

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF ROBERT POWELL,

APPELLANT

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SC Court of Appeals

APPELLATE CASE NO. 2018-000426

RECORD ON APPEAL

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COURT REPORTER LEGEND

dashes --	intentional or purposeful interruption
	or change in thought
ellipses . . .	trailing off
[ph]	phonetically written
[sic]	written as said

25

1 FEBRUARY 26, 2018

2 (WHEREUPON, the proceedings began at 10:55 a.m.)

3 THE BAILIFF: All jurors are present, Your Honor.

4 THE COURT: Thank you, Norm.

5 Thank you. Mr. Bogle, are you ready? Yes? Mr. Bogle,
6 Mr. Falk, are you both ready?

7 MR. BOGLE: Yes, Your Honor.

8 THE COURT: Thank you.

9 MR. FALK: We're ready.

10 THE COURT: Thank you, gentlemen. Ladies and gentlemen,
11 if you would, give me your attention.

12 We are about to begin the trial of the case of In the
13 Matter of the Care and Treatment of Robert Powell. Ladies
14 and gentlemen, the State has brought this case under the
15 Sexually Violent Predator Law of South Carolina. The State
16 seeks the civil commitment of Robert Powell for long-term
17 control, care, and treatment in a secure facility. Ladies
18 and gentlemen, this is not a criminal proceeding seeking
19 incarceration, but rather it is a proceeding seeking civil
20 commitment.

21 Ladies and gentlemen, in this case, the State of South
22 Carolina alleges or claims that the respondent, Robert
23 Powell, is a sexually violent predator under the law. Now,
24 Mr. Powell denies that he is a sexually violent predator, and
25 it's going to be your job as jurors to determine whether or

1 not the State has met their burden of proving that Robert
2 Powell is a sexually violent predator beyond a reasonable
3 doubt.

4 Now, ladies and gentlemen, I'm going to ask the
5 attorneys to introduce themselves to you and then, Mr. Falk,
6 I'm going to ask that you introduce your client as well. Mr.
7 Bogle, if you'll start and introduce the office that you are
8 with as well, sir.

9 MR. BOGLE: Thank you, Your Honor. Ladies and
10 gentlemen, my name is Jim Bogle. I'm with the Attorney
11 General's Office out of Columbia.

12 THE COURT: Thank you, sir. Mr. Falk?

13 MR. FALK: My name is Jim Falk. I'm a private attorney
14 in Charleston, South Carolina. I've been retained by the
15 Office of Indigent Defense to represent my client here today,
16 Mr. Powell.

17 THE COURT: Mr. Powell, if you'll just stand and face
18 the jury panel as well, sir. Thank you. You all may be
19 seated.

20 Ladies and gentlemen, I am going to ask you a number of
21 questions in regards to the potential issues in this case,
22 whether or not you know anyone. When you need to respond to
23 a question, I want you simply to stand and give me your
24 number on the back of your badge.

25 Ladies and gentlemen, also, if you want to speak to me

1 in private, you are more than welcome to do so, and I
2 encourage you to, ladies and gentlemen. All you simply have
3 to do is when you respond to a question, when you're called
4 upon, just give me your number and just say may I approach.

5 You and I are going to have a conversation over here and
6 I have to tell you that it's in relative private, because the
7 court reporter needs to take it down and the two attorneys
8 are entitled to hear what you have to say. But I remind you,
9 ladies and gentlemen, that it is vitally important that you
10 respond truthfully to the questions asked of you in this
11 case.

12 All right? As I told you before, if for some reason it
13 turns out that you didn't disclose something, it could
14 invalidate the verdict, ladies and gentlemen, and I would
15 never want that to happen. All right?

16 So to begin with, ladies and gentlemen, you have been
17 introduced to Mr. Powell in this case. Is anyone related by
18 blood, connected by marriage, have a close personal
19 relationship or special relationship with Mr. Powell? If so,
20 please stand.

21 (WHEREUPON, there was no response.)

22 THE COURT: Ladies and gentlemen, does anyone have any
23 type of social relationship, work relationship, or
24 professional relationship or any type of other -- maybe
25 community involvement relationship with Mr. Powell? If so,

1 please stand.

2 (WHEREUPON, there was no response.)

3 THE COURT: Additionally, you've been introduced to the
4 attorneys trying this case, ladies and gentlemen, Mr. Bogle
5 and also Mr. Falk. Is anyone related by blood, connected by
6 marriage, have a close personal relationship or special
7 relationship with the attorneys in this case? If so, please
8 stand.

9 (WHEREUPON, one juror stood.)

10 THE COURT: Sir, your name and juror number?

11 JUROR NUMBER 49: Brandon Carpenter. I'm Number 49.

12 THE COURT: Who do you know, Mr. Carpenter?

13 JUROR NUMBER 49: What was this lawyer's name?

14 THE COURT: This is Mr. Falk.

15 JUROR NUMBER 49: I actually helped --

16 THE COURT: Yes.

17 JUROR NUMBER 49: -- him move in Charleston.

18 MR. FALK: Wow. Oh, okay.

19 JUROR NUMBER 49: For some extra cash. So I know the
20 lawyer. So I didn't know how it was going to work out.

21 THE COURT: Okay. And I am so glad you disclosed that.
22 That's exactly what I want to know. My question to you is
23 this. It sounds like it's been a while --

24 JUROR NUMBER 49: Yeah.

25 THE COURT: -- since you did that, and my question is

1 can you be fair and impartial in the trial of this case?

2 JUROR NUMBER 49: Yes.

3 THE COURT: Obviously, based on that you have known him
4 in the past, you're clearly not overly close.

5 JUROR NUMBER 49: No, no. I just helped him move.

6 THE COURT: But I just want to make sure that you can be
7 fair and impartial and decide this case based on the law as I
8 give it to you.

9 JUROR NUMBER 49: Yes.

10 THE COURT: Can you do that?

11 JUROR NUMBER 49: I can, yes.

12 THE COURT: Thank you, sir. You may be seated. And
13 that's really the basis of all this is whether or not you can
14 be fair and impartial to both sides, that you're not going to
15 give any additional credence to someone because of the
16 attorney, because of a client, because of a witness. Okay?
17 You are to sit as a fair and impartial juror.

18 All right. Ladies and gentlemen, the following is a
19 list of potential witnesses in this case. And again, the
20 question is are you related by blood or marriage, connected
21 by some type of social or personal relationship or
22 professional relationship or you know these people, if you're
23 neighbors. And again, the emphasis is whether or not you can
24 be fair and impartial to both sides, depending on who calls
25 them. All right?

1 And they are, of course, Mr. Powell in this case, Robert
2 Powell.

3 Dr. Marie Gehle.

4 Donna Powell.

5 Nora Powell.

6 Christopher Powell.

7 Alphonso Kline.

8 And Dr. Emily Gottfried.

9 Again, is anyone related by blood, connected by
10 marriage, have a close personal relationship, special
11 friendship, professional friendship, or anything along those
12 lines with any of these potential witnesses? If so, please
13 stand.

14 (WHEREUPON, there was no response.)

15 THE COURT: All right. Ladies and gentlemen, you
16 shouldn't know anything about this case, but I need to make
17 sure. Sometimes through word-of-mouth or some other way.

18 Does anyone have any independent knowledge about this
19 case whatsoever? If so, please stand.

20 (WHEREUPON, there was no response.)

21 THE COURT: Ladies and gentlemen, additionally, has
22 anyone read anything about it, seen anything about it, you
23 know, potentially in the newspaper, along those lines? I
24 don't know that it's been there, but I'm required to ask it
25 at every trial. Ladies and gentlemen, has anyone read or

1 seen anything about this case or about Mr. Powell, Robert
2 Powell, in general? If so, please stand.

3 (WHEREUPON, there was no response.)

4 THE COURT: Ladies and gentlemen, does anyone know of
5 anything or about any of the crimes for which Mr. Powell has
6 been sentenced? If so, please stand.

7 (WHEREUPON, there was no response.)

8 THE COURT: Ladies and gentlemen, is anyone here related
9 to or have a close friend who has accused Mr. Powell, Robert
10 Powell here, of committing a sexual offense against them? If
11 so, please stand.

12 (WHEREUPON, there was no response.)

13 THE COURT: Ladies and gentlemen, now I'm going to ask
14 some questions and, again, these are questions that if you
15 feel more comfortable, I want you to come up and talk to me
16 personally. All right?

17 Do I have anyone here on this panel who has been the
18 victim of a violent crime? Or any family member? And when I
19 say family member, I mean an immediate family member,
20 parents, children, grandchildren, a very close aunt or uncle,
21 something along those lines, that has been the victim of a
22 violent crime. If so, please stand.

23 (WHEREUPON, several people stood.)

24 THE COURT: All right. Sir, I'm going to ask to give
25 you -- you to give me your name. I need you to tell me who

1 it is, but before that, if you would rather just come speak
2 with me, you can do that as well. So give me your number, if
3 you would.

4 JUROR NUMBER 21: 21.

5 THE COURT: Sir, do you want to come talk to me?

6 JUROR NUMBER 21: Yes, ma'am.

7 THE COURT: Come on around and, ma'am, give me your
8 number as well?

9 JUROR NUMBER 186: 186.

10 THE COURT: Would you like to come talk to me?

11 JUROR NUMBER 186: Yes.

12 THE COURT: Come on around and, sir, again, you're
13 Number 50?

14 JUROR NUMBER 49: Number 49.

15 THE COURT: 49. Sorry. I was one off. You want to
16 come around and talk to me? Come on around. All right.

17 THE COURT: Stand right here.

18 MR. FALK: Where do you want us?

19 THE COURT: Just stand right here, if that's okay. Come
20 on up.

21 THE BAILIFF: Juror Number 21, Your Honor.

22 (WHEREUPON, a bench conference was held with Juror
23 Number 21 as follows.)

24 THE COURT: How are you?

25 JUROR NUMBER 21: Good.

1 THE COURT: It's so nice to meet you.

2 JUROR NUMBER 21: Nice to meet you.

3 THE COURT: Okay. Number 21.

4 JUROR NUMBER 21: One of my -- my mama's husband

5 (unintelligible).

6 THE COURT: Okay.

7 JUROR NUMBER 21: Just me. And he's been a convict.

8 THE COURT: Okay.

9 JUROR NUMBER 21: There was tons of kids, and I was one

10 of them.

11 THE COURT: Okay. Let me ask you this. Do you want to

12 sit on this case?

13 JUROR NUMBER 21: No.

14 THE COURT: And I can understand that. I'm going to go

15 ahead and excuse you from the trial of this case. I want to

16 make sure you haven't talked to anyone about your experience.

17 JUROR NUMBER 21: Oh, no. Plus, I have two girls. I

18 get notifications on my phone. I don't want to.

19 THE COURT: I understand. Okay. I understand. What

20 I'm going to do is this. I'm going to go ahead and excuse

21 you. Thank you for being here. I appreciate that.

22 JUROR NUMBER 21: I would stay, but --

23 THE COURT: No, you're good.

24 (WHEREUPON, the bench conference ended.)

25 THE COURT: Number 21 is excused.

1 THE BAILIFF: This way, sir.

2 THE COURT: We are going to -- you're going to follow
3 the arrows, apparently.

4 THE BAILIFF: Number 186, Your Honor.

5 THE COURT: Come on up.

6 (WHEREUPON, a bench conference was held with Juror
7 Number 186 as follows.)

8 THE COURT: How are you?

9 JUROR NUMBER 186: Good. Good morning.

10 THE COURT: Good morning. Give me your number again?

11 JUROR NUMBER 186: 186.

12 THE COURT: Yes, ma'am?

13 JUROR NUMBER 186: I have a niece that was sexually
14 assaulted.

15 THE COURT: Okay.

16 JUROR NUMBER 186: Years ago. Two years ago.

17 THE COURT: Okay. Was it someone you knew that sexually
18 assaulted her?

19 JUROR NUMBER 186: No.

20 THE COURT: So, what this hearing is is this is not to
21 decide whether or not he committed a specific sexual assault
22 at this time, but whether or not he should be civilly
23 committed. And the State has the burden of proving a prior
24 conviction for a violent offense and then also whether or not
25 he suffers from any type of mental or psychological

1 abnormality that would make it more likely that he would
2 reoffend.

3 My question to you is is can you sit and be a fair and
4 impartial juror in the trial of this case based on your
5 experience with your niece? Can you do that?

6 JUROR NUMBER 186: No.

7 THE COURT: You can't? Okay. And I understand that.
8 But I appreciate you disclosing that. I'm going to go ahead
9 and excuse you. You said you're 186; right?

10 JUROR NUMBER 186: Yes.

11 THE COURT: Thank you for being here. Just give your
12 card to them.

13 (WHEREUPON, the bench conference ended.)

14 THE COURT: Number 186 is excused.

15 THE BAILIFF: Juror Number 49, Your Honor.

16 (WHEREUPON, a bench conference was held with Juror
17 Number 49 as follows.)

18 THE COURT: Thank you. Nice to meet you.

19 JUROR NUMBER 49: Yeah. Well, the violent crimes,
20 ma'am, my father has a restraining order against my -- or my
21 mom has a restraining order against my dad.

22 THE COURT: Okay.

23 JUROR NUMBER 49: And now I stay at the house with my
24 mom.

25 THE COURT: Okay.

1 JUROR NUMBER 49: So I don't know if that applies or
2 not.

3 THE COURT: It does, and let me ask you this. Is it a
4 domestic violence type of situation or --

5 JUROR NUMBER 49: Yes.

6 THE COURT: -- something along those lines?

7 JUROR NUMBER 49: Things escalated one night when I was
8 out of town. So --

9 THE COURT: Okay.

10 JUROR NUMBER 49: Yeah.

11 THE COURT: Okay. Okay. My question to you is is can
12 you be fair and impartial in the trial of this case, being
13 able to put aside any feelings you have about those events,
14 understanding that that has nothing to do with this case?

15 JUROR NUMBER 49: Yeah.

16 THE COURT: I mean you know that they're separate?

17 JUROR NUMBER 49: Separate, yeah.

18 THE COURT: I need to make sure in your head you can
19 separate them --

20 JUROR NUMBER 49: It doesn't confuse --

21 THE COURT: Exactly.

22 JUROR NUMBER 49: -- the facts.

23 THE COURT: And you can't be motivated by emotion in any
24 way, shape, or form. I mean you need to decide it based on
25 the facts as you hear them.

1 JUROR NUMBER 49: Okay.

2 THE COURT: And having to do specifically with Mr.
3 Powell and not anything you may from your parents or any
4 other incidents --

5 JUROR NUMBER 49: Experiences. Yeah.

6 THE COURT: Can you do that?

7 JUROR NUMBER 49: Yeah, I believe so.

8 THE COURT: You're confident?

9 JUROR NUMBER 49: Uh-huh.

10 THE COURT: You need to be absolutely sure. Okay.

11 JUROR NUMBER 49: I think so, yeah.

12 THE COURT: Okay. Well, I need you to be absolutely
13 sure. You've got to be able to tell me --

14 JUROR NUMBER 49: Okay.

15 THE COURT: -- because at the end of this case what I'm
16 going to do is I'm going to charge you on the law and I'm
17 going to say --

18 JUROR NUMBER 49: Uh-huh.

19 THE COURT: -- that this is what the State has to prove
20 to be able to, you know, find this determination --

21 JUROR NUMBER 49: Yeah.

22 THE COURT: -- and you're going to be asked yes or no.

23 JUROR NUMBER 49: Well, yes.

24 THE COURT: And you have to be able to follow the law.

25 JUROR NUMBER 49: And this is sexual assault. I also

1 know friends that have been --

2 THE COURT: Okay.

3 JUROR NUMBER 49: -- victims of that. So I guess there
4 is --

5 THE COURT: Okay.

6 JUROR NUMBER 49: -- like, that whole issue where I just
7 --

8 THE COURT: You've got to be able to distance yourself.

9 JUROR NUMBER 49: Yeah.

10 THE COURT: And you've got to be able to -- I mean are
11 you able to or not?

12 JUROR NUMBER 49: I don't know if I'd be able to, to be
13 honest.

14 THE COURT: All right. I'm going to go ahead --

15 JUROR NUMBER 49: Some of them are close friends and,
16 like --

17 THE COURT: I'm going to go ahead and excuse you then.

18 JUROR NUMBER 49: Okay.

19 THE COURT: Because I can't have you bringing that in
20 there, but thank you. You go this way.

21 JUROR NUMBER 49: Yes, ma'am.

22 (WHEREUPON, the bench conference ended.)

23 THE COURT: Number 49 is excused.

24 THE BAILIFF: This way, and let me have your badge,
25 please.

1 THE BAILIFF: Juror Number 5, Your Honor.

2 (WHEREUPON, a bench conference was held with Juror
3 Number 5 as follows.)

4 THE COURT: Nice to meet you, sir.

5 JUROR NUMBER 5: Nice to meet you.

6 THE COURT: It's a pleasure. Come on a little closer to
7 me. Okay.

8 JUROR NUMBER 5: When I was a kid, me and a few of my
9 friends got robbed.

10 THE COURT: Uh-huh.

11 JUROR NUMBER 5: Basically, these guys were in another
12 motel room. We were on vacation. They came in there.

13 THE COURT: Uh-huh.

14 JUROR NUMBER 5: I don't like to talk about it a lot.

15 But --

16 THE COURT: Okay.

17 JUROR NUMBER 5: Basically, they held us almost like
18 hostage for a while. This was in Wilmington.

19 THE COURT: Okay.

20 JUROR NUMBER 5: A bad time.

21 THE COURT: Okay. Yeah. That was hard for you. I
22 understand that.

23 JUROR NUMBER 5: Uh-huh.

24 THE COURT: I just want to make sure -- I'm sorry --

25 that you can separate that experience from here. I mean this

1 is not a criminal case. This is actually about a civil
2 commitment. And so I need to know that that experience in no
3 way will affect how you would decide this case in this trial.

4 JUROR NUMBER 5: I mean I couldn't tell you right now.
5 I don't know what's going on. So --

6 THE COURT: Okay. Again, like I said, I mean one really
7 has nothing to do with the other. This is whether or not Mr.
8 Powell can be civilly committed under our Sexually Violent
9 Predator statute.

10 JUROR NUMBER 5: Uh-huh.

11 THE COURT: So I just need to know whether or not you
12 feel comfortable sitting --

13 JUROR NUMBER 5: I don't think I would, no.

14 THE COURT: Okay. Well, I'm going to go ahead and
15 excuse you then.

16 JUROR NUMBER 5: Thank you.

17 (WHEREUPON, the bench conference ended.)

18 THE COURT: Number 5 is excused. All right. Thank you.
19 He was excused.

20 THE CLERK: I think you pronounced this witness wrong.

21 THE COURT: Oh, it's Gehle?

22 THE CLERK: It's Gehle.

23 THE COURT: Okay. Ladies and gentlemen, I'll go ahead
24 and say that I apologize. The doctor -- what's her first
25 name again?

1 MR. BOGLE: Marie Gehle.

2 THE COURT: Marie Gehle. Ladies and gentlemen, the one
3 witness -- I pronounced her last name wrong. It's Dr. Marie
4 Gehle. It's spelled G-e-h-l-e. I have always thought it was
5 Gehle, but it's Gehle. So I want to make sure no one knows
6 her or is close personal friends with her. Anyone?

7 (WHEREUPON, there was no response.)

8 THE COURT: No. Okay. Ladies and gentlemen, also, the
9 next question I am going to ask -- and again, it's one that I
10 invite you to come talk to me personally if you need to, if
11 you don't feel comfortable disclosing it.

12 Has anyone here ever been accused of, convicted of, a
13 victim of, or any member of your immediate family ever been
14 accused of, convicted of, or a victim of, whether or not it
15 went reported or didn't go reported, a sexual assault? If
16 so, please stand.

17 (WHEREUPON, several people stood.)

18 THE COURT: And I'm going to have everyone come talk to
19 me. And again, this is a pretty broad question and it
20 includes not only yourselves, but it also includes any family
21 members, any close, close personal friends.

22 And the idea, ladies and gentlemen, is I need to make
23 sure that you can be fair and impartial in the trial of this
24 case, understanding that one has nothing to do with the
25 other, and that you can set your feelings aside because you

1 can't ever make a jury decision based on emotion. You've got
2 to make it based on the facts.

3 And I'm going to order you at the end of the trial and
4 tell you what the law is in this case, and you have to be
5 able to follow it. And if for some reason you can't follow
6 it, you are not a juror that should be sat. Okay?

7 And again, the whole idea with the justice system is is
8 that you are fair and impartial and you're weighing
9 everything. That's why we have a jury of twelve people and
10 not just one judge sitting here. Okay?

11 So with that said, I'm going to ask all of y'all to come
12 talk to me. Just come on. Everyone come over, possibly
13 everybody. Okay. Come on. All right.

14 THE BAILIFF: Juror 152, Your Honor.

15 THE COURT: Come on up.

16 (WHEREUPON, a bench conference was held with Juror
17 Number 152 as follows.)

18 THE COURT: How are you? All right. Juror Number 152.
19 Yes, ma'am?

20 JUROR NUMBER 152: I was molested when I was eight by my
21 neighbor.

22 THE COURT: By your neighbor? Okay. Well, I can tell
23 you some of the testimony that we're going to hear in this
24 case has to do with the defendant --

25 JUROR NUMBER 152: I don't think I could watch it.

1 THE COURT: Okay. You don't feel comfortable trying
2 this. I understand that. I'm going to excuse you, but thank
3 you for being here.

4 JUROR NUMBER 152: Okay.

5 (WHEREUPON, the bench conference ended.)

6 THE COURT: Number 152 is excused.

7 THE BAILIFF: Juror 260, Your Honor.

8 THE COURT: Come on up.

9 (WHEREUPON, a bench conference was held with Juror
10 Number 260 as follows.)

11 THE COURT: How's your arm?

12 JUROR NUMBER 260: Well, it hurts.

13 THE COURT: On the mend. Okay. Yes, ma'am.

14 JUROR NUMBER 260: I've been raped and sexually
15 assaulted twice.

16 THE COURT: Okay.

17 JUROR NUMBER 260: But I want to stay.

18 THE COURT: You want to stay? But I need to know that
19 you can be --

20 JUROR NUMBER 260: Oh, yeah.

21 THE COURT: -- fair and impartial. Are you comfortable
22 --

23 JUROR NUMBER 260: Yes.

24 JUROR NUMBER: -- and understand that one has nothing to
25 do --

1 JUROR NUMBER 260: I know.

2 THE COURT: Okay. Do you mind me --

3 JUROR NUMBER 260: I know the difference.

4 THE COURT: Can I ask you -- do you mind telling me was
5 it when you were a minor or --

6 JUROR NUMBER 260: Yeah. I was 13.

7 THE COURT: Okay. And was it a family member that you
8 knew or someone --

9 JUROR NUMBER 260: No.

10 THE COURT: No? Okay.

11 JUROR NUMBER 260: It was just a --

12 THE COURT: And you said it was two incidents?

13 JUROR NUMBER 260: Uh-huh.

14 THE COURT: Were they separate or somewhere close in
15 time? The same?

16 JUROR NUMBER 260: The same person.

17 THE COURT: The same person? Okay. Was it over a
18 course of a period of time?

19 JUROR NUMBER 260: Within six months.

20 THE COURT: Okay. And are you absolutely positive you
21 can be fair and impartial?

22 JUROR NUMBER 260: Oh, yeah.

23 THE COURT: Okay. All right.

24 JUROR NUMBER 260: I'm a big girl.

25 THE COURT: Okay. I appreciate you staying with us.

1 Yeah, you're going to go to the right. Norman is going to
2 make you go that way, but thank you for staying with us.

3 (WHEREUPON, the bench conference ended.)

4 THE BAILIFF: Juror 124, Your Honor.

5 (WHEREUPON, a bench conference was held with Juror
6 Number 124 as follows.)

7 THE COURT: How are you, sir?

8 JUROR NUMBER 124: I'm doing fine.

9 THE COURT: Good.

10 JUROR NUMBER 124: My mother was sexually molested by a
11 reverend. He is a reverend now.

12 THE COURT: When?

13 JUROR NUMBER 124: When she was younger.

14 THE COURT: When she was younger?

15 JUROR NUMBER 124: Yeah.

16 THE COURT: All right. I need to know if you can be
17 fair and impartial in the trial of this case, knowing one has
18 nothing to do with the other. You understand that; right?

19 JUROR NUMBER 124: Yeah.

20 THE COURT: Are you comfortable?

21 JUROR NUMBER 124: Uh-huh.

22 THE COURT: Thank you for disclosing that. I appreciate
23 it.

24 JUROR NUMBER 124: All right.

25 (WHEREUPON, the bench conference ended.)

1 THE COURT: Number 124 is going to stay with us.

2 THE BAILIFF: Juror 45, Your Honor.

3 (WHEREUPON, a bench conference was held with Juror
4 Number 45 as follows.)

5 THE COURT: How are you?

6 JUROR NUMBER 45: Fine.

7 THE COURT: It's a pleasure to meet you.

8 JUROR NUMBER 45: I have a nephew who is a registered
9 sex offender.

10 THE COURT: Okay.

11 JUROR NUMBER 45: He's on the registry.

12 THE COURT: Is he here in Beaufort County?

13 JUROR NUMBER 45: Virginia.

14 THE COURT: He's in Virginia?

15 JUROR NUMBER 45: Uh-huh.

16 THE COURT: Okay.

17 JUROR NUMBER 45: I also have a sister who was murdered
18 in 2001.

19 THE COURT: Okay.

20 JUROR NUMBER 45: It's -- she was shot, but there was
21 some -- she was disrobed and --

22 THE COURT: Uh-huh.

23 JUROR NUMBER 45: -- there was -- that's just a cold
24 case.

25 THE COURT: Okay.

1 JUROR NUMBER 45: That was in Charlotte.

2 THE COURT: In Charlotte, North Carolina?

3 JUROR NUMBER 45: Yeah.

4 THE COURT: Okay. And what year was that?

5 JUROR NUMBER 45: 2001.

6 THE COURT: Okay. Are you okay to sit on this trial?

7 JUROR NUMBER 45: I am.

8 THE COURT: Do you feel fine?

9 JUROR NUMBER 45: Uh-huh.

10 THE COURT: Okay. I just need to know to make sure
11 you're okay. Okay. I appreciate it.

12 JUROR NUMBER 45: I just wanted to let you know.

13 THE COURT: Thank you.

14 (WHEREUPON, the bench conference ended.)

15 THE COURT: Number 45 is going to stay with us. Thank
16 you.

17 THE BAILIFF: This way, ma'am.

18 THE COURT: They're going to tell you to go this way.

19 THE BAILIFF: Juror 345, Your Honor.

20 (WHEREUPON, a bench conference was held with Juror
21 Number 345 as follows.)

22 THE COURT: It's a pleasure, sir.

23 JUROR NUMBER 345: My wife was raped when she was a
24 teenager by her cousin.

25 THE COURT: Okay.

1 JUROR NUMBER 345: So I don't think this is good for me.
2 THE COURT: Okay. All right. I'm going to go ahead and
3 excuse you.
4 JUROR NUMBER 345: Okay.
5 THE COURT: But I appreciate your candor. Thank you.
6 JUROR NUMBER 345: Thank you.
7 (WHEREUPON, the bench conference ended.)
8 THE COURT: Number 345 is excused.
9 THE BAILIFF: This way, sir. Juror 309, Your Honor.
10 (WHEREUPON, a bench conference was held with Juror
11 Number 309 as follows.)
12 THE COURT: How are you?
13 JUROR NUMBER 309: Good morning.
14 THE COURT: It's so nice to meet you.
15 JUROR NUMBER 309: My daughter, 18 years ago, was
16 assaulted and harassed.
17 THE COURT: Okay.
18 JUROR NUMBER 309: By a family member.
19 THE COURT: Okay.
20 JUROR NUMBER 309: But I see no reason to be dismissed.
21 I can be fair and impartial.
22 THE COURT: Okay. So you're comfortable?
23 JUROR NUMBER 309: Yes.
24 THE COURT: You can separate that incident with
25 whatever's in front of us?

1 JUROR NUMBER 309: Of course.

2 THE COURT: I appreciate that. Thank you.

3 JUROR NUMBER 309: You're welcome.

4 (WHEREUPON, the bench conference ended.)

5 THE COURT: Number 309 is going to stay with us.

6 THE BAILIFF: Juror 328, Your Honor.

7 (WHEREUPON, a bench conference was held with Juror

8 Number 328 as follows.)

9 THE COURT: Okay. It's nice to meet you.

10 JUROR NUMBER 328: It's nice to meet you.

11 THE COURT: Sure.

12 JUROR NUMBER 328: I have a cousin who has served jail

13 time for being a sexual predator.

14 THE COURT: Okay.

15 JUROR NUMBER 328: However, we are not close. I just

16 felt like I needed to disclose that information.

17 THE COURT: And I appreciate knowing that.

18 JUROR NUMBER 328: Certainly.

19 THE COURT: Where is he?

20 JUROR NUMBER 328: He's in Florida.

21 THE COURT: He's in Florida now? Do you know --

22 JUROR NUMBER 328: And it's been years.

23 THE COURT: It's been --

24 JUROR NUMBER 328: Actually, he was recently moved to

25 Savannah, like within the last month or two, but he -- we are

1 not close or nothing.

2 THE COURT: Okay.

3 JUROR NUMBER 328: And I just felt like I should
4 disclose it.

5 THE COURT: And you should. And I appreciate that.

6 JUROR NUMBER 328: Yeah.

7 THE COURT: Can you be fair and impartial in the trial
8 of this case?

9 JUROR NUMBER 328: Yes.

10 THE COURT: Do you feel comfortable and understand that
11 one has nothing to do with the other?

12 JUROR NUMBER 328: Yes.

13 THE COURT: Thank you.

14 JUROR NUMBER 328: Okay.

15 THE COURT: I'm going to have you stay with us.

16 JUROR NUMBER 328: Okay.

17 MR. FALK: Your Honor?

18 THE COURT: Pardon? Sure. Sure.

19 MR. FALK: Is he -- I want to know whether or not he was
20 civilly committed or just doing prison time.

21 THE COURT: Do you know -- do you know if he was
22 criminally convicted of a sexual offense?

23 JUROR NUMBER 328: I believe so. I'd have to ask.

24 THE COURT: And that he hasn't been civilly committed?
25 I mean do you understand the difference?

1 JUROR NUMBER 328: Not really, but I think he served
2 jail time and he's now --

3 THE COURT: Okay.

4 JUROR NUMBER 328: -- doing jail in --

5 THE COURT: Okay.

6 JUROR NUMBER 328: -- Savannah.

7 THE COURT: Okay. That sounds to me like he was
8 criminally convicted.

9 MR. BOGLE: It was in Florida?

10 THE COURT: She said it was in Florida.

11 MR. BOGLE: And he's since moved to Savannah?

12 THE COURT: Yeah. He's in Savannah.

13 JUROR NUMBER 328: Yeah. And it's been years since he

14 --

15 THE COURT: Was out?

16 JUROR NUMBER 328: Yeah.

17 THE COURT: Okay.

18 JUROR NUMBER 328: I just felt like I should --

19 THE COURT: Thank you.

20 JUROR NUMBER 328: -- tell you that.

21 THE COURT: I appreciate it. Thank you.

22 (WHEREUPON, the bench conference ended.)

23 THE COURT: Okay. Number 328 is going to stay with us.

24 Okay.

25 THE BAILIFF: Juror 245, Your Honor.

1 (WHEREUPON, a bench conference was held with Juror
2 Number 245 as follows.)

3 THE COURT: It's nice to meet you.

4 JUROR NUMBER 245: Nice to meet you too.

5 THE COURT: Pleasure.

6 JUROR NUMBER 245: Okay. So my sister was sexually
7 molested when she was a child, when she was 9.

8 THE COURT: Okay.

9 JUROR NUMBER 245: Two of my best friends -- their
10 daughters were sexually molested.

11 THE COURT: Okay.

12 JUROR NUMBER 245: And then I was raped when I was 25.

13 THE COURT: Okay.

14 JUROR NUMBER 245: That was never reported.

15 THE COURT: Okay. I need to know this. Can you be fair
16 and impartial --

17 JUROR NUMBER 245: Oh, absolutely.

18 THE COURT: -- in the trial of this case --

19 JUROR NUMBER 245: Yes.

20 THE COURT: -- understanding that one has absolutely
21 nothing to do with the other? You are probably going to hear
22 some evidence about a prior conviction or convictions for --

23 JUROR NUMBER 245: Right.

24 THE COURT: -- sexual abuse and I want you to understand
25 that. And this is a civil commitment case; so it's a little

1 bit different for everyone to kind of understand.

2 So I just want to make sure that you can separate your
3 own experience --

4 JUROR NUMBER 245: Yes, I can. And my husband's best
5 friend was convicted of -- like, there was -- it was in
6 Pooler, Georgia.

7 THE COURT: Uh-huh.

8 JUROR NUMBER 245: This past year. This past year.

9 THE COURT: Uh-huh.

10 JUROR NUMBER 245: Convicted of underage --

11 THE COURT: Solicitation?

12 JUROR NUMBER 245: Yes.

13 THE COURT: Or something along those -- okay. So he was
14 trying to solicit --

15 JUROR NUMBER 245: Yes.

16 THE COURT: --- sex with underage people?

17 JUROR NUMBER 245: Correct.

18 THE COURT: Okay. And this was just in the past year?

19 JUROR NUMBER 245: Yes.

20 THE COURT: Okay.

21 JUROR NUMBER 245: Yeah. When he was convicted.

22 THE COURT: So is he doing prison time?

23 JUROR NUMBER 245: Yes.

24 THE COURT: Or is he -- do you have any idea what his
25 sentence was or you have no idea?

1 JUROR NUMBER 245: I have no idea.

2 THE COURT: Okay. Because you have no contact with him?

3 JUROR NUMBER 245: Correct.

4 THE COURT: It's just -- okay. Okay. And this is your

5 husband's best friend from childhood or just --

6 JUROR NUMBER 245: From the Navy.

7 THE COURT: From the Navy? Okay. Okay. Again, you can

8 be fair and impartial --

9 JUROR NUMBER 245: Oh, yeah.

10 THE COURT: -- based on all of these different

11 experiences?

12 JUROR NUMBER 245: Oh, yeah.

13 THE COURT: Okay. I appreciate you disclosing that to

14 me. Thank you.

15 JUROR NUMBER 245: all right.

16 THE COURT: You're going to stay with us.

17 (WHEREUPON, the bench conference ended.)

18 THE COURT: Number 245 is going to stay with us.

19 THE BAILIFF: Juror 93, Your Honor.

20 (WHEREUPON, a bench conference was held with Juror

21 Number 93 as follows.)

22 THE COURT: Hi. How are you?

23 JUROR NUMBER 93: Good. How are you?

24 THE COURT: Good.

25 JUROR NUMBER 93: I was kidnapped and sexually abused

1 when I was six years old in New Jersey.

2 THE COURT: Okay.

3 JUROR NUMBER 93: So I don't know --

4 THE COURT: Can you sit here?

5 JUROR NUMBER 93: Huh-uh.

6 THE COURT: Okay. I didn't think so. I'm going to
7 excuse you.

8 JUROR NUMBER 93: Okay. Thank you.

9 THE COURT: Thank you for being here.

10 (WHEREUPON, the bench conference ended.)

11 THE COURT: Number 93 is excused.

12 THE BAILIFF: Juror 131, Your Honor.

13 (WHEREUPON, a bench conference was held with Juror
14 Number 131 as follows.)

15 THE COURT: Nice to meet you.

16 JUROR NUMBER 131: Nice to meet you.

17 THE COURT: Yes?

18 JUROR NUMBER 131: When I was 14 years old, the first
19 time I ever had sex, I was raped by an older man.

20 THE COURT: Okay. Are you okay to sit on this case or
21 not? You need to be sure. This is --

22 JUROR NUMBER 131: I'm not sure.

23 THE COURT: Okay. That's what I want to know from you.
24 That's absolutely fine. I'm going to excuse you from being
25 here, but thank you.

1 JUROR NUMBER 131: Okay.

2 THE COURT: Thank you. I hope to see you again.

3 (WHEREUPON, the bench conference ended.)

4 THE COURT: Number 131 is excused.

5 THE BAILIFF: Juror 98, Your Honor.

6 THE COURT: Okay.

7 (WHEREUPON, a bench conference was held with Juror
8 Number 98 as follows.)

9 THE COURT: Hi. It's nice to meet you.

10 JUROR NUMBER 98: It's nice to meet you. I have
11 personal experience myself when I was a little girl.

12 THE COURT: Okay.

13 JUROR NUMBER 98: From the age of about 11 or 12 until I
14 was 16.

15 THE COURT: Okay.

16 JUROR NUMBER 98: My mother's boyfriend at the time.

17 THE COURT: Okay.

18 JUROR NUMBER 98: Then after that, it was a situation
19 with my two nieces.

20 THE COURT: Okay.

21 JUROR NUMBER 98: Which was my brother's two girls.

22 THE COURT: Okay.

23 JUROR NUMBER 98: But they were very tiny, and he was
24 the one that did it.

25 THE COURT: The same person?

1 JUROR NUMBER 98: It was my brother.

2 THE COURT: Oh, okay. Okay. I need to know from you is
3 whether or not you can sit and be fair and impartial in the
4 trial of this case --

5 JUROR NUMBER 98: I can.

6 THE COURT: -- separating it, and you need to be
7 absolutely sure you can be fair to both sides.

8 JUROR NUMBER 98: Yeah.

9 THE COURT: And I know you can understand that and know
10 that.

11 JUROR NUMBER 98: Uh-huh.

12 THE COURT: But I just want to make sure because
13 sometimes it's very difficult for someone themselves
14 personally.

15 JUROR NUMBER 98: Yes. I can do it.

16 THE COURT: You're positive?

17 JUROR NUMBER 98: I've forgiven him. So I'm good with
18 that.

19 THE COURT: And you're okay?

20 JUROR NUMBER 98: Uh-huh.

21 THE COURT: Are you sure?

22 JUROR NUMBER 98: Uh-huh.

23 THE COURT: Okay. Well, I appreciate that.

24 JUROR NUMBER 98: Okay.

25 THE COURT: All right.

1 (WHEREUPON, the bench conference ended.)
2 THE COURT: Number 98 is going to stay with us.
3 THE BAILIFF: Juror 326, Your Honor.
4 (WHEREUPON, a bench conference was held with Juror
5 Number 326 as follows.)
6 THE COURT: Hi. It's nice to meet you.
7 JUROR NUMBER 326: You asked that question.
8 THE COURT: Yes.
9 JUROR NUMBER 326: I'm not sure if it's responsive.
10 THE COURT: It's okay.
11 JUROR NUMBER 326: My best friend -- her brother is in
12 jail for the same thing.
13 THE COURT: Okay.
14 JUROR NUMBER 326: So I just didn't know.
15 THE COURT: Okay. No. And I'm glad you said that.
16 What I need to know is this, is that you can distance
17 yourself, understanding that that is a solely different case.
18 JUROR NUMBER 326: Well, that's --
19 THE COURT: And that you have to determine this case
20 based on, you know, what you hear in the courtroom based
21 specifically on --
22 JUROR NUMBER 326: Right. That's why I just wanted to
23 make sure, and I wanted to be honest.
24 THE COURT: Thank you. But you're comfortable you can
25 do that? You understand it's --

1 JUROR NUMBER 326: Yeah, yeah, yeah.

2 THE COURT: I can't have you thinking. I have to have
3 you, like, know in your own head that you can follow what I
4 tell you and understand that one has nothing to do with the
5 other. Do you understand every case is different? Every
6 circumstance is different?

7 JUROR NUMBER 326: I do.

8 THE COURT: And you have to decide --

9 JUROR NUMBER 326: I just felt like I needed to stand.

10 THE COURT: And I'm -- you did need to and I appreciate
11 that, but I just need to make sure that you can be fair and
12 impartial.

13 JUROR NUMBER 326: Yes, ma'am.

14 THE COURT: Thank you.

15 JUROR NUMBER 326: All right. Thank you.

16 THE COURT: Give me your number again.

17 JUROR NUMBER 326: 326.

18 (WHEREUPON, the bench conference ended.)

19 THE COURT: Okay. 326 is going to stay with us.

20 THE BAILIFF: Juror 70, Your Honor.

21 (WHEREUPON, a bench conference was held with Juror
22 Number 70 as follows.)

23 THE COURT: Hi. How are you? A pleasure.

24 JUROR NUMBER 70: Nice to meet you.

25 THE COURT: I love your bag.

1 JUROR NUMBER 70: Oh, thank you. When I was a child, I
2 was a victim of sexual assault. So I don't know.

3 THE COURT: Okay. I need to know this. Roughly how old
4 were you?

5 JUROR NUMBER 70: Five -- six years old.

6 THE COURT: Okay. Can you be fair and impartial in the
7 trial of this case? Are you comfortable and can you sit and
8 listen to it or is it going to be hard for you emotionally?

9 JUROR NUMBER 70: If it's something to do with children
10 --

11 THE COURT: You can't do it?

12 JUROR NUMBER 70: No.

13 THE COURT: Got it. Okay. All right. I appreciate
14 that.

15 JUROR NUMBER 70: Okay.

16 THE COURT: I'm going to go ahead and excuse you.

17 JUROR NUMBER 70: Thank you.

18 (WHEREUPON, the bench conference ended.)

19 THE COURT: Number 70 is excused.

20 THE BAILIFF: Juror 239, Your Honor.

21 (WHEREUPON, a bench conference was held with Juror
22 Number 239 as follows.)

23 THE COURT: Hi. How are you?

24 JUROR NUMBER 239: Getting along.

25 THE COURT: It's a pleasure.

1 JUROR NUMBER 239: Back when I was younger, one of my
2 neighbors was accused of that.

3 THE COURT: He was accused of that?

4 JUROR NUMBER 239: Yeah. And after listening to my
5 parents, I just don't know if I'd be fair and impartial as a
6 juror, but --

7 THE COURT: Okay. You can't be fair and impartial?

8 JUROR NUMBER 239: I don't think so.

9 THE COURT: Okay. All right. Well, I appreciate your
10 candor. I'm going to go ahead and excuse you. Thank you.

11 JUROR NUMBER 239: Thank you.

12 (WHEREUPON, the bench conference ended.)

13 THE COURT: 239 is excused.

14 THE BAILIFF: Juror 294, Your Honor.

15 THE COURT: Okay.

16 (WHEREUPON, a bench conference was held with Juror
17 Number 294 as follows.)

18 THE COURT: Hi. It's okay.

19 JUROR NUMBER 294: I just can't.

20 THE COURT: Don't worry about it. Okay. You don't want
21 to sit?

22 JUROR NUMBER 294: No.

23 THE COURT: Okay. All right. Is it easier if I just
24 don't ask you and you just tell me you don't want to sit?

25 JUROR NUMBER 294: Right.

1 THE COURT: Okay. Okay. I'm going to excuse you, but
2 thank you for coming today.

3 JUROR NUMBER 294: Okay. (Unintelligible.)

4 THE COURT: Yes. Okay.

5 JUROR NUMBER 294: Thank you.

6 THE COURT: Okay. Absolutely. Just give me your number
7 and we're going to let you go.

8 JUROR NUMBER 294: 294.

9 THE COURT: 294? All right.

10 JUROR NUMBER 294: I'm sorry.

11 THE COURT: No. You're fine. Thank you. It's good to
12 see you again.

13 (WHEREUPON, the bench conference ended.)

14 THE COURT: Already. 294 is excused.

15 THE BAILIFF: Juror 24, Your Honor.

16 (WHEREUPON, a bench conference was held with Juror
17 Number 24 as follows.)

18 THE COURT: Hi. How are you?

19 JUROR NUMBER 24: This happened, like, a while ago. I
20 just wanted to disclose.

21 THE COURT: Uh-huh.

22 JUROR NUMBER 24: I was good friends with her.

23 THE COURT: Okay.

24 JUROR NUMBER 24: But her mother's ex-boyfriend used to
25 come in and sexually assault her.

1 THE COURT: Okay.

2 JUROR NUMBER 24: She didn't know about it. She never
3 said anything about it.

4 THE COURT: Okay. And then she just recently disclosed
5 that?

6 JUROR NUMBER 24: There has been no report of it.

7 THE COURT: Okay.

8 JUROR NUMBER 24: I just know.

9 THE COURT: Okay. Did she tell you contemporaneously or
10 how -- how did you find out about it?

11 JUROR NUMBER 24: She told me.

12 THE COURT: Okay.

13 JUROR NUMBER 24: In confidence.

14 THE COURT: Okay. I need to know whether or not you can
15 be fair and impartial in the trial of this case?

16 JUROR NUMBER 24: Yes.

17 THE COURT: Okay. And tell me how old was this woman
18 roughly or young girl when you think it occurred?

19 JUROR NUMBER 24: She was, like, 12.

20 THE COURT: 12-ish and around there. Okay. Okay. So
21 you were childhood friends then. Okay. All right. But
22 you're okay to sit?

23 JUROR NUMBER 24: Yes.

24 THE COURT: Are you comfortable?

25 JUROR NUMBER 24: Yes.

1 THE COURT: Okay. Perfect. Thank you.

2 (WHEREUPON, the bench conference ended.)

3 THE COURT: All right. Number 24 is going to stay with
4 us.

5 (WHEREUPON, there was a bench conference with the
6 attorneys off the record, after which the proceedings
7 resumed as follows.)

8 THE COURT: Ladies and gentlemen, does any member of the
9 jury panel have a parent that was addicted to either drugs
10 and/or alcohol? If so, please stand.

11 And, of course, this is another one that I'm going to
12 tell you to come talk to me.

13 (WHEREUPON, several people stood.)

14 THE COURT: Come on around, ladies. Unless you feel
15 comfortable? Do you want to do it in private? It's
16 completely up to you.

17 JUROR NUMBER 260: I don't care.

18 THE COURT: Okay.

19 JUROR NUMBER 260: My dad was a crackhead.

20 THE COURT: Okay. So we're going to -- and I'll get to
21 you. No problem. And I'm going to ask one more question.
22 Well, let's take care of this first. Ladies, do you feel
23 comfortable staying there and saying it? Okay.

24 We're going to go ahead and start. Give me your name
25 and number because you spoke up first.

1 JUROR NUMBER 260: All right. My name is Amber Rucker.
2 I'm Number 260.

3 THE COURT: Okay.

4 JUROR NUMBER 260: And my dad was a drug addict here in
5 Beaufort County.

6 THE COURT: Okay. Thank you. You may be seated.

7 Ma'am, would you like to come talk to me or are you
8 comfortable staying right there?

9 JUROR NUMBER 310: I'm fine right here.

10 THE COURT: And just give me your number.

11 JUROR NUMBER 310: 310.

12 THE COURT: Yes, ma'am?

13 JUROR NUMBER 310: My father was a functioning
14 alcoholic.

15 THE COURT: Okay. Thank you, ma'am. You may be seated.

16 Yes, ma'am?

17 JUROR NUMBER 98: I'm Number 98, and my mother was an
18 alcoholic.

19 THE COURT: Thank you, ma'am. You may be seated.

20 Yes?

21 JUROR NUMBER 245: Number 245. My dad was a drug addict
22 and an alcoholic.

23 THE COURT: Thank you. You may be seated.

24 All right. I'm going to talk to you in just one moment.
25 I'm going to ask one more personal question because I may

1 have someone that wants to approach me again.

2 Ladies and gentlemen, do I have any member of the jury
3 panel who has been a victim of or a close family member has
4 been a victim of domestic violence? If so, please stand.

5 (WHEREUPON, several people stood.)

6 THE COURT: All right. And I'm going to have you come
7 talk to me. So come on around.

8 If you have already earlier disclosed -- I think maybe
9 one of you told me that they had been a victim of domestic
10 violence potentially. You don't need to repeat it, but if
11 you didn't disclose that, just come on around. Just come
12 talk to me. Just come talk to me.

13 THE BAILIFF: Juror 306, Your Honor.

14 (WHEREUPON, a bench conference was held with Juror
15 Number 306 as follows.)

16 THE COURT: Hi. It's nice to meet you.

17 JUROR NUMBER 306: It's nice to meet you.

18 THE COURT: Yes?

19 JUROR NUMBER 306: (Unintelligible.)

20 THE COURT: Okay. Okay. I just need to -- oh, sorry.
21 She wants me to back you up just a little bit, and that's
22 fine.

23 JUROR NUMBER 306: Okay.

24 THE COURT: I think it's fine. It's just one of these
25 questions that I need disclosed. It doesn't disqualify you

1 in any way.

2 JUROR NUMBER 306: Okay.

3 THE COURT: Okay? I just needed to know that. So okay.

4 Are you fine to sit in this type of trial?

5 JUROR NUMBER 306: Uh-huh.

6 THE COURT: Are you okay?

7 JUROR NUMBER 306: Yep.

8 THE COURT: Thank you. I appreciate it.

9 (WHEREUPON, the bench conference ended.)

10 THE COURT: All right. Number 306 is going to stay with
11 us.

12 THE BAILIFF: Juror 260, Your Honor.

13 (WHEREUPON, a bench conference was held with Juror
14 Number 260 as follows.)

15 THE COURT: We are going to be fast friends.

16 JUROR NUMBER 260: I'm a member of domestic violence; so
17 is my mother.

18 THE COURT: Okay. Okay.

19 JUROR NUMBER 260: I'm good.

20 THE COURT: You -- I know you're staying.

21 JUROR NUMBER 260: I'm staying.

22 THE COURT: Okay. You're still okay?

23 JUROR NUMBER 260: I'm good.

24 THE COURT: Okay.

25 MR. BOGLE: Number 260?

1 THE COURT: Number 260.

2 JUROR NUMBER: Thank you.

3 THE COURT: Thank you.

4 (WHEREUPON, the bench conference ended.)

5 THE COURT: Okay.

6 THE BAILIFF: Juror 12, Your Honor.

7 (WHEREUPON, a bench conference was held with Juror

8 Number 12 as follows.)

9 THE COURT: Hi. Good to see you.

10 JUROR NUMBER 12: Good to see you. My kids' father

11 physically abused me until I got away and moved here in 2008.

12 THE COURT: Okay. And so you've been here since 2008?

13 JUROR NUMBER 12: Uh-huh.

14 THE COURT: Everything good?

15 JUROR NUMBER 12: Yep.

16 THE COURT: Good. In this case, I don't know exactly

17 how this relates, but I want to make sure you can be fair and

18 impartial --

19 JUROR NUMBER 12: Uh-huh.

20 THE COURT: -- in the trial of this case, understanding

21 that that's a completely different experience?

22 JUROR NUMBER 12: Yes, ma'am.

23 THE COURT: Do you understand that?

24 JUROR NUMBER 12: Yes.

25 THE COURT: Okay. What I'm going to do is this. You're

1 Number 12. Go ahead and take a seat. We appreciate you
2 staying with us.

3 JUROR NUMBER 12: Okay.

4 THE COURT: And I'll be back with you.

5 JUROR NUMBER 12: Okay.

6 THE COURT: Thank you.

7 (WHEREUPON, the bench conference ended.)

8 (WHEREUPON, a bench conference was held with the
9 attorneys off the record, after which the proceedings
10 resumed as follows.)

11 THE COURT: Come on up.

12 THE BAILIFF: Juror 272, Your Honor.

13 (WHEREUPON, a bench conference was held with Juror
14 Number 272 as follows.)

15 THE COURT: Hi.

16 JUROR NUMBER 272: How are you?

17 THE COURT: How are you?

18 JUROR NUMBER 272: Good.

19 THE COURT: Come closer.

20 JUROR NUMBER 272: My family had domestic violence in
21 the home when I was around -- between 12 and 15.

22 THE COURT: Okay.

23 JUROR NUMBER 272: By my mom.

24 THE COURT: By your mother?

25 JUROR NUMBER 272: Uh-huh.

1 THE COURT: Okay. Did she physically --

2 JUROR NUMBER 272: Uh-huh.

3 THE COURT: -- hurt you?

4 JUROR NUMBER 272: Physically and verbally.

5 THE COURT: Okay. Did she use drugs as well or alcohol
6 or no?

7 JUROR NUMBER 272: Not that I know of.

8 THE COURT: She was just physically abusive? Okay.

9 JUROR NUMBER 272: That's all she would do.

10 THE COURT: Okay. So she was just physically abusive?

11 JUROR NUMBER 272: Uh-huh.

12 THE COURT: I just want to make sure that -- this case
13 really has to do more with a sexual assault type of nature.

14 JUROR NUMBER 272: Okay.

15 THE COURT: But I need to know that you can be fair and
16 impartial --

17 JUROR NUMBER 272: Okay.

18 THE COURT: -- in the trial of this case and weighing it
19 and understanding that your situation is completely
20 different.

