statute and how the very narrow  
9 piece of testimony that says, Yes, he has been  
10 convicted under this statute and he is on the sex  
11 offender list.

12 THE COURT: Okay.

13 MS. WILLIAMS: And that is what -- I think  
14 that takes into account the analysis and what  
15 those states anticipate.

16 THE COURT: Thank you, ma'am. Yes, sir.

17 MR. GROEBER: I'll address James real quickly  
18 here, Your Honor. I think that there's some  
19 really -- some language in there that strengthens  
20 the idea that the Court has the authority and the  
21 power to examine under 403(b) these prior  
22 convictions and their prejudicial nature.

23 I will direct you to the last page, Page 5,  
24 and I'll read, it says, None of the relevant  
25 authorities nullify the trial judge's traditional

1 role in weighing the probative value of evidence  
2 versus the prejudicial facts or to suggest that  
3 Rule 403 is displaced by the operation of Section  
4 16-11-311(A) (2), and that is the burglary statute  
5 that allows for priors. Even later in the next  
6 paragraph the admissibility of prior convictions  
7 is always limited by the traditional rules of  
8 evidence.

9 MS. WILLIAMS: And, Your Honor, that is  
10 assuming that something is coming in. I mean,  
11 what James is saying is you can't bring in eight  
12 convictions, you have to prove your elements.  
13 There's a conferring by the courts that you still  
14 get to prove the elements of the statute. I mean,  
15 if we tried our case and forgot to put in that he  
16 was on the registry you can be sure there would be  
17 a motion for directed verdict that we haven't  
18 proved our element.

19 THE COURT: Now I understand a little bit  
20 more what your concern was. That wouldn't be the  
21 subject of a motion for directed verdict at that  
22 first stage since the Court had constrained the  
23 mode of the trial. So, you are not being  
24 prohibited from introducing evidence that the  
25 State needs to prove its elements, it is merely

1 the mode and the manner of the way in which the  
2 evidence is presented. But let me finish reading  
3 James real quick.

4 (Pause.)

5 THE COURT: Okay. I'm looking at State v.  
6 James. There are two opinions which are helpful  
7 to me here. The State v. James Supreme Court  
8 opinion which notes that the burglary statute in  
9 no way supplants the trial Court's duty to balance  
10 the evidence under Rule 403.

11 But in State v. James the Court specifically  
12 acknowledged and recognized Judge Shuler's  
13 concurrence in the Court of Appeals' decision in  
14 State v. James which is 551 S.E.2d 591. And this,  
15 as y'all know, was about -- the Court did not err  
16 in -- what Judge Shuler said, While I feel  
17 constrained by Benton and Hamilton to find that  
18 the trial court, Judge Floyd, did not err in  
19 admitting all seven burglary convictions I am  
20 mindful that neither case, Benton nor Hamilton,  
21 involve the admission of more than two prior  
22 convictions into evidence.

23 To me it is readily apparent that the problem  
24 arising from this case, in James, the seemingly  
25 unnecessary introduction of extremely prejudicial

1 evidence of numerous burglary convictions stems  
2 directly from what appears to be a general  
3 prosecutorial policy of refusing to accept the  
4 Defendant's offer to admit the validity of the  
5 credited prior convictions. In my review just  
6 because the State is entitled to reject a  
7 Defendant situation under Benton and Hamilton in  
8 this regard does not mean that in the interest of  
9 fairness it should.

10 Here my concern is not even just the interest  
11 of fairness, it's the mandate that I'm supposed to  
12 weigh under Rule 403 whether the introduction of  
13 certain evidence substantially outweighs the  
14 probative value of the evidence.

15 Obviously the evidence, it is probative. It  
16 is an element of the offense that the State has to  
17 prove. But to protect against the prejudicial  
18 effect and to make sure that if the State does  
19 indeed convict this Defendant it has a clean  
20 conviction.

21 The State is not harmed by presuming the  
22 evidence in a bifurcated manner, but I understand  
23 the State's concern and I will -- you know, if  
24 y'all want to appeal and work this one out, I  
25 think that granting the motion for bifurcation or

1 separate trials -- is it not immediately  
2 appealable? I think it is.

3 MR. GROEBER: I'm going to argue that it's  
4 not, but Mr. Schwacke will do that.

5 THE COURT: There's case law on it so -- I  
6 just can't remember exactly what it says. But I  
7 do know that that issue has come up.

8 MS. WILLIAMS: I agree that it depends on  
9 what the prejudice is, and that is something that  
10 I need to beg the Court's indulgence and leave for  
11 a little bit and figure out how I am going to get  
12 that information out -- and that is why I really  
13 need a clear understanding of what procedural  
14 application you are proposing.

15 THE COURT: Well, and obviously I'm inclined  
16 to grant bifurcation because of the nature of  
17 these charges but -- or it is really not even  
18 bifurcation, a separate trial with a separate  
19 issue under Rule 42(b).

20 But I'm up for proposal how the Defense and  
21 the State think that it should be presented. That  
22 to me what I suggested seemed like a stream-lined  
23 way to do it. And special verdict forms are used  
24 in civil court all of the time.