21 JUROR NUMBER 272: Okay.

22 THE COURT: Can you do that?

23 JUROR NUMBER 272: Yes, ma'am.

24 THE COURT: You're comfortable doing that?

25 JUROR NUMBER 272: Yes, ma'am.

1 THE COURT: I appreciate that.

2 JUROR NUMBER 272: All right.

3 THE COURT: All right.

4 JUROR NUMBER 272: Thank you.

5 (WHEREUPON, the bench conference ended.)

6 THE COURT: Number 272 is going to stay with us.

7 THE BAILIFF: Juror 245, Your Honor.

8 (WHEREUPON, a bench conference was held with Juror
9 Number 245 as follows.)

10 JUROR NUMBER 245: My mom was abused. I was abused by
11 my ex-husband.

12 THE COURT: Okay.

13 JUROR NUMBER 245: And recently, my son was picked up
14 and thrown on his back by his father.

15 THE COURT: Okay. How old is your son?

16 JUROR NUMBER 245: Sixteen.

17 THE COURT: Sixteen? Okay.. Again, I need to make sure.
18 You know, these cases are hard and I appreciate that, and you
19 kind of have a background with having been exposed to this
20 and having to have gone through it.

21 JUROR NUMBER 245: Because it is my child, I can't do
22 it. That's my child.

23 THE COURT: I understand that and that's not unusual I
24 think for parents. Are you comfortable with me going ahead
25 and excusing you --

1 JUROR NUMBER 245: Absolutely.

2 THE COURT: -- from this case. Is that okay?

3 JUROR NUMBER 245: Uh-huh.

4 THE COURT: Okay. I'm going to do that. I just think
5 there's just a lot --

6 JUROR NUMBER 245: And we're still, like --

7 THE COURT: You're still going through it.

8 JUROR NUMBER 245: We haven't even reached our 365 days
9 yet.

10 THE COURT: Okay.

11 JUROR NUMBER 245: Which will be next month.

12 THE COURT: Okay. Okay. I appreciate your willingness
13 to be here. Thank you so much. I'm going to excuse you.

14 (WHEREUPON, the bench conference ended.)

15 THE COURT: Number 245 is going to be excused. Okay.
16 Anyone else?

17 Ladies and gentlemen, has any member of the jury panel
18 been the subject of or had a close friend or family member
19 that was the subject of a mental inquest warrant or other
20 civil commitment procedure, possibly through probate court,
21 for mental health reasons? If so, please stand.

22 In other words, have you ever had a close personal
23 friend or a family member that either you had to have
24 committed civilly or potentially was committed civilly, even
25 if it potentially was against what your wishes were. Anyone

1 ever gone through that procedure or through that experience?

2 If so, please stand.

3 (WHEREUPON, several people stood.)

4 THE COURT: And, ma'am, give me your number, if you
5 would.

6 JUROR NUMBER 303: 303.

7 THE COURT: Are you comfortable talking there?

8 JUROR NUMBER 303: May I approach to do this?

9 THE COURT: Absolutely. Come on around. Sir, your
10 number, please?

11 JUROR NUMBER 174: 174.

12 THE COURT: Sir, would you like to approach?

13 JUROR NUMBER 174: Yes.

14 THE COURT: Please come around. Anyone else? Come on
15 up.

16 THE BAILIFF: Juror 303, Your Honor.

17 (WHEREUPON, a bench conference was held with Juror
18 Number 303 as follows.).

19 THE COURT: All right. Come right here. It's nice to
20 meet you.

21 JUROR NUMBER 303: You too.

22 THE COURT: Okay.

23 JUROR NUMBER 303: I don't know. I had a nervous
24 breakdown probably about 30 years ago and I was committed for
25 three days to a hospital.

1 THE COURT: Okay.

2 JUROR NUMBER 303: I don't know if that counts.

3 THE COURT: Okay. No, that's okay. So it was just your
4 family brought you in? Is that --

5 JUROR NUMBER 303: Yeah.

6 THE COURT: Okay. Okay. Since then, you've been fine,
7 not an issue?

8 JUROR NUMBER 303: Oh, yeah.

9 THE COURT: Do you understand the trial of this case --
10 what the State is seeking to do is civilly commit Mr. Powell,
11 and so I want to make sure based on that experience you don't
12 have any kind of --

13 JUROR NUMBER 303: Like, civilly commit? Like, I was
14 just committed for three days for a nervous breakdown. It
15 wasn't civil. It was a family -- I went to the hospital.

16 THE COURT: They just put you in there and --

17 JUROR NUMBER 303: Yes.

18 THE COURT: -- stabilized you and you were fine?

19 JUROR NUMBER 303: Yes.

20 THE COURT: I just want to make sure that that
21 experience wouldn't affect your ability one way or the other
22 here.

23 JUROR NUMBER 303: I don't think so.

24 THE COURT: Okay. I mean one has absolutely nothing to
25 do with the other.

1 JUROR NUMBER 303: Right.

2 THE COURT: And so I need to make sure you understand
3 that.

4 JUROR NUMBER 303: Okay.

5 THE COURT: And you're comfortable with that?

6 JUROR NUMBER 303: Yes.

7 THE COURT: All right. What is your number again?

8 JUROR NUMBER 303: 303.

9 (WHEREUPON, the bench conference ended.)

10 THE COURT: All right. Number 303 is going to stay with
11 us. Thank you. And they're going to make you go that way.

12 THE BAILIFF: Juror 174, Your Honor.

13 (WHEREUPON, a bench conference was held with Juror
14 Number 174 as follows.)

15 THE COURT: Closer.

16 JUROR NUMBER 174: How are you?

17 THE COURT: Very well. Thank you.

18 JUROR NUMBER 174: My wife and I for 40 years had
19 adopted two younger kids.

20 THE COURT: Okay.

21 JUROR NUMBER 174: Actually, older kids who were
22 severely mentally disturbed. We thought we could love them
23 through anything.

24 THE COURT: Okay.

25 JUROR NUMBER 174: The youngest daughter was borderline

1 personality --

2 THE COURT: Okay.

3 JUROR NUMBER 174: -- and was hospitalized for about six
4 years.

5 THE COURT: Okay.

6 JUROR NUMBER 174: It became quite violent at times.

7 THE COURT: Okay.

8 JUROR NUMBER 174: The son physically abused my wife.

9 THE COURT: Okay.

10 JUROR NUMBER 174: It was never reported and it's --

11 THE COURT: All right.

12 JUROR NUMBER 174: It was borderline on your earlier
13 question.

14 THE COURT: Okay. And I appreciate knowing that. Okay.

15 JUROR NUMBER 174: I just --

16 THE COURT: Okay.

17 JUROR NUMBER 174: You asked the question. I don't
18 know.

19 THE COURT: No. And I appreciate that. Part of what
20 we're talking about here is this isn't a criminal trial for
21 any type of case. This is for a civil commitment, which our
22 statute allows that.

23 JUROR NUMBER 174: And Larissa was.

24 THE COURT: And I just want to make sure. And what
25 they're interested in is finding out who has been through

1 that procedure, not necessarily, but you obviously had to do
2 some work to get your children committed. So you may have a
3 little more knowledge than most people and that's why the
4 lawyers are asking the question. So that's why they're
5 interested, but what I need to know from you is is there
6 anything about that experience and obviously having to commit
7 your children for mental health issues that would affect your
8 ability to be fair and impartial in the trial of this case?

9 JUROR NUMBER 174: You know, I don't think it impacts.
10 I will say that my personal opinion of the mental health
11 system is less than stellar.

12 THE COURT: Okay. Okay. And I understand that, and I
13 certainly appreciate that.

14 JUROR NUMBER 174: That's the honest truth.

15 THE COURT: Okay. Okay. And I appreciate knowing that.
16 Are you comfortable sitting?

17 JUROR NUMBER 174: Yeah, I am.

18 THE COURT: Okay. Okay. Well, I would love for you to
19 stay.

20 JUROR NUMBER 174: Okay.

21 THE COURT: If you're willing. So thank you.

22 JUROR NUMBER 174: Thank you.

23 (WHEREUPON, the bench conference ended.)

24 THE COURT: Number 174 is going to stay with us.

25 (WHEREUPON, a bench conference was held with counsel off

1 the record, after which the proceedings resumed as
2 follows.)

3 THE COURT: Ladies and gentlemen, has any member of the
4 jury panel ever worked for or been connected in any way with
5 a social services agency, a guardian ad litem program, CASA,
6 which stands for Court Appointed Special Advocate program, a
7 foster care program, or any other entity, either private or
8 governmental, that investigates or counsels victims of rape
9 or sexual assault? If so, please stand.

10 (WHEREUPON, there was no response.)

11 THE COURT: Ladies and gentlemen, does any member or a
12 spouse of yours or a close family member work for or with any
13 law enforcement agency, either city, county, state, or
14 federal? If so, please stand.

15 (WHEREUPON, several people stood.)

16 THE COURT: Ma'am, give me your number again.

17 JUROR NUMBER 309: 309.

18 THE COURT: Yes.

19 JUROR NUMBER 309: 309.

20 THE COURT: Yes.

21 JUROR NUMBER 309: Does that include family members who
22 are attorneys outside of the state?

23 THE COURT: Absolutely. And I'm getting to that too,
24 but yes, I want to know what family members of yours are
25 attorneys.

1 JUROR NUMBER 309: A nephew.

2 THE COURT: You have a nephew? Where does he practice?

3 JUROR NUMBER 309: Savannah.

4 THE COURT: Do you know what type of law he practices?

5 JUROR NUMBER 309: All types.

6 THE COURT: All types? Okay. All types. Can you tell
7 me is he with a law firm?

8 JUROR NUMBER 309: Yes.

9 THE COURT: Do you know the name?

10 JUROR NUMBER 309: I cannot remember it.

11 THE COURT: That's --

12 JUROR NUMBER 309: He's a first-year attorney.

13 THE COURT: He's a brand-new -- yes. Perfect. Okay.

14 Thank you. You may be seated. Anyone else?

15 And I have no one here who --

16 THE BAILIFF: Your Honor, one standing.

17 JUROR NUMBER UNKNOWN: What was the question?

18 THE COURT: So the question, sir, was is there any
19 person who is on the panel who is either themselves, their
20 spouse, an immediate family member, your parents, your
21 children, anyone that you are really close to that has been a
22 member of law enforcement? Okay?

23 Do you have a husband? A father? I need to know who has
24 a law enforcement background. It would include yourself as
25 well. So if you've been in law enforcement, even in the

1 past, I need to know about it. Okay?

2 Yes, ma'am?

3 JUROR NUMBER 260: Number 260.

4 THE COURT: Yes.

5 JUROR NUMBER 260: I have two cousins that are with the

6 Beaufort County Sheriff's Department.

7 THE COURT: Tell me their last names?

8 JUROR NUMBER 260: Duncan.

9 THE COURT: They're both Duncan?

10 JUROR NUMBER 260: Yeah. Well, my cousin, Todd Duncan,

11 I do believe is a detective now.

12 THE COURT: Okay. Thank you. You may be seated.

13 Sir?

14 JUROR NUMBER 232: Well, 232.

15 THE COURT: Yes, sir?

16 JUROR NUMBER 232: The question came up if you're a

17 lawyer. I'm an attorney.

18 THE COURT: Are you a lawyer?

19 JUROR NUMBER 232: You said law enforcement I think.

20 THE COURT: And I've -- I've got to tell you I will be

21 asking questions about that. So, no. Keep standing. Give

22 me your number again?

23 JUROR NUMBER 232: 232.

24 THE COURT: Are you retired?

25 JUROR NUMBER 232: Semi.

1 THE COURT: Semi-retired? What law have you practiced?

2 JUROR NUMBER 232: I was a general counsel for an
3 independent power company.

4 THE COURT: Okay.

5 JUROR NUMBER 232: And I now do work for a private
6 equity firm that is in the power business.

7 THE COURT: Okay. Thank you, sir. You may be seated.

8 Sir?

9 JUROR NUMBER 9: Juror Number 9.

10 THE COURT: Yes?

11 JUROR NUMBER 9: I have some brother-in-laws that were
12 in law enforcement.

13 THE COURT: Okay.

14 JUROR NUMBER 9: No longer.

15 THE COURT: Two brothers-in-law?

16 JUROR NUMBER 9: Yes.

17 THE COURT: Okay.

18 JUROR NUMBER 9: And then a brother-in-law is currently
19 a state trooper in Virginia.

20 THE COURT: Thank you, sir. You may be seated. We've
21 got his number; right? Okay.

22 Sir?

23 JUROR NUMBER 113: I was in law enforcement. Retired.

24 THE COURT: You were? For how long?

25 JUROR NUMBER 113: Criminal justice degree. I was a kid

1 when I first became a cop in 1975 and that went into airline
2 security and then back in law enforcement here in Beaufort
3 County and retired two years ago.

4 THE COURT: Thank you, sir. Can you tell me what your
5 rank was when you retired?

6 JUROR NUMBER 113: I'm sorry?

7 THE COURT: What was your rank when you retired?

8 JUROR NUMBER 113: Sergeant.

9 THE COURT: Sergeant? Thank you, sir. Your number?

10 JUROR NUMBER 113: Number 113.

11 THE COURT: Thank you, sir. Yes?

12 JUROR NUMBER 128: 128, and I have a question. My late
13 father and my late eldest brother were both in corrections in
14 the prison system. So do I count that?

15 THE COURT: Absolutely. That counts.

16 JUROR NUMBER 128: Okay.

17 THE COURT: Yes.

18 JUROR NUMBER 128: My father was in the federal prison
19 -- Bureau of Prisons.

20 THE COURT: Okay.

21 JUROR NUMBER 128: And my brother worked in the state
22 correctional system while he was still alive in Mexico.

23 THE COURT: Okay. Sir, what was your number again?

24 JUROR NUMBER 128: 128.

25 THE COURT: Thank you, sir. You may be seated.

1 MR. BOGLE: Judge, when you jumped -- when we jumped to
2 him, I forgot -- never got his number.

3 THE COURT: Sir, give me your number again?

4 JUROR NUMBER 113: 113.

5 THE COURT: That's what I thought, 113. Okay. Yes,
6 ma'am?

7 JUROR NUMBER 328: 328. My dad is a retired attorney.
8 He was a corporate lawyer for 40 years in Cincinnati, Ohio.

9 THE COURT: In Cincinnati? Okay. Thank you.

10 JUROR NUMBER 328: He has since retired.

11 THE COURT: Thank you. Anyone else?

12 Ladies and gentlemen, is there any member of the jury
13 panel or any member of your immediate family -- excuse me --
14 ever worked for the 14th Circuit Solicitor's Office or the
15 Beaufort County Solicitor's Office? If so, please stand.

16 (WHEREUPON, there was no response.)

17 THE COURT: And other than those of you that just
18 disclosed -- the one who had a brother and a father that
19 worked for the Department of Corrections or the Federal
20 Department of Corrections, do I have anyone else who has had
21 a family member or close family member that has worked at a
22 correctional facility? If so, please stand. Or themselves.

23 Yes, sir?

24 JUROR NUMBER 174: My adopted son worked briefly for the
25 Georgia Department of Corrections.

1 THE COURT: All right. Thank you, sir. Give me your
2 number again?

3 JUROR NUMBER 174: 174.

4 THE COURT: Thank you, sir.

5 Ladies and gentlemen, do I have any member of the jury
6 panel or their spouses work as an EMT, an emergency medical
7 technician, a volunteer fireperson, or any occupation that
8 can be described as a first responder? If so, please stand.

9 (WHEREUPON, several people stood.)

10 THE COURT: Sir, your name and -- I'm sorry. Just your
11 juror number, sir.

12 JUROR NUMBER 85: Juror Number 85.

13 THE COURT: Yes, sir?

14 JUROR NUMBER 85: Myself. I'm a firefighter/paramedic
15 for the town of Hilton Head.

16 THE COURT: For the town of Hilton Head?

17 JUROR NUMBER 85: Yeah.

18 THE COURT: All right. Thank you, sir. You may be
19 seated.

20 Yes, ma'am?

21 JUROR NUMBER 212: 212.

22 THE COURT: Yes.

23 JUROR NUMBER 212: I mean he's deceased now, but he was
24 a fireman.

25 THE COURT: Who was it? Your --

1 JUROR NUMBER 212: Husband.

2 THE COURT: Your husband? All right. Thank you, ma'am.
3 You may be seated.

4 Yes, ma'am?

5 JUROR NUMBER 45: Number 45. My husband is retired fire
6 chief for Bluffton.

7 THE COURT: Thank you. Ladies and gentlemen, do I have
8 anyone here that holds a degree in or who works in the field
9 of psychiatry, psychology, or the law? Other than my lawyers
10 that have already disclosed that they are lawyers or have
11 practiced law. If so, please stand. So once again, I need
12 to know anyone who has degrees in psychiatry, psychology, the
13 law, or works in that field, even if they may be or not a
14 psychologist or psychiatrist.

15 Yes, sir?

16 JUROR NUMBER 113: 113, Bachelor's in criminal justice
17 administration.

18 THE COURT: Thank you, sir. You may be seated.

19 JUROR NUMBER 301: 301, bachelor's in psychology with a
20 sociology minor.

21 THE COURT: Thank you.

22 JUROR NUMBER 301: And I work for an attorney.

23 THE COURT: Thank you. It's good to see you.

24 JUROR NUMBER 301: Good to see you.

25 THE COURT: Anyone else?

1 (WHEREUPON, there was no response.)

2 THE COURT: Ladies and gentlemen, is there any member of
3 the jury panel who contributes money to or volunteers their
4 time to any crime prevention group or victims' right group or
5 any criminal or law enforcement organization, such as
6 Citizens Against Violent Crime, People Against Rape, or Rape
7 Crisis Hotline or Darkness to Light or anything. Here we
8 have local CAPA. Is there anyone who is a contributor to or
9 a member of or volunteers their time to any of those types of
10 organizations? If so, please stand.

11 (WHEREUPON, one person stood.)

12 JUROR NUMBER 301: 301. I contribute to BACA, Bikers
13 Against Child Abuse.

14 THE COURT: Thank you. Anyone else?

15 (WHEREUPON, there was no response.)

16 THE COURT: Ladies and gentlemen, does any member of the
17 panel personally know or have regular conversations with any
18 person who works at the Beaufort County Solicitor's Office?
19 If so, please stand.

20 (WHEREUPON, there was no response.)

21 THE COURT: Ladies and gentlemen, is anyone a close
22 friend of or had regular or has regular recent communication
23 with any member of the South Carolina Attorney General's
24 Office? If so, please stand.

25 (WHEREUPON, there was no response.)

1 THE COURT: Is any member of the panel related by blood
2 or marriage to any other member of the panel? If so, please
3 stand. I always seem to get a husband and wife together at
4 some point. They both get jury duty. No one?

5 (WHEREUPON, there was no response.)

6 THE COURT: Ladies and gentlemen, has any member of the
7 jury panel been involved in a prison ministry, prison
8 outreach program, or any other program involving contacts
9 with incarcerated persons? If so, please stand.

10 (WHEREUPON, there was no response.)

11 THE COURT: Ladies and gentlemen, I know that what I've
12 explained to you -- and sometimes it's a bit difficult to
13 understand. This is a -- this is a civil commitment
14 proceeding. Ladies and gentlemen, this is not a criminal
15 proceeding. This is not to determine whether or not any
16 specific acts were committed.

17 I need to make sure, ladies and gentlemen, though that
18 -- you will hear potentially some testimony regarding abuse
19 of children. I need to make absolutely sure that you can be
20 fair and impartial in the trial of this case to both the
21 State of South Carolina and Mr. Powell. Be able to put any
22 opinions or anything aside and be able to decide the case,
23 based on the law that I give you at the end of this trial and
24 the facts as you hear them and, again, be comfortable doing
25 that, ladies and gentlemen.

1 Do I have anyone who thinks that they are unable to be
2 fair and impartial in the trial of this case? If so, please
3 stand.

4 (WHEREUPON, there was no response.)

5 THE COURT: Ladies and gentlemen, does anyone know of
6 any reason whatsoever that you cannot give Mr. Powell a fair
7 trial in this case? If so, please stand.

8 (WHEREUPON, there was no response.)

9 THE COURT: Are any further questions requested of this
10 panel from the State, Mr. Bogle?

11 MR. BOGLE: I have none, Your Honor.

12 THE COURT: Mr. Falk?

13 MR. FALK: No, Your Honor.

14 THE COURT: Thank you. Ladies and gentlemen, what is
15 going to happen at this time is we are going to draft a
16 random list of people. I'm the only one that gets to look at
17 that list. And what will happen then is that your name will
18 be chosen and you will, when it's called, simply stand in
19 your place. Each side has an opportunity to accept or reject
20 you as potential jurors -- and I apologize.

21 Now that you said it, it's a civil case. So I'm
22 interrupting myself.

23 Ladies and gentlemen, they're going to have an
24 opportunity to look at the case and to look at the list of
25 jurors and choose jurors. So with that, ladies and

1 gentleman, that process is going to take about 15 minutes or
2 so. So by the clock in the back of the courtroom, I am
3 asking that you all be back, if you would -- and we'll need a
4 little more time than usual for this. I'm going to ask that
5 you all be back in the courtroom by 12:15, when we're going
6 to go ahead and seat this jury, ladies and gentlemen.

7 So you are welcome to refresh yourselves. If you have
8 to go outside, again, give your badge to one of the bailiffs.
9 But if you'll please back here by 12:15, we will seat this
10 jury and y'all will be out of here before 1:00. Okay?

11 Thank you, gentlemen. Sorry.

12 (WHEREUPON, there was a break in the proceedings from
13 11:47 a.m. until 11:49 a.m., after which the proceedings
14 resumed as follows.)

15 (WHEREUPON, a bench conference was held as follows.)

16 THE COURT: Okay. Give them to the lawyers. He's got
17 one? Mr. Bogle?

18 THE CLERK: Did you want to talk to them?

19 THE COURT: Yeah. We're going to have to put this on
20 the record to see if there's anyone here.

21 THE COURT: Come on up, gentlemen. We're going to be a
22 little quiet because we have some of the jurors still sitting
23 here.

24 MR. BOGLE: What you got?

25 THE COURT: Okay. So my biggest concern is Number 260,

1 and she is pretty far down. She's number 34. Let me ask you
2 can you both agree that we can just strike her off this list
3 regardless?

4 MR. FALK: Obviously, I do.

5 THE COURT: You want her gone? I just --

6 MR. BOGLE: She's got lots of baggage, but said she
7 could be fair. So I just have to go by that.

8 THE COURT: I know. I know. Okay. She was one of
9 them. She said she could be fair. Who else, Mr. --

10 MR. FALK: 98.

11 THE COURT: 98?

12 MR. FALK: She's on the third page.

13 MR. BOGLE: 98, you said?

14 MR. FALK: Yeah.

15 THE COURT: Okay. She's all the way down. She's not
16 going to get reached.

17 MR. BOGLE: Oh, she's on the list?

18 MR. FALK: Yes.

19 THE COURT: So we're okay.

20 MR. BOGLE: I've got a list.

21 THE COURT: She's 55.

22 MR. BOGLE: I don't have a list yet.

23 THE COURT: Give him a list.

24 MR. BOGLE: Thank you.

25 THE COURT: We are just doing 1 through 20 and then --

1 MR. BOGLE: All right. So which one did you just do?

2 THE COURT: So the first want -- we just talked about
3 260 first, which she is number 34 on your list. So chances
4 are we're not going to reach her either, but -- so I'm going
5 to leave her on there for now.

6 MR. BOGLE: That would be Number 260?

7 THE COURT: Yes. Who was the second one you just talked
8 about?

9 THE COURT: And the one we just talked about was 98.
10 Tell me what was her -- what was her issue, Mr. Falk?

11 MR. FALK: Sometime between when she was 11 and 12, she
12 was the victim of a sexual assault, and the person who
13 assaulted her then assaulted her nieces.

14 THE COURT: Her nieces?

15 MR. BOGLE: Her nieces, yeah. Her nieces were victims
16 and her parents -- she said her parent was an alcoholic.

17 MR. FALK: So it's a --

18 MR. BOGLE: But she's forgiven the guy.

19 THE COURT: Oh, yeah.

20 MR. FALK: I'd make a bigger stink if she weren't so far
21 down on the list.

22 THE COURT: Yeah. Okay. Okay.

23 MR. BOGLE: She's 98?

24 THE COURT: She's so far down, she's not going to get
25 reached. So we're fine. She's not going to be reached.

1 MR. BOGLE: She's way down there.

2 THE COURT: I'm more concerned about 260 and we
3 shouldn't reach her either, but --

4 THE CLERK: I thought you just did the top 20 and then
5 the --

6 MR. FALK: There's really nothing left to get anybody
7 else. We're just going to go to 24.

8 THE COURT: Exactly. Yeah.

9 MR. BOGLE: The first 20 is the jury and then the next
10 four are the two alternates.

11 THE COURT: The next six. It's the next six. Yeah.

12 MR. BOGLE: The next six or next --

13 THE COURT: No. It's in the next six. You each --

14 MR. FALK: Yeah.

15 THE COURT: Yeah. Yeah.

16 MR. BOGLE: So 20?

17 THE COURT: I'm sorry. Yeah. 24, 25, and 26, so I
18 think we're fine.

19 So is there anyone, Mr. Falk, before that? Is there
20 anyone, Mr. Bogle, before that?

21 MR. FALK: Not as a result of coming up.

22 THE COURT: Okay.

23 MR. BOGLE: No.

24 THE COURT: Okay. No strike for cause then? Okay.

25 MR. BOGLE: Well, wait a minute. Who's that guy that --

1 the one that didn't think much of mental health. Number 174
2 is his number. He's number 23. He's the guy that has the
3 low opinion of mental health.

4 THE COURT: Uh-huh.

5 MR. BOGLE: So I just think he's --

6 THE COURT: I don't know though because you both have
7 mental health experts.

8 MR. BOGLE: Yeah. We're going to commit him to the
9 Department of Mental Health for long-term control, care, and
10 treatment, and if he doesn't like mental health at all, you
11 know, he might give the guy a break by saying let him out
12 because mental health is bad or he might -- we don't know
13 what he'll do.

14 THE COURT: What's your position on it?

15 MR. FALK: It's a wildcard and I'd rather not have it.

16 THE COURT: Okay. Well, let's get rid of him, then.
17 Let's get rid of 23. So it's going to be 21, 22, and 24, and
18 then it's going to be -- sorry -- 25, 26, and 27. Exactly.
19 And I don't even get to your -- and if some reason we get to
20 your 34, we'll have a conversation. We shouldn't ever, but
21 for some crazy reason, I'm worried about her too. Okay?

22 Okay. So we're good. So you're striking between 1 and
23 20.

24 MR. BOGLE: Uh-huh.

25 THE COURT: Four strikes each; right?

1 MR. BOGLE: Right.

2 THE COURT: And then we're 21, 22, and 24 for the first
3 alternate.

4 MR. BOGLE: Uh-huh.

5 THE COURT: And 25, 26, and 27 for the second alternate.

6 MR. BOGLE: Right.

7 THE COURT: Okay. And if y'all want to go -- I mean
8 you're welcome to sit here too; but if you want to go into
9 the anterooms back in the corner, you're welcome to go there
10 if you need to talk. You can't take your client back there.
11 The bailiffs will go crazy.

12 MR. FALK: Okay. I don't need to take him.

13 THE COURT: Okay.

14 MR. BOGLE: Thank you, Judge.

15 THE COURT: Okay. So I gave you all until about 15
16 after so you would have time to go through the list. Okay?
17 Is that okay? Are you okay?

18 MR. FALK: Yes.

19 THE COURT: Okay... Perfect.

20 (WHEREUPON, there was a break in the proceedings for
21 11:55 a.m. until 12:13 p.m., after which the proceedings
22 resumed as follows.)

23 THE COURT: Ladies and gentlemen, we're going to go
24 through and we will be striking numbers or the attorneys will
25 be striking numbers. I need to tell you that you have all

1 been now reassigned new numbers. So if you think your number
2 has been struck, it has not. All right?

3 So just sit tight. After we have done all the strikes,
4 then they are going to call off the list. Those people are
5 going to come take a seat. You'll understand that you have
6 been chosen as a juror at that point. All right?

7 So with that said, gentlemen, are you ready?

8 MR. BOGLE: Yes, Your Honor.

9 THE COURT: Sir?

10 MR. FALK: Yes, Your Honor.

11 THE COURT: All right. Marlene, I'll turn it over to
12 y'all.

13 THE CLERK: The first strike for the State?

14 MR. BOGLE: Yes. The State would strike Juror Number 1.

15 THE CLERK: And the defense?

16 MR. FALK: The respondent would strike Juror Number 4.

17 THE CLERK: Second strike for the State?

18 MR. BOGLE: Juror Number 7.

19 THE CLERK: Strike for the defense?

20 MR. FALK: Juror Number 6.

21 THE CLERK: Third strike for the State?

22 MR. BOGLE: The State would strike Juror Number 9.

23 THE CLERK: Third strike defense?

24 MR. FALK: The respondent would strike Juror Number 5.

25 THE COURT: Thank you.

1 THE CLERK: Fourth strike for the State?

2 MR. BOGLE: The State would strike Juror Number 12.

3 THE COURT: And the respondent fourth strike?

4 MR. FALK: Juror Number 10.

5 THE COURT: Thank you.

6 THE CLERK: Selecting the first alternate, the numbers

7 21, 22, and 24. Strike for the State?

8 MR. BOGLE: Juror Number 24.

9 THE CLERK: Strike for the defense?

10 THE COURT: It's the respondent.

11 MR. FALK: The respondent strikes Juror 21.

12 THE CLERK: Second alternate, numbers 25, 26, and 27.

13 Strike for the State?

14 MR. BOGLE: Strike Number 27.

15 MR. FALK: Respondent will strike Number 25.

16 THE COURT: Thank you. Can we review the strikes?

17 THE CLERK: Reviewing the strikes for the State,

18 striking Number 1, Number 7, Number 9, Number 12, Number 24,

19 and Number 27.

20 THE COURT: Is that correct?

21 MR. BOGLE: Yes, that's correct.

22 THE COURT: Okay. And for the respondent?

23 THE CLERK: Striking Number 4, Number 5, Number 6,

24 Number 10, Number 21, and Number 25.

25 MR. FALK: That's correct.

1 THE COURT: Thank you. Ladies and gentlemen, when your
2 number is called -- and I would like you just to call the
3 numbers, not the names.

4 Ladies and gentlemen, everyone just take a look to make
5 sure you look at your number back here just so you know what
6 it is. When your number is called, bring all your belongings
7 with you and you're going to come take a seat over in the
8 jury box. All right?

9 THE CLERK: Number 27.

10 (WHEREUPON, a white male came forward.)

11 THE COURT: Thank you, sir.

12 THE CLERK: Number 136.

13 (WHEREUPON, a white male came forward.)

14 THE CLERK: Number 205.

15 (WHEREUPON, a white male came forward.)

16 THE CLERK: Number 103.

17 (WHEREUPON, a black female came forward.)

18 THE CLERK: Number 34.

19 THE COURT: Hold on a second. Slow down for a second
20 just to --

21 THE CLERK: Sorry.

22 THE COURT: -- make sure I've got everybody.

23 (WHEREUPON, a white female came forward.)

24 THE COURT: Number 34? Okay.

25 THE CLERK: Number 2 -- 290.

1 (WHEREUPON, a black female came forward.)
2 THE CLERK: Number 187.
3 (WHEREUPON, White male came forward.)
4 THE CLERK: Number 85.
5 (WHEREUPON, a white male came forward.)
6 THE CLERK: Number 54.
7 (WHEREUPON, a black female came forward.)
8 THE CLERK: Number 250.
9 (WHEREUPON, a white female came forward.)
10 THE CLERK: Number 278.
11 (WHEREUPON, a black male came forward.)
12 THE CLERK: Number 184.
13 (WHEREUPON, a white female came forward.)
14 THE CLERK: First alternate is 124.
15 (WHEREUPON, a black male came forward.)
16 THE CLERK: Second alternate, 199.
17 (WHEREUPON, a black male came forward.)
18 THE COURT: Are there any matters of law we need to take
19 up regarding the jury selection process, Mr. Bogle?
20 MR. BOGLE: No, Your Honor. Thank you.
21 THE COURT: Mr. Falk?
22 MR. FALK: No, Your Honor.
23 THE COURT: Thank you. Ladies and gentlemen, sit tight
24 with me for just a moment.
25 For those of you back here, I'm going to go ahead and

1 excuse you with our thanks. We appreciate you being here,
2 ladies and gentlemen. You are excused for the week.

3 (WHEREUPON, the jury panel was released and exited the
4 courtroom at 12:21 p.m.)

5 THE COURT: Thank you. Welcome, ladies and gentlemen.
6 As you know, you are my jury for the trial of this case. As
7 I've told you for scheduling purposes, we're going to go
8 ahead and break for the day just after I give you a few brief
9 instructions and the bailiffs give you some further
10 instructions.

11 And we're going to meet back tomorrow morning here at
12 the courthouse at 9:30. You can expect to run until roughly
13 5-ish, 5:30-ish tomorrow, ladies and gentlemen, and then I
14 believe we're going to come back on Wednesday morning and
15 we're going to be a little bit later because I have another
16 hearing first thing at 9:00 in the morning that may take a
17 while. So I'm anticipating that I might bring you back
18 roughly at 11:00 on Wednesday morning, but I can tell you
19 that this case will be concluded on Wednesday. All right?
20 And it will be sent to you for your deliberations.

21 I do need to give you a few ground rules though before
22 we begin. Ladies and gentlemen, under the oath that you've
23 taken, you're required to follow what I say. To begin with,
24 if you were able to get into the courthouse without a cell --
25 or with a cell phone today, you need to leave it back in the

1 car or leave it at home, and the reason why is you can get so
2 much information off of a smart phone these days that I
3 wouldn't want anyone tempted. So out of an abundance of
4 caution, I tell you to leave them back in the car.

5 While you're here performing jury duty, if you need to
6 use a phone, simply ask the bailiffs. They will take you to
7 a phone for you to use. Ladies and gentlemen, the bailiffs'
8 sole purpose here is to take care of the jury. You are the
9 most important people in this courthouse. Ladies and
10 gentlemen, we need to make sure you all are taken care of and
11 well.

12 With that said, if anyone falls ill over the evening or
13 when we are on a break, you have to call into the clerk's
14 office and tell us because we're going to be looking for you,
15 which also means if you run into car trouble in the morning,
16 if you oversleep, I can tell you that we're going to come
17 find you and come get you because we need you. So please
18 understand how important you are and know that we need all 14
19 of you to try this case. All right?

20 Ladies and gentlemen, also I don't think there's going
21 to be anything on the TV or on the news about this case, but
22 out of an abundance of caution, I'm required to tell you that
23 you are not to read anything in regards to this case. You're
24 not to do any research in regards to this case. You are not
25 to do any research in regards to the type of case this is.

1 You're going to have everything you need to decide this
2 case right here in this courtroom, and it would be highly
3 inappropriate for you to be influenced by any outside source.
4 Therefore, I tell you not to discuss it.

5 And you're not going to discuss it not only when you go
6 home tonight. The only thing you are permitted to say to a
7 family member or friend or colleague is that you have been
8 chosen as a juror in the trial of a civil case. You cannot
9 say the people involved, the lawyers involved, the type of
10 case it is, and the reason why is inevitably someone is going
11 to try to tell you something about something when they know
12 nothing, absolutely nothing about this case, and I wouldn't
13 want you to be influenced in any way. So out of an abundance
14 of caution, I just tell you not to discuss it. All right?

15 Also, I want you to know that in coming and going from
16 the courthouse over today and the next couple of days, you
17 may run into the attorneys or maybe a witness in the case.
18 They've been instructed not to speak to you, and the reason
19 why is even an innocent conversation out in the parking lot
20 of isn't it a gorgeous day outside will be misinterpreted.
21 It will be reported back because we do have cameras all over
22 the courthouse and in the parking lot, and I'll have to ask
23 you about it. So out of an abundance of caution, I just tell
24 them not to speak to you in coming and going. All right?

25 So, ladies and gentlemen, again, I cannot start until

1 all 14 of you are here, and I want to make sure everyone can
2 get here by 9:30 tomorrow morning. I know some people may
3 have children drop-offs. Anyone have any issues with that?
4 I know some people come from Hilton head Island, which, you
5 know, takes a good almost hour. And if you're coming from
6 the far outreaches of St. Helena, that at times can take an
7 hour too. So I just want to make sure everyone is fine and
8 can get here and everyone has a ride. If anyone has any
9 concerns about that, simply just tell the bailiffs. We will
10 come get you. Okay?

11 Anyone have any problems? Any concerns? Are y'all
12 okay?

13 (WHEREUPON, there was no response.)

14 THE COURT: Very good. We're going to start at 9:30
15 tomorrow morning, ladies and gentlemen. I look forward to
16 seeing you back in the jury room. I'm going to excuse you.

17 Tom and Rick are going to give you some further
18 instructions. He is going to get names and good phone
19 numbers from you all. If for any reason I am running
20 substantially late for some reason or we have an issue here
21 at the courthouse, we try very hard to call you and let you
22 know so you're not sitting around waiting on us.

23 With that said, I want you to know that there are going
24 to be times where I'm going to have to take up matters of law
25 with the attorneys, and I'm going to have to send you back to

1 your jury room or you may have to wait on us. I want you to
2 know, ladies and gentlemen, that we are working and working
3 hard.

4 I'm sending you home for the rest of the afternoon
5 because there's a number of matters that I need to take up
6 with the lawyers and, rather than send you for a long lunch
7 and have you sit and wait on us, I would rather get the case
8 streamlined, do everything we need to do, so at 9:30 when you
9 come in tomorrow morning, we hit the ground running and the
10 case is put before you. All right?

11 So please know that the lawyers are going to be here
12 working with me and getting this case ready for you. All
13 right?

14 Again, thank you for your service. We appreciate you
15 being here and I look forward to seeing you all tomorrow
16 morning at 9:30 a.m. If you have any problems, any concerns,
17 or need anything, please go straight to a bailiff.

18 The one other thing I need to tell you is if you do have
19 a problem or concern or any issue that you need to take up, I
20 don't want you to announce it in front of the entire jury. I
21 would rather you go straight to a bailiff individually and
22 speak with them. All right? And do it outside the presence
23 of other people. Just simply say I need to talk to you and,
24 if there is anything, we will accommodate you. All right?

25 Again, thank you. You're excused back to the jury room

1 and I'll see you all tomorrow morning at 9:30 a.m. Thank
2 you. Good night, y'all.

3 (WHEREUPON, the jury exited the courtroom at 12:28 p.m.)

4 THE BAILIFF: The jury is clear, Your Honor.

5 THE COURT: Thank you, Rick. All right.

6 I want to take up the first thing I can to get rid of as
7 many people as I can out of the courtroom. So come on up and
8 tell me if this is acceptable that we're going to go ahead
9 and hear -- I believe she has a motion to quash a subpoena.
10 Is that correct?

11 MS. FAIRBARIN: That's correct.

12 THE COURT: All right. And just tell me what we can to
13 get rid of as many people as possible, and tell me who are
14 all these people over here just so I know who I'm --

15 MS. FAIRBARIN: So we've got Dr. Dwyer, who is here.

16 THE COURT: Wave, Dr. Dwyer. Thank you, sir.

17 MS. FAIRBARIN: And he's a forensic psychologist -- a
18 psychiatrist at MUSC with Dr. Diamante.

19 THE COURT: Okay.

20 MS. FAIRBARIN: Who is training in Dr. Dwyer's office in
21 psychiatry.

22 THE COURT: Very good.

23 MS. FAIRBARIN: We've got Dr. Burke.

24 THE COURT: Okay.

25 MS. FAIRBARIN: Who has been subpoenaed I believe by Mr.

1 Bogle.

2 THE COURT: All right. Thank you all for being here.

3 MS. FAIRBARIN: I don't know the last person in the
4 back.

5 MR. FALK: That's Dr. Gehle.

6 THE COURT: And Dr. Gehle. Thank you. And I apologize.
7 I referred to you as Gehle earlier and I'm so sorry. So, Dr.
8 Gehle. It's a pleasure to have you all. Thank you.

9 All right. My understanding is -- do you have a copy of
10 the subpoena that you served, Mr. Falk?

11 MS. FAIRBARIN: I've got a copy of it.

12 THE COURT: You've got a copy? Okay. Thank you.

13 MS. FAIRBARIN: It should be on the back of the motion
14 also.

15 THE COURT: If you'd just pass it up, if you don't mind.
16 If you've got an extra copy or if you do.

17 MS. FAIRBARIN: I do.

18 THE COURT: Thank you.

19 MS. FAIRBARIN: Do you need the extra copy?

20 THE COURT: For me. Sorry.

21 MS. FAIRBARIN: Okay. I think I submitted one.

22 THE COURT: And I apologize. I just don't know who has
23 them. My law clerk should be here any moment running in. So
24 it's possible that my office has them, but -- okay.

25 MS. FAIRBARIN: I can tell you --

1 THE COURT: Whenever you're ready.

2 MS. FAIRBARIN: -- for the record --

3 THE COURT: Yes.

4 MS. FAIRBARIN: -- my name is Vivian Fairbarin, and I'm
5 with the General Counsel's Office at MUSC. I'm here on
6 behalf of Dr. Dwyer and Dr. Gottfried, who we notified you
7 earlier is subpoenaed to be here, but is in a domestic -- not
8 a domestic, but a child abuse case in Charleston and will be
9 traveling down here shortly.

10 THE COURT: Okay.

11 MS. FAIRBARIN: As soon as she finishes there.

12 What has occurred is in this case Dr. Dwyer and Dr.
13 Gottfried were then subpoenaed to bring all the raw data --

14 THE COURT: Uh-huh.

15 MS. FAIRBARIN: -- of a PPG test.

16 THE COURT: Okay.

17 MS. FAIRBARIN: A penile plethysmograph test.

18 THE COURT: Right.

19 MS. FAIRBARIN: And it's almost impossible for them to
20 do. The reason that we filed the motion to quash and the
21 whole basis behind this is Dr. Gottfried will be testifying
22 in this trial.

23 THE COURT: Uh-huh.

24 MS. FAIRBARIN: She actually was retained to conduct a
25 sexual behaviors consultation evaluation report. As part of

1 that report, she utilized an analysis, and I'm going to call
2 it a PPG test just because it's easier to spell.

3 THE COURT: Okay. That's fine.

4 MS. FAIRBARIN: So she actually took that analysis.
5 That test was performed by Dr. Dwyer over the course of about
6 seven hours, and that was one of the factors that she took
7 into consideration in rendering her opinion that Mr. Powell
8 does meet the statutory definition for being a sexually
9 violent predator.

10 THE COURT: Uh-huh.

11 MS. FAIRBARIN: I believe that Mr. Falk will take issue
12 with the validity of that testing, whether it should be
13 admissible.

14 THE COURT: Uh-huh.

15 MS. FAIRBARIN: And that's the reason that he subpoenaed
16 the raw data. That exam was actually taken over the course
17 of about seven-and-a-half hours and --

18 THE COURT: Okay.

19 MS. FAIRBARIN: -- it's done in a forensic laboratory.
20 It's done kind of like live-streaming graphs in multiple
21 areas of data in actual software.

22 THE COURT: Okay.

23 MS. FAIRBARIN: And that software is just not mobile.
24 So it exists in the system --

25 THE COURT: Okay.

1 MS. FAIRBARIN: -- there. We'd have to buy additional
2 licenses to be able to bring portions of that to the Court.

3 THE COURT: Okay.

4 MS. FAIRBARIN: So our suggestion had been to Mr. Falk
5 is we'll give you the raw data in a zip drive format. You're
6 not going to be able to view it, but we can provide it to
7 another analyst in the state, somebody who is licensed and
8 credentialed and maintains the software to be able to view
9 the raw data, analyze it, and serve as an expert and help in
10 preparing the defense.

11 And that's what we have suggested in the alternative,
12 but that was denied because the only other way to even
13 produce what we can produce outside the software would be in
14 15-second increment shots, and we'd have to do print screens
15 of all the graphs and some of the data because the exam -- if
16 you want to compare it to something, it's almost kind of like
17 an EKG.

18 THE COURT: Uh-huh.

19 MS. FAIRBARIN: What they're doing is they're measuring
20 body responses --

21 THE COURT: ~ Okay.

22 MS. FAIRBARIN: -- heart rate monitors, and so there's
23 no way to just print that.

24 THE COURT: There's no printout? Like an EKG, there is
25 a printout.

1 MS. FAIRBARIN: Right. Exactly.

2 THE COURT: That just goes the entire time.

3 MS. FAIRBARIN: That goes the entire time, but it's
4 measuring multiple different things --

5 THE COURT: Right.

6 MS. FAIRBARIN: -- as opposed to the EKG.

7 THE COURT: Okay.

8 MS. FAIRBARIN: So that's kind of like the -- it is just
9 unduly burdensome on MUSC or for these psychiatrists or
10 psychologists to bring the data to court. So our alternative
11 would be to say we'll put it in a format. Just tell us what
12 expert you choose it to go to and we can allow them to come
13 --

14 THE COURT: When you say what expert, what type of
15 expert? Are you talking about a psychiatrist? Or are you
16 talking about someone in computers?

17 MS. FAIRBARIN: So it actually has to be done by a
18 credentialed clinical analyst --

19 THE COURT: Right.

20 MS. FAIRBARIN: -- on this particular software.

21 THE COURT: And correct me if I'm wrong. I was told
22 that the person that actually conducts the PPG test -- excuse
23 me. What was the gentleman's name?

24 MR. FALK: Mr. Bogle has it.

25 THE COURT: Mr. Bogle, you told me today.

1 MR. BOGLE: In the --

2 THE COURT: The actual lab --

3 MR. BOGLE: The guy -- the employee in the lab is named
4 Joe Secondary.

5 MS. FAIRBARIN: So that's the technician.

6 MR. BOGLE: Is he still --

7 THE COURT: Okay.

8 MS. FAIRBARIN: That's the technician who administers
9 it, but then all that information is provided to the analyst,
10 who then goes through all of it and is measuring it and --

11 THE COURT: Okay.

12 MS. FAIRBARIN: -- doing the analysis of the data.

13 THE COURT: So all he does is a printout in some --

14 MS. FAIRBARIN: He doesn't print anything out.

15 THE COURT: Okay.

16 MS. FAIRBARIN: But he just administers the test.

17 THE COURT: Okay.

18 MS. FAIRBARIN: That's all he does, but then the
19 analyst, Dr. Dwyer, comes in and actually analyzes --

20 THE COURT: Okay.

21 MS. FAIRBARIN: -- the data.

22 THE COURT: The responses. Got it.

23 MS. FAIRBARIN: Formulates an opinion and passes those
24 results on, and this is just another way to equate it.

25 THE COURT: Uh-huh.

1 MS. FAIRBARIN: Think about going for a physical --

2 THE COURT: Uh-huh.

3 MS. FAIRBARIN: -- and they order you bloodwork. You
4 have the blood work performed and that's one of the things
5 that the internal doctor -- the internal medicine doctor
6 evaluates. It's the same thing. Dr. Gottfried is the one
7 rendering opinions here.

8 THE COURT: Uh-huh.

9 MS. FAIRBARIN: She just had this test done. It's one
10 portion, one piece of information that she took into
11 consideration in formulating her opinions.

12 THE COURT: Okay. So she is the expert psychiatrist who
13 bases her opinion on a number of different things.

14 MS. FAIRBARIN: Yes.

15 THE COURT: And one of them is the PPG analysis from --
16 correct me if I'm wrong -- Dr. Burke. Am I correct on that?

17 MS. FAIRBARIN: From Dr. Dwyer.

18 THE COURT: I'm sorry. Dr. Dwyer. I apologize.

19 MS. FAIRBARIN: In this case, it would be Dr. Dwyer. I
20 believe Dr. Burke does also.

21 THE COURT: Okay.

22 MS. FAIRBARIN: He is another individual who can perform
23 that exam, and there are others. You know, there's hundreds
24 of people nationally that do this --

25 THE COURT: Okay.

1 MS. FAIRBARIN: -- and in this state also we have
2 additional clinical analysts that would be able to take this
3 data and serve as an expert for the defense.

4 THE COURT: Okay. All right. Mr. Falk?

5 MR. FALK: First of all, I think it is unrealistic to
6 compare this PPG test which takes seven hours and which
7 generates a tremendous amount of data to saying it's as
8 straightforward as the blood test. We'll just put that
9 aside.

10 I can appreciate that it may be burdensome. However,
11 this is not the first time I have tried a sexually violent
12 predator case where a PPG test has come in, and Dr. Burke has
13 been able to provide a very detailed -- and what I was
14 looking for -- a breakdown because the PPG test -- it has
15 different scenarios.

16 THE COURT: Uh-huh.

17 MR. FALK: And the scenarios would relate to a
18 particular age group and gender, and under particular
19 situations. Some would be coercive, persuasive, you know.

20 THE COURT: Okay.

21 MR. FALK: So you'll get that many permutations of male,
22 female, grammar, elementary, whatever, preschool, elementary.

23 THE COURT: Right. Okay.

24 MR. FALK: All that kind of thing. And also, then what
25 Dr. Burke is able to do is he is able to provide me the raw

1 data for the max -- the increase in the min/max and
2 millimeters of the increase in the circumference.

3 THE COURT: Okay.

4 MR. FALK: He's able to give me a number which describes
5 what's called the area under the curve.

6 THE COURT: Uh-huh.

7 MR. FALK: He's able to give me then what's called --

8 THE COURT: And you said you've gotten this from him
9 before?

10 MR. FALK: Yes. And I provided a redacted copy of one
11 of these reports from actually a case I had just done.

12 THE COURT: Uh-huh.

13 MR. FALK: And I sent it to her and I said this is all I
14 want is this.

15 THE COURT: Uh-huh.

16 MR. FALK: Because I think it's meaningful for me to
17 know some more specific data.

18 THE COURT: Uh-huh.

19 MR. FALK: For example, I think the Z scores, which is a
20 way to measure the intensity -- I believe Dr. Burke will
21 attest to that.

22 THE COURT: Okay.

23 MR. FALK: Of the particular response. And I think I
24 would be entitled to -- I need to know really more specific
25 comparisons to scenarios that he didn't respond to and ones

1 that he did respond to.

2 THE COURT: Okay.

3 MR. FALK: As it stands right now, I was just given --
4 he responded to these scenarios, period, without any type of
5 --

6 THE COURT: What he didn't respond to.

7 MR. FALK: No, no, no. Excuse me. The report that I
8 got from Dr. Gottfried said that my client responded to these
9 scenarios.

10 THE COURT: Right.

11 MR. FALK: Okay. Not the intensity of the response.

12 THE COURT: Okay.

13 MR. FALK: And really not even quantified the response,
14 just yes/no. I think the data coming out of the PPG is not
15 binary. I think it's a continuum of responses.

16 THE COURT: Okay.

17 MR. FALK: I can't believe that I can't get this same
18 information from Dr. Dwyer that I get from Dr. Burke, who has
19 provided it to me through an expert. I mean he provides it
20 to the expert in other cases, and the expert had provided it
21 to me.

22 I appreciate that I'm kind of maybe late to the table
23 asking for this. When I realized this trial was coming, I
24 contacted Mr. Bogle and said I kind of need the PPG reports.
25 And then I heard from Mr. Bogle that MUSC is not going to

1 turn it over, and that's when I said I've got no other
2 choice.

3 THE COURT: So what is the difference in this case of
4 why he says that Dr. Burke has given it to him before, but
5 now in this case Dr. Dwyer will not give it to him?

6 MS. FAIRBARIN: So remember, we're talking about two
7 different physicians.

8 THE COURT: I understand.

9 MS. FAIRBARIN: There are also two different software
10 systems that they're using.

11 THE COURT: Okay.

12 MS. FAIRBARIN: My understanding is the table that Dr.
13 Burke produced --

14 THE COURT: Uh-huh.

15 MS. FAIRBARIN: -- is a table that is produced in his
16 software.

17 THE COURT: Okay.

18 MS. FAIRBARIN: The version. So I actually took that
19 table, showed it to Dr. Dwyer, and said is this something
20 that we can do, and he specifically said I don't even
21 necessarily know what factors, like where this table is
22 created. It is not something that is generated in the
23 version of the program that I have.

24 THE COURT: So he doesn't use that one?

25 MS. FAIRBARIN: So he doesn't use that particular

1 version.

2 THE COURT: Okay.

3 MS. FAIRBARIN: Now with respect to scores, he may be
4 able to provide the Court with, like, specific scores, but
5 it's not going to be that table, and he's got to extrapolate
6 that in his version. It's not something he can just print
7 and say here you go.

8 And I think what we're boiling down to is the central
9 issue. This has happened in the past before. They've been
10 able to share this information, but it's gone to an expert
11 that's been retained who can analyze the data without
12 imposing any additional undue burden on Dr. Dwyer because he
13 doesn't have the ability to just generate, print, and
14 reproduce that same table.

15 THE COURT: Yes.

16 MR. FALK: I don't know about the past. My past
17 experience in this exact scenario has been in Charleston
18 County, and Dr. Macaulay -- Judge Macaulay did not let it in
19 because they did not provide the PPG information. So I have
20 not been able to, you know -- I don't know what this workout
21 has been in the past.

22 THE COURT: Uh-huh.

23 MR. FALK: And Dr. Burke -- the reports are coming in
24 through the expert that the Attorney General hires. As it
25 stands, this is a -- and under the facts in this case, this

1 is an extremely critical test. I appreciate that they want
2 to say it's one more data point, but if you lay Dr. Gehle's
3 report and Dr. Gottfried's report on top of each other --

4 THE COURT: Uh-huh.

5 MR. FALK: -- the biggest skew is the PPG results.

6 THE COURT: Okay.

7 MR. FALK: And so I think under the facts in this case,
8 it's extremely critical. I have no ability to cross-examine
9 this report, these numbers. I have to take them on face
10 value from somebody who didn't even do the test and can't
11 give me this information.

12 THE COURT: Let me ask you is there any reason why you
13 couldn't have just taken a thumb drive of the information and
14 given it to your expert? I mean is there any reason why you
15 couldn't have just taken what she said was -- here's the
16 thumb drive and give it your -- and I apologize. Your expert
17 is who again?

18 MR. FALK: Dr. Gehle.

19 THE COURT: Dr. Gehle. Is there any reason you couldn't
20 have given it to her?

21 MR. FALK: Dr. Gehle, if you would have gotten the raw
22 -- could she stand?

23 THE COURT: Yeah. And I just need -- and Dr. Burke is
24 back here too; correct? Yes.

25 MS. FAIRBARIN: Yes, Your Honor.

1 THE COURT: Well, you know what? Let's just hear -- and
2 I hate to say from the horse's mouth, but come on up, you
3 all. Come a little closer because there's nothing worse than
4 lawyers talking about medicine because we don't know what
5 we're talking about.

6 MS. FAIRBARIN: Do you want Dr. Dwyer too?

7 THE COURT: Yeah. They can all -- y'all come closer.
8 Help us out here.

9 DR. GEHLE: I work for the State and I was court-
10 appointed in this case.

11 THE COURT: Okay.

12 DR. GEHLE: I don't use PPG evaluations in my reports.

13 THE COURT: Okay.

14 DR. GEHLE: I believe that we have that software at the
15 Department of Mental Health.

16 THE COURT: Okay.

17 DR. GEHLE: I'm not sure what version it is. I had no
18 idea that Dr. Dwyer and Dr. Burke use different software. I
19 thought from their reports that they were both using the
20 Limestone system. So I thought it would be the same. So
21 that's brand-new information to me.

22 THE COURT: To you.

23 DR. GEHLE: I have no idea if we got a thumb drive if
24 software that we have at the Department of Mental Health
25 would, you know, work --

1 THE COURT: Uh-huh.

2 DR. GEHLE: -- or read that information. I'm not sure.

3 THE COURT: My question is is if you had that
4 information, would it help assist you in your determination
5 of whether or not you could either agree with the PPG or poke
6 holes in it or you know what -- you know what I'm trying to
7 say. Is there --

8 MR. FALK: I think I would need to hire my own PPG
9 expert.

10 THE COURT: Okay. Okay. Because I know she doesn't do
11 that. Okay.

12 Yes, sir?

13 DR. BURKE: I -- I trained the Department of Mental
14 Health for the PPG system.

15 THE COURT: Okay.

16 DR. BURKE: And as well as Dr. Dwyer's system, and they
17 would interface. They're the same software. The software I
18 have is the brand-new version.

19 THE COURT: Okay.

20 DR. BURKE: That is now -- now available. It adds a
21 couple more statistical analysis columns that aren't in
22 everyone else's right now. When they upgrade, they can have
23 them. That's what Mr. Falk is talking about is the
24 maximum/minimum and maximized base. So but to answer that
25 question, it could be -- a thumb drive could be given to

1 Mental Health and their software -- their expert would be
2 able to view it.

3 THE COURT: Okay.

4 DR. BURKE: But it needs to be someone who is certified.

5 THE COURT: In PPG.

6 DR. BURKE: It's an FDA approved --

7 THE COURT: Right.

8 DR. BURKE: -- medical instrument, and you have to be
9 certified by the company in order to read it correctly.

10 THE COURT: Okay.

11 MR. BOGLE: Just for the record, that's Dr. Burke.

12 THE COURT: Right. I understood that.

13 MR. BOGLE: With regard to his saying -- he didn't
14 introduce himself. So I just wanted to make sure.

15 THE COURT: That's okay. I understood that was Dr.
16 Burke. Okay.

17 MR. BOGLE: I know you know. Just --

18 THE COURT: Okay.

19 MR. BOGLE: -- for the court reporter.

20 MS. FAIRBARIN: And Your Honor?

21 THE COURT: Yeah.

22 MS. FAIRBARIN: I did talk to Dr. Dwyer about this
23 earlier in terms of what we could potentially --

24 THE COURT: Uh-huh.

25 MS. FAIRBARIN: -- generate. There are some things that

1 he can generate, but it's not going to be the table and it's
2 not going to be a complete picture of all the raw data.

3 THE COURT: Uh-huh.

4 MS. FAIRBARIN: And the concern for Dr. Dwyer was just
5 we don't want to take these things out separately. We really
6 need to be evaluating all the data, not just little slices
7 and pieces of it because then it could -- it could skew --

8 THE COURT: Okay.

9 MS. FAIRBARIN: -- what, you know, the perception is of
10 the analysis.

11 THE COURT: Okay.

12 MR. FALK: Your Honor?

13 THE COURT: Yes.

14 MR. FALK: Honestly, I can't speak to that, but I -- if
15 we need to look at all the data --

16 THE COURT: Right.

17 MR. FALK: I think I should at least be able to look at
18 all the data for all the different scenarios that were
19 applied and the neutral scenarios that he was exposed to. As
20 it stands, I don't.

21 MS. FAIRBARIN: And again, we don't have a means of
22 bringing that to you, given that it exists in licensed
23 software.

24 THE COURT: So these are what the concerns are, and I'll
25 just take two steps back from my point of view and what I am

1 concerned about. We are here for the trial, obviously.

2 We've got a jury that's coming back in the morning.

3 I can do one of two things, obviously. If he needs this
4 data and if you tell me, Mr. Falk, that you needed to hire --
5 if I were to allow the PPG in, if I would do that, then you
6 would need your own expert for the PPG exam to be able to --
7 and then you would want to look at the raw data as well. So
8 regardless, you would need some kind of continuance or not to
9 start the trial; correct?

10 MR. FALK: Your Honor, may I have a moment?

11 THE COURT: Sure. Sure.

12 (WHEREUPON, there was a pause in the proceedings, after
13 which the proceedings resumed as follows.)

14 THE COURT: Talk to your --

15 MR. FALK: I would suggest that Mr. --

16 THE COURT: Mr. Falk, talk to -- talk to Dr. Dwyer
17 really quick because --

18 DR. DWYER: Can I --

19 THE COURT: Certainly.

20 DR. DWYER: -- just share something? So the kind of
21 data that Mr. Falk is talking about -- so if he wants to look
22 at the result of a particular trial, which is a scenario --

23 THE COURT: Right.

24 DR. DWYER: -- that his client has listened to and he
25 sees a value on that particular, what he doesn't have is

1 whether or not there was any respiratory changes, any
2 physical movement that would have influenced that value.
3 That's the problem with not having all the data. So he's
4 going to ask a question and I'll just throw a number, say 10 ,
5 millimeters.

6 THE COURT: Okay.

7 DR. DWYER: Well, the reality is that it's really
8 because of artifact with that particular trial with body
9 movement or a sneeze or a cough. It's not 10 millimeters.
10 It's really six millimeters. Now, an analyst would see that
11 looking at the full data set.

12 THE COURT: Okay.

13 DR. DWYER: But he won't be able to see that, and I
14 can't give him the graphic representation because that's in
15 the software. I can't.

16 THE COURT: Right.

17 DR. DWYER: If I save that to a drive, he won't be able
18 to open it up because he doesn't have the software to --

19 THE COURT: Open up.

20 DR. DWYER: -- open it up. Right. Which -- and then he
21 wouldn't necessarily, in all fairness, understand necessarily
22 how to do the --

23 MR. FALK: Absolutely. I would not be able to. I'm not
24 saying I could understand it.

25 DR. DWYER: -- calculations.

1 THE COURT: Uh-huh.

2 DR. DWYER: And so that's why I'm saying we have in the
3 past on this -- we have given the whole -- the whole exam,
4 all of that data, to another expert, who the other -- the
5 other side wanted them to review. So they reviewed it and
6 consulted with their attorney on it.

7 THE COURT: Uh-huh.

8 DR. DWYER: That's the problem with just getting the
9 tables. Even the tables that are produced -- which as Dr.
10 Burke pointed out is a different version.

11 THE COURT: Right.

12 DR. DWYER: So it doesn't have all the same columns that
13 Mr. Falk had seen with Dr. Burke's version. Even if he had
14 that, he won't necessarily know if it's the most accurate
15 representation because he's not seeing the other streaming
16 data, so to speak.

17 THE COURT: Okay. Let me ask you as a psychiatrist --
18 you're a forensic psychiatrist. Do y'all agree on the use of
19 PPG? And I -- Dr. Gehle, of course, is sitting there shaking
20 her head.

21 I mean where I am now stuck is whether or not (a) to let
22 a PPG test in and allow a doctor to testify to that. And on
23 top of that, now he doesn't have whatever the background is
24 to ask the proper, appropriate cross-examination questions to
25 do whatever he needs to poke holes in it. I just don't know.

1 I kind of feel like I'm, you know, at the end of the game
2 here and don't know, really where we're going and what we need
3 to do.

4 MR. FALK: An independent expert who I've talked to in
5 the past -- there's one up in --

6 THE COURT: Okay.

7 MR. FALK: -- Massachusetts. Have you all heard of Dr.
8 Claude?

9 DR. DWYER: Claude. Yes, sir.

10 MR. FALK: And I have been in contact with him.

11 THE COURT: See, and typically, I mean I would have to
12 approve the financing for that and we would've had to have
13 done that ahead of time. We would've had to have given
14 everyone the full opportunity.

15 Let me ask you this, just as the forensic psychiatrist
16 in these cases or in this case. Do you agree that really the
17 difference in the opinion in this case really comes down to
18 the PPG test or is that not a fair statement?

19 MS. FAIRBARIN: That has got to be a Dr. Gottfried
20 question really.

21 DR. GEHLE: I can tell you from reviewing our report --

22 THE COURT: Yes.

23 DR. GEHLE: -- we have the same diagnosis and we have
24 the same Static score.

25 THE COURT: Okay.

1 DR. GEHLE: That's an actuarial risk assessment.
2 THE COURT: Right.
3 DR. GEHLE: Which, you know, gives you a percentage of
4 --
5 THE COURT: Yeah.
6 DR. GEHLE: -- likelihood that they'll reoffend.
7 THE COURT: Reoffend.
8 DR. GEHLE: We have the same results in those. It
9 really comes down to our opinion. I said, no, he doesn't
10 meet criteria.
11 THE COURT: Okay.
12 DR. GEHLE: And Dr. Gottfried said yes.
13 THE COURT: Okay.
14 DR. GEHLE: What she based that all on, I'm not sure.
15 THE COURT: Okay. Yes, sir?
16 DR. BURKE: It's my opinion PPG is necessary for a
17 number of reasons. As I said, it's an FDA-approved medical
18 instrument.
19 THE COURT: Right.
20 DR. BURKE: It is the only test mentioned --
21 THE COURT: In the DSM-5.
22 DR. BURKE: -- and recommended in the DSM-5 --
23 THE COURT: Right.
24 DR. BURKE: -- for this exact kind of evaluation.
25 THE COURT: Okay.

1 DR. BURKE: It is -- in the standards of care that
2 you're supposed to provide this kind of information according
3 to the Association for the Treatment of Sexual Abusers.

4 THE COURT: Uh-huh.

5 DR. BURKE: And the other international organization,
6 which I can't recall off the top of my head. There's a
7 plethora of data research supporting PPG. It's been found to
8 be the single greatest predictor of recidivism and child
9 molestation --

10 THE COURT: Uh-huh.

11 DR. BURKE: -- by two major studies. A major study
12 meta-analysis just last year --

13 THE COURT: Uh-huh.

14 DR. BURKE: -- endorses it and says it should be used in
15 these kinds of cases. So it may be that the PPG is the
16 determining factor because it's the only direct measure of
17 sexual arousal available right now.

18 THE COURT: And if it is a direct factor and it needs to
19 be admitted or used, then I think he is more than entitled to
20 the raw data, whatever he can get from it, and to have his
21 own expert analyze it. I mean that's kind of where I am
22 stuck.

23 MS. FAIRBARIN: And again, we have no objection.

24 THE COURT: Does that make sense? I know you -- I'm not
25 worried --

1 MS. FAIRBARIN: We have no objection to providing it to
2 him.

3 THE COURT: I understand. No. And of course, I have to
4 deal with the practical aspect of it is we're all here, we're
5 ready to go.

6 MR. BOGLE: If I may, Your Honor?

7 THE COURT: Yes.

8 MR. BOGLE: It's not really my motion, but let me --

9 THE COURT: Yeah.

10 MR. BOGLE: I can't resist. If we are talking an out-
11 of-state expert from where? Boston? Something like that?

12 MR. FALK: He's from -- is he from Massachusetts?

13 DR. DWYER: He's from Whitinsville, Massachusetts.

14 MR. BOGLE: Okay. We had --

15 DR. DWYER: Outside of Boston.

16 MR. BOGLE: We have had two instances in the past in
17 Berkeley County, SVP cases, where in one case the pro se
18 committed person wanted an out-of-state expert from Johns
19 Hopkins. In the second case, the guy represented by counsel
20 wanted the same expert to testify. A hearing was conducted
21 on whether or not that request should be granted in front of
22 Judge Dennis. Judge Dennis, in his role as chief
23 administrative judge, he says, look, my job is not only to
24 run the Common Pleas docket in this circuit --

25 THE COURT: Uh-huh.

1 MR. BOGLE: My job is also to look at the expenses the,
2 State may have to incur.

3 THE COURT: Uh-huh.

4 MR. BOGLE: Now, this doctor you want is going to cost
5 to come down here twice, once to see the guy and then come
6 back to testify. It's going to be between 30- and \$40,000.

7 THE COURT: Uh-huh.

8 MR. BOGLE: So his question was tell me you can't find
9 somebody else in South Carolina who can do it for a lot less.

10 THE COURT: Uh-huh.

11 MR. BOGLE: Because we all in this business know what
12 the going rate is --

13 THE COURT: Right.

14 MR. BOGLE: -- for an evaluation. That's between 2- and
15 \$5,000.

16 THE COURT: And, Mr. Bogle, I've got to tell you OID has
17 a listing of what these doctors all cost and what we're
18 allowed to approve, and it's not allowed.

19 MR. BOGLE: I know.

20 THE COURT: But it gives us guidelines; so we know what
21 is an excessive amount versus what is reasonable or the going
22 rate or just a little bit higher. So again, I mean it's up
23 to the Court to approve whatever they want to approve. I
24 just want to make sure that we have the best evidence and so
25 --

1 MR. BOGLE: Right. I just bring that up in case this
2 guy from Massachusetts turns out to be a five-figure expert.

3 THE COURT: And I'm not saying I'm not -- I mean he can
4 only be approved from what I allow him to do. ' So I don't
5 know if there's anyone else that can do it. I don't know if
6 anyone else uses it. Mr. Falk, do you have anyone else that
7 --

8 MR. FALK: I mean I think those two gentlemen right
9 there are the only two people in the state who can do it.

10 THE COURT: That do it --

11 MS. FAIRBARIN: Actually, Your Honor --

12 THE COURT: -- actually.

13 MS. FAIRBARIN: If I may interrupt?

14 THE COURT: Certainly.

15 MS. FAIRBARIN: I did ask them. I believe that there is
16 another one in the state.

17 THE COURT: Who else is it?

18 MS. FAIRBARIN: Donna Maddox.

19 THE COURT: Oh, Schwartz-Watts Maddox. Yeah. Okay.

20 DR. GEHLE: She doesn't give them. She doesn't give
21 those tests. I mean she works for the Department of Mental
22 Health.

23 THE COURT: Right.

24 DR. GEHLE: She doesn't -- she doesn't give and
25 interpret those tests. She sometimes might request them, but

1 she doesn't give and interpret them.

2 MS. FAIRBARIN: I understand she's credentialed.

3 DR. BURKE: She's credentialed to do so, and she doesn't
4 have a lab; so she usually refers them --

5 THE COURT: Okay.

6 DR. BURKE: -- to one of us.

7 THE COURT: Okay. I guess my question then would be --

8 MS. FAIRBARIN: We'd have to have help with that.

9 THE COURT: -- is could -- could she testify in a case
10 as to the raw data and -- I mean I certainly would qualify
11 her.

12 DR. GEHLE: I have never seen her write a report on the
13 --

14 THE COURT: Right.

15 DR. GEHLE: -- PPG in all the years that I've been doing
16 this. I've been involved at the Department of Mental Health
17 for almost ten years and I -- and I've never seen her write a
18 PPG report.

19 THE COURT: Yeah.

20 MR. BOGLE: She has -- Dr. Schwartz-Watts is obviously a
21 believer, if you would, in the PPG.

22 THE COURT: Okay.

23 MR. BOGLE: And I have had SVP cases where she's had one
24 done. That's part of --

25 THE COURT: And she sent them to Dr. Burke it sounds

1 like to get done in his lab.

2 MR. BOGLE: She hasn't done them.

3 THE COURT: Okay.

4 MR. BOGLE: And usually what happens is, just like Dr.
5 Swan, when Dr. Swan wants one, Mental Health sends the guy
6 down to Dr. Burke.

7 THE COURT: Okay.

8 MR. BOGLE: That's in pre-commitment and sometimes in
9 annual reviews.

10 THE COURT: Okay.

11 MR. BOGLE: For the most part, we're talking pre-
12 commitment hearings.

13 MS. FAIRBARIN: I think Dr. Dwyer wanted to offer
14 something.

15 THE COURT: Yes, sir?

16 DR. DWYER: If Dr. -- I think it's Maddox now.

17 THE COURT: It is.

18 DR. DWYER: But she could come and look at it in our lab
19 as somebody who is certified. We'll have to have a chaperone
20 because she can see other people's results, but I'm not
21 worried about her doing that.

22 THE COURT: Me either.

23 DR. DWYER: But nevertheless -- or for that matter, Dr.
24 Burke. I mean we've sent data to him before.

25 THE COURT: Okay.

1 DR. DWYER: As long as it's ordered obviously by the
2 Court to do so.

3 THE COURT: All right. We need to talk about one other
4 thing. In addition to all that, where are we timing on this
5 case as well? Because I'm going to guess that we're past our
6 --

7 MR. FALK: He is -- how long have you been in the
8 detention center here?

9 THE RESPONDENT: Fourteen months.

10 THE COURT: You're all looking at me. I know. That's
11 why I asked. I mean, Mr. Falk, statutorily, what are -- how
12 long are we allowed to keep him and how long are we allowed
13 to --

14 MR. FALK: Unfortunately, I think the case -- and I'm
15 sure Mr. Bogle will agree. I don't think that case law is
16 jurisdictional.

17 THE COURT: Okay.

18 MR. FALK: So I mean, yeah, we're supposed to do it and,
19 if we don't, well, we should try harder. I mean I think it's
20 --

21 THE COURT: Okay.

22 MR. FALK: But --

23 MR. BOGLE: There's statutory provisions about how long
24 the doctor has to evaluate the guy.

25 THE COURT: Right.

1 MR. BOGLE: When you first appoint her or him.

2 THE COURT: Yeah.

3 MR. BOGLE: There's statutory provisions as to when that
4 evaluation is finished, how long before the trial. They're
5 not jurisdictional.

6 THE COURT: Okay.

7 MR. BOGLE: Basically, unfortunately, he's got to remain
8 confined until the case is over.

9 THE COURT: I understand that. I just want to make sure
10 that that's the case and, again, I want to make sure we're
11 not going above and beyond what we're allowed to keep him.
12 Mr. Falk?

13 MR. BOGLE: In some respects --

14 THE COURT: I am going to see -- what you want is that
15 the PPG results not to come in at all and you would rather go
16 forward and try the case right now and they not come in
17 because you don't have all the background?

18 MR. FALK: Or --

19 THE COURT: Or?

20 MR. FALK: Weeks ago have gotten Dr. Burke's report. At
21 least I'd have a starting point of -- you know what I'm
22 saying?

23 THE COURT: Uh-huh.

24 MR. FALK: Here as I'm standing right now, I don't know
25 how I could effectively cross-examine Dr. Gottfried on the

1 reports that she's parroting from Dr. Dwyer.

2 MR. BOGLE: And we have the situation here -- while Dr.
3 Burke is the State's witness in this case --

4 THE COURT: Right.

5 MR. BOGLE: He's the State's witness only for a State v.
6 Council, State v. Jones --

7 THE COURT: I understand.

8 MR. BOGLE: -- hearing on the admissibility of the PPG.

9 THE COURT: Right.

10 MR. BOGLE: If Mr. Falk wants to have Dr. Burke look at
11 Dr. Dwyer's raw data, I don't have a problem with that.

12 THE COURT: Can you do that today?

13 MR. FALK: Well, I mean --

14 DR. BURKE: I could get it done. I can get it done. I
15 can go back to Charleston.

16 DR. SWYER: I don't have a problem with him coming back
17 with me to the lab this afternoon, Your Honor.

18 MR. FALK: As far as this issue right here --

19 THE COURT: Right.

20 MR. FALK: -- on the subpoena and motion to quash.

21 THE COURT: Right.

22 MR. FALK: That's a workout for it.

23 THE COURT: Okay. Well, I'm all for a workout. So if
24 that's how we can do it, then I'd appreciate that.

25 MR. FALK: You can do it for how much?

1 DR. BURKE: \$1,000.

2 MR. FALK: Yeah.

3 THE COURT: It's approved. That's fine. That's fine.

4 DR. DWYER: The majority of what is in Dr. Burke's
5 report is in our report as well. He can just see
6 calculations and they're in his report. The only thing that
7 is not there --

8 THE COURT: Uh-huh.

9 DR. DWYER: -- is the raw data table.

10 THE COURT: Okay.

11 DR. DWYER: Otherwise, our reports -- you can correct me
12 if I'm wrong -- have the same content in them.

13 THE COURT: Okay.

14 DR. DWYER: And we don't put that raw data because we
15 don't want someone to look at a column and ask a question
16 that's not accurate for what's in the column in the event
17 that there's not somebody there to talk about that. We've
18 had that before.

19 THE COURT: Okay.

20 DR. DWYER: So there's not a whole -- in other words,
21 what I'm getting at is they'll be able to look at what we've
22 prepared and then look at the raw data and do that. It may
23 be a little bit into this evening, but we'll stay there until
24 he's done.

25 MR. FALK: Now --

1 THE COURT: Yes?

2 MR. FALK: Are you saying that he can't go back to
3 y'all's lab and give me something like this?

4 DR. DWYER: He's -- he's going to go back and have to
5 look at all of that.

6 MR. FALK: Okay. Okay.

7 DR. BURKE: I can make that happen.

8 DR. DWYER: He's going to have to look at all of it.

9 DR. BURKE: Right.

10 DR. DWYER: What I'm saying is I don't want him to give
11 you just that without him already looking at the other so
12 that he can tell you that either this particular line item
13 has got an artifact change --

14 MR. FALK: Okay.

15 DR. DWYER: Which you would not be able to tell by just
16 looking at the table.

17 THE COURT: Okay.

18 DR. DWYER: Even if we handed you the table.

19 THE COURT: Okay.

20 DR. DWYER: But he can do that when he looks at it. Is
21 that how I -- did I answer your --

22 MR. FALK: Dr. Burke has been a witness of mine in the
23 past. I have no problem with that as far as a workout on
24 this motion to quash.

25 THE COURT: Okay.

1 MR. BOGLE: Now, one problem. If he leaves the building
2 right now --

3 THE COURT: He can't testify.

4 MR. BOGLE: He can't testify about the admissibility
5 issues in the State v. Council hearing this afternoon.

6 THE COURT: Well, let me ask you all --

7 MR. BOGLE: We can postpone that until in the morning.

8 THE COURT: Well --

9 MR. BOGLE: And have the jury come in a few minutes
10 later.

11 DR. DWYER: How late do you want to work tonight? I'm
12 trying to be helpful.

13 THE COURT: He's being very helpful. Let me tell you
14 this. You can either stay here and testify or you can go
15 back. I will work as early tomorrow morning, if you wanted
16 to. Y'all are from Charleston; correct? I mean it's an hour
17 and 15-minute drive. I appreciate it.

18 You tell me when you would like to do this. What's
19 easiest for you? I mean I can start tomorrow morning as
20 early as the courthouse opens at eight. So I could start at
21 eight if you needed me to. You tell me what's best for you
22 all.

23 MR. FALK: To do?

24 THE COURT: We could either --

25 MS. FAIRBARIN: You have the motions hearing and then

1 you've also got to review the data.

2 DR. BURKE: Okay. So we can do -- we can do the motions
3 hearing now.

4 THE COURT: Right now. Exactly.

5 DR. BURKE: That's fine.

6 THE COURT: Is that okay?

7 DR. BURKE: Yes, ma'am.

8 THE COURT: Are y'all okay not to take a lunch? I don't
9 want to starve anybody out, but if you all need a lunch
10 break, you tell me.

11 DR. DWYER: There's a snack bar if the bailiffs don't
12 mind me eating a snack.

13 THE COURT: Absolutely. You can eat anything you want
14 in here. It's fine. Is that acceptable? So let's go ahead
15 and have the Council hearing then. Is that --

16 MR. FALK: Certainly.

17 THE COURT: -- acceptable?

18 MR. BOGLE: Yes, Your Honor.

19 MR. FALK: Yes.

20 DR. BURKE: Is the plan then, Your Honor, if all that
21 goes smooth, then Dr. Burke and I will go back to the lab?

22 THE COURT: Absolutely. You'll go back and you'll
23 analyze it, and then -- yes.

24 MR. FALK: All right.

25 THE COURT: Okay. Thank you.

1 MS. FAIRBARIN: Thank you, Your Honor.

2 THE COURT: Thank you. I appreciate it. Okay. Thank
3 you. Okay. So you want to go forward then with --

4 MR. FALK: The Council hearing?

5 THE COURT: Yeah. Is that --

6 MR. FALK: The last time we did this, I started with my
7 witness, but I think --

8 MR. BOGLE: I think I go first.

9 THE COURT: Okay.

10 MR. FALK: The State goes first.

11 THE COURT: Okay. That's fine. Okay. Mr. Bogle?

12 MR. BOGLE: What you've got before you, Your Honor --
13 may it please the Court?

14 THE COURT: Yes, sir.

15 MR. BOGLE: You've got a respondent's motion in limine
16 to exclude testimony regarding the PPG testing.

17 THE COURT: Okay.

18 MR. BOGLE: You've also got a companion --

19 THE COURT: Rick, would you get my iPad in my office, --
20 I mean my computer? Yeah.

21 MR. BOGLE: So that's the first one.

22 THE COURT: Okay.

23 MR. BOGLE: A motion to exclude Dr. Gottfried from
24 testifying about the -- excuse me -- excluding testimony
25 regarding the PPG. So that's number one.

1 There's another motion in limine for a Council hearing
2 about the opinion question of Dr. Gottfried and, again, this
3 relates to the PPG.

4 THE COURT: PPG.

5 MR. BOGLE: So there's two motions that kind of we can
6 wrap into one hearing I think.

7 THE COURT: Sounds good.

8 MS. FAIRBARIN: May we be excused? Can Dr. Dwyer get
9 back and get things set up?

10 THE COURT: Absolutely. Thank you, all.

11 MS. FAIRBARIN: Thank you, Your Honor.

12 DR. DWYER: And I was only subpoenaed to bring in raw
13 data. So I'm released for the week then?

14 THE COURT: You are released. You don't need him, Mr.
15 Falk, do you?

16 MR. FALK: No. I don't believe we can do the second
17 part of --

18 THE COURT: The hearing.

19 MR. FALK: -- without Dr. Gottfried here.

20 THE COURT: Okay.

21 MR. FALK: I mean we can do the Council hearing.

22 THE COURT: Right. But then Dr. Gottfried is going to
23 be here at two. Am I correct?

24 MR. FALK: Okay. I'm just saying --

25 MS. FAIRBARIN: I'm going to step out in the hall and

1 see where they are on that.

2 THE COURT: Okay.

3 MS. FAIRBARIN: Because last time they were trying to
4 get here.

5 THE COURT: So let's just -- so we can do the first part
6 of the hearing; is that correct?

7 MR. EALK: Yes, ma'am.

8 THE COURT: Okay. Thank you.

9 MR. BOGLE: And, Your Honor?

10 THE COURT: Yes.

11 MR. BOGLE: Just for your reference, as part of this
12 entire thing, I'll be looking -- I'll be -- we'll be getting
13 involved in the rules on testimony by experts --

14 THE COURT: Uh-huh.

15 MR. BOGLE: -- and the Rules of Evidence. 702, 703,
16 704, and 705 all come into the line on this.

17 Now, regarding the admissibility of the PPG, a State v.
18 Council or State v. Jones hearing, I would like to call Dr.
19 Burke.

20 THE COURT: He didn't run far. Come on up.

21 MR. BOGLE: Dr. William Burke.

22 THE COURT: Just come on up, Dr. Burke.

23 THE CLERK: Do you solemnly swear or affirm that the
24 testimony you give to the Court in this trial shall be the
25 truth, so help you God?

DR. WILLIAM BURKE - DIRECT BY MR. BOGLE

1 THE WITNESS: I do.

2 THE CLERK: And would you please state your name for the
3 record?

4 THE WITNESS: William Perry Burke.

5 THE CLERK: And spell your last name, please.

6 THE WITNESS: B-u-r-k-e.

7 THE CLERK: Thank you.

8 THE COURT: Okay. Whenever you're ready.

9 DR. WILLIAM BURKE, being first
10 duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BOGLE:

13 Q: Dr. Burke, what is your -- you've already given your
14 name. What is your occupation?

15 A: I'm a clinical director of Southeastern Assessments,
16 which is a -- my company that is tasked with evaluating
17 individuals with sexual disorders and treating individuals
18 with sexual disorders.

19 Q: What degrees do you possess?

20 A: A bachelor's degree in psychology from The Citadel, a
21 master's degree in clinical counseling from The Citadel, a
22 Ph.D. in counseling with a cognate in psychology from the
23 University of South Carolina.

24 Q: Have you had any specialized additional training or
25 experience within the field of forensic assessment of sex

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1 offenders beyond the degrees you talk about?

2 A: Yes, sir. I've been trained by the developer of every
3 test that I utilize, with the exception of the MMPI and the
4 PAI.

5 Q: Okay. And MMPI stands for?

6 A: Minnesota -- Minnesota Multi-Phasic Personality
7 Inventory.

8 Q: And PAI is Personality --

9 A: Personality Assessment Inventory.

10 Q: Assessment Inventory? Okay.

11 A: But that doesn't mean I haven't been trained -- I'm
12 sorry. I've been trained and certified with the MMPI. Just
13 the guy who invented it is dead. So -- but other people -- I
14 actually know the people who invented it.

15 THE COURT: Okay.

16 Q: Do you have memberships in any professional
17 organizations related to what you talk about?

18 A: I no longer am a member of ATSA. I chose to not re-up
19 last year because of my difference of opinion about -- about
20 the way things are progressing.

21 Q: Okay. Does your work have you evaluating and doing
22 forensic assessments of individuals?

23 A: Yes, sir.

24 Q: Would you have -- do you also have experience in working
25 directly with sex offenders?

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1 A: Correct. I am -- I'm 60 years old and I've been doing
2 this since -- in one capacity or another, since 1981. I
3 think a conservative estimate is over 6,000 sex offenders I
4 have evaluated.

5 Q: Uh-huh.

6 A: And about 4,000 of those I have evaluated utilizing the
7 PPG.

8 Q: Now, what types of assessments have you done over the
9 years of different types of sex offenders? What type of
10 assessment are we talking about?

11 A: Well, they're all the same really. They are risk
12 assessments, but they've been utilized for -- in sexually
13 violent predator hearings, in sentencing hearings, in General
14 Sessions court. They are often used as mitigation to come to
15 some sort of resolution in court in General Sessions as well.
16 I've been to multiple court-martials for risk assessment in
17 court-martials.

18 Q: Have you authored any chapters in publications related
19 to sex offenders?

20 A: Yes, sir. Two -- I was invited to write two -- or co-
21 author two chapters, and I've got nine or ten peer-reviewed
22 articles that my name is on that involve --

23 Q: Involving? I'm sorry. Involving?

24 A: Involving the assessment --

25 Q: Okay.

DR. WILLIAM BURKE - DIRECT BY MR. BOGLE

1 A: -- and treatment --

2 THE COURT: Okay.

3 A: -- of sex offenders.

4 Q: Okay. What about your background with regard to the
5 Sexually Violent Predator Act? Tell the judge about your
6 eval -- your background there and how you became involved
7 with that?

8 A: Well, I was actually involved in the very first case and
9 -- I'm sorry -- by the defense counsel. I was invited by the
10 governor for a sex offender or sexually violent predator task
11 force. I sent my resume. I can't remember the date. It was
12 in the early 2000s. And I -- I can't give an accurate number
13 of how many times I've testified in SVP cases. Probably over
14 30, and that's a conservative estimate. And I've been hired
15 50 or 60 times, but, you know --

16 THE COURT: It just doesn't go to trial, yeah.

17 THE WITNESS: Yeah, right.

18 THE COURT: Okay.

19 MR. BOGLE: Okay.

20 BY MR. BOGLE:

21 Q: So have you specifically created tools to help determine
22 an individual's risk to reoffend?

23 A: Well, I'm the principal investigator for the -- for the
24 Real Child Voices stimulus set that Limestone utilizes.

25 Q: Is Limestone a manufacturer of the PPG?

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- 1 A: Yes, sir.
- 2 Q: Is that --
- 3 A: There are two companies left standing, yes, Monarch and
- 4 Limestone.
- 5 Q: Okay. Now, one side question. Have you previously been
- 6 recognized as an expert witness in the assessment of sex
- 7 offenders overall, not just the SVP --
- 8 A: Many times, yes.
- 9 Q: -- but overall?
- 10 A: Yes, sir.
- 11 Q: About how many times in the state of South Carolina?
- 12 A: I don't know. Hundreds. I mean since the '80s.
- 13 Q: Okay. And you've already testified that you've been
- 14 recognized as an expert witness in SVP cases; correct?
- 15 A: Yes, sir.
- 16 Q: Twenty or 30 times?
- 17 A: Yeah.
- 18 Q: And you have been hired by defense counsel to conduct
- 19 evaluations in SVP cases, have you not?
- 20 A: Yes, sir.
- 21 Q: Okay.
- 22 MR. BOGLE: Your Honor, at this time, I'd like to ask
- 23 that the Court qualify Dr. Burke or recognize him as an
- 24 expert in the field of assessment and evaluation of sex
- 25 offenders pursuant to the Sexually Violent Predator Act.

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1 THE COURT: Any objection, Mr. Falk?

2 MR. FALK: No objection.

3 THE COURT: Okay. He is qualified as such.

4 THE WITNESS: May I add one thing?

5 THE COURT: Sure.

6 THE WITNESS: Actually, Limestone trained me in the
7 early 2000s, and I'm the -- I'm the person that trains
8 everybody else for Limestone.

9 THE COURT: Okay.

10 THE WITNESS: So I'm the administrator of the course --

11 THE COURT: Okay.

12 THE WITNESS: -- to be a clinical analyst.

13 THE COURT: Okay.

14 MR. BOGLE: Okay.

15 BY MR. BOGLE:

16 Q: Now, just for the record, what is a PPG or a penile
17 plethysmograph? What is it?

18 A: It's an instrument that measures blood flow to the
19 penis, which is a direct -- it's direct evidence of sexual
20 arousal. It's been around since the '50s. It came -- became
21 utilized in the United States clinically for these kinds of
22 evaluations involving sex offenders in the '70s. It's been
23 refined and refined again to where we are now.

24 I know -- I know -- personally, I've trained all the
25 doctors at New York State's sexually violent predator program

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1 and all the doctors at Coalinga, which is the California
2 state SVP program. So it's -- it's utilized in SVP cases all
3 over the United States.

4 Q: Why is it important for experts like you or in this case
5 Dr. Dwyer's laboratory to conduct a PPG of an individual in a
6 sexually violent predator case?

7 A: Well, as I mentioned, it's the only direct measure of
8 sexual arousal available. Actually, we're working on
9 something at MUSC with brain imaging. That's a ways off.

10 THE COURT: Okay.

11 A: And as I mentioned earlier, it's an FDA approved
12 instrument. It's --

13 THE COURT: When was it approved by the FDA?

14 THE WITNESS: When?

15 THE COURT: When.

16 THE WITNESS: 2006.

17 THE COURT: Okay.

18 THE WITNESS: That particular instrument. I can give
19 you a copy of that.

20 THE COURT: That's okay.

21 BY MR. BOGLE:

22 Q: So why is it important in SVP cases?

23 A: Well, I mean it's the only measurement of sexual arousal
24 available right now, and that's -- and statistically, from
25 the research in the last 15 years, it's been found on three

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1 separate meta-analytic studies, which are large studies
2 pulled together, to be the number one predictor of recidivism
3 regarding child molestation. So it's a very important point.

4 THE COURT: Dr. Burke, why do different psychiatrists
5 and psychologists disagree as to the use and whether or not
6 it's accurate? Because obviously as the gatekeeper, I need
7 to make sure that whatever evidence is allowed in the case is
8 reliable, it is peer-reviewed, it is, you know,
9 scientifically accepted. Those are all -- obviously, you
10 understand my role.

11 THE WITNESS: Certainly.

12 THE COURT: So tell me honestly why people disagree?
13 Why do some believe it's not a good and reliable test?

14 THE WITNESS: Well, I have a copy of a Daubert challenge
15 in Florida --

16 THE COURT: Right.

17 THE WITNESS: -- where PPG passed.

18 THE COURT: Okay. I hate to say it. That's one judge.

19 THE WITNESS: I understand.

20 THE COURT: Yeah.

21 THE WITNESS: Well, every time -- I just know from
22 personal experience every time I've had a challenge, there
23 seems to be a couple of articles that are brought to my
24 attention to ask on cross-examination.

25 THE COURT: Uh-huh.

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1 THE WITNESS: And they're all from the '80s or early
2 '90s.

3 THE COURT: Okay.

4 THE WITNESS: And the objections that are brought up in
5 those articles aren't even applicable today. For instance,
6 we don't show pornography per se. There -- there's some nude
7 images of adult women and adult men in the beginning, but
8 it's not much more than the swimsuit issue of Sports
9 Illustrated.

10 THE COURT: Okay.

11 THE WITNESS: And we don't show child pornography. We
12 don't touch the individual. We don't see their genitalia.
13 We don't instruct them to masturbate. Those are the things
14 that are often brought up and cited in other position papers
15 against PPG.

16 THE COURT: Okay.

17 THE WITNESS: We just don't do any of those things.

18 THE COURT: Okay.

19 THE WITNESS: I've done 4,000 and I maybe have seen --
20 and I'm going to -- I'm going to say 30 -- 30 penises in my
21 life, and it's just because they showed me.

22 THE COURT: Okay.

23 THE WITNESS: You know, it wasn't what I was looking
24 for. So ...

25 THE COURT: Okay.

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1 BY MR. BOGLE:

2 Q: So as I understand it, the way this thing works is the
3 person being tested -- he puts the strap around his penis;
4 right?

5 A: Correct.

6 Q: Okay. He applies it, if you will?

7 A: Right.

8 Q: The person observing it is not looking at him from the
9 front? He's looking from the back?

10 A: Well, he's in a room by himself.

11 Q: And the man is in a room by himself. And as the test
12 progresses, he is showed a series of images, scenarios,
13 accompanied by voices depicting such things as persuasive
14 adult sex, coercive adult sex, persuasive sex with children
15 --

16 THE COURT: And this is just audio; correct?

17 MR. BOGLE: Well, it's pictures. The pictures might be
18 a non-pornographic picture of a little girl in a bathing
19 suit.

20 THE COURT: Okay.

21 MR. BOGLE: For example. And then a voice will say
22 something that is not sexual by itself, but the guy looking
23 at that image and hearing the voice will suddenly -- may, if
24 he's aroused -- might get aroused and stretch the gauge on
25 his penis and you get a reading.

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1 BY MR. BOGLE:

2 Q: Is that a simplified way of talking about it?

3 A: That's too simple. The -- I'm sorry. I don't mean to
4 be --

5 THE COURT: That's okay.

6 A: -- disrespectful.

7 First of all, they are very sexually explicit. I mean
8 there's no question that there's sexual abuse going on with
9 the children scenarios or the adult rape scenarios. I mean
10 there's no question about it. But there's no child
11 pornography. There's no -- I mean with the Real Child Voices
12 stimulus, there's a couple of little girls in bathing suits
13 and boys in bathing suits. There's a couple of them -- one
14 kid has got winter clothes on. I mean, you know, he's got a
15 jacket on and a hood on and everything else. It more has to
16 do with -- those pictures are designed to say this is the
17 victim in this scenario. This is what they look like.

18 THE COURT: Okay.

19 A: And then you hear the story for 90 seconds and then
20 there's a series of pictures relating back to the story with
21 that same victim. There are ways to track it. They're
22 listening to the audio. They're instructed to press a button
23 when the scenario changes into something sexual or violent.
24 So we know when that is and so we can, you know,
25 automatically see that they're listening.

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1 We also can ask them in between, you know, what was that
2 story about. Insofar as making sure that they are looking at
3 the stimulus pictures, the entire process is videoed with the
4 exception of them placing the gauge on their penis. That's
5 not videoed, but everything else is videoed and we can tell
6 if they're looking.

7 Also, they are instructed to press a button if the
8 person changes in the picture. What that means is you might
9 have a little girl that's got red hair, a little girl with
10 red hair, one similar that's a brunette. It forces them to
11 attend to what's going on.

12 THE COURT: In other words, they can't close their eyes
13 then --

14 THE WITNESS: Exactly.

15 THE COURT: -- and still --

16 THE WITNESS: Exactly. Right.

17 THE COURT: Okay.

18 THE WITNESS: And then we have countermeasure
19 instruments. We have a seat cushion that is really
20 sensitive, and we can detect any kind of movement or muscle
21 tension in the groin area. Then we have respiration that's
22 traced, and that's not to be utilized like a polygraph. It's
23 simply one of the ways people try to fake it is to hold their
24 breath.

25 THE COURT: Okay.

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1 THE WITNESS: And so it's just -- just seeing what
2 they're doing.

3 THE COURT: This lasts for seven hours?

4 THE WITNESS: Well, it -- what Dr. -- well, here --

5 THE COURT: Okay.

6 THE WITNESS: Dr. Dwyer is doing something. He uses an
7 older stimulus set, which is very long. It's called the
8 Marshall stimulus, and it doesn't have any pictures. And
9 then he also -- after that is done, he does the Real Child
10 Voices.

11 Now, if a person gets an erection, what you're
12 instructed to do is you have to wait until they get back down
13 to baseline before you start the next scenario. So if you
14 show them -- for instance, they say they're heterosexual and
15 here's a nude attractive adult woman and they get an
16 erection, you know, you don't have to worry about, well,
17 they're erect and we're going to show them a picture of a kid
18 and a story about a kid. So some -- you know, that varies.
19 So sometimes --

20 THE COURT: Okay.

21 THE WITNESS: And I've had one poor soul -- he's an SVP.
22 He only got through four trials which should've taken 15
23 minutes and he was in there, like, three-and-a-half hours.
24 He just could not detumesce. He just could not get rid of
25 his erection.

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1 So I don't know. I haven't seen the data. My thought
2 is that it took a while for the individual to detumescere.
3 That's a marathon session, seven hours.

4 THE COURT: Okay.

5 BY MR. BOGLE:

6 Q: Now, in this particular case -- so they're shown
7 photographs and they hear voices?

8 A: Right.

9 Q: And you mentioned a minute ago Limestone being the
10 company that you use?

11 A: Yes, sir.

12 Q: Is Limestone also the manufacturer of the one that the
13 sexual behaviors lab that Dr. Dwyer runs also uses?

14 A: It is. And so it's the same one as the Department of
15 Mental Health in Columbia.

16 Q: Okay. DMH owns one?

17 A: Yes.

18 Q: And doesn't use it as far as you know; right?

19 A: Not often.

20 Q: Because they send people down to you, don't they?

21 A: Right. They had trouble with their tech doing it
22 correct I want to say.

23 Q: Okay. That was some time ago, wasn't it?

24 A: Yes.

25 Q: In fact, there are situations where if a Department of

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1 Mental Health psychologist were to in one of these cases,
2 like Dr. Donna Maddox for example, wants a PPG or Dr. Swan
3 wants a PPG, Dr. Amy Swan, DMH sends the guy down to you to
4 run the PPG on him, like the case we had last week? So now
5 have you authored any books or publications on the PPG?

6 A: I co-authored an article about the standardization of
7 PPG last year in a sexual medicine -- *Journal of Sexual*
8 *Medicine*.

9 Q: You mentioned a minute ago that a PPG has been approved
10 by the FDA?

11 A: Correct.

12 Q: Okay. You also mentioned -- have you been involved in
13 the certification of the laboratory at the sexual behaviors
14 lab, Dr. Dwyer's lab, that Dr. Gottfried used in Charleston?
15 What's your connection there?

16 A: Well, I'm the -- I'm the administrator for Limestone to
17 train doctors on this instrument, and also make sure that
18 their laboratory meets the standards that are set up by
19 Limestone, standards such as it has to have at least a 27-
20 inch color TV, it has to have a Naugahyde chair that's
21 covered with medical paper, have to have a separate room with
22 a door, and a method to communicate with the individual.
23 Those are the major points.

24 Q: So Dr. -- the lab -- I'm going to call it Dr. Dwyer's
25 lab because that's easier for me to say. Dr. Dwyer's lab was

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1 certified by you when they set it up; is that right?

2 A: Yes, sir.

3 Q: And you have a license with Limestone, the manufacturer,
4 to do that?

5 A: Right.

6 Q: What is the -- what is the Diagnostic and Statistical
7 Manual, Edition 5, that I'm holding?

8 A: It's the American Psychiatric Association's publication,
9 which all psychiatrists, psychologists, therapists go to for
10 diagnosing or diagnostic purposes.

11 Q: Okay.

12 A: It's the Bible of the industry, so to speak.

13 Q: So it sets forth the criteria for, say, diagnosing
14 pedophilic disorder?

15 A: Correct.

16 THE COURT: Yes.

17 Q: Okay. Now, the DSM-5, that's the latest version?

18 A: Yes, sir.

19 Q: Does it mention the PPG by name in at least two -- two
20 places?

21 A: It does. Yes.

22 Q: I'd like you to turn --

23 MR. BOGLE: If I may approach the witness?

24 THE COURT: You may.

25 BY MR. BOGLE:

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1 Q: Turn to page 686. It might be marked.

2 A: I'll use mine.

3 Q: Yeah. If I may, I've got a print out for the same
4 thing.

5 THE COURT: He wants his own.

6 MR. BOGLE: If I may pass this up to Your Honor as well?

7 THE COURT: Sure.

8 BY MR. BOGLE:

9 A: All right, 686. Do you want me to read the applicable
10 paragraph?

11 Q: Yeah. On page 686, is the -- is the PPG, the penile
12 plethysmograph, specifically mentioned on that page?

13 A: Yes, it is.

14 Q: Okay. Would you read the paragraph where it talks about
15 it?

16 A: The most widely applicable framework for assessing the
17 strength of a paraphilia itself in which one -- is one -- I'm
18 sorry. The strength of a paraphilia itself is one in which
19 examinee's paraphilic sexual interests, urges, and behaviors
20 are evaluated. In a clinical interview or self-administered
21 questionnaires, examinees can be asked whether their
22 paraphilic sexual fantasies, urges, or behaviors are weaker
23 than, approximately equal to, or stronger than their normal
24 sexual interests. This type of comparison can be usually --
25 can be and usually is employed in psychophysiological

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1 measures of sexual interest, such as the penile
2 plethysmograph in males and viewing time in males and
3 females.

4 Q: So that's on page 686?

5 A: Right.

6 Q: Does it also appear on page 699?

7 A: Yes. Psychophysiological measures of sexual interest
8 may be -- sometimes may be useful when an individual's
9 history suggests the possible presence of pedophilic
10 disorder, but the individual denies strong or preferential
11 attraction to children. The most thoroughly researched and
12 longest used of such measures is penile plethysmography,
13 although the sensitivity and specificity of diagnosis may
14 vary from one site to another.

15 Q: That's page 699?

16 A: Yep. Yes, sir.

17 MR. BOGLE: Can we -- instead of leaving the book here,
18 could we mark -- have this page that I have extracted marked
19 as an exhibit for this hearing, Your Honor?

20 THE COURT: As a Court's exhibit, yes.

21 (WHEREUPON, the page from the DSM-5 was marked as
22 Court's Exhibit Number 1.)

23 BY MR. BOGLE:

24 Q: Doctor, was the PPG -- is that the only test of that
25 nature mentioned in the entire book? In the entire DSM-5?

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1 A: I believe so, yeah. I know it is for paraphilias.

2 Q: Okay.

3 A: I haven't found anything else in the other areas.

4 Q: And by paraphilias, you're referring to deviant --

5 A: Sexual disorders.

6 Q: -- sexual disorders?

7 THE COURT: Okay.

8 Q: Was the PPG mentioned in the same place and mentioned at
9 all in the previous version, the DSM-IV?

10 A: Not to my knowledge, no.

11 Q: Okay. Has the PPG been subject to publication and peer-
12 review?

13 A: Yes, sir.

14 Q: Now, can this -- and has this method been previously
15 applied in South Carolina sexually violent predator cases?

16 A: Yes, sir.

17 Q: And you've done many reports at the request of Mental
18 Health; right?

19 A: Yes, sir.

20 Q: Okay. What quality control methods are used during the
21 PPG?

22 A: Well, the entire process is videoed, video recorded,
23 with the exception of the individual placing the gauge on his
24 penis. And there's a checklist of things that you go through
25 as the test progresses or is started. It's almost sort of

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1 like a rocket launch. You have to get things calibrated, and
2 the software confirms that the gauge works within the
3 parameters it's supposed to. And the software is designed to
4 where you can't -- it tries to make it human proof. It
5 doesn't allow you to stop a recording or stop -- stop any
6 sort of data collection. It never dumps data. It always
7 keeps the data.

8 Q: And if a guy who is being tested tries to, if you will,
9 fake or somehow throw the test off by holding his breath, by
10 moving, by shifting around, by something like that, this
11 software picks it up; is that right?

12 A: Yeah. It does. And also, it is to the benefit of the
13 person being examined. For instance, I mean if they -- if
14 they sneeze, the penile trace can jump or if, you know, their
15 back is hurting and they just stretch, the penile trace can
16 jump, but that's real easy to -- when you have the waveforms
17 to look at, when you're trained, you know what that looks
18 like.

19 And so the chances of a false positive are incredibly
20 low. In fact, Harris, I just read, published that he thinks
21 that there's 100 percent accuracy with specificity, meaning
22 it doesn't incorrectly diagnose someone, but you can't say
23 that in the world of statistics because we're into confidence
24 intervals now.

25 THE COURT: Right.

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1 A: So there's, like -- he said a 96.9 percent error rate,
2 meaning less than four percent are incorrect. But he hasn't
3 found one incorrect, but just statistically he has to say
4 that.