25 MS. WILLIAMS: We would argue that it is an

1 element of the crime, and the jury gets to hear  
2 all of the elements. That is our argument.

3 THE COURT: Right, I understand that that is  
4 your argument but in crafting the verdict forms  
5 that will go to the jury at the end of the trial  
6 what I'm trying to say, apparently very  
7 inarticulately, is that I welcome the State and  
8 the Defense's input on crafting the forms.

9 MS. WILLIAMS: We appreciate that.

10 THE COURT: Okay. What else?

11 MR. GROEBER: I can address that issue, if  
12 you want.

13 THE COURT: Yeah, sure.

14 MR. GROEBER: But I think that it's probably  
15 the problem for Ms. Williams and I, we have never  
16 done civil, I haven't done civil, I don't know if  
17 she has or not. But at least in civil litigation  
18 process, at least in the bifurcation issue --  
19 well, so I think that the Court can present --  
20 there's going to be some question about what  
21 indictment and how we deal with the indictment at  
22 the initial stage.

23 THE COURT: Right.

24 MR. GROEBER: But I think that it's the  
25 allegations minus anything regarding the registry.

1 It is the first two elements, we can exercise  
2 those two out. And they can then -- they can be  
3 presented with a verdict form on those two  
4 elements, under 16 and was the assault or intent  
5 to commit on minor -- or assault with intent to  
6 commit a sexual battery. So, I think that that  
7 would be the way that we do it. And then it's two  
8 trials essentially. One trial on those two  
9 elements, plus the element of CSC. And then one  
10 trial on the one element. That is what we would  
11 request.

12 MS. WILLIAMS: And we would just ask what  
13 Mr. Schwacke's argument is against us appealing.  
14 I think that is a threshold issue that we are just  
15 going to have to ask the Court to deal with.

16 THE COURT: Well, I am not -- it makes no  
17 difference to me whether y'all choose to appeal or  
18 not. If you file a notice of appeal my  
19 jurisdiction is gone as far as I am concerned and  
20 then y'all can fight it out in the Court of  
21 Appeals about whether, you know, you really want  
22 to fight about this issue. But -- and you might  
23 want to put your head together with Mr. Schwacke  
24 about whether it's immediately appealable or not.

25 I would like today to get resolved as much as

1 we can get resolved so if indeed we are going to  
2 pick a jury tomorrow morning we are ready to go  
3 when they get here. Does that make sense?

4 MS. WILLIAMS: It does. If we are going to  
5 take that avenue, and I don't know, I would just  
6 like 15 or 20 minutes to kind of explore that  
7 because then we don't need to pick a jury.

8 THE COURT: Everybody is getting so worried  
9 about things. All I'm saying is, whether you  
10 choose to appeal or not, and I will not be mad at  
11 anybody if you do, I think it is an interesting  
12 legal issue and one of first impression here with  
13 respect to this particular statute.

14 We have from 3 to whenever to argue motions.  
15 We are going to argue motions and then you can  
16 have as much time as you want tonight to decide  
17 whether you want to appeal or not, okay? And we  
18 will put the appropriate message on the jury  
19 hotline or I pick for another case tomorrow or I  
20 will tell the jury, I am so sorry we dragged you  
21 in here this morning, but guess what, surprise,  
22 you don't have to stay. Okay?

23 What I'm saying is that we need to -- I want  
24 to argue the other motions and I want to talk  
25 about the telephone calls.

1 MS. WILLIAMS: All right.

2 THE COURT: And Mr. Schwacke, if you want to  
3 share with us what you found for purposes of the  
4 record, I'm happy to hear it but you don't have  
5 to.

6 MR. SCHWACKE: Briefly, Your Honor, the most  
7 recent case on whether or not it can be appealed  
8 on an interlocutory basis is that stand your  
9 ground case in Columbia, re-sent, August 21st of  
10 this year, in which it cites the appropriate  
11 statute to determine when something is appealable  
12 is Section 14-3-330. The stand your ground case  
13 is State versus Greg Isaac. The opinion number on  
14 that is 27302.

15 And again, citing that statute basically it  
16 limits how -- the statute has a number of  
17 paragraphs that set out circumstances which an  
18 appeal can be made. But the one involved here  
19 would be whether or not yours would be an order  
20 affecting the substantial right which in effect  
21 determines the action and prevents a judgment for  
22 which an appeal might be taken, or discontinues  
23 the action, grants or refuses a new trial or  
24 strikes an answer in whole or part of a pleading.

25 So, what you are proposing in terms of a

1 bifurcation really is more of an order of  
2 sequencing the presentation of evidence and the  
3 jury's deliberation on those bits of evidence and  
4 would not prevent the State -- because they can  
5 very well still win.

6 THE COURT: Right.

7 MR. GROEBER: So it would not prevent them  
8 from going forward in presenting all of their  
9 evidence, it would just be in the sequence that  
10 you would determine would follow if, in fact,  
11 there was a bifurcation.

12 THE COURT: I agree. And in light of the  
13 stand your ground ruling, because as you all know  
14 that is called the South Carolina Protection of  
15 Persons and Property Act. There's no exact  
16 language in it that allows for immediate appeal.  
17 And I believe that it was Duncan maybe, State v.  
18 Duncan or one of the cases considering it. But  
19 the Supreme Court said, Oh, no, you can  
20 immediately appeal. They then realized what they  
21 had done in opening that Pandora's Box and then  
22 have began in the Isaac case gone and explained,  
23 no, you go to the jurisdictional statute of what  
24 matters are interlocutory appealed.

25 I would agree that this is probably not

1' because it doesn't deprive the State of the  
2, substantial right. But, again, it won't hurt my  
3 feelings if you decide to do it, they can tell you  
4 what the answer is in Columbia, which your guess  
5 is as good as mine on that. And I am fine with  
6 that.

7 MS. WILLIAMS: I think you are right. I  
8 understand Your Honor. If we decide to appeal  
9 I'll let the Court know. I don't think that it's  
10 analogous to that case, but I do think that we are  
11 being deprived substantial rights to present  
12 material elements of our case, but the powers that  
13 be may see it differently.

14 THE COURT: Right. Well, the courts in  
15 Vermont and New Jersey would reverse me if I did  
16 not do it the way that I have suggested it but,  
17 you know, again, that is not our court and I do  
18 think that, as in the cases that I have read about  
19 42(b) in discussing separate trials and severance,  
20 generally that is a discretionary decision of the  
21 trial court. But I'm just trying to protect  
22 everybody's rights particularly under Rule 403 so  
23 y'all don't have to do this all over again.

24 But that being said, unless anybody has  
25 anything else they need to put on the record my

1 inclination is to bifurcate it. But I do want to  
2 make sure that the State puts on any evidence that  
3 they want to put on. I think what -- the safest  
4 thing we can do, if you do go forward tomorrow,  
5 and that is completely up to y'all, is to put up  
6 your evidence and then we will note a proffer of  
7 whoever your witness is to talk about the  
8 registry, Mr. Groeber can cross-examine them, Mr.  
9 Schwacke can, and that will be short and it is  
10 completely unnecessary for purposes of this trial.  
11 But for purposes of error preservation, you might  
12 just want to do that.

13 And then if the jury comes back with a not  
14 guilty verdict and no -- it found no intent to  
15 commit -- no assault with intent to commit a  
16 sexual battery, then we don't even have to get to  
17 the registry issue. If they find yes, then we get  
18 to the sexual registry issue. And I don't suspect  
19 that they will be out very long on that because he  
20 either is or isn't on the registry.

21 Anything else?

22 MR. GROEBER: Not with regard to that.

23 THE COURT: What do you want to talk about on  
24 record?

25 MS. WILLIAMS: I think the next two motions

1 are the State's. Do you have other motions beside  
2 the denoted and two that we just did?

3 MR. GROEBER: I have a litany that I can go  
4 through. The Court did rule that we bifurcate?

5 THE COURT: The motion to bifurcate is  
6 granted as to the issue of the sex offender.

7 MR. GROEBER: Thank you, Your Honor.

8 THE COURT: Granted over the State's  
9 objections.

10 MS. WILLIAMS: Thank you, Your Honor.

11 THE COURT: Sure.

12 (Whereupon, the excerpt concludes.)  
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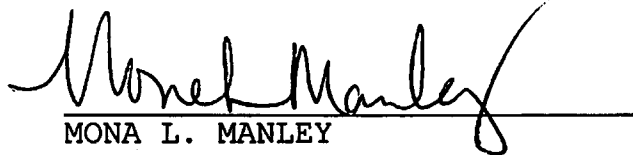
CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 15th day of October, 2013.

  
MONA L. MANLEY  
Court Reporter

1 State of South Carolina }  
 } Court of General Sessions  
 2 County of Berkclery }

3

4 State of South Carolina, } Case No. 2012-GS-08-00919  
 Appellant, } Case No. 2012-GS-08-01798  
 5 vs. }  
 } Transcript of Record  
 6 Marcus Greene, }  
 Defendant. }

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September 10, 2013

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Moncks Corner, South

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Carolina

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EXCERPT OF PROCEEDINGS

14

B E F O R E:

15

The Honorable Stephanie McDonald, Judge

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17

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**ORIGINAL**

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24

NINTH JUDICIAL CIRCUIT

25

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## PROCEEDINGS

2

THE COURT: All right. Good morning.

3

Everybody. Do we need to wait on our clerk? Or

4

do we need to put a few things on the record? I

5

think they are managing the jury. We don't have

6

any jurors in the courtroom, do we?

7

THE CLERK: No jurors.

8

THE COURT: All right. Thank you, ma'am.

9

Well, I understand that we have some additional

10

matters to place on the record. I think that

11

Ms. Williams has additional matters to place on

12

the record. And it is my understanding that the

13

Defendant wanted to read me a statement as well.