5 Q: Is the RPG consistent with recognized scientific laws
6 and procedures?

7 A: I believe so, yes.

8 Q: And how so? How would you qualify that?

9 A: Well, it's based off known human physiological factors.
10 Back to Masters and Johnson stating that, you know, the best
11 way to see what a man is aroused to is to, you know, observe
12 what happens in the genital region. And it's -- like I said,
13 it's been -- there are several hundred publications.
14 Overwhelmingly, the publications are in favor of it, but the
15 ones that are not in favor of it tend to be publications put
16 together for hearings. The most famous one is Weber v. -- in
17 the Ninth Circuit of California. That's the one that gets
18 brought up the most.

19 Q: And is --

20 A: That's the one that I was speaking about earlier where
21 they -- you know, you're showing them child pornography.
22 You're putting the gauge on the penis. You're making them
23 masturbate, and all that stuff. We don't do any of that.

24 Q: Okay. In fact, in the early days of the PPG, that was
25 part of the thing was showing actual pornographic pictures

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1 of, say, children; right?

2 A: Yeah.

3 Q: And that's no longer --

4 A: Right.

5 Q: -- in any way, shape or form involved in this, is it?

6 A: Well, the law changed in the '70s and it's illegal to

7 possess it. I mean you can possess it in America now, but

8 it's -- why? I mean because the stimulus with the children's

9 voices is -- I mean there's a study about to be published by

10 Federov with the Real Child Voices and nude images of

11 children, and the Real Child Voices is equal to or better

12 than nude children.

13 Q: Okay.

14 A: So why use nude children?

15 Q: So in this particular examination, they are shown the

16 photographs and they hear what's called the Real Child

17 Voices, and these are real children reading a script of some

18 sort; is that correct?

19 A: Correct. They read -- they read a script that has

20 nothing to do with sex.

21 Q: Uh-huh.

22 A: The parents were in the recording studio with them.

23 Q: Okay.

24 A: And approved everything and, you know, you cut and paste

25 what they say and put it into the scenario.

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- 1 Q: Okay. So the child is reading something that sounds
2 perfectly ordinary, but then it can be cut and pasted into a
3 scenario that would be effective to a sex offender?
- 4 A: Yes, sir.
- 5 Q: Okay. And you said that it's FDA approved?
- 6 A: Correct.
- 7 Q: Since 2006?
- 8 A: Correct.
- 9 Q: You yourself served --
- 10 A: Well, the Limestone is 2006. The Monarch was FDA
11 approved in '97.
- 12 Q: '97? But the Limestone is what we're talking about
13 here?
- 14 A: Limestone since 2006.
- 15 Q: Is the Limestone the one we're talking about here?
- 16 A: Yeah. Yeah. Right.
- 17 Q: Okay. Okay. And you yourself are a certifying agent
18 for Limestone?
- 19 A: Correct.
- 20 Q: And you certified the lab at MUSC? Dr. Dwyer's lab?
- 21 A: Yes, sir. Although, I think Mr. Buttle was with me. So
22 I mean I didn't need to be there because the vice president
23 of the company was there for that one too. But yeah, I was
24 there.
- 25 Q: And did you also -- are you aware that the company doing

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1 the treatment of sex offenders committed to the sexually
2 violent predator treatment program, a company called Correct
3 Care, has a PPG as part of their rigmarole or part of their
4 protocol for treatment -- measuring treatment?

5 A: I know they do in Florida, but I've been told they want
6 to get the lab going again up --

7 Q: Okay.

8 A: -- in Columbia.

9 Q: And as certifying agent for the laboratory at Dr.
10 Dwyer's office, you've watched it being performed down there,
11 have you not?

12 A: Yes, sir.

13 Q: Okay. There's been some question about how there's a
14 certain percentage of people out there, say as high as maybe
15 20 percent, who just don't respond to the PPG at all?

16 A: Correct.

17 Q: What are the reasons for this in your opinion?

18 A: Well, my opinion and what research also suggests, you
19 know, anxiety is the killer of arousal. I mean it's a real
20 anxiety provoking process to go in, you know, which I've done
21 myself. I mean before I did this, I made -- you know, I made
22 sure I went through one. I didn't sleep the night before. I
23 was so worried about it.

24 Q: There's also been some talk about how if a woman is
25 administering the PPG, then the person would hear a female

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1 voice and that might get him aroused as opposed to the
2 pictures or voices he's looking at or hearing. Is there any
3 validity to that contention?

4 A: There is some validity to that, but I mean Harris just
5 published on that and found no significant difference. And I
6 would also submit, okay, if a female is -- is instructing the
7 person to put the gauge on and how to do it, well, actually,
8 you know, all of that is videotaped. I mean it's a
9 standardized presentation on how to do it that the individual
10 can watch as many times as they need to. But say they get
11 aroused to the lady being in the room talking to them. Well,
12 it's the technician's duty to monitor that, and you can tell.
13 Part of the protocol is they sit there for 5 to 10 minutes
14 and don't do anything. You just have them sit there, and
15 they should detumesce.

16 Q: So you wait for things to get back down to whatever?

17 A: Right.

18 Q: In this case --

19 A: I mean you can --

20 Q: In this case, the guy doing it, administering the test
21 in Dr. Dwyer's lab, is a guy, Joe Secondary?

22 A: Right. Right.

23 MR. BOGLE: One moment, Your Honor. Your Honor, that's
24 all the questions I have right now.

25 THE COURT: Okay. Mr. Falk?

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1 MR. BOGLE: Please answer any questions, Dr. Burke, Mr.
2 Falk may have or that the Court may have.

3 CROSS-EXAMINATION

4 BY MR. FALK:

5 Q: What's your relationship -- professional relationship
6 with Limestone? Are you on the board or are you an employee?

7 A: Well, I'm not an employee. I -- okay. So I had a
8 business relationship with Monarch. Okay? I invented a test
9 that they liked and they marketed, and I became involved with
10 them and then we went our separate ways. I don't know when
11 that was, 2001 -- 2002.

12 I met the individuals at a conference at Limestone and
13 told them about this project that we were doing with the Real
14 Child Voices, and they were interested. And so sometime,
15 some months later, they flew down to my laboratory, which
16 interestingly enough had Monarch equipment in it, and they
17 were interested in -- in -- in having their system utilize
18 that.

19 So then I transferred over to that. Then they came back
20 three or four months later and spent four days with me
21 training me on that system and the protocols that they put in
22 place before, which came from actually Dr. Marshall, who is
23 pretty big in the field from Canada.

24 And what I added to the -- added to the instrument was
25 the stimulus set, and I started doing trials to validate it.

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1 And then they said, okay, if you're going to use the
2 Limestone system with this, you know, you really need to be
3 trained by me. That's what they wanted to set it up. I get
4 paid -- I get paid directly by the doctor I'm training. I
5 don't get paid by Limestone directly for that.

6 And for the Real Child Voices, I get \$137 every time
7 it's sold. Okay? There is 220 labs on the planet. If I
8 sell it to every one of them, I'm still losing money because
9 it cost me about 30,000 to make. I'm not -- it's not about
10 the money. It's about -- I'm pretty big on being accurate
11 and doing the best job. This is a very important field, I
12 think.

13 Q: Now, is there a difference between using the equipment
14 for treatment versus for diagnosis?

15 A: Yes, sir.

16 Q: And what is that difference?

17 A: Well, for treatment -- well, for diagnosis, for instance
18 if we're talking about pedophilic disorder, if the individual
19 has arousal to children in a laboratory and that's, you know,
20 congruent with their crime, that speaks to their sexual
21 motivation and desire towards children being directly
22 measured.

23 Where treatment is one of the things -- and actually, in
24 this book, I was -- I was asked to write a chapter on arousal
25 reconditioning. So what we do is if they become aroused in

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1 the laboratory, they have a visual feedback because the first
2 10 to 20 percent of arousal a man generally can't really
3 tell. And then they're instructed to either inhale ammonia
4 or valproic acid cream. It's terrible, but it works. So for
5 treatment purposes, you can then go through ten trials of
6 aversion therapy that way, give them another PPG, and then
7 their arousal to children is less than it was initially.

8 Fedorov is about to publish from Canada. He believes --
9 he's been doing that. He believes you can have permanent
10 change when that. I don't buy that yet, but I mean he's --
11 so this is an example. That's how you use it for treatment
12 purposes. Arousal reconditioning.

13 Q: And when you're using it for treatment, it's because
14 you've already have established some type of baseline for --

15 A: Right.

16 Q: -- prior --

17 A: That's the diagnostic component. Right.

18 Q: So on the Limestone equipment, you can run different
19 stimulus sets through that; is that correct?

20 A: You can -- well, right now, the only one -- the only one
21 you can run if you were to purchase it today would be the
22 Real Child Voices. I think when Dr. Dwyer purchased the
23 laboratory, I think he was at the University of South
24 Carolina at the time, initially, and they had the Marshall
25 stimulus set and the RCV. They've since phased out the

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1 Marshall because the RCV is just much more -- you get better
2 results.

3 Q: So when was the RCV developed?

4 A: Developed? We began -- well, we finished development
5 around 2005 and published -- did a presentation in Atlanta at
6 a conference in 2006, I believe. It might've been 2007.

7 Right now, there's about -- I know we're in the 60s. There
8 are 60-some laboratories in the United States, Canada, Great
9 Britain, and Australia that use RCV.

10 Q: And there's multiple uses for the RCV other than in this
11 situation?

12 A: Say again?

13 Q: There are other uses? I mean these labs are not just
14 using it to diagnose people in sexually violent predator
15 cases; is that correct?

16 A: No. It's for sexual disorders, you know, although often
17 they are involved with criminal cases, yeah.

18 Q: But you could use it as part of your therapy, could you
19 not?

20 A: Oh, definitely. Yes, sir.

21 Q: Does the Department of Parole in some states or
22 Probation in some states require --

23 A: They do. California --

24 Q: -- PPG testing?

25 A: They do.

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1 Q: And again, that's --

2 A: California and New York.

3 Q: Again, that's more like on a therapeutic level? They
4 have a baseline and they're comparing it --

5 A: Yes, sir.

6 Q: -- to a baseline?

7 A: Yes, sir.

8 Q: This FDA approval, what is -- is it specifically
9 approved for what?

10 A: Measuring sexual arousal in men.

11 Q: Okay. But not necessarily -- never mind. What
12 protection is there when you're using the Real Child Voices
13 set that you're not going to get a false positive?

14 A: Protections? Well, you have the respiration trace. You
15 have the -- it's called the stingray cushion. It's an air
16 cushion that is very sensitive to movement and muscle
17 tension.

18 Like Dr. Harris published last year, so he -- if you're
19 not aroused to children, you don't -- you don't get aroused
20 to it. If you sneeze, like I said earlier, and it spikes up,
21 you can -- you can -- you know, a sneeze -- the trace will
22 look like this, up and down. Okay? That's not what your
23 penis does when you get aroused. A penis is like a waveform
24 you would surf or something. It's much more elongated like
25 that.

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1 So visually, you can tell on a monitor if that's a false
2 positive or not. In the software, you have the capability to
3 -- to cut -- cut a slice on the video portion and say, okay,
4 this is where the sneeze happened and we're going to
5 disregard that. So that's a safeguard.

6 When we were developing the RCV, one of the things that
7 I did -- and this is why it was so expensive for me to
8 develop -- is I had everyone polygraphed on a sexual history
9 polygraph and a background check. So I had really a hard
10 time getting normal people to come in. Okay? And then
11 finally, I listened to my daughter and she said put it on
12 Craigslist.

13 So we had these people come in and, you know, I don't do
14 polygraph. I have to pay somebody to come in. So to save
15 time, I put some people in the lab first and some of them
16 said, yeah, I've never been convicted. They passed a
17 background check and, in their sexual history they filled
18 out, they've never molested or had interest in children.

19 They had interest -- they started having erections to
20 children. I had seven guys do that and I thought, well, this
21 isn't -- this isn't working out. And then they hadn't been
22 polygraphed. Well, we polygraphed them and they all admitted
23 they have molested kids in the past, but nobody had ever said
24 anything. So I have a lot of confidence.

25 Q: But is there ever -- has there ever been a study where

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1 you had non-sex offenders and then admitted sex offenders
2 take the test and they compare the responses?

3 A: There's multiple studies like that.

4 Q: Using the Real Child Voices?

5 A: There's one, yeah.

6 Q: Okay.

7 A: Just one.

8 Q: What study is that?

9 A: That's with Fedorov, and it's in -- what do you call it?
10 In press. It's about to be released.

11 Q: So currently there's no study on the RCV where you are
12 comparing whether or not somebody who was not a sex offender
13 and somebody who has a history that you can discriminate
14 those two?

15 A: There's not a peer-reviewed study. That's the only one
16 that's coming out.

17 Q: You use audio scenarios; is that correct?

18 A: Presently or --

19 Q: I mean part of the Real Child Voices is obviously audio
20 scenarios.

21 A: Yeah, audio. Correct. Right.

22 Q: Has there even been a study so that -- and you break
23 that down, grammar school -- what is it?

24 A: There's infant, preschool, grammar school, adolescent,
25 and adult categories, male and female.

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1 Q: Has there been a study when people have just listened to
2 those, maybe just those same voices, whether or not people
3 could identify whether or not that was a grammar school child
4 or a --

5 A: We had two pediatricians do that for us in the
6 development. I'm sorry. One -- I'm sorry. One is a child
7 psychiatrist. The other one was a pediatric -- she was a
8 pediatrician first. She ended up being a pediatric
9 cardiologist.

10 Q: But as far as asking 100 men whether or not that sounds
11 like a grammar school child or whether or not that sounds
12 like an infant, preteen, high school, you've not done that?

13 A: No, sir. Keep in mind though you have a picture of a
14 person. This is the -- this is the person we're talking
15 about in the story. It's a 10-year-old girl. You see a
16 picture of the 10-year-old girl, the picture for seven
17 seconds. The picture goes away and for a minute and a half
18 you hear the story that has a real 10-year-old girl voice in
19 it.

20 Q: Some of the -- when you're talking about some of the
21 meta-studies in the past when they looked just generally at
22 PPGs, that's included Canada; is that correct?

23 A: Yes.

24 Q: Now, don't they use different stimulus sets in Canada
25 back in the '80s and '90s and '70s?

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1 A: Yes, they did. They continued -- Canada continues to
2 use nude images of children in their laboratories.

3 Q: So those meta-studies maybe say something about the use
4 of a PPG machine, but not necessarily the use of the Real
5 Child Voices stimulus set; is that correct?

6 A: Well, this last study that -- I can't remember the lead.
7 Fernandez is in it, and I thought I printed it out to bring
8 it. That's the latest meta-analytic -- meta-analytic study
9 that has Canadian and United States labs. I know one of the
10 labs -- one of the persons in there I trained on Limestone.
11 So my assumption is it's in there.

12 Q: When you had talked about that Daubert test, was that on
13 Monarch equipment or was that on Limestone equipment?

14 A: It's Limestone and the RCV as well.

15 Q: Now, tell me this. When you are doing this test, you
16 are looking at a percentage of full arousal?

17 A: A percentage of full --

18 Q: Well, how do you measure response?

19 A: Okay. You have a baseline at the beginning of the
20 presentation and we'll say just for sake of discussion 100
21 millimeters is where it is. And over that 90 seconds --
22 well, over that three-minute period, you're tracking the
23 blood flow in and out of the penis.

24 Sometimes nothing happens and it's just trickling right
25 along at baseline. Sometimes you start to get tumescence.

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1 You get more blood into the penis and so it becomes more
2 engorged and that -- the ring on their penis stretches and
3 creates a voltage that goes back to the instrument into a box
4 in the computer, and that voltage translates to millimeters
5 of change.

6 And so at the end of that three minutes -- excuse me --
7 or however long it takes for them to detumesce if they did
8 become erect, that period of time is all recorded and you
9 have the peak. Like, it started at 100 and it got to 115, or
10 you may go less max minus base or it can be minimum divided
11 by max, which it's called rapid onset of an erection if a man
12 becomes excited sexually.

13 I don't know how to say it other than to quantify it as
14 he's really turned on by what he is seeing and hearing. What
15 happens is the penis actually shrinks because it will
16 elongate and, when it elongates, it shrinks and so it will
17 dip down below baseline and then it becomes more engorged and
18 it comes up.

19 But, you know, this whole test is designed to give the
20 benefit of the doubt to the person being examined always.
21 And what I mean by that is, you know, max minus base and
22 minimum minus base, whichever those two columns has the
23 greatest level of arousal as appropriate, that's what you go
24 with. You give them the best -- the best chance
25 mathematically to have the best outcome.

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1 Q: Well, if you are just measuring in millimeters of
2 change, how does that account for people being different
3 sizes?

4 A: Well, there's a study in 2007 about how he measured 800
5 and something individuals across ethnic backgrounds of penile
6 size. So what we do is we call it -- or he calls it
7 circumferential change scores because it's a very important
8 question because if somebody is at 100 and -- I'm sorry. If
9 somebody is flaccid at 70 millimeters and they have five
10 millimeters of change, from a percentage wise, that is --
11 that is significantly greater than a person who is flaccid at
12 125 millimeters and goes to 130.

13 So part of his equation that he developed to account for
14 different sizes of penises -- I'm sorry. I just think, you
15 know, I am up here testifying about it.

16 To account for different sizes of penises, you take the
17 millimeters of change, we'll say five, and you divide it by
18 47. Okay? And that gives a circumferential change score
19 that is an average between the overall average penile size.

20 Q: Okay. That's -- that's the part I was confused about.
21 I was thinking when you were giving those percentages that
22 was based on some base of full arousal with that. Because
23 I've seen reports that you've given before where you're
24 giving a percentage number.

25 A: Yeah. But I'm saying it's a percentage in

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1 circumferential change score by Howes' 2006 equation.

2 Q: Well, that's the part I didn't understand --

3 A: Yeah.

4 Q: -- what that was. Okay. Now, you had said that -- is
5 there any kind of certification process for the techs who do
6 this?

7 A: Yes, sir.

8 Q: And what would -- what does that look like?

9 A: It's two days of live training where they -- they
10 administer anywhere from four to six real sex offender -- sex
11 offenders who are in treatment. They administer the test
12 under my supervision.

13 Q: And you certify them?

14 A: Yes, sir.

15 Q: Okay. Are they recertified?

16 A: No. They are not recertified.

17 Q: Okay. You had talked about periods of detumescence?

18 A: Yes, sir.

19 Q: Does that ever cause a strange gauge -- a strain gauge
20 to come off?

21 A: Yes, it does.

22 Q: Now, is that reflected in the report whether or not
23 that's had to have been recalibrated?

24 A: It should be reflected in the report. If that happens,
25 it's real easy to see because the gauge is so sensitive that

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1 you can -- if you know what you're doing, which we tell them,
2 you can see a person's heartbeat through it. Okay? So if
3 it's like straight, it's like -- you know, it looks like
4 they're dead. So you'll know.

5 And another thing that you'll notice though is if you
6 calibrate it for 100 millimeters, for instance, 100-
7 millimeter calibration is -- the gauges are 90 to 95. And so
8 it's going to -- your baseline is going to just drop through
9 the floor. I mean you'll know if it's off. If you're paying
10 attention, the tech should -- and he does his job, you should
11 know, yeah.

12 Q: And I think I read an article that was in the *Post and*
13 *Courier*. Are these all videoed?

14 A: I'm sorry?

15 Q: Do you videotape -- I mean not the part below the waist
16 --

17 A: The whole -- yeah. We do.

18 Q: Okay. And do you maintain those videos?

19 A: Yes, sir.

20 Q: And what about -- I've also read that there is a
21 dialogue -- there's a recording of any dialogue between the
22 person who is administering the test and the person being
23 subject to the test.

24 A: I don't -- we don't do audio recording. That is not
25 part of the protocol we do have. If there is any

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1 communication, it is documented in writing, and then you can
2 go back and look on the video and say, yeah, he was talking
3 to me here, but no, we don't keep the audio.

4 Q: And there was some -- I know Dr. Swan has testified
5 about this in the past about a button test that you can make
6 sure that somebody is paying attention?

7 A: Right. As I mentioned earlier, it's just a single
8 button you touch that -- that part of the instructions are
9 you're going to hear this story and if it turns sexual or
10 violent, at that moment you press the button, and then that
11 gives a mark on the screen in the computer where it's
12 predetermined where that is supposed to be so you can tell
13 that they're paying attention to the story.

14 And again, we have two to three neutral presentations
15 where there's nothing sexual or violent in them where they
16 shouldn't press the button for that. And then also, there
17 are seven photographs or pictures after the story relating
18 back to the story, but one or more of those pictures are
19 going to have a different person than -- than the original
20 child or adult, whoever it is, and you -- it forces you to
21 look and say, you know, that's a different person.

22 Q: I'm sort of pulling a random quote out of an article
23 that I believe you and Dr. Dwyer co-authored.

24 A: Uh-huh.

25 Q: And I don't know if this is attributable to you or

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1 somebody else in there where it says that the relationship
2 between the man's level of sexual arousal and his degree of
3 penile tumescence is far from perfect.

4 A: Right. Correct.

5 Q: And men are known to have penile tumescence in response
6 to rapid eye movement, sleep, anxiety, depression, or tactile
7 stimulation; is that correct?

8 A: Yes, sir.

9 Q: So you can have responses that are not necessarily
10 related to the image?

11 A: Yeah. But if they're -- but what you just listed --
12 okay. So rapid eye movement, they're going to be asleep.
13 Okay? We're going to know if they're asleep. Okay? And
14 tactile, we're not touching them. Okay? We're not doing --
15 we're not laying a hand on them. They're not touching
16 themselves either other than to put the gauge on.

17 The only thing that you listed is anxiety. Anxiety
18 overwhelmingly causes non-responders. There are -- there has
19 been -- the citation is Stone. The doctor's name is Stone
20 from the early '90s where he found a couple of people who had
21 an anxiety disorder where anytime they got aroused, he didn't
22 know which came first, the arousal or the anxiety, but they
23 were always together. So whenever he -- but he did publish
24 that there are some individuals who may when they become
25 really, really anxious may have an arousal response.

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 Q: And I think towards the end of that article it says the
2 authors of this article are currently conducting a study on
3 discriminant validity of first-person monotone narrative
4 stimuli from the RCV. What does that mean?

5 A: That's that study I was telling you about.

6 Q: That's the one that Federov just finished?

7 A: Federov, yeah. It's about to -- it's in press.

8 Q: Can you tell me -- and I'm not sure I've seen this in
9 one of your reports. What does it mean if there's -- if the
10 description in the report there's a confidence level was
11 medium for both the Marshall and RCV sets? What does a
12 medium confidence level mean?

13 A: In the literature, there is debate. Roughly upper 60s
14 -- 70 percent of the clinicians published believe that 10
15 percent change in erection is indicative of sexual arousal.
16 There are 25 to 30 percent who maintain 20 percent is the
17 cutoff.

18 So as part of the protocol for Limestone, when you say a
19 medium level of confidence, that just speaks to recognizing
20 that there are those that say -- what that tells me is they
21 didn't reach 20 -- it wasn't 20 millimeters. I'm sorry. 20
22 percent change. It was between 10 and 19 percent.

23 Q: And again, this percentage. This is back to what you
24 were talking about before, the circumferential?

25 A: Circumferential change percentage.

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 Q: That's using, like, a constant for the denominator;
2 right?

3 A: Dividing by 47.

4 Q: Yeah.

5 A: Right.

6 Q: Okay.

7 A: And I've got that study, if you want it.

8 Q: But is there any way to know what that means as far as
9 whether or not there could be a false positive if your
10 confidence in the test is only medium? I mean is there high
11 confidence? Low confidence?

12 A: Well, high confidence speaks to as 20 percent or
13 greater. Okay? It's generally accepted that if you have a
14 30 percent increase in tumescence that that represents a full
15 erection. So you don't have to have a full erection to
16 indicate that you're aroused to something.

17 Q: Okay. But again, I'm just trying to -- can we put a
18 medium -- is this, you know, more likely than not to be
19 aroused?

20 A: Yes, yes.

21 Q: Okay. Did you read Dr. Gottfried's report?

22 A: I read -- the only -- the only part I read was the PPG
23 component that Dr. Dwyer did.

24 Q: Well, you had talked before about neutral stimuli. How
25 does that work?

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 A: Well, we did Marshall and RCV. Neutral stimuli are
2 things like I am going to go -- one of them is you're going
3 shopping for furniture and you can't decide which chair you
4 like, and another is you have a job interview and you can't
5 find the building and you're lost and you're going to be late
6 for the job.

7 Those are examples of neutral. They have nothing to do
8 with sex because you want to provide that -- that kind of
9 stimulation is not sexual to see if they are going to -- you
10 know, if they get an erection during looking for chairs, then
11 I think you have a good reason to question their responses
12 overall.

13 Q: So if somebody has a -- if somebody's maximum arousal on
14 the Marshall set was to a non-sexual violence against
15 prepubescent males, what does that mean?

16 A: Nonsexual violence is there is a scenario where the
17 person -- I know that one. He is being beaten, his bones are
18 being broken. I mean the kid is being horribly brutalized,
19 but it's nothing sexual. There's no sexual component to that
20 presentation.

21 Q: Well --

22 A: He's just getting horribly beaten up.

23 Q: Does that draw into question the results on the more --
24 on the stimulus sets that are sexual?

25 A: No. What that speaks to is rapists with, you know,

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 raptophilia, which is the paraphilia for if you're turned on
2 by forced rape, forced raping people violently. You -- well,
3 it's all violent, but rapists tend to respond significantly
4 to nonsexual violence as opposed to sex offenders who are
5 more classified as persuasive, talking to someone, a child,
6 into having sex or putting something in a woman's drink to
7 take advantage of her, things like that.

8 Q: Well, what would it mean if somebody had a significant
9 arousal -- and I assume that's over the 10 percent or
10 something -- to stimulus sets that are described as neutral,
11 nonsexual, and not violent?

12 A: That would -- you would need to try to understand why it
13 is. Now, one -- one possible scenario is that there's a
14 couple of websites you go to that you can go to if you're
15 going to go through one of these tests where they -- there
16 are sort of tricks that they try to inform people on what to
17 do.

18 The first one is you try to get an erection at the
19 beginning of the test and then when you detumescence, it's going
20 to throw everything off, but a properly trained person will
21 catch that. Another is to during neutral to think of
22 something sexual to try to become aroused so you can come
23 back and say, well, see, you know, I'm shopping for chairs
24 and I'm aroused. This can't be accurate. Or it's a
25 legitimate question that needs to be addressed.

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 Q: What would -- and I know in your test a lot of times you
2 do this rape index?

3 A: Yes, sir.

4 Q: And what would that mean if when you do the rape
5 indexes, it doesn't -- if you do all the rape indexes, I
6 guess grade school, children, grammar, etc., that there's no
7 indication of a deviant sexual arousal?

8 A: Well, you can do a rape index -- here's what a rape
9 index means. You take the highest appropriate -- let's say,
10 your client is a heterosexual and he's attracted -- he says
11 he's attracted to adult females. He's been married to an
12 adult female.

13 So you take the highest response he has to that
14 appropriate category and you take rape of an adult female,
15 for example, and you subtract those one to three scenarios
16 for rape and average them together. You subtract that from
17 the appropriate. So if you have a negative number, that
18 means that the appropriate arousal is higher than the rape
19 arousal. If you have a positive number, it means the rape is
20 more arousing than normal -- than appropriate sexual.

21 Now, those are raw score figures. So how do you
22 quantify it beyond that? That's where you go with the Z
23 scores, and so if they're both within -- you may have a
24 negative number; so it looks like he's more aroused to
25 appropriate sex than the rape of an adult female, but when

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 you convert it to Z scores, you may find that both of those
2 results are within one standard deviation. So
3 mathematically, you have to say that they're statistically
4 the same. So I mean you're asking --

5 Q: I know. I mean my problem with fielding these cases is
6 I get lost in the stats.

7 A: Yes, sir. Yes, sir.

8 Q: Let me ask you just a couple more questions. You also
9 do -- Limestone also does a visual reaction type test?

10 A: Yes, sir.

11 Q: Do they not?

12 A: Yes, sir.

13 Q: And that's a way to measure somebody's subconscious
14 responses to stimuli?

15 A: Well, it's classified as sexual interests, which is
16 defined as how long one lingers, the latency period one views
17 a slide, because research has indicated if you give someone
18 100 to 200 slides to look at, the things they are most
19 attracted to sexually they're going to linger, sometimes just
20 a fraction of a second longer than things that they are not.
21 And those are categorized.

22 Q: And that's a way to measure somebody's sexual arousal?

23 A: Not -- it's not arousal. Okay? Because you're --

24 Q: Oh, just sexual interest?

25 A: Just sexual interest.

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 Q: I see.

2 A: Yeah. It's a real -- it's hard to articulate what
3 sexual interest means.

4 Q: Is it possible to pass a polygraph test and fail the
5 PPG?

6 A: Oh, yes.

7 Q: How does that happen?

8 A: Well, it could be specific to the case. Okay? Did you
9 rape this little girl? And he really didn't and he passes,
10 but he is attracted to kids. Maybe he's done something
11 somewhere else. I mean you can be attracted to kids and not
12 -- and not commit a crime. I mean DSM-5 differentiated that.
13 You have pedophilia, which means you're attracted to kids,
14 and then you have pedophilic disorders, which means you've
15 acted on that.

16 Q: But if the question is have you ever had fantasies about
17 preschool children --

18 A: Uh-huh.

19 Q: -- and then you have a PPG that shows an interest in
20 preschool children, is that inconsistent?

21 A: Okay. It doesn't show -- the PPG shows arousal, not
22 interest. So I think it's certainly possible for somebody to
23 say I don't have any fantasies about children, but when
24 presented -- and maybe they're telling the truth. Okay? But
25 when presented with a scenario that is sexually explicit and

DR. WILLIAM BURKE - CROSS BY MR. FALK

1 has children's voices and pictures of children, they may
2 become aroused to that.

3 You know, one of the -- one of the things that -- a
4 similar circumstance is a real bizarre case a long time ago
5 is this first responder guy. You know, just a salt of the
6 earth guy, who had contracted HIV and he maintained that it
7 was because of blood products from, you know, car wrecks and
8 things. And Workmen's Comp, which don't get me started on
9 that, were saying that, no, he was actually cheating on his
10 wife with men. And so Workmen's Comp paid for him to have a
11 PPG.

12 My point is some people -- and by the way, he was -- he
13 ended up being heterosexual, but there are men who can be
14 married for 30 years and deny their homosexuality, but put in
15 a situation and particularly a tactile situation where they
16 are touched by a man in some way, a massage therapist is a
17 common method this happens, is that they are suddenly aware
18 that they are attracted to men as well as women. So that
19 would be just sort of a parallel example of how you cannot
20 have any thoughts about children and possibly not fantasize
21 about them, but when presented with that scenario be aroused
22 to it.

23 Q: I believe --

24 THE COURT: Mr. Falk, are we pretty close? Because I
25 need to take a little break.

DR. WILLIAM BURKE - REDIRECT BY MR. BOGLE

1 MR. FALK: I know, and I think I -- I think I've asked
2 my last question, but we'll just --

3 THE COURT: Okay. Okay. You look.

4 MR. FALK: One moment?

5 THE COURT: Sure.

6 MR. FALK: No further questions.

7 THE COURT: Okay.

8 REDIRECT EXAMINATION

9 BY MR. BOGLE:

10 Q: You read the PPG portion of Dr. Gottfried's report;
11 correct?

12 A: Yes, sir.

13 Q: So just very briefly, when she refers to the acronym
14 RCV, she's talking the Real Child Voices?

15 A: Yes, sir.

16 Q: And that's the thing you've been talking about for the
17 last half hour or so?

18 A: Yes, sir.

19 Q: Okay. And so if she says when the RCV said the
20 individual trial results indicate clinically a significant
21 arousal to the following trials, what does that sentence
22 mean? After that is a list of different scenarios, children,
23 men, whatever.

24 A: Like I said --

25 Q: What does that sentence mean when she says that?

DR. WILLIAM BURKE - REDIRECT BY MR. BOGLE

1 A: What that says to me is that there has been an arousal
2 response to those categories of five millimeters or greater.

3 Q: Okay. And that's within the range -- that's the
4 acceptable range in your industry, the industry of the PPG,
5 to show this guy is getting sexually aroused to whatever he
6 sees?

7 A: Well, actually, it's not in the industry. The industry
8 -- Limestone is higher. What I mean by that is you've got to
9 be more aroused. In Canada, it's 2 ½ millimeters to 3
10 millimeters.

11 Q: Okay. But here, it's 5? That's Limestone; right?

12 A: Limestone is 4.7 or 5.

13 Q: Okay.

14 A: Depending on the software.

15 Q: Okay. So if she lists then six or seven scenarios after
16 that --

17 A: So that tells me -- and I know his software is at 5
18 millimeters. So that means they're above 5 millimeters. So
19 that's a valid -- a valid indication of arousal.

20 Q: That he was aroused so those different scenarios,
21 whatever they may be?

22 A: Yes, sir.

23 Q: Okay. And is knowing that -- in your experience in this
24 type of line of work and your experience in sexually violent
25 predator cases, is knowing that information about a guy of

DR. WILLIAM BURKE - REDIRECT BY MR. BOGLE

1 assistance to the evaluator in making an ultimate conclusion
2 about the guy's sexual interests?

3 A: Well, certainly, as I stated, I mean it's in the
4 standard of care for ATSA. You're supposed to do that.

5 Q: Standard of care for who?

6 A: It's ATSA, Association for the Treatment of Sexual
7 Abusers.

8 Q: Sexual abusers? That's what it stands for?

9 A: Yeah.

10 THE COURT: ATSA.

11 MR. BOGLE: Thank you, Doctor.

12 MR. FALK: I didn't remember one question.

13 THE COURT: Okay.

14 RECROSS-EXAMINATION

15 BY MR. FALK:

16 Q: When you do the scenarios, you use the term grammar
17 school, teen, female, preschool. Is that correct? That's
18 how they're described as far as the ages of them?

19 A: No. There's infant and there's -- well --

20 Q: Well, then there's adult and everything else?

21 A: Right, right, right.

22 Q: But if we're looking for under 18 --

23 A: Right.

24 Q: -- you use infant, grammar school, teen female, and
25 preschool?

DR. WILLIAM BURKE - RECROSS BY MR. FALK

1 A: Yeah. Well, I did -- everybody should who uses the
2 software, but it also includes infants, yes.

3 Q: Okay. Where does an adolescent fit in that?

4 A: Well, it would be normal to be aroused to adolescent.
5 It's called Kinsey 2 profile. Well over -- you know,
6 somewhere between 50 and 60 percent of all male heterosexual
7 or homosexual adult males are attracted to adolescents for
8 whatever, you know, gender preference.

9 I always go back to -- there was a Britney Spears
10 commercial during the Super Bowl in the '90s, and she was 15
11 years old and Bob Dole was in that commercial and she's, you
12 know, scantily clad and dancing and there's this sexual
13 innuendo from Sen. Dole telling his dog, easy, boy, I know,
14 you know. But that's an example. I mean she's got sexual --
15 sexual characteristics of an adult when you're an adolescent,
16 meaning the curvature of the body, breasts and all, and
17 things like that. So it's normal. It would be normal for --
18 if you're homosexual, you would be attracted to an adolescent
19 male.

20 Q: All right. So --

21 A: But that's normal. Now, the scenarios in there though
22 are that the persuasive one is, you know, he gets her drunk
23 to have sex with her. But I mean I think it could be a valid
24 argument that that's a normal arousal I mean if you're -- I
25 mean it is normal to be attracted to adolescents.

1 MR. FALK: Thank you.

2 THE COURT: Okay. Anything further?

3 MR. BOGLE: Your Honor, no. I have three cases from
4 Florida that I would present to you. One of them is
5 mentioned in my memorandum of law.

6 THE COURT: Okay. Before we go into that, is there
7 anything further for this Council hearing?

8 MR. BOGLE: No further -- no further testimony.

9 THE COURT: Is there anything from you as far as the
10 Council hearing?

11 MR. FALK: Just to sum up.

12 THE COURT: Okay. Can we let Dr. --

13 MR. FALK: Oh, yes.

14 THE COURT: Can he go?

15 MR. FALK: He can go.

16 THE COURT: Okay. And so who else do we have to
17 testify?

18 MR. FALK: Dr. Gehle.

19 THE COURT: I figured as much. Okay. Yes?

20 MS. FAIRBARIN: And if I could just ask if -- Dr.
21 Gottfried was released from Charleston and is on her way, do
22 you need her this afternoon or can she just go back?

23 THE COURT: My understanding is we need her; correct?

24 MR. BOGLE: Well, she's going to --

25 THE COURT: Dr. Burke, you can step down.

1 MR. BOGLE: And let's let her go.

2 DR. BURKE: Your Honor, I'm supposed to be here in the
3 morning with a report; right? Correct? Correct? That's the
4 plan?

5 MR. FALK: So far, it is.

6 DR. BURKE: Okay.

7 THE COURT: Well, let me ask you this. So is he
8 actually going to -- what is he giving you exactly? An
9 actual report or is he giving you the raw data or is there
10 any --

11 MR. FALK: He's giving me this table.

12 THE COURT: Is there any reason why he has to physically
13 be here? I mean he can't just send it to you?

14 MR. FALK: Well, yeah, of course.

15 THE COURT: I'm just trying to figure out a way that if
16 he doesn't have to come back -- I don't know if you're
17 supposed to be here in any other way, but again, if we don't
18 have to make him drive, then --

19 DR. BURKE: If I get it and email it to you, would that
20 be good?

21 MR. FALK: Let me give you my email.

22 DR. BURKE: I've got your email.

23 MR. FALK: You do? Okay.

24 DR. BURKE: Yes, sir.

25 THE COURT: Okay.

1 MR. BOGLE: Copy to me.

2 DR. BURKE: Yes, sir.

3 THE COURT: Okay.

4 DR. BURKE: All right. Thank you very much.

5 THE COURT: Is that okay, Mr. Falk?

6 MR. FALK: That's fine.

7 MS. FAIRBARIN: No, that's fine. And, Dr. Burke, if you
8 want to send it to me, I'll make sure they get it.

9 DR. BURKE: If I want to do what?

10 MS. FAIRBARIN: If you want to email it to me, I will
11 make sure they get that, that both Mr. Bogle and --

12 THE COURT: And it's whatever time it comes, it needs to
13 get to Mr. Falk. So if he's working in the lab until
14 midnight --

15 DR. BURKE: I'll get it today. I'll get it today.

16 THE COURT: Okay. Okay. So we're fine with him. He
17 can go; correct?

18 MR. FALK: Yes.

19 THE COURT: Okay. So you need obviously -- Dr. Gehle
20 needs to be put up. I just want to know can we give someone
21 a break without unduly keeping anyone here that doesn't need
22 to be here? In other words, I feel bad. This is the first
23 time I've ever worked with this court reporter, Krystal, so
24 I'm going to go ahead and say it. I am known for starving
25 people out and for being tough on court reporters. So I

1 would love to give people an opportunity to go eat something.
2 If you guys want to take a half-hour or whatever you need,
3 you tell me.

4 MR. FALK: Can we, please?

5 MR. BOGLE: Please.

6 MR. FALK: I would love a lunch break.

7 THE COURT: Okay. Because I'm here; so we are good.

8 MS. FAIRBARIN: Dr. Gottfried can't be here until 3:30.
9 She's on her way.

10 THE COURT: Perfect. She'll be here at 3:30. So that
11 all works. So we still need her; correct?

12 MR. FALK: I believe so.

13 MR. BOGLE: Well, let's talk about that. The purpose of
14 today's hearing --

15 THE COURT: Okay.

16 MR. BOGLE: -- and we're not done yet.

17 THE COURT: Uh-huh.

18 MR. BOGLE: Is a State v. Jones, State v. Council
19 admissibility of the PPG.

20 THE COURT: Right.

21 MR. BOGLE: Now, Dr. Gottfried is going to testify that
22 she had one administered by the laboratory there.

23 THE COURT: Right.

24 MR. BOGLE: She didn't administer it. She did not, but
25 as an expert --

1 THE COURT: But she's relying on it.

2 MR. BOGLE: She's relying on it.

3 THE COURT: That's what she's going to testify to, but I
4 think we have to have her testify. I can't imagine how we
5 wouldn't.

6 MR. BOGLE: We'll put her up then.

7 THE COURT: Okay. So I think she needs to be here. So
8 she'll be here at 3:30-ish.

9 MR. BOGLE: Yes, ma'am.

10 THE COURT: What do we need to do and do we have things
11 to do between now and then? It's about 2:10 -- 2:15 right
12 now. My question is how long should we take for lunch?

13 MR. BOGLE: We can take a half-hour break for food, come
14 back and knock out the State's other two preliminary motions.
15 That'll take 15 minutes.

16 THE COURT: Well, then, if she's not going to be here
17 until 3:30, why don't we come back at 3:00 then? Why don't
18 we give you a little more time?

19 MR. BOGLE: That's fine.

20 THE COURT: Let's come back at three. We'll take those
21 up. She should stroll in and we'll be good; right?

22 MR. FALK: Thank you.

23 THE COURT: Is that okay?

24 MS. FAIRBARIN: Thank you.

25 THE COURT: Is that okay with you? Thank you. So 3:00.

1 If you're running a little bit late, we'll wait on you. You
2 know that, I know. Okay.

3 MR. BOGLE: Are y'all going to lock the courtroom?

4 THE COURT: Pardon?

5 MR. BOGLE: Are they going to lock the courtroom?

6 THE COURT: I don't know. Ask them. I don't know. All
7 right. Thank you, y'all.

8 (WHEREUPON, there was a break in the proceedings from
9 2:12 p.m. until 3:05 p.m., after which the proceedings
10 resumed as follows.)

11 THE COURT: All right. What else can we take up now
12 before Dr. Gottfried gets here?

13 MR. FALK: Dr. Gehle.

14 THE COURT: Dr. Gehle, thank you. Come on up, please.
15 Thank you.

16 THE CLERK: Do you solemnly swear or affirm that the
17 testimony you give to the Court in this trial shall be the
18 truth, so help you God?

19 THE WITNESS: I do.

20 THE CLERK: If you would, please state your name for the
21 record?

22 THE WITNESS: It's Marie Gehle, G-e-h-l-e.

23 THE CLERK: Thank you.

24 THE COURT: And not pronounced Gehle. Sorry. Take a
25 seat.

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 THE WITNESS: Everybody pronounces it differently. It's
2 a hard one.

3 THE COURT: I'm sorry. Okay. All right. Mr. Falk?

4 DR. MARIE GEHLE, being first
5 duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. FALK:

8 Q: Dr. Gehle, where are you currently employed?

9 A: The South Carolina Department of Mental Health.

10 Q: What is your title?

11 A: I'm a chief psychologist there.

12 Q: Okay. And what are your job responsibilities?

13 A: My job responsibilities are conducting pre-commitment
14 sexually violent predator evaluations.

15 Q: How long have you --

16 A: That's all I do there.

17 Q: How long have you been in that role?

18 A: Since 2012...

19 Q: Do you have an estimate -- did you ever do any pre-
20 commitment evaluations prior to 2012?

21 A: I did annual review sexually violent predator
22 evaluations prior to 2012. It was I think the middle of 2012
23 I started doing them.

24 Q: And you do this exclusively?

25 A: Yes.

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 Q: Do you have an estimate of how many you do in a year or
2 how many you've done since 2012?

3 A: I think I've done about around 150 roughly.

4 Q: Okay.

5 MR. FALK: Your Honor, at this time, I'd like to offer
6 her as an expert in sex offender evaluations.

7 THE COURT: Absolutely.

8 MR. FALK: Okay.

9 MR. BOGLE: No objection.

10 THE COURT: I will go ahead and qualify her. No
11 question. Thank you.

12 BY MR. FALK:

13 Q: Dr. Gehle, you were here when Dr. Burke testified?

14 A: Yes.

15 Q: Okay. What is your familiarity with the Limestone?

16 A: It's one of the PPG, I guess, companies, and they
17 produce some equipment and some software.

18 Q: Does the South Carolina Department of Mental Health have
19 access to PPG machinery?

20 A: Yes.

21 Q: And do you have any familiarity with the Real Child
22 Voices or the RCV?

23 A: Yes. I sat down and watched it one day.

24 Q: Okay.

25 A: Well, listened to it and watched it.

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 Q: Okay. Now, you said you've given -- you've done about
2 150 evaluations of pre-commitment evaluations?

3 A: Pre-commitment, yes.

4 Q: Do you ever offer -- do you ever want PPG tests?

5 A: No.

6 Q: And why is that?

7 A: Well, they are really unreliable, and I don't believe
8 that they're valid based on what the research says. It's
9 complicated, but -- but there's research that says that these
10 things are reliable and valid, but what's used in South
11 Carolina, the Real Child Voices set, that's never been found
12 to be reliable and valid in peer -- peer-reviewed journals.
13 That's never been determined. So it's a still an up-in-the-
14 air question right now.

15 And the stimulus is what is shown to the person to
16 determine what they are aroused to. So if you have somebody
17 who is hearing scenarios, looking at pictures, we don't know
18 if what Dr. Burke and his researchers determined would be a
19 scenario depicting a certain type of sexual arousal, if that
20 actually does depict that type of sexual arousal. We just
21 don't know about its accuracy.

22 Q: So are you aware of any studies where, for example, they
23 will compare non-sex offenders' responses to the Real Child
24 Voices to the sex offenders' responses to the Real Child
25 Voices?

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 A: No. I have not seen any research on the validity of the
2 Real Child Voices stimulus set.

3 Q: Would that include any research on the validity of just
4 whether or not the scenarios depict what they are supposed to
5 depict?

6 A: No. I have not seen any research at all.

7 Q: For example, you haven't seen any research about whether
8 or not the voice -- everybody -- or a significant amount of
9 people who would hear a particular voice would identify that
10 voice as a teen or a preteen?

11 A: Correct.

12 Q: Why would that be important?

13 A: Well, you have to know that what you say you're
14 measuring you're actually measuring, and there's a lot that
15 goes into that test construction, and I haven't seen the
16 research on that. The tests that I would use as a
17 psychologist, they will have that research of why this is a
18 valid measure, why these questions are valid. That stuff
19 will be in the research that's typically offered in a user's
20 manual or a manual with the test.

21 Q: Now, you heard Dr. Burke testify about validation
22 studies on the PPG test going back -- probably back to 1954
23 in Czechoslovakia or whatever; is that right?

24 A: Yes.

25 Q: Now, are those valid comparators to our Real Child

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 Voices set?

2 A: Well, the research that's been done over the years have
3 used different stimulus sets, and that's really the problem
4 is that when -- I couldn't -- I could hook somebody up to the
5 machine and have them watch a movie. I could say that that's
6 my stimulus set. I could have them watch a pornography
7 movie. I could have them watch a -- you know, an afterschool
8 cartoon. The stimulus set is what is supposed to be
9 eliciting the arousal.

10 The PPG is actually the hardware measuring the arousal,
11 but the stimulus set is what's eliciting the arousal. And
12 throughout the research, different stimulus sets have been
13 used. There's no standardized stimulus set. There's no
14 standardized way to do these tests. So you can't apply that
15 research back to what was done in MUSC's lab and what was
16 done in Burke's lab.

17 Q: Well, now, you heard Dr. Burke talk about an article by
18 Howes in 2003?

19 A: Yes.

20 Q: Is that a famous article? Is that an article that is --
21 that you're familiar with?

22 A: Yes. It's an article that I read, yes.

23 Q: And Dr. Burke certainly thought that that supported his
24 findings. Do you have a different conclusion?

25 A: I do.

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1 Q: And what is that?

2 A: Well, this -- this article -- if you bear with me, it's
3 going to be kind of graphic, but based --

4 Q: First, if you could identify the name of the article and
5 the publication that it's in?

6 A: Okay. It's called -- it's an article by Richard Howes,
7 and it's entitled "The Circumferential Change Scores in
8 Phallometric Assessment: Normative Data" and it was published
9 in *Sexual Abuse, a Journal of Research and Treatment* in
10 October 2003.

11 Q: And just how do you spell the gentleman's last name?

12 A: H-o-w-e-s.

13 Q: Okay. I'm sorry to interrupt. Go on.

14 A: Okay. So this -- this article was written in response
15 to people who don't elicit full -- full erections on PPG.

16 Most of the time, they are not measuring full erections.

17 They are looking at very, very minute changes. So they talk
18 about five millimeters being a significant change. That's
19 half a centimeter. You know, that's like that big.

20 (Gesturing.)

21 THE COURT: Yeah.

22 A: What this article did is they wanted to know, well, what
23 is normal. What -- what -- like, how much do -- how much
24 does the circumference change in a penis based on arousal.

25 So they put people on a PPG machine, 724 men, and they

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1 looked at what was the range of change of somebody who was
2 recording a full erection. And what they found was -- or
3 what he found was some different things here, but the results
4 were -- so from -- from flaccid to full erection -- and these
5 were male sex offenders. The mean is 32.6 millimeters with a
6 standard deviation of 8.8 millimeters, and these scores were
7 pretty normally distributed, meaning like they were almost in
8 a bell curve. There's actually a graph in here that -- that
9 you could see that shows it was a little bit skewed, but it's
10 close to a bell curve.

11 THE COURT: Okay.

12 A: So this was -- that was the mean. And so you want to
13 look at -- well, we want to capture as many people as
14 possible because if we use the mean, that's going to mean
15 that some people are going to be below that, some people will
16 be above that, because mean is average.

17 And the way that a bell curve works is that you have
18 about -- you know, 50 percent is where the middle of the bell
19 curve is and then a standard deviation goes out to about -- I
20 think it's 68 percent or roughly, and then if you go out two
21 standard deviations, you'll have about 95 percent roughly.

22 So what they did was they looked at -- if we go out to
23 that 95 percentile, so people -- 95 percent of the people
24 will be at or below this, the change is 47 millimeters. So
25 19 times out of 20, somebody will -- their circumference of

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1 their penis from flaccid to full erection will grow by 47
2 millimeters.

3 This article then recommends that you use as a minimum
4 20 percent of 47 millimeters --

5 Q: And that was --

6 A: -- which is 10.4 millimeters.

7 THE COURT: Okay.

8 A: And what I found with -- with MUSC's lab and with
9 Burke's lab, for reasons that I am very unclear about, they
10 have decided to use 10 percent or -- well, Burke uses 10
11 percent instead of 20 percent, but MUSC actually uses a
12 different number. So we have two -- two labs in this state
13 that do PPGs and they are assigning different values to what
14 is significantly arousing, and those values also don't match
15 the research.

16 THE COURT: Okay.

17 Q: And basically, those values are half what the research
18 recommends?

19 A: Yes. So Burke -- actually, I looked through some of his
20 reports. I mean I have access to those being at DMH. DMH
21 owns the SVP program in essence. I looked at some of his
22 reports and, in some reports, he uses 5 millimeters as the
23 minimum significant level, and some he uses 4.7 millimeters,
24 and 4.7 would be that 10 percent of Howes' article, 10
25 percent of 47 millimeters.

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1 Then MUSC -- well, Burke has changed his numbers over
2 time and it's not been like it's progressed. It's just
3 changed. I'm not sure why. Sometimes he's using 5,
4 sometimes 4.7, and then MUSC uses 5 millimeters. I'm not
5 sure exactly where that comes from or why they've chosen that
6 number.

7 Other research will say, well, we're going to measure
8 significant arousal as 2.5 millimeters, 3 millimeters or 10
9 millimeters or anything. So all of it is very variable, and
10 it's hard to compare this research study that used that level
11 as significant to what's happening at MUSC if it's not all
12 the same.

13 Q: There are some other problems with comparing research
14 studies. Are the stimulus sets that are used in Canada the
15 same that are used in the United States?

16 A: No. The stimulus sets can vary from site to site, you
17 know, from lab to lab, and over time as well. So what
18 elicits the arousal is different and some labs who might
19 conduct research use their own materials, and I don't know if
20 those have any relationship to what Burke or MUSC does. I
21 don't know if they -- if they are comparable to the Marshall
22 and to the Real Child Voices stimulus sets because we don't
23 have research to tell us that it is.

24 Q: There was some discussion about the significance of the
25 DSM-5?

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1 A: Yes.

2 Q: And that you would also believe that that's a -- is that
3 the Bible in y'all's business?

4 THE COURT: I think we all know that.

5 A: Yeah. Yeah.

6 Q: Okay.

7 A: I think everybody walked in here with a copy of it.

8 THE COURT: As a matter of fact, I even have one.

9 THE WITNESS: There you go.

10 BY MR. FALK:

11 Q: What's the significance of the fact that there's a
12 reference to the PPG in the DSM-5?

13 A: There is a reference to it because it says that it's
14 helpful in determining relative sexual arousal. So part of
15 what the DSM's criteria for paraphilic disorders is that you
16 have a preference. That means that you prefer this over
17 that. Right? And they say that the PPG can help determine
18 if there is a preference. So if you have, you know, more
19 arousal to whatever stimuli that's deviant as opposed to --
20 to normal consenting sexual encounters with an appropriate
21 person.