14

And we can mark it as an exhibit, Exhibit B. So,

15

I'll take that in any order that y'all like.

16

We are talking again about the motion for

17

bifurcation?

18

MS. WILLIAMS: Yes, Your Honor.

19

THE COURT: Okay.

20

MS. WILLIAMS: We understand that the Court

21

has ruled, but we would ask you to reconsider in

22

light of new arguments that the State has that --

23

issues that we did not anticipate yesterday.

24

THE COURT: Okay.

25

MS. WILLIAMS: Let me just preface my

1 argument by saying that ordinarily we don't  
2 consider lesser and included offenses until the  
3 end of the trial but because of the changes of the  
4 structure of the trial that has been proposed by  
5 the Court we feel that we need to address the fact  
6 that the lesser and included offense of criminal  
7 sexual conduct with a minor in the first degree,  
8 A2, 16-3-655(A)(2), that the lesser included  
9 offense would be 16-3-655(B)(1).

10 THE COURT: Okay.

11 MS. WILLIAMS: And essentially the elements  
12 of those are identical except for the element of  
13 the sex offender registry, which is the element  
14 that Your Honor would not present to the jury  
15 during the first part of the trial.

16 THE COURT: Okay.

17 MS. WILLIAMS: And even though they are  
18 essentially the same they are confusing because  
19 under (A)(2) the jury would have to find Mr. Green  
20 guilty of the sexual battery and that the child is  
21 under the age of 16. Under B2, which is the  
22 lesser, they would have to find a sexual battery  
23 and that the child was between the age of 11 and  
24 14.

25 THE COURT: Which is actually the age that

1 the child is, correct?

2 MS. WILLIAMS: Well, the child was both. She  
3 was under the age of 16 and she was between the  
4 age of 11 and 14.

5 THE COURT: The answer to the question is yes  
6 then. How old is the child? What is the child's  
7 date of birth?

8 MS. WILLIAMS: At the time the child was 11.

9 THE COURT: Thank you. That was the time --  
10 the date of the incident was?

11 MS. WILLIAMS: It was July 12, 2012.

12 THE COURT: Okay, thank you.

13 MS. WILLIAMS: Or maybe --

14 THE COURT: But in any event.

15 MS. WILLIAMS: \_\_\_\_\_ was the  
16 evening of her 11th birthday.

17 THE COURT: She is now 13 -- 12.

18 MS. WILLIAMS: I think that she's 12 now,  
19 Your Honor.

20 THE COURT: Okay. So, that is indeed between  
21 11 and 14, correct?

22 MS. WILLIAMS: Correct. So, basically the  
23 jury would be presented with the choice of either  
24 under 16 or 11 to 14 we think is incredibly  
25 confusing. And our argument is that it materially

1 and appreciably impairs the State unless you give  
2 a charge to the jury that if they find for the  
3 lesser offense they must find for the greater  
4 offense.

5 THE COURT: Isn't that problem alleviated by  
6 serving a special interrogatory that says, We the  
7 jury find that the age of -- is it VICTIM  
8 or VICTIM ?

9 MS. WILLIAMS: VICTIM .

10 THE COURT: VICTIM is "blank".

11 MS. WILLIAMS: We don't think so, Your Honor.

12 THE COURT: Why not?

13 MS. WILLIAMS: We think that it is confusing.  
14 You are giving them -- they have to choose which  
15 elements. They have to choose between the lesser  
16 and the greater offense and it is our opinion that  
17 that is unduly confusing.

18 THE COURT: They don't have to choose between  
19 the lessor and greater offense. What you have to  
20 do, pursuant to the law, is prove the elements of  
21 the offense, whether it is the indicted offense or  
22 a lesser included offense. It may very well be  
23 that they have established both, that you have  
24 proved the lesser included and the greater  
25 offense, which often happens.

1           If they check yes on the intent to commit or  
2 assault with intent to commit a sexual battery box  
3 and then they find the age that bring you within  
4 the statute, whether it is Subsection A or  
5 Subsection B, if they find the age that bring her  
6 under the age of 16 and the intent to commit a  
7 sexual battery you then get to put up evidence of  
8 the sex offender registry. I imagine that  
9 evidence will be uncontroverted because he either  
10 is or he isn't.

11           Then they get another interrogatory. Do you  
12 beyond a reasonable doubt find that the Defendant  
13 was required to register as a sex offender, yes or  
14 no. He is then guilty if you prove all of that.  
15 Now, I understand for your argument, the work, it  
16 has to be confusing and I appreciate that. I  
17 decline to so find. But go ahead and put the rest  
18 of your argument on the record.

19           MS. WILLIAMS: Thank you, Your Honor, I  
20 appreciate that. It is our opinion that when they  
21 are presented with those two elements, the lessor  
22 offense of 11 to 14 and the greater offense of  
23 under 16, that there might be an inclination to do  
24 11 to 14 rather than under 16 because they may  
25 think that more specific is better.

1           So we would ask that -- we feel that the only  
2 way to cure that is for you to tell the jury that  
3 if they convict of the second degree they must  
4 convict of the first degree. But the problem with  
5 that is that you are then entering the realm of  
6 the fact finder, and we think that is  
7 inappropriate.