22 Q: And there was also discussion about the DSM-IV, the
23 prior version?

24 A: Yes.

25 Q: And --

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- 1 A: Well, I actually found a reference. The DSM-IV did have
2 a reference about the PPG, and this is a quote from actually
3 a lawsuit that was quoting it. So I don't have the DSM-IV
4 with me. It's in my office, but I don't have it. But it --
- 5 Q: What's the -- what's the lawsuit?
- 6 A: But the quote for -- it's the Weber case.
- 7 Q: Okay.
- 8 A: Which is a case about the admissibility of the PPG.
- 9 Q: Okay.
- 10 A: It's United States v. Weber. The quote is
11 -- the quote is the reliability and validity of this
12 procedure in clinical assessment have not been well
13 established, and clinical experience suggests that subjects
14 can stimulate response by manipulating mental images, meaning
15 that they can fake it.
- 16 Q: Okay. And the DSM-5 has all the diagnostic criteria for
17 making a diagnosis of a particular mental illness; is that
18 right?
- 19 A: Yes.
- 20 Q: Is a finding of a PPG, a particular response, part of
21 the diagnostic criteria for any paraphilia?
- 22 A: No.
- 23 Q: So DSM-5 doesn't necessarily endorse -- I mean so it
24 never says, you know, somebody has done this, this, and they
25 have a 10 percent response as part of the diagnostic

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1 criteria?

2 A: Right.

3 Q: That's not there?

4 A: It doesn't say that you have to show arousal towards
5 that type of image or whatever on a PPG in order to meet
6 criteria. It does give somewhat of an endorsement when it
7 says that you use -- you know, look at preferential sexual
8 arousal.

9 Q: There's more than one way to use a PPG, is there not?

10 A: Sure.

11 Q: And this is a diagnostic PPG? Is that a good way to say
12 it?

13 A: I would -- I would say that's how it was used, yes.

14 Q: Because a lot of times it could also be used as a
15 therapeutic?

16 A: Yes.

17 Q: Measuring progress of treatment?

18 A: Yes.

19 Q: And actually, I think he even talked about using it as
20 part of an aversion therapy, which is still --

21 A: Yeah. And that's not how it's typically used in
22 treatment, but that could be a way that it could be used.

23 Q: Well, what's the problem with using the PPG as part of
24 diagnostic in pre-commitment evaluations?

25 A: Well, a pre-commitment evaluation is very high-stakes,

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1 and so I think that you need to be using the most valid,
2 reliable instruments that you -- that you can find. And if
3 -- and if you want to use one and it's not valid and
4 reliable, you should abandon using it and you shouldn't use
5 it. These are very high-stakes evaluations. The outcome
6 means that Mr. Powell's, you know, liberty will be gone if he
7 is committed, and so I think that you should just use very
8 valid and reliable instruments.

9 Q: Do you have any knowledge of -- I mean is South Carolina
10 as part of the mental health sort of alone in not using PPGs
11 as part of a pre-commitment process?

12 A: I mean we -- the South Carolina Department of Mental
13 Health is a court-appointed --

14 Q: No. I mean do you know of any other mental health
15 agencies or SVP programs in other states about whether or not
16 they use that?

17 A: Oh. I had -- I don't know if I brought it, but there is
18 a yearly survey of sex offender civil commitment programs,
19 SVP programs, in the state and many of them do not use the
20 PPG.

21 Q: So the South Carolina Department of Mental Health is not
22 alone in not using PPG?

23 A: No. I think it might be like eight out of 20 programs
24 -- that's off the top of my head -- that use it, but that's
25 also -- that's a survey of the treatment programs.

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1 I actually don't know how frequently it is used in pre-
2 commitment evaluations. There's research about, you know,
3 surveys of experts in pre-commitment evaluations about what
4 instruments they use, what information they rely on, and one
5 of them was written by Rebecca Jackson. She worked at DMH
6 for a little while, but they didn't even ask the question
7 whether they were using PPGs, which led me to believe that
8 they didn't think that people would be using PPGs in these
9 evaluations if they didn't ask because they asked quite a
10 wide range of questions about, you know, what are people
11 using.

12 Q: Dr. Burke referred to a Marshall -- a gentleman -- a Dr.
13 Marshall?

14 A: Yes.

15 Q: Is he well known in the field?

16 A: Yes.

17 Q: And what is his name?

18 A: I don't even know if I know what his first name is. I
19 think it's William Marshall.

20 Q: Okay.

21 A: I think.

22 Q: Is he published --

23 A: Yeah, it's William Marshall.

24 Q: And he's published articles on this subject?

25 A: Articles, books, a treatment program that we used to use

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1 at the Department of Mental Health.

2 Q: Do you have any articles or do you know of any articles
3 where he's talked about the use of a PPG?

4 A: Yeah. He wrote a book. It's called *Sexual Offender*
5 *Treatment*. It was published in 2006, that he specifically
6 talks about the PPG.

7 Q: And what was his conclusions about using it?

8 A: In my notes, I have a quote that -- that the routine use
9 of phallometric assessments as part of the evaluation of sex
10 offenders is not recommended, and he says at present it is
11 difficult to recommend any use of phallometry, and that's
12 also another word for PPG. Researchers and clinicians are
13 encouraged to seek alternative evaluation procedures.

14 Q: How invasive is the PPG? This test took seven hours.
15 Do they always take seven hours?

16 A: I've never heard of a test taking seven hours. I mean I
17 sit down and do clinical interviews and sometimes mine last a
18 long time, but that is exhausting. I'm exhausted. They're
19 exhausted.

20 THE COURT: So is it in this case that it took seven
21 hours?

22 THE WITNESS: He said seven and a half.

23 MR. BOGLE: I don't believe that's been documented. I'm
24 not sure.

25 THE COURT: And I just don't know where the seven hours

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1 came from. I thought they were just talking about in
2 general. I didn't know that they were talking about
3 specifically Mr. Powell.

4 THE WITNESS: No.

5 MR. BOGLE: That was established during Dr. Burke's
6 testimony why it can take so long.

7 THE COURT: I understand that, but where are you coming
8 up with -- you're asking specifically about a seven hours.

9 MR. FALK: Then I misunderstood Dr. Burke's response.

10 THE WITNESS: No. I'm sorry. I heard seven-and-a-half
11 hours when we were talking and we were standing back there
12 and --

13 THE COURT: For Mr. Powell's test?

14 THE WITNESS: I think Dwyer said it took seven-and-a-
15 half hours. And I think the attorney said --

16 MR. BOGLE: I object to comments by the witness about a
17 guy who is not here. If she's going to say Dwyer said
18 something, she needs to have him as a witness.

19 MR. FALK: Well, she's telling the basis -- no. She is
20 giving a basis of her opinion.

21 THE COURT: Exactly. And she can rely on what she's
22 read. It's got to be somewhere. It's got to be written
23 somewhere.

24 THE WITNESS: I didn't bring the -- well, maybe I did.

25 THE COURT: It's got to be written somewhere. Well, I

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1 don't care what the lawyers say. We'll go with what the
2 doctors say.

3 THE WITNESS: Here on the -- here on MUSC's report --

4 THE COURT: Uh-huh.

5 THE WITNESS: It says penile plethysmograph examination
6 on 9/5/2017. For everything else, it really says -- well,
7 for polygraph it doesn't say how long it took, but interviews
8 they list how long it took.

9 THE COURT: Okay.

10 THE WITNESS: But for the penile plethysmograph, they
11 don't have it in their source of information on the length of
12 time. I'm relying on what I heard from -- I believe it was
13 the attorney or Dr. Dwyer.

14 THE COURT: Okay.

15 MR. FALK: That's fine.

16 THE COURT: Do you mind me asking a question? So I
17 heard Mr. Bogle refer earlier about Dr. Maddox or Schwartz-
18 Watts, now Maddox, being a believer is what I heard. I heard
19 the word as being a believer in the PPG, and I know she
20 worked at the Department of Mental Health for many years
21 obviously.

22 Why do we have some people that are believers and not
23 believers? I mean experts disagree, and I get that. I do
24 this all day, every day, but why is there still this inherent
25 fight?

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1 THE WITNESS: I think that this is kind of like the
2 polygraph.

3 THE COURT: Right.

4 THE WITNESS: I mean people want this answer. It would
5 be amazing if this worked really well and if we could, you
6 know, heavily rely on this. You know, if we had an objective
7 measure and it -- and it tied to recidivism and all that kind
8 of stuff, I mean it would be great.

9 And so I think people really want it to work and they're
10 really holding onto it. There's been some research that says
11 it works. So they're holding onto that, but there is
12 definitely a divide. It is not generally accepted in our
13 field. There are definitely camps of -- you know, I think
14 it's great and those people tend to use it, and I don't think
15 it's great and I'm one of them. I've taken lots of classes
16 in statistics. I've taken classes in test development.

17 THE COURT: Right.

18 THE WITNESS: I mean that's part of what I -- I know how
19 to give standardized tests as part of a psychologist. You
20 know, I took a whole class on how to give an IQ test because
21 it's so standardized.

22 THE COURT: Right.

23 THE WITNESS: There's -- you know, there's parameters on
24 what questions I'm allowed to ask, when I'm allowed to ask
25 questions of somebody giving a -- it's all in the manual and

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1 you read -- you read straight out of the manual. You ask the
2 questions exactly the same.

3 THE COURT: Uh-huh.

4 THE WITNESS: If you show cards and stuff, you show them
5 for exactly the same amount of time to everybody, and that's
6 how everybody is trained to do it. In fact, in graduate
7 school, if you can't do that in a standardized way, you fail
8 out. You're done.

9 THE COURT: Okay.

10 THE WITNESS: But that's not how it is in the PPG.
11 Things are just not standardized. They vary from site to
12 site, and even in South Carolina, two people who -- I mean,
13 Dr. Burke is on faculty at MUSC and they use two different,
14 you know, methods and different standards.

15 THE COURT: Okay.

16 THE WITNESS: And so it's problematic because we don't
17 know. Maybe Burke's Real Child Voices set -- maybe it does
18 work, but I don't know that yet.

19 THE COURT: Okay.

20 THE WITNESS: I need to have the research to determine
21 that.

22 THE COURT: Just so I'm clear and I understand,
23 obviously as to a guilt or innocence phase in a criminal
24 trial, it wouldn't be useful because you couldn't determine
25 in any way about a specific act. I can tell you that go back

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1 in reading what I see is that more states use it for civil
2 commitment purposes, but we're back to the standard of you
3 still have to prove that someone is a sexually violent
4 predator beyond a reasonable doubt, and so, again, can you
5 use this and can you allow this to come in?

6 And, Mr. Bogle, I'm kind of looking at you to help me.
7 Can you use this and can a jury rely on this --

8 MR. BOGLE: Well --

9 THE COURT: -- to be able to use it to determine? And
10 particularly in this case what I am concerned is what I heard
11 the doctor say, which is that your report, Dr. Gehle, and Dr.
12 Gottfried's report is very similar as far as diagnosis, you
13 told me, and certain findings. The real difference was the
14 PPG, and that's what I heard you say and to me that's
15 concerning.

16 MR. BOGLE: Well, I don't think -- the burden of proof
17 is the same as in a criminal case, that is true, but bear in
18 mind that of the 26 states that have this law --

19 THE COURT: Right.

20 MR. BOGLE: -- about a third of them have a burden of
21 proof beyond a reasonable doubt. Many of them are
22 preponderance of the evidence. Some are clear and
23 convincing.

24 THE COURT: Okay.

25 MR. BOGLE: It varies from state to state.

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1 THE COURT: Right.

2 MR. BOGLE: We adopted, for whatever reason, beyond a
3 reasonable doubt probably because we pretty much copied the
4 Kansas law.

5 THE COURT: Okay.

6 MR. BOGLE: It was held by the Supreme Court in 1998.
7 So the burden of proof and the type of testing used I think
8 are apples and oranges. It's two separate animals.

9 THE COURT: Okay.

10 MR. BOGLE: Okay? The problem here is -- and I really
11 should save this for cross-examination of her, and if you
12 want to let me do that --

13 THE COURT: And if you want to, we can do that. We can
14 do that. I just --

15 MR. BOGLE: Let me do that, and then I can respond to
16 your question.

17 THE COURT: Certainly. Okay. That's fine.

18 MR. FALK: Before we finish, there's been comment about
19 whether Dr. Maddox is a believer or not. I've got two
20 reports that she's prepared since December 2017, no PPG
21 report in it.

22 THE COURT: Oh, I understand that she doesn't
23 necessarily do that and she doesn't require them or request
24 them in all cases, and I understand that. I just don't know
25 for someone in her position if it aids them in some way. A

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1 lot of times they'll say it may aid them or assist them in
2 some way, but it isn't necessarily determinative. And again,
3 it's the strength of it.

4 My bigger concern is this. As you know, I've got my
5 standard and I've got to decide whether or not it's been, you
6 know, subject to peer review, if it's been tested, if it's
7 generally accepted, and that's where my concern lies is,
8 again, if it's reliable.

9 MR. BOGLE: I'll tell you what you'll find.

10 THE COURT: And that's in my gatekeeper role.

11 MR. BOGLE: I've seen this in some of Dr. Maddox's
12 reports and Dr. Swan's.

13 THE COURT: Uh-huh.

14 MR. BOGLE: If the guy admits everything, if he admits,
15 yeah, I'm sexually aroused by children, why run a PPG? Why
16 spend the money?

17 THE COURT: Right.

18 MR. BOGLE: And so you won't see it done sometimes.

19 MR. FALK: But that doesn't apply.

20 THE COURT: Okay.

21 MR. FALK: Dr. Maddox, in one where he didn't admit, she
22 let the guy off and did not run a PPG since December.

23 THE COURT: Okay. Well, again, we are not here pitting
24 witnesses and we're not here saying -- you know. Anyway, you
25 go ahead. Do you have anything more for her?

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1 MR. FALK: Your Honor, I think I've said what I need to
2 say.

3 THE COURT: Okay. Mr. Bogle?

4 CROSS-EXAMINATION

5 BY MR. BOGLE:

6 Q: Good afternoon, Dr. Gehle.

7 A: Good afternoon.

8 Q: Welcome to Beaufort. Dr. Gehle, it's safe to say that
9 of the testing you do, you use the Static 99-R as a scoring
10 instrument to see if a guy is likely to reoffend? That's a
11 major part of your report; correct?

12 A: Yes.

13 Q: Okay. And from my experience with each other, you and
14 me, we know that you, for whatever reason, scientific, do not
15 believe in the reliability of the PPG; correct?

16 A: Reliability and validity, yes.

17 Q: Okay. Now, as far as the Real Child Voices, you
18 testified a minute ago that you went and watched it be
19 administered one time?

20 A: No, that's not what I said.

21 Q: Okay. You said you watched it one day. What does that
22 mean?

23 A: Right. I didn't watch it being administered. I sat in
24 the lab at DMH and I just watched it.

25 Q: Okay.

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1 A: Like, as if I was, you know, a client.

2 Q: So you didn't watch it -- so you didn't go to Burke's
3 lab and watch it be administered to somebody?

4 A: No.

5 Q: And you didn't go to MUSC --

6 A: I just looked.

7 Q: -- and watch it?

8 A: I just looked at the stimulus set.

9 Q: You didn't go to MUSC and watch it being administered to
10 somebody either?

11 A: Correct.

12 Q: Okay. All right. And so you didn't watch somebody go
13 through the sitting down, being monitored by video or audio
14 or whatever for three to seven or however long it takes to do
15 it?

16 A: Right.

17 Q: You didn't watch all that? You haven't seen the test
18 done ever?

19 A: That's correct.

20 Q: Okay. And with all apologies too, Dr. Gehle, I have
21 confirmed that it did take about seven hours with this guy,
22 the entire test with all the problems took about seven hours,
23 and I apologize for calling you on that.

24 Now, you mentioned this 4.7 -- this 5.0 millimeters
25 scale, and you said you were not sure where they got that.

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- 1 Well, have you ever sat down and interviewed Dr. Burke on
2 what centimeters he's using and where he got them?
- 3 A: Have I ever interviewed him?
- 4 Q: Yeah.
- 5 A: No.
- 6 Q: Just called him on the phone and said, hey, I'm having a
7 problem with this. Why do you do this?
- 8 A: I actually reviewed his presentation that he gives as
9 part of his certification, and that's -- that's where I saw
10 the reference to Howes' article.
- 11 Q: Okay.
- 12 A: And then I --
- 13 Q: Did you raise your hand and say, Dr. Burke, what's going
14 on here?
- 15 A: No.
- 16 Q: Okay. How about -- how about the lab at MUSC? Have you
17 called them and asked them where they get the centimeters
18 that they use and why they might use something else?
- 19 A: No.
- 20 Q: Okay. But you've never talked to anybody at MUSC about
21 their lab or how they run it; correct?
- 22 A: Correct.
- 23 Q: And you've never talked to Burke about how he runs his
24 lab and why he does it a certain way, do you?
- 25 A: Correct.

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1 Q: Okay. And this Richard Howes' article is about -- what?
2 Seventeen years old? And it refers to full erections.
3 You're not contending that a person has to get a full
4 erection to show that he's aroused to something, are you?
5 A: No.
6 Q: Okay. And the DSM-IV is quoted in the Weber case. It
7 talked about questioning the PPG's reliability; right?
8 A: Yes.
9 Q: Well, that quote has vanished from the DSM-5; correct?
10 A: I don't know if it's in the DSM-5. I would guess that
11 it's not.
12 Q: Would you like me to show you?
13 A: Sure.
14 Q: Okay. In the two places that it's in the DSM-5 under
15 diagnostic markers on this page -- and so I can leave you
16 alone, I'll tell you where the other one is. Let's see. One
17 is right here, and one is the underlying part right here.
18 A: Okay. So your question was that -- is that quote still
19 in there?
20 Q: My question is if it's in the DSM-5. You said you
21 didn't know and I'm showing it to you. Do you see it in the
22 DSM-5?
23 A: I said I didn't know if it was in there.
24 Q: Okay. Is there anything in the DSM-5 attacking the
25 reliability of the PPG?

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1 A: Well, it talks about the sensitivity and specificity,
2 but not reliability or validity.

3 Q: And the only two places in the entire thousand-page book
4 you're looking at are marked with my marker; correct?

5 A: I would have to take your word on it, Jim.

6 Q: Okay. And you heard testimony that the Limestone Real
7 Child Voices is a standardized set used in hundreds of labs
8 around this country -- in this country; correct?

9 A: I don't know how many labs it's used.

10 Q: Okay.

11 A: I don't know that he -- that Dr. Burke testified to it's
12 being used in hundreds of labs.

13 Q: So you don't know how many labs it's being used in or
14 not being used in?

15 A: I don't know how many labs are in the United States or
16 how many -- how many labs uses that.

17 Q: Well, Dr. Burke testified how many labs are in the
18 United States a few minutes ago right before lunch.

19 A: I think he said that there was, like, 214 in the world.
20 I'm not sure how many are in the United States.

21 Q: Well, on the planet he said. He testified about the
22 number in the United States. Okay. So basically, there's no
23 question there was a time, that Weber case is an example,
24 when the PPG was at least by one Court looked upon as not
25 being reliable. Okay? And it wasn't in the DSM-IV; right?

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 A: What wasn't in the DSM-IV?

2 Q: You've got to answer the question. All right. Let me
3 back up. There was a time when at least one court case, U.S.
4 v. Weber, criticized the reliability of the DSM -- of the
5 PPG; correct?

6 A: That case did more than just criticize the reliability.
7 I mean it -- it looked at a variety of factors.

8 Q: Are you aware of the case of Danny Connelly v. State of
9 Florida from 2014?

10 A: No.

11 Q: Are you aware of the case of In re: Jeff Rivers Finney,
12 a Circuit Court case from 2015?

13 A: From where?

14 Q: Circuit Court of Florida.

15 A: No.

16 Q: Are you aware of State v. Fullwood, Court of Appeals of
17 Florida, 2009?

18 A: No.

19 Q: And all of these cases approved the use of the PPG. In
20 fact, the State tried to keep it out and they let it in;
21 right? Do you know? Are you aware of these cases?

22 A: No.

23 Q: Okay. And you yourself have never researched the PPG,
24 have you?

25 A: What do you mean researched?

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 Q: Meaning other than seeing the Real Child Voices one
2 time, you have never watched one being done, one from start
3 to finish; right?

4 A: Correct.

5 Q: You've never tried to analyze the Real Child Voices and
6 find out why they're not right or why they're not good or why
7 they're good or bad? You haven't written on this, have you?

8 A: I have not written on this, no.

9 Q: Okay. And you mentioned how -- there was questioning
10 about how the DSM-5 when it sets forth the criteria for a
11 particular paraphilia, such as pedophilic disorder, it
12 doesn't mention PPG score; right?

13 A: Correct.

14 Q: It doesn't mention any psychological test, does it?

15 A: For the diagnosis of pedophilic disorder?

16 Q: Yeah.

17 A: Correct.

18 Q: It doesn't mention the Abel, the MMPI, anything?

19 A: That's correct.

20 Q: It doesn't mention the Static?

21 A: That's correct.

22 Q: Okay. And the article you mentioned by Rebecca Jackson
23 -- that was done in the early 2000s, wasn't it? When she was
24 a -- a -- let me see -- a graduate assistant and it basically
25 trashed the Static 99; correct?

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 A: No. I'm talking about a different article.

2 Q: Okay.

3 MR. BOGLE: Nothing further.

4 THE COURT: Okay. Yes, sir?

5 REDIRECT EXAMINATION

6 BY MR. FALK:

7 Q: Three cases from Florida. You have no idea whether or
8 not those were Burke Real Child Voices as the stimulus set or
9 whether or not they were using the Marshall set, do you?

10 A: I have no idea.

11 Q: You don't know the cases?

12 A: I have no idea.

13 Q: You don't even know what kind of equipment they had
14 there?

15 A: That's correct.

16 Q: Okay. Now, just -- this book right here is not the
17 manual for conducting an SVP pre-commitment evaluation; is
18 that correct? There's more than one use for this book?

19 A: That's correct.

20 Q: And it's used for people in counseling, therapy, and in
21 treatment; is that correct? This would be a guideline to
22 use?

23 A: I don't know that you necessarily use it I mean in
24 treatment per se. It's --

25 Q: Well, as far as measuring progress in treatment? No,

DR. MARIE GEHLE - REDIRECT BY MR. FALK

1 I'm sorry. I'm confused. Okay.

2 A: It is just a book with lists of symptoms and diagnoses.

3 Q: Here's the way to ask the question. You would -- you
4 would possibly look to this book to try and find a diagnosis
5 in a setting other than -- in settings in addition to SVP
6 commitment cases; is that correct?

7 A: Yes.

8 Q: That's what I meant to say. So it could be used to find
9 a diagnosis for somebody who is coming in for therapy?

10 A: Absolutely.

11 Q: And it could be used for a diagnosis for somebody coming
12 in for treatment?

13 A: Yes.

14 Q: And -- okay. And I don't believe those quotes on the
15 PPG said anything about using this as a -- in a pre-
16 commitment evaluation? Did you see that?

17 A: Correct.

18 MR. FALK: No further questions.

19 THE COURT: Anything further?

20 MR. BOGLE: Not from the State, Your Honor.

21 THE COURT: Okay. Anything further?

22 MR. FALK: No, Your Honor.

23 THE COURT: You may step down. Thank you. Okay.

24 MR. BOGLE: We would call Dr. Gottfried.

25 THE COURT: Okay. Come on forward, Dr. Gottfried. Go

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 ahead.

2 THE CLERK: Do you solemnly swear or affirm that the
3 testimony you give to the Court in this trial shall be the
4 truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Thank you. Please state your name for the
7 record.

8 THE WITNESS: Emily Gottfried, G-o-t-t-f-r-i-e-d.

9 DR. EMILY GOTTFRIED, being
10 first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. BOGLE:

13 Q: Dr. Gottfried, by whom are you employed at the present
14 time?

15 A: I'm currently employed at the Medical University of
16 South Carolina.

17 Q: And what is your job there?

18 A: I am an assistant professor in psychiatry, and I work in
19 the sexual behaviors clinic and lab at MUSC.

20 Q: Are you a clinical -- clinical psychologist?

21 A: Yes, I am.

22 Q: In what states are you licensed to practice psychology?

23 A: Georgia and South Carolina.

24 Q: How much of your practice is dedicated to forensic
25 psychology?

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

- 1 A: A hundred percent.
- 2 Q: When I say the word forensic with the word psychology,
3 what am I talking about?
- 4 A: Well, forensic is kind of the marriage between science
5 and the law. So forensic psychology is looking at psycho-
6 legal concepts to help a trier of fact usually.
- 7 Q: As a forensic psychologist, about how many people have
8 you evaluated in all categories?
- 9 A: I would say hundreds. I don't know the exact number.
- 10 Q: And what types of evaluations, forensic psychological
11 evaluations, have you done?
- 12 A: I do criminal and civil forensic cases. So I look to
13 see if somebody is competent to stand trial, if they're
14 criminally responsible, risk assessments, violence risks,
15 sexually violent risks. I do sexual value violations for
16 licensing boards.
- 17 Q: So if a person who is licensed by a particular board,
18 like a psychologist or a psychiatrist or a doctor, has
19 crossed the line with a patient and there is a question as to
20 whether or not he is a risk to reoffend, that might be the
21 type of evaluation you would do?
- 22 A: Or a danger to continue practicing, yes.
- 23 Q: Okay. What about sexually violent predator evaluations
24 under our law? Have you done some of those?
- 25 A: Yes.

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 Q: Okay. Now, just to speed things up, you work for the
2 lab in Charleston?

3 A: Yes.

4 Q: And you --

5 THE COURT: You work for where?

6 Q: -- that lab is brought in from time to time --

7 THE WITNESS: MUSC.

8 THE COURT: Okay. Sorry.

9 MR. BOGLE: That's all right.

10 BY MR. BOGLE:

11 Q: And your -- the lab that you work at is brought in from
12 time to time by our office to get a second opinion on a
13 sexually violent predator case; correct?

14 A: Correct.

15 Q: Okay. Many of those have you done?

16 A: I have done 15 full evaluations and then several file
17 reviews.

18 Q: Okay. And how many -- by file review, that means just
19 looking at the paperwork and not bringing the guy in for the
20 full evaluation?

21 A: That's right.

22 Q: Because sometimes just based on the paperwork, you
23 decide whether or not a full evaluation at increased expense
24 by the State is even necessary?

25 A: That's correct.

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 Q: And sometimes it hasn't been?

2 A: Right.

3 Q: Okay. How many times have you had to test -- been
4 recognized as an expert witness and testified in South
5 Carolina in sexually violent predator cases, like this one
6 here?

7 A: Just two so far.

8 Q: Okay. Were those both pre-commitment cases?

9 A: No. One was a pre-commitment and one was an annual
10 review.

11 Q: An annual review? Okay. Have you been recognized as an
12 expert witness in the field of psychology in any other
13 jurisdictions besides South Carolina?

14 A: Yes. In Georgia.

15 Q: About how many times in Georgia?

16 A: Four times in Georgia.

17 Q: And how many times in South Carolina other than SVP?

18 A: If I could correct one of my answers, I forgot that we
19 did the trial last week. I've done three SVP, two were
20 release hearings and one was pre-commitment, and I've been
21 involved a total of 14 times.

22 Q: Okay. Okay.

23 MR. BOGLE: Your Honor, at this time, I'd like to ask
24 that Dr. Gottfried be recognized as an expert witness in the
25 field of clinical psychology.

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 THE COURT: Okay. Any objection?

2 MR. FALK: No objection.

3 THE COURT: She is. Thank you.

4 BY MR. BOGLE:

5 Q: Now, in this particular case, were you -- was your
6 laboratory retained by our office to conduct a second opinion
7 on Mr. Powell?

8 A: Yes.

9 Q: Okay. And to do that, you got all the documents we had
10 on the guy; correct?

11 A: Correct.

12 Q: And you got Dr. Gehle's report?

13 A: Yes.

14 Q: Okay. What is your protocol, the list of protocol, the
15 things you have to do on a guy when conducting an examination
16 before you can write a report? And this is the protocol
17 followed by the lab in Charleston where you work.

18 A: Our protocol is that we get all of the documents
19 provided by your office and we review those thoroughly. I
20 also review the other evaluator's report to make sure that
21 things -- if they got something that was missed from my file.
22 Then I also usually contact your office to find out if there
23 are additional school or mental health records. So I review
24 all of the records.

25 Then we bring the examinee in for a full day of

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 psychological testing. They come in for a second day, which
2 is the PPG, and then they usually have two interviews.
3 Sometimes some of the interview is on the first day and then
4 we always bring them back for another full day for an
5 interview and to give them the results of all of their
6 testing.

7 Q: And by assessments and testing that y'all do, that would
8 include the Conners Continuous Performance Test, Number 3?

9 A: Yes.

10 Q: The substance abuse screening inventory on the SASSI, S-
11 A-S-S-I it's called?

12 A: Yes. The Subtle Screening Inventory.

13 Q: All right. The Personality Inventory -- Assessment
14 Inventory or PAI?

15 A: Yes.

16 Q: You also do the Abel Assessment for Sexual Interest,
17 Version 3?

18 A: Yes.

19 Q: You also do the penile plethysmograph, the PPG?

20 A: Correct.

21 Q: You do a polygraph exam on the guy?

22 A: Yes.

23 Q: And the Hair psychopathy or psychopathy --

24 A: Psychopathy.

25 Q: Psychopathy -- thank you -- checklist is also done?

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 A: Yes.

2 Q: And you score the guy on the Static 99-R?

3 A: Correct.

4 Q: Okay. Now, why so many things?

5 A: Well, so it is best practices according to ATSA to not
6 -- or the Association for the Treatment of Sexual Abusers.
7 They have practice guidelines for doing these kinds of
8 evaluations.

9 It's against the standard of practice to rely on only
10 one data point, and it's also in testing and measurement
11 important to look at different types of data so you're not
12 relying just on one data source. So we're also doing a full
13 diagnostic evaluation, and so that's why we give them all of
14 the metrics.

15 Q: Okay. And so -- and some of these measures may help the
16 guy?

17 A: Right.

18 Q: Some may hurt him in your evaluation or adversely affect
19 him?

20 A: Sure. Yes.

21 Q: And some may help him. So you give them all?

22 A: Right.

23 Q: Okay. And in this particular case, the three sexually
24 violent convictions are on three young girls; is that right?

25 A: Yes.

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 Q: And the age range -- I think one was 5, one was from 5
2 to 11, and one was from 3 to 10?

3 A: Yes.

4 Q: That's the age ranges on the dates of the crimes as set
5 forth in these sentencing sheets; right?

6 A: Yes.

7 Q: So why was it necessary -- now, did this guy deny guilt
8 to you when you asked him about if he did the things he
9 pleaded guilty to?

10 A: He did deny.

11 Q: Why the PPG? Why run -- why run the PPG?

12 A: Well, it's important to not look at self-reports. So
13 this is somebody who has pled guilty to sex offenses against
14 children and, in order to make a diagnosis, you need to know
15 that they had a paraphilic arousal to children, not just that
16 they offended against children out of convenience. And so
17 that we know paraphilic arousal makes somebody more dangerous
18 because typically people are going to, you know, engage in
19 things that they are aroused to. So the PPG is a
20 physiological objective measure of male arousal to children
21 as well.

22 Q: Okay. Is the PPG part of your standard protocol in
23 these types of evaluations?

24 A: Yes. Everybody gets one.

25 Q: Okay. And it's administered -- I think the technology

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 guy that does it is Joe Secondary?

2 A: Yes.

3 Q: Okay. And then the results are reviewed by Dr. Dwyer?

4 A: He's the interpreter or the analyst.

5 Q: And then it becomes part of your report, either helps

6 the guy or doesn't help the guy?

7 A: Correct.

8 Q: Is the Limestone Technologies PPG the one that y'all

9 use?

10 A: Yes.

11 Q: And that would include the Real Child Voices or RCV set

12 of stimuli; correct?

13 A: That is one of them that we use.

14 Q: On page 26, you also use the Marshall set?

15 A: Yes, we do.

16 Q: Okay. Is that also a part of the Limestone

17 Technologies?

18 A: It's all on the Limestone system, yes.

19 Q: Okay. So the Limestone system includes the Marshall set

20 of things the guy sees and hears and the Real Child Voices?

21 A: Correct.

22 Q: Okay. Why both?

23 A: Well, for a couple reasons. So the Marshall has been

24 better studied. There's more empirical support for using the

25 Marshall. It seems in talking to people who have PPG labs

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 around the country that they see more results in the Real
2 Child Voices, and so we're trying to collect data on that as
3 well in doing these, but we're not going to solely rely on it
4 because it hasn't been as thoroughly studied as the Marshall
5 set.

6 Q: Have you run into other labs around the country who use
7 the PPG in this -- this type of evaluation?

8 A: Yes.

9 Q: A number? How many would you say?

10 A: I have no idea, but there are people that I have met at
11 conferences and we've discussed the PPG and I've met people
12 who use it and we've discussed what stimuli that we use, but
13 I couldn't tell you a number of how many.

14 Q: Now, are these people that are doing it in a pre-
15 commitment sexually violent predator context?

16 A: Yes.

17 Q: Okay. Now, in this particular case, how did the PPG
18 assist you in determining whether or not Mr. Powell should be
19 civilly committed as a sexually violent predator?

20 A: Well, it told me his current sexual arousal, what he was
21 sexually aroused by.

22 Q: Okay. And what was that?

23 A: That was to young children.

24 Q: Okay. Was it young girls in particular or young
25 children in general?

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 A: Males and females, but there was a number of females.

2 There was some -- yeah, at least one male child.

3 Q: Okay. What about being aroused to consenting adult
4 scenarios? Was he aroused to that as well?

5 A: Yes.

6 Q: In fact, your diagnosis of him was pedophilic disorder,
7 sexually attracted to both, meaning adults as well as
8 children, females, meaning females are the one deviant sexual
9 arousal that he has; is that correct?

10 A: To children, yes.

11 Q: Okay. Now, after giving him the PPG -- and I think in
12 this case it lasted seven hours?

13 A: I believe it was seven-and-a-half hours because he had
14 both sets and he has child victims, so he got all of those --
15 all of the stimuli.

16 Q: By all of the stimuli, what does that mean?

17 A: He got -- so if somebody doesn't have any children
18 victims, they just get the screener set of children.

19 Q: Uh-huh.

20 A: So it's shorter, but when somebody has child victims,
21 they get all of the children sets.

22 Q: So both the Marshall sets and the Real Child Voices
23 sets?

24 A: Yes. But everybody gets both.

25 Q: Okay. Okay. After giving him the interview, did you

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 have a follow-up? After giving -- after the PPG was
2 administered, did you have a follow-up interview with him?
3 A: Yes. I always meet with them to give them their
4 results.
5 Q: Did you learn anything -- did you learn anything of
6 significance from the follow-up interview? What was his
7 response? Was he told how he responded on the PPG?
8 A: Yes.
9 Q: And what was his response?
10 A: He told me that he, quote, wasn't aware he was aroused
11 by the child scenarios, that he never masturbated to
12 fantasies of children, that he didn't feel the arousal. He
13 said he wasn't thinking anything about that. He thought it
14 was disgusting and he was aware that the results of the PPG
15 don't look good.
16 Q: Okay. Based upon the information you got from the
17 technician and Dr. Dwyer's review of the test that was passed
18 on to you, was there any evidence that he might've tried to
19 manipulate the test?
20 A: Yes, there was evidence of manipulation.
21 Q: Is manipulation the right word? What should I call it?
22 A: We call it dissimulation, but I think the layman's term
23 would be trying to manipulate the machine.
24 Q: Okay. And how do people try to do it? What did he try
25 to do to do that?

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 A: There's a couple different ways that people try to do
2 it: holding their breath, breathing irregularly, and then
3 moving. So they might be kind of squirming or trying to
4 prohibit themselves from getting or inhibit an erection.

5 Q: Okay. Is it your ultimate opinion that Mr. Robert
6 Powell should be civilly committed as a sexually violent
7 predator?

8 A: That is my opinion.

9 Q: Okay. Does the PPG reinforce that opinion?

10 A: It is definitely a factor that I think about in
11 rendering my opinion.

12 Q: Okay. Because the overall timeframe of his activity
13 covers, like, almost an 18-year period?

14 A: I believe it's 16 years.

15 Q: Sixteen years?

16 A: Uh-huh.

17 Q: Okay. By the sentencing dates on the indictments?

18 A: That's correct.

19 Q: I think '86 to 2004 or something like that?

20 A: I believe so.

21 Q: Okay. Are you aware of studies, research about the
22 validity or the usefulness of the -- validity of the Real
23 Child Voices as well as the Marshall set?

24 A: To my knowledge, the Real Child Voices studies have not
25 been published yet.

DR. EMILY GOTTFRIED - DIRECT BY MR. BOGLE

1 Q: Uh-huh.

2 A: Our sister lab in Canada is currently doing a study and
3 we are doing a study with another lab in California where
4 we're -- we're looking at the psychometric properties of it.
5 I'm not aware of studies on it, but that doesn't mean that
6 there aren't any.

7 Q: What about the Marshall?

8 A: There are studies on the Marshall.

9 Q: Okay. Why do you use the Real Child Voices as part of
10 your overall technology if there's no studies that you're
11 aware of at this time?

12 A: Well, so we don't solely rely on it. It's been around
13 for a little while and we use it in part with the Marshall.

14 Q: Okay.

15 MR. BOGLE: Thank you. Please answer any questions that
16 counsel may have or the Court may have.

17 CROSS-EXAMINATION

18 BY MR. FALK:

19 Q: Is your testimony that para -- that you have to have
20 pedophilic arousal to make a diagnosis of pedophilia?

21 A: A part of the diagnosis is a paraphilic arousal to
22 children.

23 Q: But that's for pedophilic disorder?

24 A: Yes.

25 Q: Because the diagnostic criteria says over a period of

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 six months recurrent intense sexually arousing fantasies,
2 sexual urges. It doesn't say anything about arousal, does
3 it?

4 A: I guess I'm kind of grouping those together as sexual
5 interest in children.

6 Q: So you're saying that you can't make a diagnosis of
7 pedophilia without using the PPG test?

8 A: No. You can make one. If somebody admits that they
9 have that arousal or there's a lot of evidence of it, you
10 certainly could make a diagnosis. The PPG is helpful in
11 making a diagnosis.

12 THE COURT: What is a lot of evidence of it? Like
13 offenses that they've admitted to or --

14 THE WITNESS: Yeah. I mean I think it's easiest when
15 somebody comes in and says, yes, I masturbate to fantasies of
16 children or, yes, I molested this child and I groomed them
17 and I was, you know, interested in them romantically. That's
18 a lot easier, but when you have somebody who is denying it,
19 even if they committed the offenses, that doesn't necessarily
20 mean that they have a sexual arousal to children. It
21 could've been that that child was there.

22 THE COURT: Okay.

23 THE WITNESS: And so that's why I like to do the PPG
24 because it gives you objective physiological data of their
25 arousal.

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 BY MR. FALK:

2 Q: But even more than just deny it, didn't he pass a
3 polygraph test that asked those questions?

4 A: He passed a polygraph that asked about current
5 masturbation to children.

6 Q: And fantasies. There were two questions, were there
7 not?

8 A: I believe they were both masturbation. Let me just
9 look. Yeah. One was in the last six months have you
10 masturbated to a fantasy involving prepubescent children.
11 The other was having masturbated to sexual fantasies
12 involving a prepubescent child in the past six months.

13 Q: Oh, I see. So that's supposed to be the same question,
14 just asked twice?

15 A: Yeah. It's asked just a little bit of a different way.

16 Q: Now, they were -- earlier, Dr. Dwyer had agreed to give
17 me a flash drive that would have the raw data on it from this
18 PPG test. If you had that raw data, could you make the
19 interpretations?

20 A: No.

21 Q: What is involved in making these interpretations?

22 A: Well, you have to go to analyst school and get certified
23 and learn how to do it. So you can't do it unless you've
24 gone through that class.

25 Q: Is this more complicated than running a blood test?

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 A: I'm not qualified to run a blood test either; so I don't
2 think I can opine on that. I mean I would think so because
3 you have to do mathematical calculations and, like, look at
4 seconds of physiological data, but I honestly don't know.

5 Q: So would you think there's a -- would you admit there's
6 a fair amount of judgment in the evaluation if you're looking
7 at a fair amount of data? What is the data that you're
8 looking at?

9 A: Right. Yeah.

10 Q: And it was described earlier as, like, what you would
11 get from an EKG?

12 A: I believe so.

13 Q: With a pen and test going up and down?

14 A: But again, I'm not certified to interpret an EKG.

15 Q: I know, but that's the type of data that you're
16 interpreting; right?

17 A: I think that's what it looks like. To my understanding,
18 they both have the waves.

19 Q: Were you present when this PPG was given?

20 A: Mr. Powell? I believe I was. I try to observe most of
21 them unless I have another evaluation.

22 Q: Is it in your report? Can you tell from your report?

23 A: No.

24 Q: Do you know what kind of certification -- do you know
25 who conducted the test?

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

- 1 A: Joe Secondary did.
- 2 Q: Okay. How many had he given?
- 3 A: I mean I would probably say all of them at MUSC. He's
- 4 done all of them since I've worked there in 2015.
- 5 Q: What type of response is required to get a significant
- 6 -- considered a significant response in one of the scenarios?
- 7 A: Well, again, so I'm not an analyst in the PPG, but I
- 8 know that at MUSC they use a stretch or a circumference of 5
- 9 millimeters or greater.
- 10 Q: Okay. What was his specific response -- hold on. What
- 11 was his specific response to passive prepubescent female?
- 12 A: That I don't know because I'm not an analyst.
- 13 Q: I could ask you all four of these and your answer was
- 14 going to be the same?
- 15 A: That's correct.
- 16 Q: So you don't know what his response was?
- 17 A: I know that they're greater than the minimum, which is
- 18 5, but I don't know their actual numbers.
- 19 Q: Do you know that because somebody told you or because
- 20 you saw that?
- 21 A: I mean I watched. Usually, I watch. I don't recall if
- 22 I watched Mr. Powell's. So I may have seen it on the screen,
- 23 but I know because the analyst gave me that information.
- 24 Q: So you know what the analyst told you?
- 25 A: Yes.

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 Q: Do you have any concerns that he had -- you reported
2 that he had a significant response to a neutral nonsexual,
3 nonviolent scenario. What does that mean?

4 A: What does it mean that he responded to that?

5 Q: Yeah. I mean you know what I'm talking about. It's on
6 page 25.

7 A: Yeah. Number three.

8 Q: Yeah.

9 A: So I don't know what to make of that. It's possible,
10 but I'm kind of speculating that he -- it could've been,
11 like, a rebound effect from trying to inhibit an erection
12 from a different scenario. I don't know what to make of
13 that, the neutral.

14 Q: What specific evidence do you have that he was
15 dissimulating?

16 A: So there are countermeasures and there is the
17 respiratory monitor, and so there is research showing that
18 the PPG is susceptible to feigning or manipulation. That
19 people have successfully been able to inhibit an erection;
20 and there have been studies looking at that where they say
21 that moving around or breathing irregularly -- that can
22 suggest dissimulation.

23 Q: Is the breathing irregularity -- is that reflected in
24 your report?

25 A: Yes.

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 Q: Now, specifically, it's that he's holding his breath for
2 a period of time? How long is he holding his breath? For
3 how long was he holding his breath?

4 A: I'm not sure that they measure how long it is. I think
5 that they look at the different seconds of the respiratory,
6 but again, I don't look at that. I'm not --

7 Q: So you don't know --

8 A: -- trained in that.

9 Q: You don't really know the basis, the specific basis for
10 his -- the statement that he was dissimulating; is that
11 correct?

12 A: I know that there was evidence of dissimulation based on
13 both the respiration and the counter pad that they sit on for
14 movement, but that's all that I know.

15 Q: Do you know specifically what the respiration evidence
16 was?

17 A: Just that there was evidence of breathing irregularly.

18 Q: And somebody told you that?

19 A: It's part of the analyst's report.

20 Q: Okay. That's what I'm getting at. So you don't have
21 any independent knowledge of the dissimulation?

22 A: Right. I didn't interpret the PPG.

23 Q: Did you go over the consent form with him?

24 A: I go over the consent form when I'm interviewing him. I
25 did not go over the PPG consent form with him.

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 Q: Okay. What would happen if Mr. Powell just -- are you
2 aware of the consent form?

3 A: Yes.

4 Q: And there's one part of the consent form that they can
5 quit at any time; is that correct?

6 A: Yes.

7 Q: What would have happened if Mr. Powell had walked out of
8 there?

9 A: He would have been totally allowed to leave and then I
10 would have reported that to the Attorney General's Office.

11 Q: Would you have completed your report?

12 A: No.

13 Q: So you can't complete the report unless he completes the
14 PPG test; is that correct?

15 A: All of the measures.

16 Q: Okay. And the PPG is one of the measures?

17 A: Correct.

18 Q: So if he didn't -- so if he didn't consent to the test,
19 what if he -- what if he said, no, I don't want you to do the
20 PPG test? What would you have done?

21 A: Typically, we have them contact their lawyer and then if
22 their lawyer agrees that they shouldn't do it, then we don't
23 do it then. We report that to the Attorney General's Office
24 and then they let us know whether or not we should bring them
25 back in.

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 Q: And so you don't complete the report in that case
2 either?

3 A: That's correct.

4 Q: Do you know what happens to those people? What the
5 consequences of that, if you don't complete the test?

6 A: I think that they file a motion and I think that they
7 wait to see if they will, but I've never been to one of those
8 hearings. But I think that's what happens.

9 Q: Can we ever get to a trial if he doesn't take the PPG
10 test?

11 A: I think that a judge could say he doesn't have to or the
12 Attorney General's Office, but that's part of our standard
13 protocol and so we wouldn't do the evaluation without it.

14 Q: Are you aware of a PPG that was given to Larry David
15 Tyler in Darlington?

16 A: He did not take a polygraph to my -- or I'm sorry -- a
17 PPG to my memory.

18 Q: Okay. Do you know if he is still in the Darlington
19 County Detention Center?

20 A: I don't know.

21 Q: Do you know how long ago that was that he didn't take
22 the test?

23 A: It was over a year.

24 THE COURT: So I understand, would you not even form any
25 type of opinion whether or not Mr. Powell meets the criteria

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 of a sexually violent predator under our statute if he did
2 not take the PPG test? Is that -- you would not opine
3 anything; correct?

4 THE WITNESS: Right. It's part of our standard battery.

5 THE COURT: Okay.

6 THE WITNESS: And so we like it to keep it consistent --

7 THE COURT: Okay.

8 THE WITNESS: -- and have all the facts and all the
9 data.

10 THE COURT: Okay.

11 BY MR. FALK:

12 Q: What is the significance of the confidence level for
13 both the Marshall and the Real Child Voices that was medium?

14 A: I'm sorry. Can you -- can you ask it again?

15 Q: I'll find it on your report.

16 A: Five millimeters is a medium confidence level.

17 Q: Oh, that's what you're saying. It's in your
18 understanding that 5 millimeters gives you a medium
19 confidence level?

20 A: That's my understanding.

21 Q: And that's because somebody told you?

22 A: That's because it was part of the analyst's report.

23 Q: Yeah. What I'm looking at, just so we know, on page 25
24 in that --

25 A: Yes.

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 Q: -- third paragraph. The confidence level was medium for
2 the Marshall set based on at least one trial?

3 A: Yes.

4 Q: Okay. And it's your understanding that -- how confident
5 are you in results that have a medium confidence level?

6 A: Well, I think that they use a conservative cut score at
7 MUSC, to my understanding, my limited understanding of how to
8 interpret the PPG data. That they are more conservative than
9 other countries. And so I think that if they meet that
10 conservative cut point, I'm pretty confident.

11 Q: Do you have any firsthand knowledge or any study showing
12 that the cut point as you use it is more conservative at MUSC
13 than anywhere else?

14 A: No. Just in talking to other people and talking to
15 people in Canada, I know that they use a lower threshold.

16 MR. FALK: May I have a moment, Your Honor?

17 THE COURT: You may.

18 BY MR. FALK:

19 Q: As part of doing the test, is there any -- is there any
20 data collected on the calibration procedure?

21 A: Like, we record it. What do you mean by data?

22 Q: I mean how is it calibrated?

23 A: There's a cone that they use to calibrate it. I don't
24 have a degree that I could ever be a technician because with
25 my degree I can't go in and help somebody or touch them. I'm

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1 not a nurse or a physician. So I'll never be able to do
2 that. So I'm not really sure, but when I see Joe do it, he
3 calibrates it on a kind of cone, a cylinder that has
4 measurements, and he does that with the calibration, but
5 that's all that I can say about that.

6 Q: Is there any evidence whether or not it had to be
7 recalibrated during the middle of this test? Whether or not
8 the gauge fell off?

9 A: That I don't -- I don't know that.

10 Q: And we had heard some testimony about buttons that get
11 pressed?

12 A: Uh-huh.

13 Q: Is there any -- do you have any data in your report
14 about whether or not he missed any of those buttons or he did
15 punch the buttons at the right time?

16 A: I don't have anything to my knowledge that he failed to
17 rate any of the scenarios or that he was late. I might be
18 missing something if it is there. I don't think so.

19 Q: Do you know how many times your lab has generated a
20 false positive on this test?

21 A: I don't think that you could ever know that, how many
22 false positives, but there is data and studies to suggest
23 that it's difficult for people to obtain an erection to
24 something they're not aroused to. And so typically, the
25 literature suggests that there's a lot more false negatives.

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1 So they are able to inhibit it or they don't show erection to
2 something that they would be aroused to, but it's difficult
3 to have an erection to something that you're not aroused to,
4 which would be a false positive.

5 Q: Has your lab ever tried to validate your process as far
6 as giving the test to a group of people who are admitted sex
7 offenders and not admitted and see if there's any type of
8 correlation?

9 A: We are working on some of those studies, and Dr. Dwyer
10 is in the process of looking at admitters versus non-
11 admitters with a PPG and an fMRI. So yeah, we do undertake
12 those studies.

13 Q: Do you have -- are any of them published or any of them
14 peer-reviewed?

15 A: The -- they're -- they all will be subjected to peer
16 review. I believe, if I'm not mistaken, that the fMRI PPG
17 paper is under peer review.

18 Q: What's fMRI?

19 A: Functional Magnetic Resonance Imaging.

20 Q: Okay.

21 Q: And we are currently right now collecting the data and
22 analyzing data to look at it in our lab.

23 Q: But is there any type of quantitative measure that we
24 can look at to see how accurate your lab is?

25 A: Well, we are research certified, which is the highest

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1 level that Limestone gives a lab.

2 Q: Okay. Do they sit through every one of -- does

3 Limestone sit through every one of your evaluations?

4 A: No.

5 MR. FALK: No further questions.

6 THE COURT: Mr. Bogle, anything further?

7 REDIRECT EXAMINATION

8 BY MR. BOGLE:

9 Q: You mentioned the Larry Tyler case. If the guy comes
10 down to y'all's lab and you administer a PPG, then somebody
11 gets him to sign a consent form to agree to undergo it;
12 right?

13 A: Yes.

14 Q: That would probably be Joe Secondary?

15 A: Yes.

16 Q: Okay. And if he refuses to take it, y'all stop
17 everything, notify his lawyer, see if his lawyer can talk him
18 into it or talk to his lawyer?

19 A: Or consult with his attorney --

20 Q: Right.

21 A: -- to make sure that that is the best course of action.

22 Q: Okay. And if after both those things have happened, he
23 still refuses to take it, you stop and notify us?

24 A: Yes.

25 Q: In the Tyler case, you're aware that we took Tyler to

DR. EMILY GOTTFRIED - REDIRECT BY MR. BOGLE

1 court and had the judge hold him in contempt of court and
2 allow him to purge his contempt by admitting to -- by
3 agreeing to cooperate with the evaluation and take the PPG,
4 and he has elected just to sit in jail?

5 A: Oh, okay.

6 Q: But that's what we do. We go get a contempt order.
7 We've done that several times. Okay. You know that's what
8 we do? We know --

9 A: I think when I --

10 Q: We know --

11 A: -- said a motion, I meant an order.

12 Q: Yeah. We go to court?

13 A: Yes.

14 Q: Okay. And sometimes after we go to court, the guy then
15 takes the PPG?

16 A: Yes.

17 Q: Like Robert Haynesworth has?

18 A: Yes.

19 Q: Okay.

20 MR. BOGLE: Nothing further.

21 THE COURT: Anything further, Mr. Falk, from this
22 witness?

23 MR. FALK: Yes, I do, based on that question.

24 RECROSS-EXAMINATION

25 BY MR. FALK:

DR. EMILY GOTTFRIED - RECROSS BY MR. FALK

1 Q: Are you a member of ATSA?

2 A: Yes.

3 Q: Is one of the ATSA protocols that the person has to
4 consent to taking the PPG?

5 A: I mean I have the protocol. I could look that up. That
6 sounds correct to me. I mean we would not administer to
7 somebody who didn't consent to take it.

8 MR. FALK: I guess I have a legal argument on that
9 rather than asking her any further questions on it.

10 THE COURT: Okay. Anything further of this witness?

11 MR. FALK: No, Your Honor.

12 THE COURT: Anything further?

13 MR. BOGLE: No, Your Honor.

14 THE COURT: You may step down, Doctor.

15 THE WITNESS: Thank you.

16 MR. BOGLE: We would ask she be released.

17 THE COURT: Absolutely. Is she coming back tomorrow or

18 --

19 MR. BOGLE: I believe so.

20 THE COURT: Okay. You believe so? Okay. All right.

21 Have we talked scheduling and everything else? Yes?

22 MR. BOGLE: One moment, Your Honor.

23 THE COURT: Okay.

24 (WHEREUPON, there was a pause in the proceedings, after
25 which the proceedings resumed as follows.)

1 MR. BOGLE: Okay. As far as evidence for you on the
2 State v. Council, State v. Jones issue, I think we're done.

3 THE COURT: Okay. Can we just take a quick five-minute
4 break? You were going to pass me up three Florida cases.

5 MR. BOGLE: I was.

6 THE COURT: I just don't think they got to me. You may
7 have given them to my --

8 MR. FALK: I don't have them either.

9 THE COURT: Someone, but -- okay. And if we'll just
10 take a quick five minutes, and if you're done with Dr.
11 Gottfried, she's more than welcome to go.

12 MR. BOGLE: She can.

13 THE COURT: Okay.

14 MR. BOGLE: The cases that I'm passing up -- the first
15 one is a Circuit Court case from 2015 in Florida.

16 MR. FALK: Which one is that? Is that Finney?

17 MR. BOGLE: That's -- this is Jeff C. Rivers-Finney.
18 That's F-i-n-n-e-y, ma'am, permitting the PPG.

19 Connelly v. State is a District Court of Appeals of
20 Florida from 19 -- from 2014.

21 And finally, State v. Fullwood is a Florida District
22 Court of Appeals, 2009.

23 THE COURT: Okay. I appreciate that. Let's do this.
24 We're going to just take a quick five minutes. I'll be right
25 back. I'll take a look at these during that time.

1 Hopefully, I can peruse them that quickly and I'll just be
2 right back with you. Okay?

3 MR. BOGLE: Thank you, Judge.

4 THE COURT: Sure.

5 (WHEREUPON, there was a break in the proceedings from
6 4:16 p.m. until 4:25 p.m., after which the proceedings
7 resumed as follows.)

8 THE COURT: Yes, sir?

9 MR. FALK: Your Honor, if we move beyond the Council
10 motion and if we're going on to the second motion I made, I
11 do have a case that I'd like the Court to consider.

12 THE COURT: Please, go ahead and pass it up. Just for
13 the record, what is it?

14 MR. FALK: It's State v. McCray.

15 THE COURT: Okay.

16 MR. FALK: And it's 773 S.E.2d 914.

17 THE COURT: Okay.

18 MR. FALK: And this is -- this is a criminal law case,
19 and where I think it's possibly applicable in this --
20 applicable in this situation is if you recognize my client
21 has confrontation clause rights to confront his accusers.

22 THE COURT: Uh-huh.

23 MR. FALK: That is a case where the department -- where
24 SLED had -- I think by the time the trial came along, the DNA
25 expert was no longer with SLED; so they used another expert

1 who said that they audited her report. She audited the
2 original report and, on that basis, they tried to have -- she
3 was able to testify regarding the DNA results.

4 THE COURT: Uh-huh.

5 MR. FALK: And that case went up on appeal and although
6 under the facts in that case the issue was not prejudicial --

7 THE COURT: Uh-huh.

8 MR. FALK: -- the Court did say that where one expert
9 admits another expert's report for the reply and, you know,
10 no new information to it, it's just really parroting the
11 results of another report --

12 THE COURT: Uh-huh.

13 MR. FALK: -- it's in violation of his confrontation
14 clause.

15 THE COURT: Okay.

16 MR. BOGLE: We would just respond that this is not a
17 criminal case.

18 THE COURT: I understand.

19 MR. BOGLE: And so the situation is different. Under
20 the rules regarding the testimony of experts, Rules 702, -03,
21 and -05, the expert can testify in terms of opinion or
22 inference giving the reasons without first testifying to the
23 underlying facts or data. That's Rule 705.

24 And the bases of the opinion talks about if the
25 underlying data is of the type reasonably relied upon by

1 experts in the field, the facts or data need not be
2 admissible in evidence. And again, the McCray case is a
3 criminal case and this is a civil matter we're here on today.

4 I have other arguments relating to the whole
5 Council/Jones issue.

6 THE COURT: Okay.

7 MR. BOGLE: The question is do you want to wait to hear
8 from Burke in the morning about what he does before we go
9 into a final ruling on this or do we do it today? I'm just
10 not sure.

11 THE COURT: Okay. Well, again, I didn't know that Burke
12 was going to testify tomorrow morning. I thought he wasn't
13 coming.

14 MR. FALK: It's my understanding he's faxing me the
15 results.

16 THE COURT: He's just going to send the results over.

17 MR. BOGLE: Okay.

18 THE COURT: So we're not -- we're not having him testify
19 in any way. Okay.

20 MR. BOGLE: I apologize. I forgot that.

21 THE COURT: Okay. Let me ask you this though. Mr.
22 Falk, would it not be more appropriate to wait though until
23 you get the results and you can look at them before I make a
24 final ruling? Because I would think that would be an
25 additional grounds for you to say, well, listen, he's saying

1 X, Y, and Z, and how do I challenge that?

2 MR. FALK: Yes.

3 THE COURT: Right?

4 MR. FALK: Yes.

5 THE COURT: Because I think then it goes back to your
6 confrontation clause argument of then how do I challenge that
7 report.

8 MR. FALK: I was just afraid you were going to come back
9 in here with a decision. I was just trying to stop the train
10 a little bit to make sure you have my case law on
11 confrontation clause.

12 THE COURT: Okay. Yeah. Okay. I think you need to get
13 what is his underlying data and you would use that even more
14 to be able to question. Correct me if I'm wrong. Am I -- am
15 I --

16 MR. FALK: I don't even know -- obviously, I don't know
17 what he's going to say.

18 THE COURT: Right.

19 MR. FALK: But I would like to know what it's going to
20 say and I would like to be able to challenge the expert about
21 the full amount of -- the expert that the State's going to
22 put up. I want to be able to challenge that with that data.

23 THE COURT: Okay. Okay.

24 MR. FALK: Why did you not include this?

25 THE COURT: Right. Okay. All right. Well, then I.

1 think then I need to reserve any ruling until tomorrow
2 morning until you've at least gone ahead and seen what you
3 have because you have the multiple bases for -- you have two
4 bases for not allowing PPG results in. Okay?

5 So my thought process is this then. You both said you
6 were spending the night tonight; so is it agreeable that we
7 all are here tomorrow morning at -- the jury is coming back
8 at 9:30 -- 9:00? Is that -- I mean I'll even be here a
9 little earlier than that. So if you are both here and we're
10 all here, I can probably jump on, you know, a little bit
11 earlier than that, but I just don't want to promise. But
12 usually I get here right about 8:45.

13 MR. BOGLE: Whatever time you say.

14 THE COURT: Okay.

15 MR. BOGLE: I'm staying. So --

16 THE COURT: Are you okay? Krystal, you tell me about
17 you.

18 THE COURT REPORTER: Yeah.

19 THE COURT: Is that okay with you? Because you're here
20 as well.

21 THE COURT REPORTER: Whatever you say.

22 THE COURT: I have the longest drive apparently. So
23 mine's an hour. So let's do -- let's just be here by 9:00.

24 MR. BOGLE: Yes, ma'am.

25 THE COURT: We'll take it up and I will hear just from

1 you quickly anything that you have in reference to Burke's.

2 But my understanding is he wasn't coming back unless --

3 MR. BOGLE: I apologize, Your Honor.

4 THE COURT: Okay.

5 MR. BOGLE: If I --

6 THE COURT: Yeah.

7 MR. BOGLE: If I kind of caught the tail end of it, we
8 hired him to come up here and testify at the Council hearing.

9 THE COURT: I understand.

10 MR. BOGLE: You just hired him to go look at those
11 reports, didn't you?

12 THE COURT: Exactly.

13 MR. FALK: Well, it was my only choice.

14 MR. BOGLE: Yeah.

15 THE COURT: Exactly.

16 MR. BOGLE: Well, he quoted you a price. So he's
17 working both sides and we're happy with that.

18 THE COURT: Exactly. And I think -- I think Dr. Dwyer
19 agreed that you probably needed them I think on top of all of
20 that. So okay.

21 So what else do we have for tonight? What other motions
22 in limine did we have outstanding? I know there was --

23 MR. BOGLE: The State has two motions in limine, Your
24 Honor. If you don't have them, I can pass them up.

25 THE COURT: I have them right here.

1 MR. BOGLE: Okay.

2 THE COURT: So your first motion in limine?

3 MR. BOGLE: The first motion in limine has to do with
4 prohibiting counsel from arguing that he's going away for
5 life or going to a prison or being punished, civilly
6 committed for life or anything like that.

7 As Your Honor is aware, the actual location of the
8 sexually violent predator treatment program --

9 THE COURT: Is the old death row.

10 MR. BOGLE: -- is two unused wings, Edisto and the one
11 next door. They're building a new facility as we speak. I'm
12 not sure when it opens. I think October or November is what
13 I'm told.

14 In any event, we have to prove the existence of the
15 sexually violent crime and whether or not he has the mental
16 abnormality that would make him likely to reoffend if not
17 confined for long-term care, control, and treatment.

18 THE COURT: Uh-huh.

19 MR. BOGLE: Anything else would distract the jury, could
20 prejudice the State, and be unfair to both sides, talking
21 about the where and how bad a place it is and stuff like
22 that. Now, we're perfectly agreeable to telling everyone
23 that he'll be securely confined, that he can't leave.

24 THE COURT: Uh-huh.

25 MR. BOGLE: But calling it a prison, a death -- a former

1 death row, behind the wire at Broad River, things like that I
2 think are out of bounds and place an additional burden on the
3 State and may prejudice the jury.

4 THE COURT: Mr. Falk?

5 MR. BOGLE: That's our first motion.

6 MR. FALK: I never say death row, but this is more than
7 just going to a mental hospital. I think I'm entitled to
8 some latitude there just so that the jury can determine
9 whether or not the treatment he needs has to be done, you
10 know, where he's going to be -- where it's going to be. He's
11 not going to have access to come and go, you know.

12 THE COURT: Uh-huh.

13 MR. FALK: He's not going to a mental hospital.

14 THE COURT: Well, it's confinement and I think there's
15 nothing wrong with saying it is confinement, which means you
16 can't leave.

17 MR. BOGLE: That's fine.

18 THE COURT: And the jury needs to understand that.

19 MR. FALK: That's fine.

20 THE COURT: It's a secure facility. Okay. I just -- I
21 don't know what verbiage you usually use. I just -- let's
22 just not say anything sensational, but, you know --

23 MR. FALK: I usually don't go down that path.

24 MR. BOGLE: That's my --

25 THE COURT: You just -- you don't strike me as that

1 person. So --

2 MR. BOGLE: That's my standard motion.

3 THE COURT: Yes.

4 MR. BOGLE: I use it on Mr. Falk anyway. I know he
5 hasn't yet, but it's my standard motion.

6 THE COURT: Okay.

7 MR. BOGLE: The second motion in limine has to do with
8 treatment. Now, in my first motion, I outlined to the Court
9 what we have to prove.

10 THE COURT: Right.

11 MR. BOGLE: Any testimony about type of treatment, how
12 long of treatment, what he goes to, the type of treatment he
13 gets, that sort of thing is not what we have to prove.

14 THE COURT: Uh-huh.

15 MR. BOGLE: It can distract the jury. It can be mere
16 speculation --

17 THE COURT: Right.

18 MR. BOGLE: -- because the testifying witness, Dr.

19 Gottfried, will have no idea what kind of treatment or how

20 much he needs until he gets there, and it's handled by a

21 separate thing, Correct Care, anyway. Even if Dr. Gehle was

22 testifying as the State's witness, it's handled by Correct

23 Care, not by the doctors who testify at the pre-commitment

24 phase.

25 So going into the type of treatment, what kind of

1 treatment it is, is not what we have to prove, will not aid
2 the jury in making a finding, and could mislead the jury or
3 distract them.

4 THE COURT: Okay.

5 MR. BOGLE: It could also be speculative. Now, I have
6 no problem in arguing whether or not he has to be confined
7 for treatment versus outpatient treatment.

8 THE COURT: Uh-huh.

9 MR. BOGLE: But as far as the specific types of
10 treatment, I think that's out of bounds.

11 THE COURT: Okay. Mr. Falk?

12 MR. FALK: I think it's inbounds whether or not the
13 treatment, if he needs it, has to be done in a secure
14 facility in order to make the treatment more effective.

15 THE COURT: Uh-huh.

16 MR. FALK: I mean if he needs to be a secure facility
17 because he's some kind of risk, that's one thing.

18 THE COURT: Right.

19 MR. FALK: But I think the jury needs to know the
20 treatment is just still talk therapy, which is something that
21 you could get on the outside. I need to have some kind of
22 way to get in there knowing that is not some type of medical
23 procedure, it's not chemical castration, it's just -- it's
24 just talking, and it doesn't have to be done in a prison.

25 THE COURT: And how -- who does that come in through?

1 Dr. Gehle?

2 MR. FALK: Anybody who knows.

3 THE COURT: Okay. So in your case, who is that?

4 MR. FALK: Well, it won't be Dr. Gehle because I don't
5 think she has any firsthand knowledge.

6 THE COURT: Okay.

7 MR. FALK: But I think it would be interesting whether
8 or not the State's expert knows what kind of treatment he
9 needs.

10 THE COURT: The concern I have is this. I can't have
11 you arguing something that doesn't come in through evidence.
12 So if you can get it in some way and it's appropriate and
13 relevant, that's fine, but I can't have you testifying.

14 MR. FALK: No. I'm going to ask Dr. Gottfried whether
15 or not she knows what kind of treatment he's going to get, if
16 he needs it.

17 MR. BOGLE: But that's where it's getting out of bounds
18 because she's not trained in what Correct Care does. She
19 doesn't know what Correct Care does.

20 THE COURT: Well, if she testifies and says I don't
21 know, then doesn't that end the inquiry? If she says I don't
22 know, then we're done.

23 MR. FALK: I'm fine with I don't know.

24 MR. BOGLE: I'm not sure if the question should be
25 allowed because it makes -- it sounds like she doesn't know

1 what she's doing.

2 MR. FALK: Okay.

3 MR. BOGLE: And see, treatment is out of bounds here
4 because no one knows what type of treatment even until he
5 gets there, and it's administered by a separate private
6 agency.

7 THE COURT: I don't see any reason why she can't say
8 that I'm not the one that determines his treatment in this
9 case. That is done by a --

10 MR. BOGLE: That's fine.

11 THE COURT: -- separate whatever.

12 MR. BOGLE: He can ask her.

13 THE COURT: I don't think it makes her look not
14 competent or like she doesn't know. I think she just says
15 that's not what I've been hired to do and that's not what I
16 do. I'm here to determine whether or not he meets the
17 statutory criteria for this.

18 And treatment is -- I mean really treatment is not their
19 concern. It isn't the jury's concern. So I think you could
20 very limitedly ask her -- I mean if she knows and has some
21 experience in it, that's one thing, but if she doesn't, then
22 --

23 MR. FALK: That's fine.

24 THE COURT: I'm confident she'll say what she needs to
25 say. Okay?

1 MR. BOGLE: Thank you, Your Honor. That's the only two
2 pretrial motions the State has.

3 THE COURT: Okay. What about you, Mr. Falk?

4 MR. FALK: Well, you know, we're putting the PPG motions
5 aside.

6 THE COURT: Right.

7 MR. FALK: And then it's my standard one also is I don't
8 think the State needs to go into the legislative history of
9 the SVP Act in opening statement. I don't know how relevant
10 that is. I don't know. You know, if I try a criminal case,
11 I don't think the State comes in and puts in evidence about
12 that crack cocaine and methamphetamines are a bad thing. I
13 mean I don't see how it's relevant and I would just assume
14 that we don't talk about the legislative history of the SVP
15 Act.

16 THE COURT: So this is obviously something you've heard
17 Mr. Bogle do before; correct?

18 MR. FALK: Yes.

19 THE COURT: Okay. And I don't know because we've said
20 this before. I have actually never jury-tried -- in all my
21 12 years on the bench, I've never jury-tried one of these
22 cases. Everyone has just voluntarily bench-tried them to me.
23 So when I get a bench trial, I don't let anyone do an opening
24 statement because I don't care what the arguments are from
25 the lawyers. I want to hear what the experts have to say.

1 So --

2 MR. BOGLE: In front of you is this statute.

3 THE COURT: What is it that you say? What is it that
4 you say?

5 MR. BOGLE: In front of you is part one of the statute.

6 THE COURT: Okay.

7 MR. BOGLE: See the two bracketed paragraphs?

8 THE COURT: Yes.

9 MR. BOGLE: This jury came here thinking they're going
10 to hear a wreck case, a med mal case, or something like that.
11 They have no idea what a sexual predator case is.

12 So in my opening statement, sometimes I will read to
13 them verbatim the first bracketed paragraph to tell what
14 we're here about. And my position is it's part of the
15 statute. It's the law. I can tell them what the law is.

16 Now, of course, they're also told later on that if your
17 version of the law differs from what Mr. Falk or I say, they
18 have to go by yours, but I usually read that first bracketed
19 paragraph to them to give an idea what they're here for.

20 THE COURT: Okay.

21 MR. FALK: I don't like the language mentally abnormal
22 and extremely dangerous group of sexually violent predators.
23 I think that's prejudicial language, especially since that's
24 why we're here, and that makes it sound like they think he's
25 an extremely dangerous sexually violent predator.

1 THE COURT: I don't see that in these first two
2 paragraphs, which is what he showed me. Oh, I'm sorry. It's
3 the very first sentence. I apologize. The general assembly
4 defines it.

5 Well, I actually have a little concern with them saying
6 extremely dangerous as well. I think -- I would be fine if
7 he just said this and just said someone that is mentally
8 abnormal, because that's what he's required to prove, and
9 dangerous. I don't know the extremely dangerous is --

10 MR..BOGLE: They wrote it. I didn't.

11 THE COURT: Yeah.

12 MR. BOGLE: What I can do, Your Honor --

13 THE COURT: Yes?

14 MR. BOGLE: If you're not comfortable with me reading it
15 verbatim, I'll paraphrase to the jury what the case is about.

16 THE COURT: And that's better because this isn't an
17 argument.

18 (WHEREUPON, there was a pause in the proceedings, after
19 which the proceedings resumed as follows.)

20 MR. FALK: I have a concern with the jury knowing that
21 under the statute, the statute reads that he's entitled to an
22 annual review every year. Because (a) they don't always get
23 their annual review and (b) I would think that just like we
24 can't talk about treatment, we can't talk about when he can
25 get out of there because I think it let's the jury say --

1 it's too easy for the jury to say, well, we'll just send him
2 up there for a year and he'll get out in a year. Whereas, if
3 we had somebody in here from Correct Care, they'll tell you
4 that the normal track is five to six years.

5 THE COURT: Uh-huh.

6 MR. FALK: So I think --

7 THE COURT: How is this not the counter to the he's
8 going to be in a confined facility? I mean --

9 MR. BOGLE: It's going to come up.

10 THE COURT: Do you normally say that? I mean you
11 normally say that they're allowed or --

12 MR. BOGLE: I don't say that.

13 THE COURT: Where does that come up?

14 MR. BOGLE: Here's where it's going to come up. It's
15 going to come up during -- first off, it's kind of hard to
16 avoid in the qualification of both experts --

17 THE COURT: Okay.

18 MR. BOGLE: -- because part of what they do for a living
19 --

20 THE COURT: Is an annual review.

21 MR. BOGLE: -- is annual reviews.

22 THE COURT: Okay.

23 MR. BOGLE: Now, am I going to ask my witness if he's
24 committed will he be entitled to an annual review? No, I
25 don't do that anymore. I used to in the early days. I don't

1 anymore.

2 THE COURT: Uh-huh.

3 MR. BOGLE: But we may stumble into it when the experts
4 are talking about their qualifications.

5 THE COURT: Okay. I don't want you to specifically ask
6 that question. I don't think though it's error if it happens
7 to come in. I just say we try to stay away from it a bit
8 just so we're not hounding on that.

9 MR. FALK: Thank you.

10 MR. BOGLE: But just for fair warning then, during the
11 qualification of my expert, as well as his, should we omit
12 any questions about them doing annual reviews or just let it
13 be part of their expertise?

14 MR. FALK: Or other reviews.

15 THE COURT: I mean why can't we just do reviews, you
16 know? We're required to do reviews. It doesn't have to say
17 when. You don't have to say annually. Just say reviews.

18 MR. BOGLE: I'm just trying to call it what it is.

19 THE COURT: Okay. I understand and appreciate that.

20 MR. BOGLE: I think in the last trial we did, it came
21 out during qualifications, but we didn't ask anything about
22 it on direct.

23 THE COURT: Okay.

24 MR. BOGLE: Isn't that what happened?

25 MR. FALK: Yes.

1 MR. BOGLE: With Filyaw?

2 MR. FALK: Yes.

3 THE COURT: I think you all are speculating on something
4 that the jury would not even catch, that these people are
5 allowed an annual review provided by statute, at least
6 supposed to.

7 MR. FALK: No. I got some feedback from a juror one
8 time.

9 THE COURT: You have?

10 MR. FALK: But that's --

11 THE COURT: So if we err on the side of caution, what
12 you don't want to happen is if the jury errs on the side of
13 caution, it's okay because in another year another twelve
14 people will get to sit and listen to this whole thing over
15 again and decide. So I understand your argument.

16 Let's just try to stay away from it. Let's avoid annual
17 review. I think if it does come in and it becomes relevant,
18 at that point I can address it. I don't think it's going to
19 be, you know, prejudicial error though. So...

20 MR. FALK: And I don't know what Dr. Gottfried's
21 testimony is going to be, but I know that my client has some
22 criminal charges which I don't think under a 402/403 is going
23 to be relevant. I think you as the gatekeeper can determine
24 that it's more prejudicial than probative. He has a 1979
25 charge for grand larceny of a motor vehicle, and I think just

1 the time alone -- and that charge was nolle prossed. So I
2 don't know what happened to that charge.

3 THE COURT: Okay. My question to her would be is
4 whether or not she took that into consideration in making her
5 opinion, and I don't know the answer, Dr. Gottfried. You
6 tell me.

7 DR. GOTTFRIED: I mean I do review the criminal history.
8 We need it to score the Static 99. Prior offending does
9 factor into my opinion.

10 THE COURT: Okay. So we have the 1979 nolle prossed --
11 and you factored in that it was nolle prossed, that it was
12 dismissed? I mean you consider that as well? You don't take
13 that in your head as a conviction, do you?

14 DR. GOTTFRIED: Some of the measures, you just count
15 charges.

16 THE COURT: Okay.

17 DR. GOTTFRIED: And not dispositions.

18 THE COURT: Okay.

19 DR. GOTTFRIED: And you look at criminal versatility for
20 the psychopathy measures.

21 THE COURT: Okay.

22 DR. GOTTFRIED: So I do look at charges and convictions.

23 THE COURT: Okay. So --

24 MR. FALK: Well, she didn't. If she's talking about
25 that's relevant on the psychopathy measure, he wasn't a

1 psychopath. He didn't hit the level to be scored under the
2 Hair as a psychopath. I don't see how it would be relevant.

3 THE COURT: So how is it relevant then, Mr. Bogle?

4 MR. BOGLE: Well, it's one of the many data points she
5 looks at. She looks at eight or ten different data points.
6 Some help the guy; some don't.

7 THE COURT: Right.

8 MR. BOGLE: And she's prepared to testify about all of
9 them.

10 THE COURT: Okay.

11 MR. BOGLE: Even the ones that help them.

12 THE COURT: Right.

13 MR. BOGLE: I mean she's -- she's looked at eight or ten
14 different things to see if he scores anywhere. And the ones
15 that help him, help him. The ones that don't, don't.

16 THE COURT: Okay. So that was a 1979 conviction? I'm
17 sorry. Charge, not a conviction. It was nolle prossed for
18 grand larceny you said?

19 MR. FALK: Yeah.

20 MR. BOGLE: Of a motor vehicle.

21 THE COURT: Okay.

22 MR. FALK: And then there was a 1991 fraudulent check
23 charge. I don't know if that was a misdemeanor offense or a
24 general sessions level offense, but that was also nolle
25 prossed.

1 THE COURT: Mr. Bogle, on --

2 MR. BOGLE: Again, it all goes --

3 THE COURT: -- his rap sheet -- okay.

4 MR. BOGLE: -- as part of the basis. I mean I'm not
5 going to dwell on these things and I don't mind her saying
6 the records showed it was nolle prossed or dismissed, but if
7 it goes for the basis of her opinion in trying to determine
8 whether or not he's a risk to reoffend, I think it's a
9 foundation for opinion or a basis for her opinion. It would
10 come in.

11 THE COURT: He's just going to argue how is that
12 relevant to him being a sexual predator, and I guess if she
13 uses it in her opinion and statistically, then I guess it
14 would be relevant. At least it is to her --

15 MR. BOGLE: And he can cross-examine her.

16 THE COURT: -- in making her opinion. I think to a
17 limited basis, I think she can testify to it if it factors
18 in, but it has to be at the point relevant to what her
19 opinion is. So I think she can testify to it.

20 MR. FALK: And if that's your decision, I know what your
21 answer is on my last one. So I'll withdraw the question.

22 THE COURT: Which is what? Just -- no, don't do that.
23 Just put it on the record.

24 MR. FALK: 1985 charge for DUI, and I'm just saying that
25 some charges are so old that they may be no longer relevant

1 to his current conduct. He had a 1985 charge for DUI, a 1988
2 charge for criminal domestic violence, and a 1995 charge for
3 simple possession of marijuana, all of which I think are
4 extremely old and not necessarily relevant. Maybe if they
5 had occurred within the last 10 years, but I mean my concern
6 is everything to -- I mean --

7 THE COURT: Oh, I agree.

8 MR. FALK: Everything is relevant at some point of view,
9 but as the gatekeeper, you've got to decide --

10 THE COURT: Right.

11 MR. FALK: -- what's going to be more prejudicial.

12 THE COURT: Than probative. All right. Actually, let
13 me sleep on that because I do have some concerns.

14 MR. BOGLE: If you'll just -- our argument would just be
15 if it's part of the basis for her opinion and she explains
16 how it's relevant --

17 THE COURT: Well, so is her PPG, but I haven't let that
18 in yet either. So I don't know. So I think that's how we
19 could look at that one.

20 It may be something that she used. I mean obviously
21 we're working on a different standard of we don't want this
22 jury to just presume that because he stole a vehicle at one
23 point, was driving under the influence, and -- I'm sorry --
24 wrote a bad check at some point that he is a menace to
25 society and for that reason we should lock him up as opposed

DR. EMILY GOTTFRIED - DIRECT BY THE COURT

1 to him being a sexually violent predator, and that's why he
2 needs to be civilly committed and treated. So I just need to
3 make sure that it's not on that basis that the jury does
4 that, which is why we don't allow prior bad acts typically.

5 So anyway, let me think about that. They are remote in
6 time and I'm not so sure. I may need testimony from Dr.
7 Gottfried about how that weighs in with her opinion.

8 MR. BOGLE: Do you want to hear her now?

9 THE COURT: I don't know. Do you -- are you okay?

10 DR. GOTTFRIED: Yeah.

11 THE COURT: Come on. Actually, you know, yeah, come on
12 up. I'm just going to remind you that you're still under
13 oath. Is that acceptable?

14 DR. GOTTFRIED: Yes.

15 THE COURT: All right. Come sit here. You know what
16 the question is. It's actually nice having the experts back
17 here so they can actually hear the lawyers' arguments because
18 we all know we're on the same page.

19 Go ahead and tell me how the previous convictions, and
20 particularly the ones, you know, further back, play into your
21 opinion.

22 DR. GOTTFRIED: Well, so I review all of the data, and
23 all of the data kind of factors in to how I think about the
24 cases, kind of putting the cases together.

25 THE COURT: Uh-huh.

DR. EMILY GOTTFRIED - DIRECT BY THE COURT

1 DR. GOTTFRIED: So I guess at least two of the measures
2 that I use, you have to count up the number of charges and
3 the convictions that they had, criminal versatility, so you
4 look at, like, the different kinds of crime that they
5 committed because all of that is related to psychopathy or
6 future reoffending or dangerousness. So it factors into my
7 opinion that way.

8 THE COURT: Okay.

9 DR. GOTTFRIED: Past behavior kind of predicts -- it's
10 the best predictor of future behavior.

11 THE COURT: Uh-huh.

12 DR. GOTTFRIED: So I think about it like that,
13 especially in terms of past sexual offenses. And then so if
14 they reoffend, you can also see, like, how violent it would
15 be if they have a lot of violent previous offenses.

16 THE COURT: Okay. And in this case, would you consider
17 any of his previous offenses violent?

18 DR. GOTTFRIED: Probably just the domestic violence one.

19 THE COURT: Okay.

20 CROSS-EXAMINATION

21 BY MR. BOGLE:

22 Q: And why domestic violence? Why is that more on your
23 radar in this type of evaluation than, say, another type of
24 conviction, like an attempt to steal a car or something like
25 that?

DR. EMILY GOTTFRIED - CROSS BY MR. BOGLE

1 A: Well, it's violent in nature and so if that tells us
2 something that if he does reoffend how violent that re-
3 offense will be. Also, violent offenses factor into the
4 Static 99 score, and there's some literature about domestic
5 violence and future offenses, but I don't think that's
6 relevant to this.

7 Q: Okay.

8 THE COURT: Mr. Falk?

9 CROSS-EXAMINATION

10 BY MR. FALK:

11 Q: Do you know of anything about these charges other than
12 what was off his police report?

13 A: Just from the NCICs and then whatever he remembered when
14 I asked him about them.

15 Q: Okay.

16 A: So not a lot because they were pretty old.

17 Q: So whether or not they were particularly violent you
18 would not know?

19 A: No. Huh-uh.

20 THE COURT: Okay. So it's just -- and the reason why I
21 ask you that is when we talk about criminal domestic violence
22 under the old statute -- and I'm assuming it was that old --
23 we're talking about all you have to do is threaten someone.
24 You didn't have to physically touch them.

25 Also, I can tell you that legally criminal domestic

1 violence in the third degree, which is what -- now, we have
2 degrees, but before that we had first offense, second
3 offense, third offense. Those are misdemeanors and they're
4 not considered violent offenses according to statute. So
5 again, I'm trying to figure that in as well, Mr. Falk.

6 MR. FALK: The other point I thought of and then forgot
7 when I sat down is I mean the only thing that we're here
8 today is to find out the risk to reoffend crimes of sexual
9 violence in the future. So past performance versus
10 predicting a future performance I think can be prejudicial
11 here because we're not worried about whether or not he's
12 going to steal a car or write a bad check.

13 THE COURT: The only difference I would say though is
14 what you worry about in a criminal case is whether or not
15 there is action in conformity with, and that's whether or not
16 they commit a certain offense. And this is a predictor. I
17 mean that's kind of what we're doing here in this is
18 predicting whether or not he is likely to reoffend.

19 So I would say that that's where I think the leeway is
20 allowed and I think the potential of a past helps you predict
21 what would happen in the future. I don't know. I'm just
22 thinking through this, y'all.

23 Again, I would completely agree in a criminal case
24 whether or not they, you know, committed the crime that
25 they're being, you know, charged with and tried on, whether

1 or not it was actually in conformity with, I would agree that
2 again you wouldn't allow that, but in this case because we're
3 talking about whether or not he is a sexually violent
4 predator likely to reoffend, I think it may come in. I
5 understand how you use it as something to weigh.

6 So I don't know. Let me think about it just a little
7 bit longer because that is the one that I'm somewhat
8 concerned of because you put emphasis on that as well. Let
9 me think about that too, Mr. Falk. Okay?

10 MR. FALK: Thank you.

11 THE COURT: Okay. Anything else from anyone?

12 MR. FALK: I just wanted to have these marked as Court's
13 Exhibit 1.

14 THE COURT: Yes.

15 MR. FALK: And these --

16 THE COURT REPORTER: Two.

17 MR. FALK: Three, four, five.

18 THE COURT: Two?

19 MR. FALK: Or two, whatever.

20 MR. BOGLE: Are these your motions?

21 MR. FALK: Yeah. This is my voir dire.

22 THE COURT: Yes. We talked about this. Typically --
23 Krystal, I hope this is okay for you. Appellate defense has
24 been telling them that they need to file everything just to
25 make sure that the record gets more quickly to the Court of

1 Appeals and the Supreme Court because it seems to take
2 longer. Don't ask me why. So I told Mr. Falk that he is
3 certainly able to file as Court's exhibits what he requests
4 in his motions.

5 MR. FALK: Right.

6 THE COURT: It still doesn't, you know, change that you
7 have to object contemporaneously, but I understand why they
8 want it and why it makes it more easy.

9 MR. FALK: So I had the two PPG motions.

10 THE COURT: That's fine.

11 MR. FALK: My general motion in limine, what we talked
12 about, what we just discussed.

13 THE COURT: Okay.

14 MR. FALK: And I've also tendered my proposed jury
15 instructions --

16 THE COURT: Okay.

17 MR. FALK: -- that we put in all at once.

18 THE COURT: All right.

19 MR. FALK: And these are the same ones that were in my
20 email.

21 THE COURT: Thank you. Okay.

22 MR. BOGLE: And I'll go ahead and have her mark my two
23 motions in limine.

24 THE COURT: Absolutely.

25 MR. BOGLE: My jury charge you've got. Do you want me

1 to mark that separately? I don't --

2 THE COURT: You don't need to.

3 MR. BOGLE: They don't tell us. Appellate defense
4 doesn't call us too much.

5 THE COURT: Yeah. I understand that. Okay. I think
6 we're fine. You can file whatever you want. I know some
7 judges these days are getting upset by all the filings and I
8 want you to make your record. That's to me the most
9 important thing and I want it to be able to, you know, be
10 quickly heard and disposed of by the appellate court. So I'm
11 fine with that.

12 MR. BOGLE: That was good enough I think for last week
13 in Florence.

14 THE COURT: Okay.

15 MR. BOGLE: For me as a first, we went ahead and filed
16 them like this.

17 THE COURT: Okay. And that's fine. You may step down,
18 Dr. Gottfried. You're on the hot seat for forever; right?

19 Okay. Tomorrow morning, 9:00. Everyone is fine with
20 that? No issues? You all are okay with 9:00 with him?

21 THE GUARD: Yes, ma'am.

22 THE COURT: Okay. And I think we should run normally
23 tomorrow from -- we'll start the trial with the jury at 9:30.
24 We'll run until roughly, you know, 5-ish.

25 Do you think, Mr. Falk, we're going to be able to get up

1 everybody by tomorrow? Do you think we're in pretty good
2 shape for that?

3 MR. FALK: Last time, if we follow the same format as
4 Florence, which was two weeks ago --

5 THE COURT: Uh-huh.

6 MR. FALK: There was --

7 THE COURT: That was Craig Brown or Hyman?

8 MR. FALK: Yeah. It was Craig Brown and I had an
9 expert.

10 THE COURT: Okay.

11 MR. FALK: And so it's going to be a little bit like
12 that, and I probably still could've gotten my client on and
13 off the stand. I had one other fact witness, not necessarily
14 his family, but that Alphonso Kline I think has something
15 that the jury would like to know, and I want to be able to
16 get him in, if we could. But that's, like, six questions.

17 THE COURT: And that's fine. If it for some reason
18 bleeds over into the next day and needs to, that's absolutely
19 fine. I'm just looking for scheduling reasons.

20 MR. FALK: I think it could get done.

21 THE COURT: Okay.

22 MR. FALK: If we can maybe go a little bit longer, you
23 know.

24 MR. BOGLE: Well --

25 THE COURT: And I'm fine with that and I'm pretty quick,

1 although Craig Brown is too. So --

2 MR. BOGLE: Another question is --

3 THE COURT: Yeah.

4 MR. BOGLE: In the trial last week, his client opted not
5 to take the stand. So --

6 THE COURT: You.

7 MR. BOGLE: -- the case finished a lot quicker.

8 THE COURT: Okay.

9 MR. BOGLE: The question is going to -- and my question
10 of you is are you, like most judges, you don't send it to a
11 jury after, say, 4:00?

12 THE COURT: Oh, no. We're not going to argue and charge
13 tomorrow. It's just too late.

14 MR. BOGLE: Okay.

15 THE COURT: And this is too important. So as I told you
16 before, what I anticipate is going to happen is that even if
17 all we're doing is arguing and charging, it's going to happen
18 on Wednesday. All the, you know, experts will be gone and
19 we'll probably not be able to start until late. I think I
20 already pretty much told this jury that.

21 MR. BOGLE: Right.

22 THE COURT: I'm guessing we'll be coming in at 11,
23 11:30-ish, is what's going to happen. If that's the case, we
24 will bring in lunch for the jury and we'll argue and charge,
25 I'll feed them while they're deliberating, and we'll go from

1 there. Okay? That's what I anticipate happening, you know,
2 unless you all finish at noon tomorrow, which I don't see
3 happening. Okay?

4 MR. BOGLE: I don't see that happening.

5 THE COURT: Okay. All right. Y'all have a good
6 evening. Drive safe, everyone. We'll see you all in the
7 morning, 9:00.

8 (WHEREUPON, the following Court's exhibits were marked.
9 Respondent's voir dire was marked as Court's Exhibit
10 Number 2. PPG motion was marked as Court's Exhibit
11 Number 3. Respondent's motion was marked as Court's
12 Exhibit Number 4. Respondent's proposed jury charges
13 were marked as Court's Exhibit Number 5. Respondent's
14 motion was marked as Court's Exhibit Number 6. State's
15 motion was marked as Court's Exhibit Number 7. State's
16 motion was marked as Court's Exhibit Number 8.)

17 (WHEREUPON, the proceedings adjourned for the day at
18 4:55 p.m.)

19 FEBRUARY 27, 2018

20 (WHEREUPON, the proceedings resumed at 9:06 a.m.)

21 THE COURT: Good morning. All right. Mr. Falk, what
22 did you get from Dr. Burke?

23 MR. FALK: I just got it. What I'm hoping is I can
24 email it to somebody to get it printed out.

25 THE COURT: Yes.

1 MR. BOGLE: It's coming to her right now. Here's a
2 spare copy.

3 THE COURT: Okay.

4 MR. BOGLE: I sent it to your secretary thinking she was
5 here.

6 THE COURT: No.

7 MR. BOGLE: Not so.

8 THE COURT: And Crystal is not here yet either. She's
9 apparently still driving from Summerville.

10 MR. BOGLE: Okay.

11 MR. FALK: Your Honor?

12 THE COURT: Yes.

13 MR. FALK: I guess, you know, this sort of moved fast
14 yesterday.

15 THE COURT: Uh-huh.

16 MR. FALK: This is still my work product unless I want
17 to do something with it, isn't it?

18 THE COURT: Pardon?

19 MR. FALK: This is my expert; right? What I'm saying --
20 I guess Mr. Bogle has it, but it's still my work product
21 unless I'm going to put it in.

22 MR. BOGLE: Well, I think the whole point was that Dr.
23 Burke was asked by the Court to go look at Dr. Dwyer's tables
24 and labs and things. I know you paid him, but it kind of
25 made him the Court's expert.

1 THE COURT: I don't see how this is -- I don't see how
2 this is your -- I mean basically what I thought you were
3 asking him for was just the backup raw data, but this seems
4 to be an interpretation of it now. Is that correct?

5 MR. FALK: Yeah. And that's not what I'm going to get
6 printed. I've got another email that's got tables in it that
7 I'm trying to email to you.

8 THE COURT: Okay. Okay. So do you want us not to look
9 at this or do you want us to look at this?

10 MR. FALK: I don't want the jury to look at it until I
11 decide.

12 THE COURT: Well, the jury isn't going to look at it
13 unless someone introduces it into evidence. So --

14 MR. FALK: Right.

15 THE COURT: So unless you put it in evidence. Okay.

16 MR. BOGLE: Now, here's a PDF of that report, which
17 includes the screenshots he references.

18 THE COURT: Okay.

19 MR. BOGLE: And I just sent you another one. There's
20 two attachments.

21 MR. FALK: That's the one I'm sending her.

22 MR. BOGLE: Yeah. It has -- it has a fancier version of
23 this report with letterhead on it, the report the judge is
24 looking at, and it's got -- it's got some data tables.

25 THE CLERK: Okay. I just received it.

1 MR. BOGLE: Yeah. There it is, the data tables. I
2 don't know. There's three pages of data tables.

3 THE CLERK: Now, this is a black-and-white printer.
4 There's no color here.

5 MR. BOGLE: That's fine.

6 THE CLERK: Is that okay?

7 MR. BOGLE: I think that's okay.

8 THE CLERK: Because I see that thing is in color.

9 MR. BOGLE: Yeah.

10 THE CLERK: Okay.

11 (WHEREUPON, there was a pause in the proceedings, after
12 which the proceedings resumed as follows.)

13 THE COURT: Mr. Falk, I'm going to step down for about
14 ten minutes, give you all a little bit of opportunity to look
15 at this, and then someone is going to have to somewhat
16 explain to me the graph at the end and if it relates to trial
17 number two, which is what I think it says, but possibly not.

18 So again, you all look at it and I'll come back in about
19 ten minutes. Okay?

20 MR. FALK: Thank you.

21 MR. BOGLE: Thank you, Your Honor.

22 THE COURT: Sure.

23 (WHEREUPON, there was a break in the proceedings from
24 9:13 a.m. until 9:43 a.m., after which the proceedings
25 resumed as follows.)

1 THE COURT: All right. Just a quick report.

2 Apparently, one of our jurors in the parking lot tripped
3 and she is fine. She is in the jury room. She wants to
4 proceed, but I can tell you that when they all come out, I am
5 going to explain to them that that's why we have alternates.
6 That they don't need to be concerned about the whole process
7 having to be done over again based on if something happens to
8 one of them. My understanding is she is insisting on going
9 forward. She just stumbled and she's okay. She didn't
10 require medical attention in any way.

11 So any objections on the record from either side?

12 MR. BOGLE: No. That sounds fine, Your Honor.

13 THE COURT: Okay.

14 MR. BOGLE: It's up to her.

15 THE COURT: That's what I said. So anyway, that's fine.
16 I'll just make sure I let them all know.

17 All right. Mr. Falk? Any objection to that in any way?

18 MR. FALK: I have no objection to that.

19 THE COURT: Thank you, sir. Okay.

20 MR. FALK: I don't know if we --

21 THE COURT: We're going to go on the record. Yeah,
22 let's go ahead. I think we need to determine --

23 MR. FALK: Okay.

24 THE COURT: -- what we're doing with the PPG.

25 MR. FALK: Your Honor, I'm not sure if I don't need more

1 time.

2 THE COURT: Okay.

3 MR. FALK: And let me just explain. In the time that I
4 got --

5 THE COURT: Okay.

6 MR. FALK: -- I've reviewed the graphs that Dr. Burke
7 provided last night.

8 THE COURT: Uh-huh.

9 MR. FALK: I've made some assumptions as to which graph
10 was the graph of the Marshall set and which graph was the
11 graph of the Real Child Voices set. My concerns at this
12 point are that the Marshall set is entirely inconsistent
13 because, for example, it's showing a passive prepubescent
14 female scenario with a min/max where it was peak minus base.

15 THE COURT: Uh-huh.

16 MR. FALK: So, peak arousal minus base --

17 THE COURT: Okay.

18 MR. FALK: -- line presumably. We got -- one of them
19 was a 1.42.

20 THE COURT: Uh-huh.

21 MR. FALK: And another one was a 5.58. And then there's
22 another test that is passive prepubescent male.

23 THE COURT: Uh-huh.

24 MR. FALK: That one is relatively consistent. All
25 right.

1 THE COURT: Uh-huh.

2 MR. FALK: Let's go to sexual violence prepubescent
3 male. One test shows a 7.4.

4 THE COURT: Uh-huh.

5 MR. FALK: The other test -- that was 12. That was
6 trial 20. Trial 40 showed a 4.82.

7 And on non-sexualized violence of a prepubescent male,
8 test number 13 showed a 4.91, 23 showed a 9.35, 34 showed a
9 7.12.

10 And then, for example, on some of the other ones, non-
11 sexualized violence prepubescent females, test number 24
12 showed a 1.42. Test number 33 under the same heading shows a
13 0.36.

14 Sexualized violence prepubescent -- what I just said was
15 non-sexualized violence. Now, under the category of
16 sexualized violence prepubescent female, we show a 1.99 and a
17 3.12.

18 So I don't understand, unless Dr. Gottfried can explain
19 to me those differences.

20 THE COURT: Uh-huh.

21 MR. FALK: I'm not sure. I mean if that's their
22 witness, this is their test, she should be able to explain
23 some of the internal inconsistencies and the cross
24 inconsistencies between the two tests.

25 For example, on the Real Child Voices under a scenario

1 described as coercive female child, it shows a 5.7.

2 THE COURT: Uh-huh.

3 MR. FALK: Where under the Marshall set, what looks to
4 be a coercive female child, which was scenario 6, it showed a
5 1.55. So there we have cross-test inconsistency. I'm afraid
6 Dr. Burke has provided me more questions than answers.

7 THE COURT: Do you want to respond to that, Mr. Bogle?

8 MR. BOGLE: Yes, Your Honor. Okay.

9 The way I left the courtroom yesterday -- and I kind of
10 am thinking of the last time we tried a case and one of the
11 -- this was Judge Brown over in Florence, and one of his
12 concerns about admissibility of the PPG -- and I'm not saying
13 it's reliable or it's not reliable. He was concerned about
14 some testimony about Burke's lab itself.

15 THE COURT: Uh-huh.

16 MR. BOGLE: Okay. And so we tried to correct that in
17 this situation by having people here, Dr. Burke, who had been
18 to the lab in Charleston and seen how it worked.

19 THE COURT: Uh-huh.

20 MR. BOGLE: And that was something we didn't have in
21 Florence last week. I'm not saying that Judge Brown made the
22 correct decision or not the correct decision. That's
23 something he seemed to dwell on near the end when he ruled
24 the test inadmissible.

25 THE COURT: Uh-huh.

1 MR. BOGLE: So we tried to correct that this time by
2 having someone testify in front of you who had been there and
3 seen the lab and knew what it looked like.

4 Now, the way I interpreted yesterday was Burke left, he
5 was being paid by the defense, but he was really the Court's
6 witness to go down to review the data, look at the
7 laboratory, talk to the guy that gave the test, and report
8 back on how fair and how accurate that laboratory looked.

9 Now, he testified that he had already been down there
10 and testified that he set it up. But he went down there to
11 look at the raw data and made a report to the Court and to
12 counsel in what he did.

13 First, in his report, he found that the gauge -- the
14 gauge strapped around the guy was fully calibrated and
15 worked.

16 THE COURT: Right.

17 MR. BOGLE: He found that Mr. Powell tried to fake the
18 test a few times by moving, and he included a screenshot of
19 the graph showing where he did some kind of movement that
20 threw the thing off a couple of times. So he found evidence
21 of that.

22 He also found -- I found this very significant -- that
23 Dr. Dwyer and the lab in Charleston -- they took the most
24 conservative estimate of reaction, and this benefits the guy.

25 THE COURT: Uh-huh.

1 MR. BOGLE: Let's say he reacts three times. He reacts
2 a lot to one and then, say, not much to the other. Instead
3 of taking the highest score, they averaged together all
4 three. Okay?

5 So if I'm in a shooting match with the doctor here and I
6 score 15 on my first shot and she scores a five on hers,
7 together, that's 20. The average is 10. Instead of giving
8 15 as a score, you average it and get 10, which benefits Mr.
9 Powell. So he found that the -- the way it's done down there
10 is to the benefit of the respondent.

11 And then his mission was also to review the data
12 calculations by Dr. Dwyer and report back that they seem to
13 be of no errors. He did that.

14 And finally, he concludes that Mr. Powell tried to move
15 a lot during the test, which is consistent with Dr.
16 Gottfried's report and her testimony that she was informed
17 that he tried to fake the test a few times.

18 So it looks to me like yesterday what happened was that
19 Dr. Burke was sent on a mission by the Court and counsel to
20 do what he did. In the report he sent back, that satisfies
21 those issues.

22 Now, as far as --

23 THE COURT: Actually, I would disagree with you on that
24 because the original issue that brought him here obviously
25 was to testify whether or not the PPG was reliable, but the

1 original issue had to do with Mr. Falk saying he didn't have
2 the raw data that he normally gets --

3 MR. BOGLE: Right.

4 THE COURT: -- from Dr. Dwyer in cases. So that's
5 really what he was going to do was to get that raw data.

6 And what we understood was that even if he got the raw
7 data, it wouldn't do any -- he couldn't get it unless there
8 was someone there to interpret it. In other words, handing
9 over raw data to anyone, including your own expert, Dr.
10 Gottfried, doesn't do anybody any good --

11 MR. BOGLE: Exactly.

12 THE COURT: -- because unless you are certified and know
13 how to interpret it, it doesn't matter. So that's what he
14 was sent to go do and that's what we were in hopes of doing.
15 I mean --

16 MR. BOGLE: Because we have people --

17 THE COURT: -- I can tell you I have layers of concern
18 at this point. Number one, that it wasn't turned over. I'm
19 worried about timeliness.

20 But I've got to tell you what my bigger concern in
21 listening to Dr. Burke testify yesterday was that this has
22 not been subject to peer review. I mean it hasn't. I have
23 Dr. Gehle testifying that it is not accepted -- generally
24 accepted in the scientific community or in the psychological
25 community. It's just not.

1 I worry about -- we talk about articles, and what
2 they're contesting in these articles is it isn't comparing
3 apples to apples. It's comparing one study up in Canada and
4 the stimulus they use to something completely different, and
5 that's another level of concern for me.

6 I think just looking at this overall, I think you can
7 possibly get there and it sounds to me like the newest report
8 that is coming out that is by Howes -- he said it was by H-o-
9 w-e-s. I'm sorry?

10 MR. FALK: No. Federvo is the new one.

11 THE COURT: By Federov. That might get it to the point
12 where it's admissible in court, and I think that might get it
13 to the point that it needs to be, but we're not there yet.
14 That hasn't been published. I understand it's in the works,
15 but I've got to tell you just across the board from
16 everything I'm hearing, I still -- I can tell you I am not
17 convinced under, you know, a State v. Jones or a Council
18 standard that it's reliable.

19 Again, it also concerns me in a case like this where
20 what I'm hearing from the doctors, again, is that they have
21 very much similar diagnoses, same opinions for the most part,
22 and what you're telling me is the tipping point, at least Mr.
23 Falk is -- it could be erroneous and it might just be his
24 argument that the real tipping point in this case is the PPG
25 results and, again, that's what concerns me.

1 I mean I know at this point across the State -- I know
2 it's been let in a few times, you know, reluctantly. I just
3 don't see it being to the point where it has been subject to
4 peer review at this point.

5 Again, I think it's almost there. It sounds to me that
6 once Federov publishes and there's some -- I think you will
7 get possibly to that point. I don't know. And at that
8 point, it will just be that experts disagree on its use. But
9 I don't think we're even there yet.