8           THE COURT: That is why I'm not going to do  
9 it that way.

10          MS. WILLIAMS: And, however, we believe that  
11 if the Defense would waive all appeals as to that  
12 kind of instruction it would be cured. So, that  
13 is the first argument. Our second argument is  
14 that 42B is a civil rule and that it doesn't apply  
15 to these proceedings.

16          THE COURT: Okay. Well, find me the rule  
17 that applies to severance or separate trials or  
18 joinder under the Rules of Civil Procedure.

19          MS. WILLIAMS: I think that you are right,  
20 Your Honor, I think this is a case of first  
21 impression. And I don't think that our system is  
22 set up for bifurcation and we think that this is  
23 prejudicial to the State when you are splitting  
24 elements.

25          And our next argument, Your Honor, is that

1 even beyond the confusion issue, where the jury is  
2 presented with essentially the same elements for  
3 the greater and the lessor, because the sex  
4 offender registry is the only thing that  
5 distinguishes the greater offense, that  
6 essentially you are asking the jury to consider  
7 the lesser offense before the greater offense.

8 Because without the sex offender registry you  
9 are basically presenting the jury with the lesser  
10 offense and we routinely instruct our jurors that  
11 they cannot consider the lesser offense before the  
12 greater offense.

13 THE COURT: That is why I'm not going to do  
14 it that way.

15 MS. WILLIAMS: We also, Your Honor, feel like  
16 you are putting yourself in the role of the fact  
17 finder when you are giving more emphasis on  
18 certain elements rather than others. We think  
19 that you are telling the jury which elements to  
20 consider first and in what order to consider the  
21 elements. And we feel like that is an improper  
22 role of the Court because you are putting yourself  
23 in the place of a fact finder.

24 THE COURT: Ms. Williams, do you have any  
25 case authority from this state or any other state

1 that supports the argument that bifurcation here  
2 is improper?

3 MS. WILLIAMS: I don't think that that issue  
4 has gone up, Your Honor.

5 THE COURT: Did any other -- in any other  
6 state?

7 MS. WILLIAMS: I don't have any case law from  
8 this state about bifurcation. And I haven't  
9 researched other states.

10 THE COURT: Okay. Thank you. All right.  
11 What is next?

12 MS. WILLIAMS: So, finally, our position is  
13 unless the Defendant is willing, unless the Court  
14 is willing to give the instruction that if they  
15 find for the lesser offense they must find for the  
16 greater offense then the Defendant -- there's a  
17 compound proposition, the Defendant is willing to  
18 waive all appeals as to that issue then we feel  
19 that the State is prejudiced to the point where we  
20 must file an interlocutory appeal. And we feel  
21 that that is -- that we are materially and  
22 appreciably impaired.

23 THE COURT: Okay. Well, let me hear from the  
24 Defendant.

25 ATTORNEY 1: I'll keep it brief, Your Honor.

1 THE COURT: Certainly.

2 ATTORNEY1: First of all as to the issue  
3 being preserved for later, the additional  
4 arguments presented today, it is our position that  
5 the Court has ruled. I'll also note that this  
6 motion was filed over three weeks ago and served  
7 upon the Court and the State at that time.  
8 Briefly I would argue that 1603-655(B), we are  
9 happy with the way that the Court will structure  
10 it, as far as what I interpret what you said as  
11 far as specific interrogatories. We think that  
12 that cures all issues in the case. But I would  
13 say that to the extent that B1 -- we would argue  
14 that it isn't a necessarily a lesser included  
15 because the element is not exactly the same. It  
16 is different.

17 I mean, yes, if she's 11, it qualifies for  
18 both. But I think that the Court would have to  
19 look at the elements and specifically compare them  
20 to determine whether or not a lesser would be  
21 required. If the State had wanted CSC assault  
22 with intent to commit CSC minor in the second they  
23 could have issued -- they could have indicted for  
24 that and then had that option had the evidence  
25 presented itself.

1           Finally, if I could have one second, Your  
2 Honor?

3           THE COURT: Sorry, we are having  
4 technological difficulties up here.

5           ATTORNEY 1: Just -- we would not waive any  
6 appeal rights at all.

7           THE COURT: That's okay. I would rather you  
8 not. I would rather have you appeal it and have  
9 it go straight up and have y'all able to argue  
10 everything possible. I think that this is an  
11 issue that someone needs to answer the question  
12 about.

13           Anything in reply, or are you all set?

14           MS. WILLIAMS: No, we are set, Your Honor.

15           THE COURT: Okay. Let me put a few things on  
16 the record in response to the new arguments that  
17 were raised this morning.

18           First of all, as I understand it the State  
19 proposed an alternate charge to the jury and an  
20 alternate way to send the verdict form, but also  
21 argues that that would be prejudicial so that's  
22 not what you really want to do in the first place.

23           MS. WILLIAMS: It would only be prejudicial  
24 if it puts the Court in an improper role as a fact  
25 finder, and we feel that that's not proper unless

1 the Defendant wants to waive that.