10 So --

11 MR. BOGLE: You've made your decision. I can't change
12 it. I just think --

13 THE COURT: Yeah.

14 MR. BOGLE: I think you need to look at what we have to
15 prove in a State v. Council hearing.

16 THE COURT: Right.

17 MR. BOGLE: Would it assist the trier of fact? Has the
18 thing been -- is the expert qualified?

19 THE COURT: I mean the expert is clearly qualified.

20 MR. BOGLE: Is the science --

21 THE COURT: Whether or not the underlying science is
22 reliable. I mean I've got Dr. Gehle sitting here telling me
23 no.

24 MR. BOGLE: But this is a doctor who doesn't believe in
25 the PPG, doesn't use the PPG, and just doesn't use one.

1 Okay? We have other doctors at Mental Health, if they were
2 here, like Donna Maddox, who would say she asks for it to be
3 done and believes in it and would explain why. We have an
4 expert on the PPG, Dr. Burke --

5 THE COURT: Okay. There's a difference. Let's just be
6 clear about this. There is a difference between referring
7 someone out for a PPG and whether or not it's admissible --

8 MR. BOGLE: I understand.

9 THE COURT: -- as scientific evidence in court, and I
10 can tell you that I haven't seen anywhere where -- and she
11 doesn't matter because she's not an expert in this case where
12 she has said that she believes truly not only is it something
13 for them to use as a diagnostic tool, but also that it should
14 be admissible in a commitment proceeding. I mean that I
15 haven't seen yet.

16 So I mean I think we're all making some very broad
17 assumptions. Again, I'm still concerned. I still don't
18 think it survives the peer review. I don't think the
19 publications are adequate to compare the same stimulus
20 profiles. And until that happens, I just -- I'm not
21 comfortable with putting it in, you know, and until the Court
22 tells me otherwise.

23 MR. BOGLE: Well, also --

24 THE COURT: Like I said, I think you're close. I
25 actually think you're close. I think the Fedorov article may

1 help and, again, that's just what it comes to. We're going
2 to start fighting, you know, over some, you know, experts
3 accept it or don't accept it, you know, and obviously it's
4 subject to a meta-analysis. But at this point, I just don't
5 think it's there yet.

6 MR. BOGLE: Well, you also have -- at the risk of
7 arguing with the judge --

8 THE COURT: Yeah, it's okay.

9 MR. BOGLE: You made your decision.

10 THE COURT: It's okay.

11 MR. BOGLE: You're going to tell the jury later on that
12 they've heard from two people qualified as experts.

13 THE COURT: Right.

14 MR. BOGLE: And they've got to -- but at the same time,
15 you're going to tell them that they have to decide how much
16 to believe and how much not to believe. That they can
17 believe all of the witness's testimony, be they a lay witness
18 or an expert witness.

19 THE COURT: Right..

20 MR. BOGLE: Or none of it or something in between.

21 THE COURT: Uh-huh.

22 MR. BOGLE: At the same time, you've got to weigh the
23 qualifications of the two experts you heard.

24 THE COURT: Uh-huh.

25 MR. BOGLE: Dr. Burke, who developed the thing, who

1 lives by it, who gives it, and developed the Real Child
2 Voices scenario, is a Limestone-qualified person who's been
3 to the Charleston lab and checked it out where this guy was
4 tested.

5 THE COURT: Uh-huh.

6 MR. BOGLE: And Dr. Gehle's expertise, while very
7 qualified in pre-commitment cases, doesn't use the PPG and
8 knows nothing about it.

9 THE COURT: Uh-huh.

10 MR. BOGLE: Okay. In fact, she's seen the Real Child
11 Voices one time.

12 THE COURT: Uh-huh.

13 MR. BOGLE: And read some articles that don't like it.
14 So I think it's a big difference between --

15 THE COURT: But the question is is the underlying
16 science good, and that's where the question lies. I agree
17 they can differ and they can -- they can buy Dr. Gottfried or
18 they can buy Dr. Gehle, but I think you have an additional
19 layer, which was the second portion of his motion on top of
20 it is that Dr. Gottfried is not qualified to testify as to
21 the raw data.

22 I truly think that if I were to allow it in, Dr. Burke
23 or someone -- Dr. Dwyer obviously in this case -- would have
24 to testify as to what his interpretation was. I mean she can
25 say she relied on it and I know we're kind of loosely now

1 jumping to Rule 703, but I think there are some things that
2 you have to have an opportunity to cross-examine someone.
3 And while I recognize this is a civil proceeding, this is and
4 has to be proven beyond a reasonable doubt.

5 And we're also talking about Mr. Powell's liberty. So I
6 think the stakes are higher, even though it's a civil
7 proceeding. I just do.

8 So that's where my concern -- that's where my concern
9 lies. Again, I think it would be a double layer of being
10 able to challenge it, and I will even go just one step
11 further. If you say, okay, there's a possibility of that, I
12 would have to grant his continuance so he could go talk to
13 Dr. Burke, if he asked for one, so to be able to have him
14 fully flesh this out because the information wasn't turned
15 over to him. And while that may have been his fault for not
16 pushing it, you and I both know at the end of the day whether
17 or not he's affected and whether or not he's done his job is
18 going to be reliant on that and whether or not something is
19 upheld.

20 So again, you know, unfortunately, you know, I have to
21 err on the side of caution and not unfortunately, but I have
22 to err on the side of caution to make sure that, you know,
23 it's reasonable. So I'm assuming you want to go forward.

24 MR. FALK: Absolutely.

25 THE COURT: I'm assuming you don't want it coming in and

1 I mean that's my ruling. And then, you know, even looking at
2 it -- even if it survives a State v. Council or a State v.
3 Jones, I think the prejudicial value over the probative -- I
4 think the prejudice outweighs it. I do.

5 MR. FALK: Thank you, Your Honor.

6 THE COURT: So --)

7 MR. BOGLE: May I have a moment, Your Honor?

8 THE COURT: Sure. How long do you all need?

9 MR. BOGLE: Five minutes?

10 THE COURT: You got it. Okay. I'm going to sit tight.

11 (WHEREUPON, there was a break in the proceedings from
12 9:58 a.m. until 10:09 a.m., after which the proceedings
13 resumed as follows.)

14 THE COURT: Okay. Are we ready?

15 MR. BOGLE: Thank you for your consideration.

16 THE COURT: Absolutely.

17 MR. BOGLE: We are ready to go.

18 THE COURT: We're ready to go? Okay.

19 MR. BOGLE: Yes, ma'am.

20 THE COURT: Okay. All right. Mr. Falk, anything else?

21 MR. FALK: No, Your Honor.

22 THE COURT: Okay. Let's go ahead and bring the jury
23 out.

24 (WHEREUPON, the jury entered the courtroom at 10:12
25 a.m.)

1 THE COURT: Good morning, ladies and gentlemen.

2 THE JURY: Good morning.

3 THE COURT: It's a pleasure to see you all. Thank you
4 all for being here promptly.

5 I understand I had one juror that had a bit of an
6 accident out in the parking lot. I just want to make sure
7 everyone is fine. That's why we have alternate jurors,
8 ladies and gentlemen.

9 I also recognize that it is flu season and I can tell
10 you probably over the last month and a half or so I have had
11 jurors that have fallen ill while serving on jury duty, which
12 is why we have our two alternates to make sure that we can go
13 ahead and finish the trial. So please, if anyone has an
14 issue, tell the bailiffs. Let me know and we'll take care of
15 you. Okay?

16 With that said, ladies and gentlemen, we're going to go
17 ahead and begin the trial of this case. What we are going to
18 first do is have you sworn in as the jury, I'm just going to
19 make a few brief comments, and then you're going to hear
20 opening statements from the lawyers in regards to what you're
21 going to hear about the case. Okay? Before the evidence is
22 presented.

23 So what I'm going to ask you all to do is please rise,
24 raise your right hand to accept the juror's oath, and when
25 you accept the oath, say "I do" and be seated. Okay?

1 THE CLERK: Do you solemnly swear or affirm that you
2 shall well and truly try the issues joined in this case and a
3 true verdict give according to the evidence, so help you God?

4 THE JURY: I do.

5 THE CLERK: Thank you.

6 THE COURT: You may be seated, ladies and gentlemen.
7 I'm going to explain to you the procedure that we're going to
8 follow so you can better understand what's happening during
9 the trial of this case.

10 You have been selected as fair and impartial jurors
11 whose purpose is to find and determine the facts in this
12 case. You, the jury, are the sole judge of all facts.

13 If at any time during this trial I make any comment
14 regarding the facts of this case, you must disregard it.
15 And, as jurors, you are to determine the facts of this case
16 from the testimony you're going to hear from the witness
17 stand, as well as any other evidence that's entered into this
18 case.

19 Please understand, ladies and gentlemen, that you should
20 not be influenced by any opinions or statements you have
21 heard outside this courtroom, and please understand that it
22 is especially important that you perform your duty of
23 determining the facts diligently and conscientiously because
24 ordinarily there is no way to correct an erroneous
25 determination of the facts by a jury.

1 The same law, ladies and gentlemen, that make you, the
2 jury, the judge of the facts makes me the judge of the law.
3 The law as given by the Court is the only law that you may
4 consider. You must accept and follow it, even though you may
5 disagree with it. I cannot tell you what the facts of this
6 case are, and you cannot disagree with me about what you
7 think the law is or what you think the law ought to be.

8 Your job at the end of this trial is going to be to take
9 the law as I give it to you and apply it to the facts as you
10 find them and from there render a true and just verdict under
11 the oath you just took.

12 Now, until you advise -- or until I advise you that you
13 can begin your deliberations, you must not discuss this case
14 with anyone, and that includes each other, until you've heard
15 all the evidence, you've heard the final arguments from the
16 lawyers, and I have charged you on the law that's applicable
17 to this case.

18 I remind you again in coming and going from the
19 courthouse, if you happen to pass one of the lawyers or a
20 witness and they don't even say hello, please remember
21 they're not being unfriendly. They're simply following my
22 orders not to speak to you.

23 Additionally, ladies and gentlemen, I don't think
24 there's going to be anything in the news or the newspaper or
25 the TV on this case, but out of an abundance of caution, I'm

1 required to tell you that if you were to see something, you
2 are to disregard it and not read it.

3 Ladies and gentlemen, the attorney for the State, Mr.
4 Bogle, is going to make what is called an opening statement,
5 and what he's going to tell you is what he believes the
6 issues are in this case. And then Mr. Falk on behalf of the
7 respondent is also going to make an opening statement.

8 Ladies and gentlemen, what the lawyers tell you in their
9 opening statements is not evidence in the case. Again, the
10 evidence comes from the witness stand, as well as any other
11 physical evidence that's entered into the case.

12 I also want you to know, ladies and gentlemen, that from
13 time to time you may hear the lawyers say something like,
14 Your Honor, there's a matter of law we need to take up. I
15 may motion them to come talk to me at the bench, or I may
16 even send you out to your jury room. I want you to
17 understand something. We're not hiding anything from you.

18 Oftentimes, when I have to rule as a matter of law
19 whether or not certain testimony or evidence is admitted, I
20 may make a comment on the facts of the case. And because I
21 would never want anything I do to influence you in your
22 determination of the facts, out of an abundance of caution,
23 we just do it outside of your presence.

24 In determining what the true facts are in this case, you
25 must decide whether or not the testimony of the witnesses is

1 believable. It's my responsibility to rule as a matter of
2 law whether or not certain testimony is admitted, but once it
3 is admitted, whether or not you believe it is solely for you
4 to determine.

5 In deciding whether to believe a witness, you have the
6 right to consider whether the witness has an interest in the
7 outcome of the trial, whether the witness is prejudiced
8 towards either the State or the respondent, whether the
9 witness had the opportunity to have seen and heard and
10 examined the matters about which they're testifying, and you
11 can also look at the way the witness acts on the witness
12 stand.

13 You have the right to use anything that is in the record
14 that will allow you to evaluate the testimony of the witness.
15 Therefore, I ask that you pay close attention so that at the
16 end of the trial you can accurately remember the testimony as
17 it was given.

18 Now, ladies and gentlemen, in order to preserve
19 everyone's rights, I'm going to give the parties an
20 opportunity to object to anything I've said. If not, ladies
21 and gentlemen, we're going to go ahead and begin the trial of
22 this case.

23 Any objection on behalf of the State?

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

25 THE COURT: Thank you. On behalf of the respondent?

1 MR. FALK: No, Your Honor.

2 THE COURT: Very good. Ladies and gentlemen, we'll go
3 ahead and begin the trial of this case. Mr. Bogle?

4 MR. BOGLE: Thank you, Your Honor. May it please the
5 Court.

6 THE COURT: Yes, sir.

7 MR. BOGLE: Mr. Falk.

8 OPENING STATEMENT ON BEHALF OF THE STATE

9 MR. BOGLE: My name is Jim Bogle. I'm with the Attorney
10 General's Office in Columbia.

11 A lot of people when they hear these cases they wonder
12 why their solicitor or their county attorney is not
13 presenting the case on behalf of the State. The reason is
14 that back when the legislature passed this law in 1998, they
15 gave it to our office.

16 So there's two of us in the office. We have the state
17 divided in half. Each of us do different counties around the
18 state, and I've got the 14th Circuit. So they've got me down
19 here.

20 Now, let me tell you about what we're here on today. In
21 every case, they have a theme. To me, the theme on this case
22 is 16 years. Sixteen years because you're about to hear what
23 I meant by that.

24 The type of case -- when you told your family and
25 friends that you were coming on jury duty, I'm sure you

1 thought you might likely be hearing a car wreck case, maybe a
2 medical malpractice case, or something like that. But that's
3 not what this is. That's not what this is.

4 In 1998, our legislature passed what's called the
5 Sexually Violent Predator Act, and what that law says --
6 basically, the legislature indicated there's a group of
7 people out there who have committed certain types of crimes
8 called sexually violent crimes. There's a list of 16 of them
9 in the statute. And if you committed one of these crimes,
10 your case is then reviewed at different levels to see whether
11 or not a case like this should be brought.

12 And the feeling I think the legislature had was that
13 these people might not be safe to be out in the community.
14 So what we have to prove to you -- this is basically a civil
15 commitment process. The question is is Robert Powell safe to
16 be in this community.

17 Now, it's not a criminal process. He's already been
18 convicted of the crimes. He's served his time. That's over
19 with. Under the law, he has to be confined until this case
20 is over. So he's been sitting in the local county jail or
21 detention center until we could have this trial today.

22 Now, what does the State have to prove to you?

23 First off, has he been convicted of a sexually violent
24 crime? And the answer is yes, and you'll hear from that
25 later on. We've got three here, three sentencing sheets and

1 indictments here in Beaufort County where he pleaded guilty
2 to criminal sexual conduct with a minor in the first degree,
3 a young child. In each case, a young girl. Okay?

4 The age ranges from when the sexual abuse began to when
5 it ended -- you've got all three victims. It started on one
6 as early as when she was about 3, another when she was about
7 5. On one girl it went until she was about 11. So that's
8 the age range we're talking about, and the conduct began --
9 the earliest dates of incidents, the dates that these crimes
10 happened, you'll see this on the sentencing sheet, was almost
11 16 years ago.

12 Now, again, he's finished his prison term. So that's
13 not what this is about. We have to prove to you the
14 existence of a sexually violent conviction. He's got three
15 of those.

16 The next question is -- and here's where it gets a
17 little more difficult both for us and for you. Does he have
18 a mental abnormality or a personality disorder that makes him
19 likely to engage in crimes of sexual violence unless he's
20 confined for treatment for what they call long-term control,
21 care, and treatment at a facility in Columbia run by the
22 Department of Mental Health. It's a civil commitment
23 process.

24 The testimony you're going to hear is whether or not he
25 crosses that line. Can he be safe to go home and get

1 outpatient treatment or no treatment at all or is he so
2 dangerous he needs to be confined for treatment until such
3 time as he's safe to be at large? That's what this case is
4 about.

5 Now, because of the type of case it is, normally in
6 civil court, Common Pleas court where you are today, if this
7 was a car wreck case, you'd be asked to decide the case based
8 on a burden of proof. One side has to prove their case by
9 what's called a preponderance of the evidence.

10 Think of a scale of justice tipping, like, 51 percent.
11 But when they wrote this law, they said, no, it's got to be
12 different because, after all, the guy's liberty is at stake.
13 So we have to prove the case to you in this type of case
14 beyond a reasonable doubt, and the judge will explain to you
15 later on what that burden of proof means.

16 I would suggest to you that proving something beyond a
17 reasonable doubt means that after you hear the State's
18 evidence, if you are firmly convinced that Robert Powell is a
19 sexually violent predator, that he's been convicted of the
20 crime, he's got the mental abnormalities, he's likely to
21 reoffend and can't control it, then you'll render a verdict
22 for the State, if you're firmly convinced.

23 On the other hand, if you find that we have failed to
24 prove one of these different elements, you're obligated to
25 return a verdict for Mr. Powell. The judge will explain at

1 the end of the case what the burden of proof is. You'll hear
2 about that later on.

3 Now, normally in court, people can't testify about
4 opinions. They can testify about what they see, what they
5 hear, facts. Like, I saw the light turned red. I heard the
6 gun go off. I saw him grab the knife. Things like that.
7 You can't give opinions.

8 But in certain cases where a person has the education
9 and the experience in a particular field to help you, the
10 jury, make a decision, they can be qualified as an expert
11 witness by the judge and allowed to give an opinion.

12 In this type of case, at a prior hearing, the Court
13 appointed a person from the Department of Mental Health, Dr.
14 Marie Gehle -- she's sitting over there -- to evaluate this
15 guy. Okay? She conducted her evaluation. When she was
16 done, she concluded that he did not fit the criteria. He'd
17 been convicted of the right kind of crime, he had the mental
18 abnormality, but he wasn't so dangerous that he needed to be
19 confined for treatment.

20 Now, the statute allows the State to get a second
21 opinion if we think it's necessary. In this case, we were
22 concerned; so we sent the case down to the Medical University
23 of South Carolina, a laboratory down there that does this
24 kind of work. Dr. Gottfried, sitting right there with a
25 black jacket on, she was assigned to evaluate Mr. Powell.

1 She looked at the information. She came back with a
2 recommendation that, no, he is a sexually violent predator.
3 He needs to be confined for treatment.

4 So we have a trial. Now, as jurors, your job is to
5 decide the facts, and the facts are going to be what you hear
6 from this witness stand and these documents right here.
7 You're going to hear from two people qualified by the Court
8 to be expert witnesses. You may also hear from some other
9 witnesses called by the defense. We'll see how -- we'll see
10 who they're going to be.

11 It's your decision in your ability. You've got to
12 decide what to believe. As jurors, you can decide to believe
13 all of what a witness says. You can believe none of it or
14 anything in between. So you've got to listen to the
15 testimony and decide what to believe and what not to believe.

16 At the same time, you certainly don't decide the case
17 just by counting the number of witnesses that each side has.
18 You've got to look at the witness, look at their
19 qualifications, and listen to what they say and decide what
20 to believe.

21 I would submit in this case that you will find that Dr.
22 Gottfried did a more thorough evaluation and find that he is
23 a sexually violent predator.

24 Now, we've got the crimes. What's the mental
25 abnormality? The mental abnormality, the mental condition

1 that he suffers from, both doctors will say is pedophilic
2 disorder. He's a pedophile, and what that is is a deviant
3 sexual interest in young children.

4 In this case, it's called pedophilic disorder. That's
5 the fancy name for it. Nonexclusive, which means he is also
6 attracted to age-appropriate women. But it's pedophilic
7 disorder. He's attracted to females, and that's involved in
8 -- involved in little girls.

9 So that's an outline of how we got here and what the
10 case is about. Again, the burden of proof is beyond a
11 reasonable doubt and your job is going to be to decide from
12 the testimony you hear and from the documents introduced
13 whether or not Mr. Powell should be committed as a sexually
14 violent predator.

15 Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Bogle. Mr. Falk?

17 MR. FALK: May it please the Court.

18 THE COURT: Yes, sir.

19 MR. FALK: Mr. Bogle.

20 OPENING STATEMENT ON BEHALF OF THE RESPONDENT

21 MR. FALK: Ladies and gentlemen of the jury, this case I
22 think is going to get a little bit simplified because my
23 expert, Dr. Marie Gehle from the Department of Mental Health,
24 -- she agrees with the expert from the State that my client
25 has a mental disease and that he is a pedophile, that he's

1 conducted these acts, he's committed these acts, and he's
2 been found guilty of these acts or he pled guilty to these
3 acts and he's gone to prison for these acts. It is not going
4 to be really -- I'm not going to try and tell you that he
5 doesn't have that problem.

6 But where the difference is going to be is whether or
7 not my client creates a risk to reoffend in the future.
8 That's really what the crux of this case is about, whether or
9 not my client creates a risk going forward. So our ability
10 to look into the future and try and determine whether or not
11 my client is going to commit another crime.

12 Mr. Bogle told you a little bit about the Sexually
13 Violent Predator Act, and I think my witness from the
14 Department of Mental Health will tell you that this program
15 was designed to do something about people who are the worst
16 of the worst. And, you know, I'm not trying to sit here and
17 say that my client is not as bad a sexual offender as others,
18 but that's really what we're talking about. There are some
19 people who are the worst of the worst, and that's what this
20 program is designed to take care of.

21 You're going to have to listen. You're going to listen
22 to my witness, who is from the state of South Carolina, and
23 you're going to be able to compare the amount of experience
24 they have in this field and you'll make your own decisions.

25 At the end of the day, your decision has to be beyond a

1 reasonable doubt, and that's really what I want y'all to
2 focus on. It's not just whether or not you think my client
3 is a pedophile, but whether or not you believe beyond a
4 reasonable doubt that he would commit a crime in the future.

5 Now, when we went through the voir dire process, when we
6 asked you those questions at the beginning, you saw a lot of
7 people come up and there's a lot of people who are going to
8 have some pretty strong emotions about people who have
9 committed crimes against children. A lot of people are going
10 to -- I'm sure many people here today have strong emotions
11 about that, but what you all have sworn to do is to try and
12 put that aside.

13 There's no questions that the acts 16 years ago or over
14 a period of time -- they were bad. There's no question about
15 that, but that's not what we're talking about today. We're
16 talking about the future. We're talking about tomorrow,
17 whether or not after ten years and two months in prison
18 whether or not my client is free to go back home.

19 Again, this is kind of a hybrid case. It's very easy to
20 sort of sit here and think that this is just like a medical
21 malpractice case. You can have a lot at stake in a medical
22 malpractice case and I use that as an example because that's
23 a case where a lot of times you're going to have two battling
24 experts. One person says that the doctor made a mistake and
25 then the other expert says the doctor didn't make a mistake.

1 There can be a lot at stake in those kinds of cases. I
2 mean you could have professional reputation of a doctor. He
3 could lose millions of dollars. By the same token, the
4 victim may not get the money that they need to live a life
5 and, you know, take care of the injuries. Those are very
6 important cases that can be decided by just a preponderance
7 of the evidence.

8 But I submit to you this is even more important than
9 that. What we're talking about is my client's liberty, where
10 he's going to go, whether or not he's going to be confined to
11 a secure facility for some period of time in the future. And
12 that's why when you're making your decision, just kind of
13 weigh it.

14 You have to be so convinced beyond a reasonable doubt,
15 and I submit to you that you have to completely discount the
16 testimony from my witness in order to get there. I think by
17 the time that you listen to the qualifications of my witness
18 that you will be convinced that the State is unable to prove
19 their case beyond a reasonable doubt that my client creates a
20 risk going forward.

21 Thank you.

22 THE COURT: Thank you, Mr. Falk. Mr. Bogle?

23 MR. BOGLE: Thank you. May it please the Court.

24 THE COURT: Yes.

25 MR. BOGLE: The State would call Dr. Emily Gottfried.

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1 THE COURT: Come on forward, Dr. Gottfried. Would you
2 swear her in, please?

3 THE CLERK: Do you solemnly swear or affirm that the you
4 shall truthfully answer all questions put to you by this
5 Court, so help you God?

6 THE WITNESS: I do.

7 THE CLERK: Thank you. Be seated and then state your
8 name for the record.

9 THE WITNESS: Yes. Dr. Emily Gottfried, G-o-t-t-f-r-i-
10 e-d.

11 DR. EMILY GOTTFRIED, being
12 first duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. BOGLE:

15 Q: Good morning, Dr. Gottfried.

16 A: Good morning.

17 Q: Please tell the jury who are you employed by at the
18 present time?

19 A: I work at the Medical University of South Carolina. I
20 am an assistant professor in the Department of Psychiatry,
21 and I work in the sexual behaviors clinic and lab there.

22 Q: Okay. What professional degrees do you possess?

23 A: I have a master's degree in psychology. I have a
24 master's in clinical psychology, and then I have a PhD in
25 clinical psychology.

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- 1 Q: What -- where did you go to school?
- 2 A: I went to Columbia University for one of my master's and
3 then Florida State University for my doctorate.
- 4 Q: In what states are you licensed? So you are a -- are
5 you a psychologist or a psychiatrist?
- 6 A: I'm a psychologist.
- 7 Q: Okay. Are you a forensic psychologist?
- 8 A: I'm a clinical psychologist who specializes in
9 forensics.
- 10 Q: Okay. When you use the word forensic in connection with
11 psychology, what are you talking about there?
- 12 A: The word forensic means the marriage of science and the
13 law. So forensic psychology is the combination of
14 psychological assessment and diagnosis to help, usually a
15 trier of fact to make legal or psycho-legal decisions.
- 16 Q: Okay. What states are you licensed to practice
17 psychology in?
- 18 A: South Carolina and Georgia.
- 19 Q: And have you had any specialized training in the field
20 of clinical psychology and, if so, what kind of training?
- 21 A: Yes. Throughout my graduate career, I did a number of
22 practicum or practical experiences. So for a number of
23 years, I worked for the Federal Bureau of Prisons doing these
24 kinds of evaluations. I have worked at forensic state mental
25 hospitals, community mental health, pretty much outpatient

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1 forensic mental health, things like that.

2 Q: And you used -- and you used the word clinical
3 psychology. What does clinical mean along with the word
4 psychology?

5 A: Clinical psychology is the assessment, diagnosis,
6 treatment of mental illness. There's different specialties
7 of psychology. And so clinical psychology is recognized by
8 the APA, whereas you can't get a separate degree that's
9 recognized just in forensic psychology.

10 Q: And the APA is the American Psychological Association?

11 A: That's correct.

12 Q: Okay. Have you previously been recognized as an expert
13 witness and testified as an expert witness in the fields of
14 psychology and forensic psychology in courts of law?

15 A: Yes, I have.

16 Q: In what states?

17 A: Both in Georgia and South Carolina.

18 Q: Okay. How much of your practice is dedicated to
19 forensic psychology?

20 A: A hundred percent.

21 Q: Okay. Does your work as a psychologist allow you to
22 conduct forensic psychological evaluations of people?

23 A: Yes.

24 Q: And basically, how many forensic evaluations of all
25 types have you done of people?

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1 A: I mean including all of my training experiences, it
2 would be hundreds of evaluations.

3 Q: And what types of evaluations have you done, looking at
4 this large group of people?

5 A: Throughout my training and my career, I do criminal and
6 civil forensic cases. So that could be competency to stand
7 trial, criminal responsibility. I do risk assessments of
8 both general violent risk assessments and sexual violent risk
9 assessments. I also do evaluations for professional boards
10 for professionals who may have had a sexual boundary
11 violation.

12 Q: Okay. So like, say, a medical doctor who came on to a
13 patient or something like that or had been doing that, you
14 might be asked to do an assessment of that person's risk to
15 continue to practice medicine and be licensed by the
16 licensing board?

17 A: That's right.

18 Q: Okay. Now, what about sexually violent predator cases,
19 like the one we're doing here? Have you done some of those?

20 A: Yes.

21 Q: About how many sexually violent predator evaluations
22 have you done in South Carolina?

23 A: Since I've been licensed in South Carolina, I've done 15
24 sexually violent predator evaluations.

25 Q: Okay. And are these cases where the Attorney General's

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1 Office has hired your laboratory to get a -- do a second
2 opinion, if you will, in a case?

3 A: Yes.

4 Q: Is that how you got involved here?

5 A: Yes.

6 Q: Okay. So of those 15 or so, how many have you had to go
7 to trial and testify about as an expert witness?

8 A: So far, three of those.

9 Q: Okay.

10 A: This is the fourth one.

11 Q: This is the fourth one? Okay. So you were qualified by
12 the judge in those three prior cases as an expert witness in
13 the field of forensic psychology to testify about a sexually
14 violent predator case?

15 A: Yes.

16 Q: Like we are today?

17 A: Yes.

18 Q: Okay. Now, the evaluations you talked about, what do
19 they all have in common in the way they're conducted? What
20 different types of evaluations do you do?

21 A: The different kinds of forensic evaluations that I do --
22 they include taking large amounts of data and putting it
23 together and kind of making sense of it to help a jury or a
24 judge make decisions or a licensing board about a person.

25 Q: Okay. What about research? You said you got your PhD.

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1 What kind of research have you been involved in?

2 A: Well, I work in the sexual behavior clinic and lab at
3 MUSC. So we do a lot of research. We give a lot of
4 presentations and submit papers for publication. Right now,
5 all of our research is looking at sex offender populations,
6 looking at paraphilic disorders, and looking at the best way
7 to measure risk and measure sexual interest. Other projects
8 that I do -- I look at female offenders and I also study
9 malingering or falsely producing mental health symptoms for
10 some kind of external incentive. So I publish in all of
11 those areas.

12 Q: Okay. Now, in that list you gave me, you pulled a word
13 out that I didn't recognize. You used paraphilia or
14 paraphilic?

15 A: Uh-huh.

16 Q: What does paraphilia mean?

17 A: That would be a sexual arousal to something
18 nonconsensual or abusive. So sexual arousal to children or
19 something like sexual sadism. So being sexually aroused to
20 really violent sexual experiences.

21 Q: So is a paraphilia a deviant sexual arousal?

22 A: You could say that, yes.

23 Q: You could say that? Okay. Like pedophilia, for
24 example? If a guy is sexually attracted to little girls,
25 that's -- that's a paraphilia, a type of paraphilia; is that

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1 right?

2 A: That's right.

3 Q: Okay. What about professional memberships? Do you have
4 any that relate to your field?

5 A: Yeah. I'm a member of a number of professional
6 memberships. I am a member of the American Academy of
7 Forensic Sciences, American Psychology and the Law Society,
8 American Psychological Association's Assessments. I am a
9 member of the Association for the Treatment of Sexual
10 Abusers. I am the secretary of the local chapter for the
11 Association for the Treatment of Sexual Abusers. And the
12 South Carolina Psychological Association.

13 Q: Okay.

14 MR. BOGLE: Your Honor, at this time, we would to move
15 to ask you to qualify Dr. Emily Gottfried as an expert
16 witness in the field of forensic psychology for this hearing.

17 THE COURT: Any question?

18 MR. FALK: No objection.

19 THE COURT: Ladies and gentlemen, in this case, Dr.
20 Gottfried is being qualified in the area as an expert in
21 clinical psychology. That allows her to give her opinion and
22 the reasons for her opinion, and that's for you to use as you
23 see appropriate and as compared to other evidence in the
24 case.

25 BY MR. BOGLE:

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1 Q: Now, in your work under South Carolina's law, have you
2 also had occasion to evaluate someone for a second opinion
3 that we asked for -- our office asked for and you came back
4 saying the guy was not a sexually violent predator?

5 A: Yes.

6 Q: Essentially, that you agreed with the report done by the
7 Department of Mental Health?

8 A: Yes.

9 Q: And in some cases, have you also not testified in one
10 case that a guy should be released from treatment because he
11 was no longer a risk?

12 A: I did testify that he should be released.

13 Q: In fact, that was about as recently as two or three
14 weeks ago in Charleston?

15 A: Yes.

16 Q: Okay. Now, how were you -- what type of evaluation
17 though were you asked to conduct in this particular case
18 involving Robert Powell?

19 A: It's called a pre-commitment evaluation.

20 Q: Okay. And what do you look -- what have you been asked
21 to determine? What are the things you're looking for in a
22 pre-commitment evaluation?

23 A: So I'm looking to see if somebody who has been convicted
24 of a sexually violent offense has a mental abnormality or
25 personality disorder that predisposes them to be at risk for

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1 committing future similar offenses.

2 Q: Okay. And how would your lab or were you approached to
3 conduct this evaluation here?

4 A: As an evaluator in the sexual behaviors clinic and lab,
5 I was assigned to the case. So I believe that your office
6 approached the lab and asked for a second opinion, and then
7 that case was assigned to me in my role as an evaluator.

8 Q: Okay. Okay. Are you -- now, are you paid by the case
9 or are you salaried?

10 A: I am a salaried employee at MUSC.

11 Q: Okay. So we paid a certain amount of money to your
12 laboratory to conduct this and they assigned you to do it?

13 A: Right. And the money goes towards my salary, but I
14 don't get paid by you for it.

15 Q: And does the amount of money you get for doing this
16 evaluation vary depending upon the outcome?

17 A: No.

18 Q: Okay. As part of this evaluation of Robert Powell, did
19 you meet with and interview him?

20 A: Yes, I did.

21 Q: On how many occasions and for about how long?

22 A: Mr. Powell came to our lab on several occasions to
23 complete testing and to do interviews with me. I sat down
24 with him on September 14th of 2017 for about an hour and
25 interviewed him. I also met with him again on October 16th of

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1 2017 for just over two hours -- two and a half hours and
2 interviewed him again and went over some of his testing. He
3 came multiple times to testing and interviews.

4 Q: Okay. And just for the record, is the guy you talked to
5 present in the courtroom today?

6 A: Yes, he is.

7 Q: Would you identify him just for the record?

8 A: Yes. He's sitting at the defense table.

9 Q: Okay.

10 MR. BOGLE: Let the record reflect she has identified
11 Mr. Powell.

12 THE COURT: Yes.

13 BY MR. BOGLE:

14 Q: Now, in addition to meeting with Mr. Powell, did you
15 receive documentary information about him?

16 A: Yes, I did.

17 Q: What type of information did you receive about him?

18 A: From your office, we received all of the pertinent
19 information about this case. So I reviewed the Beaufort
20 County Sheriff's Department records, as well as Beaufort
21 County Court of General Sessions related to his previous
22 offenses. I had a copy of his criminal history report. I
23 had copies of the lab summaries and the forensic interviews
24 of one of the victims in this case.

25 I looked at all of his South Carolina Department of

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1 Corrections records. So those would include any kind of
2 medical records, disciplinary, moving between prisons, all of
3 those records. I had an opportunity to review Department of
4 Mental Health's initial evaluation with Mr. Powell, and I
5 also reviewed the SVP or the sexually violent predator
6 committee's file that they had put together for him.

7 Q: Okay. And as part of this information, you were aware
8 that he had already been evaluated by someone appointed by
9 the Court, Dr. Gehle?

10 A: Yes.

11 Q: And was her report something you also had access to?

12 A: Yes. That's the one that I reviewed.

13 Q: Okay. Okay. Now, is the type of information you looked
14 at the kind of stuff that's typically and reasonably relied
15 upon by experts in your field?

16 A: Yes.

17 Q: And did you consider and rely upon this information,
18 along with whatever testing was done of Mr. Powell, along
19 with interviewing Mr. Powell in reaching an opinion in this
20 case?

21 A: Yes. I reviewed all of the information.

22 Q: Okay. How does a person's past sexual offense behavior
23 relate to future sexual offense behavior?

24 A: Well, the best predictor of future behavior is past
25 behavior. So it's important to me to really look through the

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1 police reports, any report that Mr. Powell gave to the
2 police, the victims' statements, the examinations of victims,
3 to see if he does reoffend, the nature of the re-offense, and
4 then how violent it could be.

5 Q: Okay. And in this particular case, when he was
6 interviewed by you, did he have to sign consent forms to go
7 along with the interview and whatever testing was done?

8 A: Yeah. Before he started on each day --

9 Q: Uh-huh.

10 A: The first day, he read a five- or six-page consent form
11 that went through every test that he was going to be
12 administered, that he had the right to not participate, and
13 he signed that and then each day that he came back, he re-
14 read that form and then signed a re-reading of that consent
15 form.

16 Q: Okay. Now, in your review of his records, did he have
17 any kind of sex offender treatment while at the Department of
18 Corrections?

19 A: No. He had no sex offender treatment.

20 Q: Did the lack of sex offender treatment while there
21 factor into your -- was that a part of your conclusions?

22 A: Yes, it was.

23 Q: Okay. Why would that be? Why is that important?

24 A: It's my opinion that Mr. Powell has an illness that he
25 needs treatment for and so the fact that he hadn't had

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1 treatment for that illness yet was something that I
2 definitely took into consideration.

3 Q: Okay. Now, if he's released by this jury today, is he
4 facing any kind of supervision by Probation and Parole or
5 anything like that? Did you look into that?

6 A: ~ I did. I contacted the South Carolina Department of
7 Probation, Parole, and Pardon Services.

8 Q: As a result of contacting them, what did you learn about
9 any community supervision that he might be getting?

10 A: I learned that he will be on community supervision
11 release until September 22nd of 2018 and, that after that
12 date, he won't be monitored, as his conviction was prior to
13 the mandatory GPS monitoring of sex offenders had passed.

14 Q: And so there's a law called Jesse's Law?

15 A: Yes.

16 Q: And depending on when you were convicted, you might have
17 to wear an electronic monitor for the rest of your life?

18 A: Correct.

19 Q: But because of the date of his convictions, he didn't
20 qualify for that?

21 A: That's correct.

22 Q: So once -- once September comes, he's --

23 A: He won't be monitored.

24 Q: He won't be monitored in any way? Okay. Okay. Okay.
25 Now, is it important to look at -- I know you looked at the

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1 sexual crimes, the ones we talked about earlier, before you
2 testified today, and I'll show them to you in a minute.

3 A: Yes.

4 Q: Is it important in your line of work to look at other
5 criminal convictions or even criminal charges that don't
6 result in convictions?

7 A: Yes.

8 Q: Why is that important?

9 A: Well, it's important for a couple of different reasons.
10 So one of the reasons is some of the psychological measures
11 that I give factor in how many times this person has been
12 charged or convicted of previous offenses.

13 Another measure looks at criminal versatility. So the
14 different types of crime. People might be more risky or
15 might have more personality characteristics if they commit
16 lots of different crimes versus, like, just one kind of
17 crime. Also, like I said, past behavior kind of predicts
18 future behavior and so I look to see if there are violent
19 offenses and I look just to see, like, just following rules
20 in the community in general.

21 Q: Okay. Now, does it matter in your line of work -- in
22 your line of work, what if these convictions didn't result --
23 what if these charges did not result in a conviction? Does
24 it still matter? Do you still have to look at them?

25 A: It still matters because, like I mentioned, for some of

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1 the measures that we score looking at risk, they just look at
2 counts of charges and not necessarily convictions.

3 Q: Now, what if the charges or the convictions are pretty
4 old, might go back 15 or 20 years? Is it still necessary in
5 your line of work to look at them?

6 A: Yes. It tells you about the length of their criminal
7 history, when problematic behavior started, and maybe even if
8 they grew out of it. So if they then stopped and they're
9 very old.

10 Q: And is looking back at these charges that don't result
11 in convictions, as well as charges that do result in
12 convictions, are they part of the basis of your opinion about
13 Mr. Powell?

14 A: Yes. They are something that I considered.

15 Q: Okay. And beginning on -- I think it's about page 12 of
16 your report. Did you find any prior criminal history that
17 you found significant as part of the basis of your opinion
18 you had to look at?

19 A: I find --

20 MR. FALK: Objection, Your Honor.

21 THE COURT: Okay. Y'all need to approach for a quick
22 moment?

23 MR. BOGLE: Yes, Your Honor.

24 (WHEREUPON, a bench conference was held in the presence
25 of the jury but out of the hearing of the jury as

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1 follows.)

2 THE COURT: I just realized that I didn't rule yesterday
3 on whether or not the previous convictions come in. Correct?

4 MR. BOGLE: I think you said you wanted to wait and hear
5 if it was a basis for opinion about the --

6 THE COURT: Okay.

7 MR. FALK: And that's where we are.

8 MR. BOGLE: And that's where we are right now.

9 THE COURT: Okay. And that is where we are. Okay.

10 MR. BOGLE: And the Edel case, which I forgot to mention
11 yesterday --

12 THE COURT: Yeah.

13 MR. BOGLE: -- talked about stuff that were not
14 resulting in convictions, including stuff that wasn't even
15 sexual. It all came in.

16 THE COURT: Okay. I'm going to let her testify to it
17 because she said it was the basis of her opinion. So --

18 MR. BOGLE: Thank you, Judge.

19 THE COURT: Okay.

20 MR. FALK: Can I make my --

21 THE COURT: And I'll just note for the record it's on
22 here that you object.

23 MR. FALK: On the basis of relevance and --

24 THE COURT: Okay.

25 MR. FALK: -- more prejudicial than probative.

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1 THE COURT: I think it's relevant and I think it is more
2 probative than prejudicial. Thank you.

3 MR. FALK: Just preserving the record.

4 THE COURT: Thank you. I appreciate it.

5 (WHEREUPON, the bench conference ended and the
6 proceedings resumed as follows.)

7 THE COURT: You can continue, Mr. Bogle.

8 MR. BOGLE: Thank you, Your Honor.

9 BY MR. BOGLE:

10 Q: Okay. Dr. Gottfried, going back to where we were, what
11 prior convictions or crimes that didn't result in convictions
12 that you found important that you wanted to look at as the
13 basis of your opinion?

14 A: Well, like I mentioned, I review the whole criminal
15 history. And so all of them are relevant because they help
16 me score those measures and they tell me information about
17 the person. So I found all of those charges relevant.

18 Q: What did you find?

19 A: What did I score him on?

20 Q: What specifically crimes did you find that you found --
21 that are part of the basis of your opinion?

22 A: In 1979, he had been charged with grand larceny of a
23 motor vehicle, and that was -- that finding -- or the outcome
24 of that was continued without finding. Let's see. And then
25 in 1985, he was charged with driving under the influence,

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1 driving left of center, and unlawful carrying of a pistol.

2 In 1988, he was charged with criminal domestic violence. In

3 1991, he was charged with having a fraudulent check. In

4 1995, he was charged with simple possession of marijuana.

5 And then in 2004, the sexual offenses.

6 Q: Okay. Now, of these crimes, is there anything

7 significant to you in your field about the criminal domestic

8 violence charge?

9 A: It could be a violent crime because domestic violence

10 could be violent. There is also some literature having to do

11 with risk and people who have been convicted of domestic

12 violent offenses.

13 Q: Okay. And is looking at this prior record things you

14 have to do -- excuse me -- things you have to do in

15 developing an opinion about whether or not Mr. Powell should

16 be civilly committed?

17 A: Yeah. I think that it's important to consider previous

18 criminal history.

19 Q: Okay. And that includes stuff where he didn't get

20 convicted, stuff where he was convicted?

21 A: That's right.

22 Q: Okay. Now, what about prison disciplinary history? Is

23 it important to look at whether or not he was disciplined for

24 doing something bad or violating the rules while locked up at

25 the Department of Corrections?

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1 A: Yes. That's important.

2 Q: Why is that important?

3 A: Well, prisons are a really controlled environment and so
4 individuals who pick up disciplinary reports or get in
5 trouble in the prison, it's kind of an extra layer of
6 difficulty controlling their behavior while they're in prison
7 where it's really monitored and there's a lot of rules and
8 consequences for breaking the rules.

9 Q: Did he have any record of being disciplined for
10 violating the rules while in prison?

11 A: He had two disciplinary infractions in prison.

12 Q: What were they?

13 A: One was he was found with -- with contraband numbers,
14 possession of numbers, which he explained to me had been from
15 a Visa gift card. So he basically was charged for having
16 credit card numbers written down on a piece of paper.

17 He also got in trouble for possession of contraband. He
18 was reportedly observed by his accuser to be smoking a joint
19 of marijuana.

20 Q: Okay. Now, none of the things you've just mentioned are
21 sexual in nature?

22 A: That's right.

23 Q: Okay. So is that something you also look at, whether or
24 not there was a sexual violation in prison?

25 A: Definitely.

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1 Q: And do sometimes people in this field of area sometimes
2 commit sexual violations, either by masturbating in front of
3 a guard or exposing himself or something like that?

4 A: Yes.

5 Q: That didn't happen here?

6 A: No.

7 Q: Okay. Now, based upon your review of the records, the
8 convictions, the documents you looked at, has Mr. Powell been
9 convicted of sexually violent offenses?

10 A: Yes, he has.

11 MR. BOGLE: If I may I approach the witness, Your Honor?

12 THE COURT: You may.

13 BY MR. BOGLE:

14 Q: I'd like to show you what's been marked as State's
15 Exhibit No. 1. It is a certified copy from the Beaufort
16 County Clerk of Court of the indictment and the sentencing
17 sheet, Case No. 04 for 2004 -- GS for General Sessions -- 07-
18 1902 for criminal sexual conduct with a minor in the first
19 degree. Is this a document you looked at, the sentencing
20 sheet and the indictment, as part of your research?

21 A: Yes.

22 Q: Okay. And I'd like to hand you then next what's been
23 marked as State's Exhibit 2, another conviction, sentencing
24 sheet and the indictment, 04-GS-07-1901, also criminal sexual
25 conduct with a minor in the first degree. Is this something

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1 you looked at as part of your records?

2 A: Yes.

3 Q: And finally, as State's Exhibit No. 3, Indictment No.

4 2004-GS-07-1897, a sentencing sheet and the charging

5 document, the indictment, for another criminal sexual conduct

6 in the first degree. Did you also look at that?

7 A: Yes, I did.

8 Q: Okay. Now, is criminal sexual conduct with a minor in

9 the first degree -- is that crime on the list of sexually

10 violent crimes under the statute we're dealing with today?

11 A: Yes, it is.

12 Q: Okay.

13 MR. BOGLE: Your Honor, at this time, I would like to
14 move to introduce into evidence the certified copies of all
15 three charges.

16 THE COURT: Okay. And we've done --

17 MR. FALK: Without objection.

18 THE COURT: Without objection. And we've redacted the
19 names of the victims in the arrest warrants?

20 MR. BOGLE: I've redacted the first names -- the last
21 names rather --

22 THE COURT: Last names.

23 MR. BOGLE: -- of each victim.

24 THE COURT: Thank you.

25 (WHEREUPON, State's Exhibits No. 1, 2, and 3, sentencing

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1 sheets and indictments, were admitted into evidence.)

2 BY MR. BOGLE:

3 Q: Now, I'll hand them back to you. In these cases, were
4 these guilty -- looking at the sentencing sheets, were these
5 guilty pleas or trials?

6 A: He pled guilty to each of these.

7 Q: Okay. And what was the sentencing date at the bottom
8 where the judge signed his name?

9 A: October 9th, 2006.

10 Q: Okay. Were all three guilty pleas happened on the same
11 day?

12 A: Yes.

13 Q: And what was the sentence he got from the Court? Well,
14 how many years did the judge give him?

15 A: Twelve years on each, to be served concurrently. That's
16 at the same time.

17 Q: Okay. So that means twelve years for all three served
18 at the same time?

19 A: Yes.

20 Q: Okay. Now, is it necessary in your line of work to look
21 at the underlying details behind each conviction, how old the
22 victim was, what happened to the victim, what was done to the
23 victim, and over what period of time? Is it necessary in
24 these types of cases to look at the underlying details?

25 A: I believe it is necessary.

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1 Q: Okay. Why do you have to explore the underlying details
2 behind the convictions?

3 A: There's a couple different reasons. One is in this kind
4 of case I've been asked if the respondent has a mental
5 abnormality or personality disorder, and so one of the things
6 that I'm looking at is what we talked about, paraphilic
7 disorder. So I want to see if there's anything reported by
8 the victim, reported by witnesses, or the police or Mr.
9 Powell himself that would give me some data to support a
10 pedophilic disorder diagnosis or another kind of sexual
11 disorder. So I'm looking for that to help me make a
12 diagnosis.

13 Also, like I mentioned, it's helpful to know when
14 estimating risk the behaviors performed on the victims to
15 help me predict or help someone predict how violent or what
16 future crimes would look like and who the victims in those
17 potential cases would include.

18 Q: Okay. Let me hand you State's Exhibit No. 1, where the
19 victim was J.P. or Jessica P. in this particular case. Is
20 that the right victim for the right indictment?

21 A: Yes.

22 Q: Okay. Now, looking at the top, the upper right-hand
23 corner of the sentencing sheet, the very first page, what are
24 the dates of the incident, the date of offense? What does it
25 show there?

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1 A: The date of offense is August 6th, 2004.

2 Q: Okay. Could you tell the jury, please, what underlying
3 details surrounding what happened to this little girl were
4 important in reaching your decision about Mr. Powell?

5 A: So I reviewed all of the documents provided to me in
6 this case, which included police reports and some
7 examinations of the victim herself. I noted that the victim
8 was Mr. Powell's daughter. I believe that she was five years
9 old. And the police reports indicate that in 2004 he
10 penetrated her vagina and rectum with his fingers and
11 performed oral sex on her.

12 This girl underwent a forensic interview, where she met
13 with people trained to discuss sexual abuse with children.
14 That forensic interview indicated that Mr. Powell touched her
15 vagina while she was sleeping, touched her, quote, heinie
16 with his hand. She said that he stuck his penis in her
17 heinie and her vagina. She then underwent a medical
18 examination to look at if there was any physical evidence of
19 sexual abuse, and it was noted that she had a rectal fissure
20 and multiple areas of redness.

21 Q: A rectal what?

22 A: Fissure.

23 Q: Fissure?

24 A: Uh-huh.

25 Q: Okay. What does that mean?

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1 A: So I'm not a medical doctor. It's damage to her rectum.

2 Q: Okay. And multiple areas of redness and a red confluent

3 rash in her vaginal area. The medical -- the physician's

4 opinion was that a rectal fissure --

5 MR. FALK: Objection, Your Honor.

6 THE COURT: Okay.

7 BY MR. BOGLE:

8 Q: Without -- without giving another doctor's opinion --

9 THE COURT: Right.

10 Q: -- what did you learn had happened to this little girl?

11 She had rectal tissue damage?

12 A: She had rectal tissue damage. She had multiple areas of

13 redness and there was a red confluent rash in her vaginal

14 area.

15 Q: Okay. And was this something that was normally you

16 would expect to see on a little girl like that?

17 A: No.

18 Q: Okay. Now, the next thing I hand up to you is

19 Indictment -- State's Exhibit No. 2, Indictment 1901,

20 involving a victim, T.S.

21 MR. BOGLE: With the Court's permission?

22 THE COURT: Uh-huh.

23 MR. BOGLE: I redacted a middle name without a last

24 name, so I'm going to go ahead --

25 THE COURT: Please.

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1 MR. BOGLE: -- and even though it's been introduced,
2 redact --

3 THE COURT: Please.

4 MR. BOGLE: -- the last name. I apologize.

5 BY MR. BOGLE:

6 Q: Now, this particular one on victim T.S. or Tanya S.,
7 look at the date of incident at the very upper right-hand
8 corner. Over what period of time did these crimes occur
9 against this little girl?

10 A: The date of offense on this sheet is 1986 to 1991.

11 Q: So what would have been the age range of victim T.S.
12 over that time period?

13 A: The police reports indicate that she was from 5 to 11
14 years old.

15 Q: And what are the underlying details you found from the
16 police reports that was done by Mr. Powell to this little
17 girl to result in this conviction?

18 A: I believe that this victim was Mr. Powell's girlfriend's
19 daughter at the time. There are reports that list her as
20 being a stepdaughter, but I'm not sure that they were
21 married. So I believe it was girlfriend's daughter.

22 The police reports indicate that from the age of 5 to
23 11, Mr. Powell digitally penetrated her vagina and her
24 rectum, performed oral sex on her, and had her perform oral
25 sex on him, and had vaginal and oral intercourse with her.

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1 It was noted in the police report that he told her that
2 he would kill her mom if she ever told, and that he told the
3 victim that the reason he was abusing her was because her mom
4 didn't satisfy him enough sexually.

5 Q: Okay. Now, in the previous case, there was no impetus
6 of -- the previous indictment, there was no record of him
7 threatening to hurt anybody or kill anybody if she told, but
8 here that happened? Here, the records indicate that
9 happened?

10 A: Correct.

11 Q: Okay. Is that significant to you when there's a threat
12 of violence in a case?

13 A: Violence, threats of violence are important. Violence
14 is significant.

15 Q: Okay. How was this discovered according to the police
16 reports you looked at?

17 A: From the police reports that I have looked at, the first
18 victim, the five-year-old daughter, it was discovered that
19 she had been sexually abused and, after that abuse came out,
20 I believe that that first victim's mother called Mr. Powell's
21 other children, other family members --

22 MR. FALK: Objection. I think --

23 BY MR. BOGLE:

24 Q: Without saying what she said, she made a call?

25 A: She made a call and discovered that other daughters or

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1 stepdaughters reported also being sexually abused by Mr.
2 Powell.