2 THE COURT: Okay. Again, that was my  
3 understanding of it. So I think that you have  
4 cleared that up. In suggesting the way that the  
5 verdict form would go in the first part of the  
6 bifurcated proceeding, that was my suggestion.

7 Yesterday, more than once, I asked for or I  
8 indicated that there would be an opportunity for  
9 both the State and the Defense to submit proposed  
10 verdict forms or propose a way that the case would  
11 be presented to the jury. I believe that is what  
12 the State has done this morning, propose the way  
13 that they would like the case to go to the jury.

14 So, that was not -- the basis of my ruling  
15 was not -- here is the basis of my ruling. Under  
16 Rule 403, under Rule 403 and the facts of this  
17 specific case, to the extent that I know about  
18 them yet -- we haven't put up much testimony  
19 yet -- and the brief presented by the Defense,  
20 including the materials regarding public  
21 exceptions about sex offenders and other  
22 information including dicta in some of our  
23 appellate court opinions about the way that prior  
24 sex offender evidence is handled in a propensity  
25 situation and how prejudicial that prior evidence

1 can be, my finding is that to send the case to the  
2 jury with a charge noting that the Defendant has  
3 been on the registry before in addition to asking  
4 whether there was the intent, assault with intent  
5 to cause a sexual battery, the other element, and  
6 the age of the child, the other element, would be  
7 substantially more prejudicial than probative if  
8 presented to the jury all at the same time.

9 Case law in other states provides for  
10 bifurcation in such situations. And in fact I  
11 think in Vermont and New Jersey a circuit court  
12 was reversed for not bifurcating the case due to  
13 the prejudicial nature of the sexual offender  
14 registry information. That is my ruling. It is a  
15 Rule 403 ruling.

16 I'm not finding the statute unconstitutional,  
17 I am just talking about the mode in which the case  
18 would go to the jury. We still need to hammer  
19 some of that out.

20 As to the new arguments that have been raised  
21 today, I certainly understand the position that it  
22 puts the State in because we don't have the answer  
23 in South Carolina. And I'm ruling on the  
24 bifurcation issue based on the prejudice to the  
25 Defendant. I'm not necessarily saying that Civil

1 Rule 42 applies in a criminal case. That is just  
2 a sample of the way it is done procedurally in  
3 circuit court. That would be a procedural way to  
4 do it. I'm not suggesting that it's the only way  
5 to do it or -- there's several different ways to  
6 do it.

7 For example we could bifurcate the two  
8 charges. He could go to trial first on what was  
9 originally indicted as lewd act but now I think is  
10 CSC with a minor third degree. Is that correct?

11 MS. WILLIAMS: Yes, Your Honor.

12 THE COURT: And then try the other case.  
13 That would be another way to do it to ensure that  
14 this Defendant got a fair trial. The fairest way  
15 that this Court could see to do it under Rule 403  
16 is to provide specific non-confusing charges which  
17 we have yet to hammer out yet and a verdict form  
18 that would allow the jury to answer special  
19 interrogatories under the same burdens that we  
20 have now, the presumption of innocence and the  
21 State's burden of proof to prove the -- attempt to  
22 prove the Defendant guilty beyond a reasonable  
23 doubt. But instead of just checking not guilty or  
24 guilty the answer would be, has the State proved  
25 beyond a reasonable doubt that the Defendant

1 "blank," yes or no. Has the State proved beyond a  
2 reasonable doubt that the, I don't know, you know,  
3 child, victim, whatever language we decided, or we  
4 could put her name, VICTIM is 12 years of  
5 age, whatever.

6 I mean, there are ways to do it other than  
7 guilty or not guilty. So, that is the ruling. It  
8 is the 403 prejudice that I see based on the brief  
9 from both parties, particularly to Defense, and  
10 the cases from other states where other states  
11 mandate that that finding be bifurcated and the  
12 specific facts of this case, the allegations of  
13 this case, Exhibit 1 that was presented as an  
14 attachment to the bifurcation motion without  
15 objection. And that is the order of the Court.  
16 Okay?

17 So, if you need to file an interlocutory  
18 appeal, you are more than welcome to. Next  
19 question, what about the witness from New York if  
20 we were to go forward? Is he available?

21 MS. WILLIAMS: Actually he's not. But we may  
22 be able to get him. But just so I understand, are  
23 you saying that there's something different about  
24 this case, or are you saying that the 403 analysis  
25 is about the sex offender registry element of the

1 statute? Because I don't understand why this  
2 particular -- the facts of this case -- are you  
3 talking about the 403 analysis as it pertains --

4 THE COURT: This is -- I have to do a 403  
5 analysis any time there is a question about  
6 whether something is argued to be more  
7 substantially prejudicial than probative. I'm not  
8 ruling on the statute as it applies in every case  
9 that is ever before any judge. I think that is  
10 for a higher court to do. It is not for me to  
11 make that policy call here. That is not what the  
12 Defense argued, as I understand it. Maybe I need  
13 to look at your brief again.

14 But under the facts of this case and the  
15 briefs that they presented to me and the  
16 arguments that have been made, the argument is to  
17 charge all the jury all three elements and just  
18 have a guilty or not guilty and let evidence come  
19 in with regard to this Defendant's participation  
20 on the registry, what, some four months before  
21 this incident happened; is that correct?

22 ATTORNEY 1: I think so, Your Honor.

23 THE COURT: Wasn't it a short time period in  
24 a similar issue? That to me presents a Rule 403  
25 problem.

1 MS. WILLIAMS: And as we said, we would not  
2 get into the fact that he had just done something.

3 THE COURT: I have ruled.

4 MS. WILLIAMS: Okay. Thank you, Your Honor.  
5 But there's nothing specific to these facts.

6 THE COURT: I have ruled.

7 MS. WILLIAMS: Thank you.

8 THE COURT: Yes, sir, anything further?

9 ATTORNEY 1: The only thing is, Your Honor, I  
10 believe that you stated that our grounds were only  
11 403 and we did make constitutional claims against  
12 the statute in the brief.

13 THE COURT: I'm not ruling on the  
14 constitutional question because I don't have to.  
15 I'm ruling on the Rule 403 issue. I think this is  
16 a procedural rule under Rule 403. I do not find  
17 the statute unconstitutional.

18 ATTORNEY1: Thank you, Your Honor. I want to  
19 make sure that we are not giving up that argument.

20 THE COURT: You are not. I think that I  
21 ruled on that yesterday. The Legislature has the  
22 authority to make the elements of the statute what  
23 the elements of the statute are, just as they do  
24 in the burglary cases. Okay?

25 But I then have to exercise my duties under

1 the Rules of Evidence to make sure that nothing  
2 prejudicial goes to the jury.

3 MS. WILLIAMS: We understand that you have  
4 ruled, we just need to supplement the record in  
5 that we are --

6 THE COURT: Ms. Williams, let's have a chat.  
7 I have given you a lot of leeway.

8 MS. WILLIAMS: I just want to put what  
9 evidence that we would present, Your Honor, so  
10 it's not confusing for the record.

11 THE COURT: Come on back.

12 (Off the record, in-chambers  
13 discussion held.)

14 THE COURT: Okay. The State did want to  
15 clarify. The Court did misspeak. It is my  
16 understanding that I have mischaracterized the  
17 evidence that the State would present.

18 So, Ms. Williams, how would you present the  
19 sexual offender registry element of, I think it's  
20 16-3-655(A)(2), correct?

21 MS. WILLIAMS: That is correct, Your Honor.

22 THE COURT: All right. Go ahead and tell the  
23 Court how you would do that.

24 MS. WILLIAMS: Okay. What we would do is put  
25 a witness on the stand that would basically

1           testify that Mr. Green has been convicted of an  
2           offense and been placed on the registry pursuant  
3           to 23-3-430(D).

4           THE COURT: Okay.

5           MS. WILLIAMS: And that is it.

6           THE COURT: Okay.

7           MS. WILLIAMS: And that he was on the  
8           registry before and that that occurred before this  
9           event, before the alleged assault occurred. We  
10          wouldn't say how.

11          THE COURT: You wouldn't be seeking to put  
12          the date that he was placed on the registry?

13          MS. WILLIAMS: I don't think that it's  
14          relevant. As long as he is on the registry before  
15          he commits the assault. And that it is -- under  
16          the right statute that is cited in 163655A2 I  
17          think that that appropriately helps us to reach  
18          that element without risking more prejudicial  
19          information coming in about the Defendant.

20          THE COURT: Okay. Thank you. Anything  
21          further from the Defense?

22          ATTORNEY 1: Only that we do believe that we  
23          challenged the statutes constitutionality, and  
24          that that was in our brief. We believe that we  
25          argued it and we hope that it is addressed as

1 well.

2 THE COURT: Okay. Then let me make sure that  
3 I rule on that so it will be preserved for you.

4 ATTORNEY1: I believe that you have ruled  
5 that you do not find it unconstitutional.

6 THE COURT: I agree. I do not find the  
7 statute unconstitutional. I think that the  
8 Legislature has the power to make that an element  
9 of the statute. Whether I share that in a charge  
10 to the jury and in reading the indictment under  
11 Rule 403 before a jury had established whether or  
12 not the Defendant or whether the State has met its  
13 burden as to the two other elements that must be  
14 met under 163655, that is the Court's concern.

15 In my view and in the case law that I have  
16 read, the fact that someone has a prior offense  
17 that's been on the registry can be so prejudicial  
18 and is so prejudicial as our courts have  
19 recognized in some of the 404B cases they have  
20 had, looking at I think Colf, which is I think  
21 C-O-L-F, and its application forward in some of  
22 the expert testimony that has come in, that could  
23 so color the jury or has the potential to so color  
24 the jury as to influence whether they actually  
25 find independently that the State has met its

1           burden as to the other two elements.

2           Well, the age is not really an issue, but the  
3           element of whether -- especially in a case like  
4           this where it wasn't even an assault, he has been  
5           indicted for -- it wasn't even a sexual battery,  
6           he was indicted for an assault with intent to  
7           commit a sexual battery. Well, as what -- I  
8           haven't heard all of the evidence yet, but that's  
9           what I understand is going to be -- the State is  
10          going to work to prove and the evidence that the  
11          State is going to work to come in.

12          With this type of case once they hear sex  
13          offender registry that is likely going to color  
14          their opinion as to the other element, the other  
15          dispositive element which is whether there was an  
16          assault with intent to commit a sexual battery.  
17          That is my Rule 403 problem. Does that help? And  
18          that comes -- I have that problem whether we say  
19          when he registered or whether we just say that he  
20          did registry. I just -- this gives me a huge 403  
21          concern. So, that is the main basis of my ruling.

22                 Anything else that we need to clarify?

23                 MS. WILLIAMS: No. Thank you for clarifying  
24                 that.

25                 THE COURT: All right. Now, if you need to

1 appeal, that is fine. I just need to let this  
2 jury know so that I can get the next trial keyed  
3 up and we can get ready to plead. If you need --  
4 take some pleas today. If you need a minute to  
5 chat with folks to decide whether you are going to  
6 appeal or not we can go from there as well.

7 MS. WILLIAMS: If I can have ten minutes?

8 THE COURT: Sure.

9 (Brief recess. Conclusion of excerpt.)

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CERTIFICATE

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, MONA L. MANLEY, Court Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 16th day of October, 2013.

  
MONA L. MANLEY  
Court Reporter

AMW2012-07-01098

WITNESSES

*R. 60*  
Berkeley County Sheriff's Office

AGENCY CASE NUMBER

201207031571

ARREST WARRANT NUMBER

Direct Indictment

DATE OF ARREST

July 17, 2012

ACTION OF GRAND JURY

*True Bill*

*DD Peters*  
Foreperson of Grand Jury

Date: *10/17/12*

VERDICT

Foreperson of Petit Jury

Date:

INDICT

DOCKET NO. 2012GS0801798

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

October Term 2012

THE STATE

Vs

MARCUS DORIE GREENE

DOB: [REDACTED]

B/M

Indictment for

Criminal Sexual Conduct with a Minor,  
Third Degree

12 OCT 17 11 31 17  
BERKELEY COUNTY S.C.

*JFH*

FILED

*JFH*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF BERKELEY )

INDICTMENT

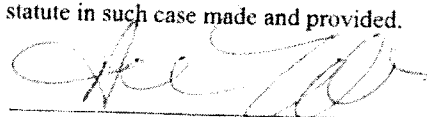
At a Court of General Sessions, convened on October 17, 2012 the Grand Jurors of Berkeley County present upon their oath:

**Criminal Sexual Conduct with a Minor, Third Degree**

That Marcus Dorie Greene, date of birth 1967, being over the age of fourteen years, did in Berkeley County, on or about July 17, 2012, willfully and lewdly commit or attempt a lewd or lascivious act upon or with the body of one VICTIM, a child under the age of sixteen (16) years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the actor or such child. This is in violation of Section 16-3-~~55~~<sup>anw</sup>(c) of the South Carolina Code of Laws (1976) as amended. *of A*

*OPM*

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



ANNE M. WILLIAMS  
ASSISTANT SOLICITOR

AMW2012-07-01098

WITNESSES

R-62

Berkeley County Sheriff's Office

AGENCY CASE NUMBER

201207031571

ARREST WARRANT NUMBER

Direct Presentment

DATE OF ARREST

July 17, 2012

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury

Date: 07-05-13

VERDICT

Foreperson of Petit Jury

Date

INDICT

DOCKET NO. 2013GS0800919

The State of South Carolina

County of Berkeley

COURT OF GENERAL SESSIONS

June Term 2013

THE STATE

Vs

MARCUS DORIE GREENE

DOB: [REDACTED]

B/M

Indictment for

Assault with Intent to Commit Criminal Sexual Conduct with a Minor, First Degree

FILED  
JUL 17 2013  
CLERK OF COURT  
BERKELEY COUNTY, SOUTH CAROLINA



**CERTIFICATE OF COUNSEL**


Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON  
Attorney General

MARK R. FARTHING  
Assistant Attorney General

SCARLETT A. WILSON  
Solicitor, Ninth Judicial Circuit

BY



Mark R. Farthing

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Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR APPELLANT

December 17, 2014

**RECEIVED**  
DEC 17 2014  
**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Berkeley County  
Honorable Stephanie P. McDonald, Circuit Court Judge  
Appellate Case No. 2013-001976

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THE STATE,

Appellant,

vs.

MARCUS GREENE,

Respondent.

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**PROOF OF SERVICE**

---

I, Norma Bigbee, certify that I have served the within Record on Appeal on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 17th day of December, 2014.

**RECEIVED**

DEC 17 2014

**SC Court of Appeals**

  
NORMA BIGBEE  
Legal Assistant

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