3 Q: So that led to further investigation by law enforcement?

4 A: Correct.

5 Q: Okay. Okay. Now, the third indictment, No. 1897. I'd
6 like to hand you this one. That is also a conviction for
7 criminal sexual conduct with a minor in the first degree, and
8 the victim here is Child 1 or Child 1 Okay?

9 A: Yes.

10 Q: What are the dates of the offense in the upper right-
11 hand corner? Over what timeframe did these crimes occur?

12 A: The date of offense on this sheet is 1988 to 1998..

13 Q: Okay. So we have 1988 to '98, which is ten years?

14 A: Yes.

15 Q: And the other one, No. 2, I think it went back even
16 further --

17 A: '86 --

18 Q: From 1986 to '91?

19 A: '91. Yeah.

20 Q: So another five or six years there. We're up to almost
21 16 years of offending? Okay.

22 The third one I showed you, Exhibit No. 3 for the State,
23 involving Child 1 or Child 1 , what underlying details involving
24 that crime did you find significant in reaching your
25 evaluation?

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1 A: This victim was also Mr. Powell's daughter and for a
2 period of ten years beginning when she was approximately 3
3 years old, it was reported that he put his fingers in her
4 vagina, had vaginal intercourse with her, and performed oral
5 sex on her. Reportedly, he told her it was because her mom
6 couldn't give him what he needed sexually.

7 Q: So looking at these three girls, the youngest age among
8 the three that I'm seeing is 3?

9 A: Yes.

10 Q: And the oldest age that it continues to was about 11?

11 A: That's right.

12 Q: The one girl is kind of in the middle at age 5?

13 A: Uh-huh.

14 Q: Okay. Did you talk to him about these things?

15 A: Yes.

16 Q: What did he say to you that you found significant?

17 A: He said that he didn't engage in these behaviors. He
18 called them trumped up charges. He said that each of these
19 children had a reason to be angry at him and this was kind of
20 their way of getting back at him.

21 I asked him questions specifically about what I had read
22 in these police reports, and he said none of it had occurred.
23 I asked him about the rectal fissure on the first victim and
24 he said that his attorney said that the child could have had
25 constipation.

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1 Q: Okay. What about on T.S., victim T.S. or Tanya S.? Was
2 there a comment he made about her sexuality?

3 A: The way that he reported it to me was that she couldn't
4 bring it up when she had reported that it had -- or when she
5 said it had actually happened to her because she was a virgin
6 at the time and that she could only report it after she
7 wasn't a virgin. And I asked her how he knew that, but he
8 didn't know.

9 Q: Okay. I mean how would he know whether or not this
10 little girl is a virgin or not?

11 A: He didn't have an answer when I -- when I asked him how
12 he knew.

13 Q: Okay. So, now, in your work, you've seen guilty pleas?
14 Have you seen guilty pleas occurring in court?

15 A: Yes, I have.

16 Q: And at a guilty plea, is the defendant placed under oath
17 by the judge?

18 A: Yes.

19 Q: Okay. And does the judge then ask the defendant a
20 series of questions about whether or not he's pleading guilty
21 freely and voluntarily?

22 A: Yes.

23 Q: And if the judge is satisfied about that, does he then
24 ask the prosecutor to tell the judge what happened?

25 A: Yes.

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1 Q: What the crime is?

2 A: Uh-huh. Yes.

3 THE COURT: Is that a yes?

4 Q: Okay. And then the judge turns to the defendant and
5 asks the defendant, well, did you do that?

6 A: Yes.

7 Q: Okay. Do these things have to happen in your experience
8 for a guilty plea to go forward?

9 A: Yes.

10 Q: So in this case, if he pled guilty, he would've had to
11 have admitted the crime in front of the judge?

12 A: That's correct. He would have to hear the facts of the
13 case against him and agree with them.

14 Q: Okay. How do you reconcile that where he's placed under
15 oath in front of a judge with his interview with you a dozen
16 or more years later when he says I didn't do it?

17 A: Well, it's inconsistent.

18 Q: Uh-huh. Did he give some reason or some how it was that
19 he got charged with these things? What was his version to
20 you?

21 A: Again, it was that this was kind of a conspiracy against
22 him by little girls that he had made angry for various
23 reasons.

24 Q: Okay. Now, what is it about this overall criminal
25 history that you found significant in reaching a conclusion

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1 or a recommendation or opinion, if you will, about Mr.

2 Powell?

3 A: Well, I noted that all of the victims were prepubescent
4 girls. It doesn't appear that any of them had reached
5 puberty by the time he stopped offending against them. So
6 that's consistent across the victims. I noted that these
7 were crimes that occurred across a 16-year period to children
8 that he had access to.

9 Q: Okay. Now, as part of your evaluation, were certain
10 assessments done by you or by the laboratory where you work?

11 A: Yes. There's a standard battery that's administered.

12 Q: Okay. Let me go to the first one. There's something
13 called the Conners Continuous Performance Test, Version 3.
14 Was that one of the assessments done of Mr. Powell?

15 A: Yes.

16 Q: Okay. What is it?

17 A: The Conners or the CPT is a measure of attention and
18 concentration. So the respondent will use a computer that
19 will kind of test how well they're paying attention and how
20 well they're concentrating. The reason that we give this
21 measure first is these assessment batteries and the interview
22 that I do -- they are really long. So I want to make sure
23 that the person is able to concentrate and pay attention so
24 then if results come up maybe kind of weird later, I can
25 already have that ruled out, that he wasn't able to

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1 concentrate.

2 Q: Okay. And in this particular -- what result -- what did
3 you learn from this Conners test on Mr. Powell?

4 A: Let's see. So this was a valid administration. So the
5 validity checks look to make sure that everything went right
6 with the test, that he actually was attending to it. He
7 didn't just not answer the questions. So it was a valid
8 test.

9 There was a few atypical scores suggested that he had
10 some attention deficits, but his overall results -- they
11 didn't suggest that he was impulsive on the test and,
12 although he demonstrated some lapses in attention over this
13 long test of attention, his overall profile didn't indicate
14 that he had a problem with sustained attention.

15 Q: Okay. So this is an aid to your being able to interview
16 him later on?

17 A: Yes. It's just one way to check to make sure that he's
18 going to be able to attend to the questions on the
19 instruments that he's going to be then administered.

20 Q: Okay. The next thing I see in your report is something
21 called the SASSI, S-A-S-S-I, Version 4, having to do with
22 substance abuse?

23 A: Yes.

24 Q: Okay. What is the reason for having that test
25 administered or having looked at in that line? Why do it?

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1 A: This is a full diagnostic evaluation. I want to explore
2 and rule out anything that could explain behavior or anything
3 that's going on with Mr. Powell. So part of my full
4 assessment and diagnoses, I also consider substance use.

5 Q: Okay. Why is substance use important in this type of
6 evaluation?

7 A: Substance use can lower your inhibition. So we know
8 that substance use doesn't make somebody sexually offend, but
9 if somebody is already predisposed or has an interest in sex
10 offending, using drugs or alcohol is going to, like, lower
11 your inhibition, kind of prevent you from having the brakes
12 to stop yourself.

13 Q: Did you find an issue with Mr. Powell with regard to
14 cocaine or crack cocaine?

15 A: Yes.

16 Q: What did you find?

17 A: I diagnosed him with having a severe stimulants cocaine
18 use disorder that was currently in sustained remission
19 because he was in a controlled environment where he doesn't
20 have access to it.

21 Q: Meaning he was in prison?

22 A: Correct.

23 Q: Okay. And was the SASSI or the S-A-S-S-I-4 -- was that
24 a part of the basis for your opinion?

25 A: Yes.

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1 Q: Okay.

2 A: All the measures were.

3 Q: And there's another thing called the Personal Inventory
4 -- Personal Assessment Inventory or the PAI?

5 A: Personality Assessment.

6 Q: Personality? I'm sorry. Personality. What is the
7 reason for that? First off, what is it?

8 A: It's a self-report objective measure of psychopathology.
9 So psychological problems and personality characteristics.

10 The reason that I give the PAI is twofold. So one is
11 it's looking at diagnostic issues. It's looking at
12 personality factors. It's looking at approach to treatment,
13 anger management, suicidality, all of the things that I want
14 to consider. It also looks at how valid the person
15 approached the test.

16 So all the tests that I give have something called
17 validity measures, and they tell me, first of all, were they
18 even paying attention or did they just randomly hit the
19 buttons. Then it tells me how they approached the test.
20 Were they defensive? Did they not admit to things that
21 typically people will admit to to make it look like either
22 they're covering up or they're not being forthcoming or they
23 want to look better at something than they actually are? And
24 then I look at the flip side. Are they endorsing so many
25 symptoms or saying yes to so many symptoms that most people

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1 wouldn't endorse so they're trying to look worse off than
2 they actually are?

3 Q: Okay. What did you learn from the administering or from
4 the PAI?

5 A: He responded to similar questions in an inconsistent
6 manner. So just for an example, if something said I feel
7 depressed and he said true and then another question said I'm
8 never depressed and he said false, that would be
9 inconsistent. And there were some inconsistencies on the
10 test which could be carelessness, confusion, not being able
11 to read very well, not paying attention, and so I asked him
12 about that during my follow-up interview when I gave him the
13 results, and he said maybe I mistook the questions. I was
14 trying to be truthful.

15 Q: All right.

16 A: There also was a degree of positive impression
17 management. So he denied common faults or shortcomings that
18 people will typically say that they have. There also was a
19 small degree of negative impression management. So
20 attempting to paint himself in a more negative light than is
21 the case.

22 And when I followed up with him on all of these things
23 during my follow-up interview, he said, like I said, I tried
24 to answer as honestly as I could. I might have
25 misinterpreted it.

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1 The way that those validity scales look, the test was
2 still in the interpretable range, but any conclusions that I
3 drew off of it, you have to kind of look at with a degree of
4 caution because they might not fully paint the picture of
5 what's going on with Mr. Powell.

6 Q: Okay. So in parts of it he seemed like he was trying to
7 paint himself in a better light than he was and other times
8 in a negative light?

9 A: That's right.

10 Q: Okay. The next thing I saw on your report is something
11 called the Abel Assessment for Sexual Interest, Version 3, or
12 called the AASI-3.

13 A: Yes.

14 Q: Was this also something y'all administered to him?

15 A: Yes.

16 Q: Now, has there been some kind of controversy in the
17 psychological field about the use of the Abel?

18 A: One part of the Abel has been subjected to some
19 controversy.

20 Q: Why is that?

21 A: Well, there's two parts of the Abel. So there's a
22 questionnaire that asks all about sexual behavior, sexual
23 knowledge, sexual interest, and that's just a questionnaire
24 where they answer yes/no and then give some details.

25 The second part of it is where they're looking at slides

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1 of adults, children, teenagers, boys, girls, men, women, and
2 they are rating how sexually interested they are in those
3 slides. And then while they're doing that, the machine is
4 kind of keeping the time and looking. They are their own
5 controls; so it's looking to see if they looked longer at
6 children versus adults and vice versa.

7 But the publisher, the person who developed that
8 machine, has trade-secreted it. So you're not allowed to
9 study what's really going on with those times, and so it's a
10 little bit controversial.

11 Q: So which Abel --

12 A: The slides.

13 Q: -- did you use? Both of them or --

14 A: Yeah. We used all of them.

15 Q: Why is that?

16 A: So the reason for the questionnaire is I am in my
17 interview going to ask all of those questions. There's some
18 literature to suggest that sometimes people are more
19 forthcoming or more likely to tell the truth when they're
20 just answering to a computer. Sometimes they feel more
21 comfortable talking to me.

22 So I like to ask the same questions in multiple
23 different ways. So somebody might not be comfortable telling
24 me something that they think is embarrassing or deviant, but
25 when they're in a room by themselves with a computer, they

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1 might answer it. That's why I do the questionnaire.

2 Q: Okay.

3 A: The reason that we do the slides is it is an asymmetric
4 test, which means you're more likely to show that you don't
5 have sexual interest in something that you do have sexual
6 interest, then the opposite. It's pretty hard to show sexual
7 interest to something that you're not interested in. So you
8 have a lot of mist on that, but we give it because it's a
9 data point.

10 Q: Okay. And what did you learn from it that relates to
11 Mr. Powell?

12 A: There was some problematic scores with social
13 desirability. So that's, again, getting at positive
14 impression management; maybe trying to look better than he
15 actually is. High scores suggest that a person might have an
16 inability to be truthful, and these are things like admitting
17 to being impatient, things that people typically will say yes
18 to.

19 And his score on that scale was in the problematic
20 range, which is kind of the middle range. It ranges from
21 nonproblematic, problematic, to highly problematic, and his
22 was in the middle, problematic. He endorsed a lot of
23 substance use, which he also reported to me in the interview.

24 And then how he did on those slides, it indicated that
25 he had sexual interest in teenage and adult women, and

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1 biologically having a sexual interest in teenage girls is
2 normal because it's difficult to tell if somebody is 17 or
3 20. So once somebody is over puberty, that's normal on -- on
4 these slides. And so --

5 Q: Let's just clarify that. It might be normal. It might
6 be illegal?

7 A: Correct.

8 Q: But it's not deviant?

9 A: That's correct.

10 Q: Okay. So did you find any evidence of him trying to
11 throw the test or fake the test or manipulate it in any way?

12 A: There was some evidence that he looked at each of the
13 slides for the exact same amount of periods. The way that
14 the results come out is a bar graph. It's a bar graph and
15 all of the bars were about the same size, which suggests that
16 he possibly was trying to manipulate it, but there's really
17 no way to test that or tell. It's possible. You usually see
18 different lengths of lines, and all of these were nearly the
19 same.

20 Q: The next thing I saw in your report was something called
21 the Hair Psychopathy Checklist?

22 A: Yes.

23 Q: The PCL-SV. What's the purpose of that?

24 A: We know that somebody having a psychopathic personality
25 -- there's some literature to suggest that they are at a

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1 higher risk for reoffending across-the-board and sexually
2 reoffending: And so in my full comprehensive diagnostic
3 evaluation, I want to check to see if they have
4 characteristics similar to somebody who scores highly on
5 psychopathy.

6 Q: Okay. And did he?

7 A: No, he didn't.

8 Q: So he's not a psychopath?

9 A: If it's dichotomous yes or no, no, he is not a
10 psychopath.

11 Q: Okay. And finally, there's something called the Static
12 99-R. What is the Static 99-R?

13 A: So the Static 99-R is an actuarial measure of sexually
14 violent risk or the risk of reoffending. And so there's no
15 way to look at a person and know whether or not that person
16 -- or I should say there's no measure for one specific
17 person, but based on studies of people who have sexually
18 reoffended, we know characteristics that they all have in
19 common.

20 And so you can kind of think about it like when you
21 apply for life insurance. So a life insurance company --
22 they don't know when you are specifically going to pass away,
23 but they know characteristics of people who pass away early.

24 So they want to know if you're a smoker. They want to
25 know what kind of job you work. They want to know if you go

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1 skydiving on the weekends. And then they're going to put all
2 of those numbers together in an actuarial way to kind of
3 assign a percentage to you of, like, what's the likelihood
4 that you're going to die early or live a long time. And the
5 Static-99 kind of works like that, looking at sex offender
6 risks.

7 Q: So the insurance company will put all this information
8 together and it might determine what your premium is going to
9 be?

10 A: That's correct.

11 Q: How much you've got to pay for insurance. If you're a
12 high risk of dying young, you're going to pay a lot?

13 A: That's correct.

14 Q: Okay. So when you say actuarial, is that what that word
15 means in this context?

16 A: Yes, that's correct.

17 Q: Is that what -- and the Static 99-R is based on
18 thousands of sex offenders who reoffended over multiple
19 countries; is that right?

20 A: That's correct.

21 Q: You add up a score?

22 A: Yes.

23 Q: Okay. What's the lowest score you can get on the
24 Static?

25 A: A -3.

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1 Q: And the highest score?

2 A: I think it's a 12.

3 Q: What did this guy get?

4 A: He had a 1.

5 Q: Okay. What does a 1 tell you as far as his risk to
6 reoffend?

7 A: That puts him in the below-average risk category for
8 being charged or convicted of another sex offense in 5 years.
9 So it gives you all kinds of different percentages. That's
10 within that 5 years. So looking at samples who have the same
11 characteristics as Mr. Powell did on this measure, his
12 likelihood of reoffending, people in that sample, over the
13 next 5 years is about, like, a 3 percent.

14 Q: Okay. Now, the Static looks at a five-year-out chance
15 of reoffending; right?

16 A: That's correct.

17 Q: In this particular case, the law is asking you to look
18 at the guy's chance of reoffending not limited to 5 years;
19 right?

20 A: I believe across the lifetime.

21 Q: Across his lifetime?

22 A: Yes.

23 Q: Okay. Is there a -- let me back up a second then. So
24 now, in addition to what you've done, these different tests,
25 these different data points you called them a minute ago --

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1 A: Yes.

2 Q: Why so -- why so many?

3 A: Well, the best practice is to include using multiple
4 measures, multiple data points. It would be unethical to use
5 one piece of information to make a decision. And so that's
6 why I incorporate a lot of data to make sure that the science
7 is sound and that I'm thinking about everything in the case
8 and not just, you know, one thing that sounds sensational or
9 looks good or bad.

10 Q: Now, you mentioned a minute ago that you also had access
11 to the report done by -- excuse me -- done by Dr. Marie Gehle
12 with the Department of Mental Health?

13 A: Yes.

14 Q: She was appointed by the Court early on to do an
15 evaluation of this guy under this law; right?

16 A: Yes.

17 Q: Okay. And was that evaluation, looking at it and
18 considering it, part of the basis of your opinion?

19 A: I noted what he told her in the evaluation and the tests
20 that she had done. So in that way, it factored into my
21 opinion.

22 Q: Okay. Why was it important for you to look at her
23 opinion?

24 A: Well, it was more important for me to look at how she
25 approached the assessments and the things that she gathered

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1 from Mr. Powell versus the things that I gathered, the things
2 that he told her versus the things that she told me or he
3 told me.

4 Q: Okay. We'll come back to that in just a minute. Let me
5 ask you about risk factors. What are risk factors with
6 regard to this type of evaluation?

7 A: I mean risk factors are anything else that would put
8 somebody at higher risk to reoffend.

9 Q: Okay. And I think on page 31 of your report, you start
10 talking about the risk factors that this guy might have --
11 that this guy appears to have. So what are the risk factors
12 that Robert Powell has that figured into your opinion about
13 him?

14 A: Well, I noted a number of risk factors that weren't
15 included in the Static 99 measure of actuarial risk that I
16 mentioned. One was that he has a sexual interest in
17 children, and so the Static 99 doesn't account for what
18 somebody is interested in or the reason that they committed
19 those crimes in the first place. Sometimes people will
20 offend against children because they have access to them,
21 they are there, and that's the only person they have access
22 to. That doesn't necessarily mean that they are sexually
23 aroused by children.

24 It's my opinion that Mr. Powell has an illness that
25 predisposes him to arousal to children and that that was one

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1 of the reasons why he offended against these victims. So
2 that was a major risk factor, that he has sexual arousal to
3 children.

4 Another risk factor is that he offended over a period of
5 16 years. He re-offended -- he offended and then re-offended
6 and then re-offended against another child.

7 Another risk factor was that he hadn't had any treatment
8 for this disorder. He has a disorder that predisposes him to
9 sexually offend against children.

10 Q: Now, let me stop you right here. I'll interrupt you if
11 I may --

12 A: Yes.

13 Q: -- and just ask you this. The lack of sex offender
14 treatment -- when you asked him about that, what did he say
15 about the Department of Corrections?

16 A: Let me look. I believe he said that he wasn't
17 approached for treatment, but I don't want to misquote my
18 report. It just says he was unaware of why he did not
19 complete any of the treatment in prison.

20 Q: Okay.

21 A: And that SCDC -- the South Carolina Department of
22 Corrections records that I reviewed indicated there was no
23 record of sex offender treatment anywhere in his file.

24 Q: Okay. Did he seem to think it was their job to come to
25 him? Or could you tell?

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1 A: I don't recall. I'm recalling that he told me that no
2 one approached him for treatment.

3 Q: Okay.

4 A: But I just have in my report that he doesn't know why he
5 didn't get treatment.

6 Q: But your recollection is that he told you that they
7 didn't come to him and say, hey, how about treatment?

8 A: Right. Sometimes you'll have people say I refused the
9 treatment.

10 Q: Uh-huh.

11 A: He didn't say that he refused it. He said he didn't
12 receive it and he doesn't know why.

13 Q: But he didn't -- he didn't seek it out, did he?

14 A: Correct.

15 Q: Okay. Does he think he needs sex offender treatment?

16 A: To my knowledge, he does not believe that he needs
17 treatment.

18 Q: Okay. Let's go back to his risk factors. I apologize.
19 I interrupted you at some point. Let's go back to that list
20 of risk factors you were talking about.

21 A: Yes. So he has the disorder that predisposes him to
22 arousal by children. He has the 16 years --

23 MR. FALK: Objection, Your Honor.

24 THE COURT: Okay. It's asked and answered? What are we
25 -- do you want to come talk to me? Okay.

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1 (WHEREUPON, a bench conference was held in the presence
2 of the jury but out of the hearing of the jury as
3 follows.)

4 THE COURT: What's your objection?

5 MR. FALK: I tried really hard not to open the door, but
6 I don't think there's any basis in her report for a sexual
7 arousal to children unless you're talking about the PPG test.
8 I mean they have assault against children, but sexual arousal
9 means sexual arousal. I don't think there's any indication
10 of intercourse with these children.

11 MR. BOGLE: Well, you know --

12 THE COURT: Can't the three prior convictions --

13 MR. BOGLE: You've got three convictions over 16 years,
14 sticking his --

15 MR. FALK: That's --

16 MR. BOGLE: Sticking his parts into the girls. Come on.

17 MR. FALK: But not the part that means sexual arousal.
18 I mean this could be assaulting these children, but she's
19 saying sexual arousal.

20 MR. BOGLE: Well, a pedophile. And she'll get to her
21 diagnosis with my next line of questioning. Pedophilia is
22 safe to find is sexual arousal to children.

23 MR. FALK: Can I cross-examine her on that without
24 opening the door to the PPG?

25 MR. BOGLE: We'll see.

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1 THE COURT: I don't know. I don't know.

2 MR. FALK: That's why I'm up here.

3 THE COURT: Well, we'll take a break in between your
4 cross-examination. We can talk about it.

5 MR. FALK: Okay.

6 THE COURT: But if you want to ask her that, it may open
7 the door.

8 MR. FALK: Okay.

9 THE COURT: Okay.

10 MR. BOGLE: Okay.

11 (WHEREUPON, the bench conference ended and the
12 proceedings resumed as follows.)

13 BY MR. BOGLE:

14 Q: Doctor, we're going through the risk factors. You
15 identified one was the sexual arousal to children?

16 A: Yes.

17 Q: We've got 16 years?

18 A: Sixteen years.

19 Q: A timeframe of over 16 years. In some cases, many years
20 on one victim?

21 A: Correct.

22 Q: All of them little girls?

23 A: Yes. And then other risk factors that I noted is that I
24 didn't feel that he had realistic plans to prevent himself
25 from reoffending. I usually ask people to estimate their own

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1 level of risk on a scale of 1 to 10, and he was adamant that
2 he was a zero.

3 And we know just human nature no one is a zero risk.
4 Anybody could offend, and so he said that it's not possible.
5 There's no way that he would ever offend, but he doesn't plan
6 to get treatment because he minimized his sexual interest,
7 sexual behaviors, sexual thoughts, sexual fantasies during my
8 evaluation, and we know that sexual suppression and avoidance
9 aren't realistic strategies to prevent reoffending.

10 Q: So his plans if released by this jury is he -- are they
11 realistic to you, given this level of risk you're talking
12 about?

13 A: Not getting treatment is not realistic to me. I mean I
14 think his other plans include going to live with his mother
15 for a period of time, possibly getting employment, but -- but
16 what I am concerned about is the plan not to get treatment.

17 Q: Okay. Now, Doctor, based on your evaluation of Mr.
18 Powell, the tests you had done, the documents you reviewed,
19 the criminal convictions you looked at right here, the
20 overall underlying details of those, do you have an opinion
21 to a reasonable degree of psychological certainty as to
22 whether or not Robert Powell suffers from a mental
23 abnormality?

24 A: Yes, I do.

25 Q: And what mental abnormalities did you find?

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1 A: I diagnosed him with two disorders. The first being
2 pedophilic disorder, nonexclusive type, which means he is
3 attracted to adults and children, females, because his
4 victims were all female children.

5 Q: Okay.

6 A: I also diagnosed him with a severe stimulant use
7 disorder for his powder cocaine and crack cocaine use. As I
8 mentioned, I think that that is in remission because he
9 hasn't had access to it. He's been in the controlled
10 environment in the detention center or in prison.

11 Q: Because he's been in prison since at least 2006?

12 A: That was when he was sentenced.

13 Q: And then when he finished the prison sentence, the local
14 jail until now?

15 A: Correct.

16 Q: Okay. Now, do you also have an opinion, again to a
17 reasonable degree of psychological certainty, as to whether
18 this diagnosis of pedophilic disorder, this sexual attraction
19 to little girls that you talked about, does that affect his
20 emotional or volitional capacity so that he is predisposed to
21 commit future sexually violent offenses?

22 A: Yes.

23 Q: When I use the word volitional, what am I saying there?

24 A: I mean I think, like, your choice, your ability to
25 control.

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1 Q: Okay. Do you also have an opinion, again to a
2 reasonable degree of psychological certainty, as to whether
3 or not Robert Powell has the propensity to be dangerous and
4 to commit future sexually violent offenses?

5 A: Yes.

6 Q: Do you have an opinion, again to -- is it your opinion
7 that he does?

8 A: Yes. That is my opinion.

9 Q: Do you also have an opinion, and again to a reasonable
10 degree of psychological certainty, does Mr. Powell's
11 propensity to commit acts of future sexually violent offenses
12 -- is it to such a degree it poses a menace to the health and
13 safety of others?

14 A: Yes. That's my opinion because it's my opinion he has
15 an illness that predisposes him to sexual interest arousal
16 urges towards children, that if acted on again would produce
17 a new prepubescent female child victim, that he hasn't had
18 treatment for yet.

19 Q: Do you also have an opinion, again to a reasonable
20 degree of psychological certainty, does Robert Powell have
21 serious difficulty controlling his behavior and his
22 propensities to be dangerous?

23 A: I believe that he does based on the 16-year period of
24 not controlling his sexual interests or arousal to children.
25 He also had a few disciplinary infractions in prison, which

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1 suggest that he might have difficulty conforming his conduct
2 to those rules as well.

3 Q: Do you also have an opinion, again to a reasonable
4 degree of psychological certainty, does Robert Powell's
5 diagnosis, the things you've talked about this morning, do
6 they make him likely to engage in acts of sexual violence if
7 he is not confined in a secure facility for long-term
8 control, care, and treatment?

9 A: Yes. As I mentioned, it's my opinion that he offended
10 against these children because he was sexually interested in
11 them, which my opinion makes him likely to reoffend and
12 dangerous if not committed.

13 Q: What about outpatient sex offender treatment? Is that
14 the idea for this guy? Is that the recommendation?

15 A: That is not the recommendation. I think, as I
16 mentioned, that if he were to act on this disorder again, it
17 would result in a new child victim and that he needs to go to
18 inpatient treatment or be confined so that he can learn to
19 manage that and be safe in the community.

20 Q: And again, do you have an opinion, again to a reasonable
21 degree of psychological certainty, as to whether or not
22 Robert Powell meets the legal criteria to be found to be a
23 sexually violent predator at this time?

24 A: Yes. It is my opinion that per the statute he meets the
25 definition for being a sexually violent predator.

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1 Q: Now, we mentioned earlier that you reviewed Dr. Gehle's
2 report?

3 A: Yes.

4 Q: And she was the mental health psychologist appointed by
5 the Court to evaluate the guy at the beginning; right?

6 A: Correct.

7 Q: Was that her involvement in the case?

8 A: To my knowledge, yes.

9 Q: Okay. What was her ultimate opinion on whether or not
10 Mr. Powell should be civilly committed as a sexually violent
11 predator?

12 A: It was her ultimate opinion that he did not meet the
13 statutory definition for being a sexually violent predator.

14 Q: Okay. So it's apparent that there's a disagreement
15 here?

16 A: Correct.

17 Q: Did you find her report lacking or her conclusions
18 lacking or that they were unsupported by the reasoning she
19 used in her report?

20 A: There were a lot of similarities between our reports.
21 She also diagnosed him with pedophilic disorder and a
22 stimulant use disorder.

23 Q: Uh-huh.

24 A: She had the same score that I got on the Static 99.
25 However, I think that she only relied on the Static 99, and I

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1 think that there were other risk factors not accounted for by
2 that measure that make him dangerous.

3 Q: Okay. If he is released by this jury, who would be at
4 risk?

5 A: I would say young girls. Prepubescent girls.

6 MR. BOGLE: Thank you, Doctor. Please answer any
7 questions Mr. Falk may have or the Court may have.

8 THE COURT: Ladies and gentlemen, I think now is a good
9 time to take a break. All right?

10 Ladies and gentlemen, do not discuss this case. It
11 wouldn't be appropriate to do so. Get a Coke or a cup of
12 coffee. You're welcome to bring it back in the jury room if
13 you want. I anticipate that we're going to go until roughly
14 1:00 o'clock or if it's a little bit earlier than that, that
15 if we finish with this doctor, we might break for lunch.
16 We'll just see kind of how it unfolds.

17 All right. Is everyone okay? Yes. Very good.

18 Ladies and gentlemen, I need you to do one thing for me.
19 I need you to elect a foreperson. The foreperson doesn't
20 have any more say than anyone else. They are simply the
21 person at the end of the case that makes sure that everyone
22 contributes to deliberations and they also sign the verdict
23 form for me.

24 When you have elected that foreperson, if you'll just
25 give that name to the bailiff so I know who it is. All

1 right? You can do that over your break.

2 Okay. Thank you, ladies and gentlemen. You're excused
3 back to the jury room.

4 (WHEREUPON, the jury exited the courtroom at 11:30 a.m.)

5 THE BAILIFF: The jury is clear, Your Honor.

6 THE COURT: All right. We're going to go ahead and take
7 10 minutes, and then we'll come back and we'll argue what
8 your objection is and we're talking about potentially opening
9 the door. You're free to step down. You just cannot discuss
10 your testimony with anybody. I mean you'll just come right
11 back up and ready to go.

12 THE WITNESS: Yes. Thank you.

13 THE COURT: Okay. I appreciate it, y'all. Let's just
14 take 10 minutes and we'll be back. Okay.

15 (WHEREUPON, there was a break in the proceedings from
16 11:31 a.m. until 11:47 a.m., after which the proceedings
17 resumed as follows.)

18 THE COURT: All right. The jury has asked to take
19 notes. Do you all have a position on that, counsel?

20 MR. BOGLE: I think one guy in the far-right front row

21 --

22 THE COURT: Is taking --

23 MR. BOGLE: Well, he had started taking notes and the
24 bailiff --

25 THE COURT: Told him not to.

1 MR. BOGLE: -- called him on it.

2 THE COURT: Okay.

3 MR. BOGLE: But it's up to you.

4 THE COURT: Do you mind? You don't object. Do you
5 object?

6 MR. FALK: What's your opinion on notes going back in
7 the jury room?

8 THE COURT: At the end, they do. But they're to use for
9 themselves. I mean they don't go back and forth until the
10 end until their deliberations.

11 MR. BOGLE: My only concern is the guy might be so busy
12 writing something down he might not hear something.

13 THE COURT: Well, that's what we always say, but I give
14 them an instruction on notetaking. So I just need to know if
15 anyone objects outright.

16 MR. BOGLE: Well, my --

17 MR. FALK: Again --

18 MR. BOGLE: It's up to you, Judge.

19 MR. FALK: Can they take their notes back to the jury
20 room at the end?

21 THE COURT: Yes.

22 MR. FALK: For deliberating?

23 THE COURT: Yes.

24 MR. FALK: Then I object.

25 THE COURT: Why?

1 MR. FALK: I'm afraid that -- because what's important
2 is what the juries remember on the testimony and not what
3 somebody writes down saying this is what this person said.

4 THE COURT: And I give them a jury instruction that says
5 specifically that. It says just because someone takes notes
6 doesn't mean that you will replace, because someone took
7 notes, your recollection. I say that your notes are for your
8 own recollection, and I told them that some people are better
9 notetakers than others and they are to use them for
10 themselves and for their own reliance. So there's a jury
11 instruction that is very clear about that.

12 MR. FALK: Okay.

13 THE COURT: So I'm not concerned. They seem to want it;
14 so I think we should go ahead and allow them to.

15 MR. FALK: Okay.

16 THE COURT: So let's go ahead and give them notebooks.
17 Okay? And pens before they come back. Okay?

18 Let's talk about the issue that you raised when you came
19 up.

20 MR. FALK: Well, there's -- there's -- the issue that I
21 raised was her testimony regarding pedophilic arousal.

22 THE COURT: She said sexual arousal to children. Right.

23 MR. FALK: And from my mind, arousal is below the waist.

24 THE COURT: Uh-huh.

25 MR. FALK: And I don't believe there's any support in

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1 the -- other than the PPG there's any support in the record
2 to him being sexually aroused when he was performing any of
3 these acts. I mean he could be -- there could be other
4 reasons why. I'm just -- and so I would like to ask her
5 about it, but not if he's going to be able to come back and
6 say, well, there was the PPG.

7 THE COURT: Well, I think she has to be able to give her
8 basis for it. Is there any other basis for you saying that
9 he's sexually aroused to children other than the PPG?

10 THE WITNESS: Well, should I get up there?

11 THE COURT: Sure. Come on up. I remind you you're
12 under oath.

13 THE WITNESS: Yes.

14 THE COURT: This is in-camera.

15 MR. BOGLE: Do you want me to ask her or you ask her?

16 THE COURT: No. He's going to ask her.

17 MR. BOGLE: Okay.

18 THE COURT: Go ahead.

19 IN-CAMERA AND PROFFERED CROSS-EXAMINATION

20 BY MR. FALK:

21 Q: Is there -- what evidence do you have that he is
22 sexually aroused to children?

23 A: Well, Dr. Gehle and I both diagnosed him with pedophilic
24 disorder. And so the point that you can offend against
25 children for a reason that isn't pedophilic, that's well

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1 taken, but because we both diagnosed him with the same
2 disorder, I don't think there's a question there and I think
3 pedophilic disorder is sexual interest, sexual thoughts,
4 sexual fantasies, sexual arousal to children.

5 Q: Yeah. But I'm just saying the sexual arousal -- so
6 you're saying fantasies is the same as arousal? Thoughts is
7 the same as arousal?

8 A: No.

9 Q: Arousal is different, isn't it?

10 A: I mean arousal can be mental, I think.

11 THE COURT: Well, there you go. She doesn't believe
12 it's just below the waist. So ...

13 MR. FALK: All right.

14 THE COURT: Okay. She seems to have cleared that up.

15 So...

16 MR. FALK: Okay.

17 THE COURT: Okay.

18 MR. FALK: My next question --

19 THE COURT: Uh-huh.

20 MR. FALK: And maybe we could just do a proffer here?

21 THE COURT: Okay.

22 MR. FALK: About the polygraph test.

23 THE COURT: Okay.

24 BY MR. FALK:

25 Q: And my question would be did you -- was a polygraph test

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1 administered as part of this?

2 A: Yes.

3 Q: What were the questions that were asked?

4 A: He was asked two questions about in the last six months
5 had he masturbated to fantasies of young children or
6 prepubescent children.

7 Q: And did that support your diagnosis? Did his response
8 conflict with your diagnosis?

9 A: It didn't conflict. It doesn't suggest that he isn't
10 aroused by children. Just that he's not currently
11 masturbating to that arousal.

12 Q: But to the extent that we're talking about what's going
13 to happen going on in the future, isn't that exactly what
14 we're talking about?

15 A: I mean there's other reasons why people aren't
16 masturbating. Sometimes people say, you know, it's hard to
17 masturbate in jail, having other people in the same cell or
18 same dorm as you. There's other reasons why people might not
19 be masturbating.

20 Q: Who framed the question?

21 MR. BOGLE: Your Honor, I think the question -- the
22 issue is admissibility of the polygraph, not a free reign
23 cross-examination without the jury being present.

24 MR. FALK: No. I thought -- okay. I was assuming it
25 wasn't coming in and this was my proffer.

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1 THE COURT: Okay. And I'm just trying to figure out --

2 MR. BOGLE: Okay.

3 THE COURT: -- at this point. So my understanding is

4 the polygraph -- the two questions that he answered to you

5 were in the negative; is that correct?

6 THE WITNESS: Correct. And he was shown to be truthful.

7 THE COURT: And he was shown to be truthful on that.

8 What was the second question that you asked? I understand

9 what your first one was. What was the second question?

10 THE WITNESS: They were just two questions.

11 THE COURT: Right.

12 THE WITNESS: Usually what they do is they ask it

13 multiple different ways.

14 THE COURT: Right.

15 THE WITNESS: Two different ways. I can give you the

16 exact wording. But they asked the same thing.

17 So the one was in the last six months have you

18 masturbated to a fantasy involving prepubescent children?

19 THE COURT: Okay.

20 THE WITNESS: And have you masturbated to sexual

21 fantasies involving a prepubescent child in the past six

22 months?

23 THE COURT: Okay. Okay.

24 MR. FALK: So I mean I would love to ask her about the

25 polygraph, but I --

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1 THE COURT: Well, do you object to it?

2 MR. BOGLE: Well, I object to the polygraph coming in.
3 Perhaps I misunderstood. I was thinking he was getting a
4 free run at cross-examining her without the jury, but really
5 we object to the polygraph coming in. I think the law is
6 long settled about the inadmissibility of polygraph
7 examinations.

8 THE COURT: Uh-huh.

9 MR. BOGLE: Now, if he wants to make a proffer for
10 appellate reasons, then I'll sit down and let him go ahead
11 with that.

12 THE COURT: Okay.

13 MR. FALK: I was basing it on our pretrial ruling that
14 --

15 THE COURT: Right.

16 MR. FALK: -- the PPG was staying out --

17 THE COURT: Right.

18 MR. FALK: -- and the polygraph was staying out.

19 THE COURT: Right.

20 MR. FALK: So maybe I jumped the gun on my --

21 THE COURT: That's fine.

22 MR. FALK: But I was going to be --

23 THE COURT: That's fine. Mr. Bogle is objecting to the
24 polygraph coming in and, again, it's -- the Court has deemed
25 that it's not reliable. So obviously, that can't come in as

1 well. So again, it was kept out for both. So --

2 MR. FALK: Okay.

3 THE COURT: Okay. I think you've done your proffer. I
4 think obviously you would like it. You think it assists him
5 in some way, although I mean she's got plenty of explanations
6 for it.

7 MR. FALK: That's what I wanted to do.

8 THE COURT: Okay. All right. So anything further?

9 MR. FALK: No, Your Honor.

10 THE COURT: No? All right. Well, are you ready to
11 bring the jury in? Are you okay? Rick, you too and you, Dr.
12 Gottfried, as well?

13 THE WITNESS: Yes.

14 / THE COURT: Okay. You're the one on the seat. Okay.
15 All right. Let's bring them in.

16 THE WITNESS: And you want me to stay up here?

17 THE COURT: Yes, please.

18 (WHEREUPON, the jury entered the courtroom at 11:56
19 a.m.)

20 THE COURT: Mr. Falk, if you'll give me a quick minute
21 with the jury.

22 Welcome back, ladies and gentlemen. It's my
23 understanding from the bailiff that some of you requested to
24 be able to take notes, and you've been given pads and papers
25 to that effect.

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1 Ladies and gentlemen, though, you are not required to
2 take notes in any way. And also, I want you to understand
3 that your notes are for your own review and recollection, not
4 for other people. As you come and go during the trial of
5 this case, you're going to leave your notes in your seats.
6 At the very end of the case, you will have them to assist
7 you, if you would like, but again, they are for you to use.

8 I'm going to give you a jury instruction at the end of
9 this case, along with the other instructions on the law, that
10 basically says is that you are supposed to use your own
11 memory and recollection of testimony in this case and not
12 base any kind of recollection or -- on someone else's
13 notetaking. And the reason why I say that is that some
14 people are better notetakers than others and some people take
15 just wrong notes, ladies and gentlemen.

16 So again, those are for you to use as you see
17 appropriate and as fit for you and not to be compared with
18 other people. And you're to rely on your own recollection of
19 the testimony and not just because someone else may have
20 taken a note. Okay?

21 All right. With that said, Mr. Falk, you can go ahead.
22 You can cross-examine Dr. Gottfried.

23 CROSS-EXAMINATION

24 BY MR. FALK:

25 Q: Dr. Gottfried, when Mr. Bogle was asking you about

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1 forensic psychology, you would say that all of your current
2 work in your professional life is devoted to forensic
3 psychology?

4 A: Yes.

5 Q: Okay. And that's sort of a broad umbrella, is it not?

6 A: Yes.

7 Q: And so that -- you said that includes competency to
8 stand trial evaluations?

9 A: Correct.

10 Q: Criminal responsibility evaluations?

11 A: Yes.

12 Q: And then have you been called on for evaluations that
13 would come up in Family Court?

14 A: Every once in a while. I just did one yesterday, but
15 that was my first one. But yes, I've done one.

16 Q: Okay. How much of your time is devoted to doing -- so I
17 guess it's not a hundred. So how much of your time is
18 devoted to doing pre-commitment evaluations in sexually
19 violent predator cases?

20 A: Well, that varies by the month. So we get the second
21 opinions from the Attorney General's Office. I do all of
22 those at MUSC, but we don't get them every day. Each month
23 varies. So in terms of the pre-commitments, it really varies
24 on the months. Sometimes I have three or four going during
25 that month; sometimes I don't have any going. I would say

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1 that the sexual behavior clinic and lab is probably about 65
2 percent of what I do, but a hundred percent forensic, not
3 just the pre-commitment though.

4 Q: So is there other things at the SBCL?

5 A: SBCL.

6 Q: SBCL that is not related to pre-commitment evaluations
7 in sexually violent predator cases?

8 A: Yes.

9 Q: Okay. And then how many of these have you done, pre-
10 commitment evaluations?

11 A: I've done 14 total. Some of those were reviews.

12 Q: Uh-huh..

13 A: I don't know off the top of my head how many. I can try
14 to count out of those 14. Probably more than half have been
15 pre-commitment, but some of the 14 have been the reviews.

16 Q: Are any of those cases pending? If you had 15, are any
17 of them pending?

18 A: Many of them are pending.

19 Q: Okay. So you were saying at least half of them are?
20 That was just a guess? You really don't have any idea?

21 A: I would guess that a little more than half are the pre-
22 commitment, but I see both types.

23 Q: Okay. Now, what is your opinion? Is everybody who
24 commits a crime against -- a sexual crime against a child
25 need to be in the sexually violent predator program?

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1 A: No.

2 Q: Does everybody who meets a diagnosis of pedophilia need
3 to be in a sexually violent predator program?

4 A: No.

5 Q: Is it -- I made a characterization that the program is
6 for the worst of the worst. Did you agree with that?

7 A: I mean I guess I would have to compare them to other sex
8 offenders, but it's a program for people who are likely to
9 reoffend if not committed.

10 Q: Okay. And what is your definition of likely?

11 A: Well, that's something that's been debated. So is it 51
12 percent? Is it more likely than not? That's a hard question
13 that hasn't been precisely defined by courts.

14 Q: But you conduct -- what is the best -- in your science,
15 imperfect as it may be, what is your best -- what is the best
16 actuarial tool for sexual recidivism in SVP cases?

17 A: I mean it does depend on the paper that you read. Most
18 of the papers suggest that the Static 99-R is the best. It
19 still has problems, but risk prediction is a really difficult
20 science and so all the studies that have been done of the
21 Static 99 find that its predictive value is better than some
22 of the other actuarials that we have.

23 Q: Okay. And his risk of reoffending over the next 5 years
24 is, you said, 3.8 percent?

25 A: Not his risk of reoffending, but individuals with

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1 similar characteristics. That would be the groups.

2 Q: Okay. So somebody in his group who meets his profile,
3 as Mr. Bogle was saying, if we're doing an actuarial
4 assessment, that group of people -- their likelihood to
5 reoffend is 3.8 percent; is that correct?

6 A: I think 3.34. It was --

7 Q: Whatever -- oh, I may have written it down wrong.

8 A: I'm sorry. 3.9.

9 Q: Okay. We were both wrong. 3.9 percent.

10 Now, on the Static 99, that first box on there when
11 you're doing the rating is based on tech questions; is that
12 correct?

13 A: Correct.

14 Q: All right. The first question relates to the person's
15 age; is that not correct?

16 A: The age of when they would be released.

17 Q: Okay. And did he get any points in that box?

18 A: He is 57. I believe it's a zero. If you want me to
19 look at my scoring sheet --

20 Q: Could you, please?

21 THE WITNESS: Mr. Bogle, would you hand me the scoring
22 sheet?

23 MR. BOGLE: This thing here?

24 THE WITNESS: Yes, please.

25 BY MR. FALK:

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- 1 A: Excuse me. He got -1 points in the first box, which
2 looks at the age of when they would be released from their
3 sex offense.
- 4 Q: And that's for what age category?
- 5 A: That is age 40 to 59.9.
- 6 Q: Okay. And so that's a -- you said that's a -1?
- 7 A: That's a -1.
- 8 Q: All right. So on his 60th birthday, what does it go to?
- 9 A: It goes to -3, but that's not really how the Static
10 works. It's looking at the age they were released.
- 11 Q: Okay.
- 12 A: And then the 5 years. So you can't -- like, you've got
13 to score it at that age.
- 14 Q: Sure.
- 15 A: So if he was 60 when he would be released, then it would
16 be -3.
- 17 Q: Okay. And if he was 60 when he was being released, it
18 would be a -3. What is that 5-year risk of re-offense?
- 19 A: I don't have the manual with me.
- 20 Q: Could it be about 1.9 percent? Does that sound about
21 right?
- 22 A: I believe it, but I don't have the manual in front of
23 me. But like I said, this is looking at the age that he is
24 released.
- 25 Q: Right. What is significant about his 60th birthday to go

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1 down so much?

2 A: Well, the literature suggests that people who sexually
3 offend usually for an antisocial reason, so because they
4 don't care about the rules of society or they, you know, do
5 things against the morals and the norms of society, we see a
6 dip in criminal behavior after the age of 60. However, that
7 doesn't account for when people have paraphilic interests.
8 Age is less related.

9 Q: Okay. But can you say right now what his risk of re-
10 offense in any type of percentage number? What's an absolute
11 risk that he will reoffend?

12 A: No. No one can say that.

13 Q: And the absolute risk that somebody in his group would
14 reoffend is this 3.9 percent?

15 A: That is based on the studies of people with similar
16 characteristics. That's the percentage of them who did go on
17 to reoffend, but they were discovered or they were arrested
18 for re-offense.

19 Q: What specifically did you -- did you find about his
20 grand larceny charge that was nolle prossed that was -- what
21 specifically was significant about that?

22 A: The only thing that I found significant about it is it
23 helped me score the PCLR, the psychopathy checklist. It has
24 an item where you have to go through their criminal history
25 and look to see the types of crimes they've been charged

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1 with.

2 Q: And so those are the charges -- and that -- when you're
3 doing the Hair PCLR, that would talk about nolle prossed
4 charges?

5 A: Yeah. Charges are charges.

6 Q: Okay.

7 A: Convictions are counted separately, like, on the Static
8 99. So you first just start looking at any contact that
9 they've had with the police.

10 Q: Is that the same -- is that your same response for the
11 fraudulent check charge?

12 A: Yes.

13 Q: And you don't know anything about the underlying facts
14 of any of those nonsexual convictions; is that correct?

15 A: That's correct. I wasn't provided -- due to the date of
16 those charges, I wasn't provided with the police reports, but
17 I did sit down and talk to Mr. Powell about what he could
18 remember about them. So any information that I have about
19 them was reported by him.

20 Q: And so you don't know the underlying facts of the CDV
21 charge; is that correct?

22 A: Only what he told me.

23 Q: Okay. And have you done -- you said you've done 15 pre-
24 commitment evaluations?

25 A: I have done 15 total. Not all of them were pre-

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1 commitment.

2 Q: Okay. So in the however many you've done, eight or
3 nine, how often do you see disciplinary infractions from the
4 Department of Corrections?

5 A: Sometimes I don't see any. Sometimes I see a lot.
6 There's a wide range between those eight or nine that I've
7 seen.

8 Q: Okay. So what did you find significant about the fact
9 that he had -- he possibly had credit card numbers on a piece
10 of paper in his cell?

11 A: Just the presence of being disciplined while in prison
12 suggests to me that they have a hard time following the rules
13 in a really controlled environment.

14 Q: Do you have an appreciation for how many rules there are
15 in prison?

16 A: I imagine there are a lot.

17 Q: And you don't know anything about the charge as far as
18 the allegation that he was smoking marijuana; is that
19 correct?

20 A: I know that he was convicted -- convicted of the
21 disciplinary report.

22 Q: A 30-year -- I mean a 30-day sentence. Sometimes a
23 disciplinary infraction is just based on what an accuser
24 said. There wasn't really any type of proof?

25 A: Right. I mean sometimes they'll find that there isn't

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1 evidence and then that -- it's not a charge, but that
2 disciplinary report will be unfounded but this -- it was
3 founded for that.

4 Q: But would you say that that's still -- over a 10-year
5 and 2-month period, that's a relatively low amount of
6 disciplinary infractions?

7 A: I have seen people who haven't had any and then, like I
8 said, I've seen people who have more than 30. So compared to
9 the person with 30, that is low. Maybe compared to the
10 person with none, it's higher, but...

11 Q: Now, when you were looking at the sentencing sheets --
12 let me ask you this --

13 MR. FALK: May I approach?

14 THE COURT: You may.

15 BY MR. FALK:

16 Q: I'm going to just refer to this line right here. Okay?
17 That line.

18 A: Okay. Yes.

19 Q: I've shown you the -- you have the sentencing sheets in
20 front of you; is that right?

21 A: Yes.

22 Q: And then there's that line where it has some check --
23 there's some boxes to check?

24 A: Yes.

25 Q: And is one of those boxes saying that it's a most

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1 violent offense?

2 A: It's saying it's violent.

3 Q: It's a most serious offense?

4 A: It's checked that it's most serious.

5 Q: Okay. Do you know what the significance of a most
6 serious offense is?

7 A: I don't.

8 Q: Are you -- have you -- in any of the other states where
9 you practice, are you familiar with the two-strike law?
10 Three-strike law?

11 A: I am.

12 Q: But you don't know how that might relate to --

13 A: No. I've actually never considered what serious versus
14 most serious means on these sheets.

15 Q: Okay. Is there anywhere on there where the judge
16 ordered sex offender treatment?

17 A: Not that I've ever seen on these.

18 Q: And he was sentenced on the same day for those; is that
19 correct?

20 A: The sentencing dates are the same day, yeah.

21 Q: Right. So if he would have pled guilty to two of them
22 or three of them or one of them, would his sentence have been
23 the same?

24 A: It appears that it would have. Each of them, he was
25 sentenced to twelve years.

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- 1 Q: Okay. Now, Mr. Bogle was trying to draw on your
2 experience as far as being at a sentencing hearing or
3 possibly a transcript that you might have read where he said
4 the judge turns to the solicitor and says tell me the facts
5 about this case?
- 6 A: Yes.
- 7 Q: Did you read the sentencing transcripts in this case?
- 8 A: They were not provided to me. I didn't request them.
- 9 Q: So we really don't know what the facts were that he was
10 pleading to; is that correct?
- 11 A: In this specific case, correct. In my experience, they
12 usually read the police report or something they've prepared
13 based on the police reports, but I wasn't at his and I didn't
14 read the -- didn't have a transcript.
- 15 Q: What were the risks -- oh, let me ask you this. You had
16 performed sort of this battery of tests --
- 17 A: Yes.
- 18 Q: -- on him? And one of them was the CPT-3?
- 19 A: The Conners, yes.
- 20 Q: Okay. What specifically about his results on that test
21 support your diagnosis of pedophilia?
- 22 A: It doesn't support my diagnosis of pedophilic disorder.
23 Like I indicated, one of the reasons I give that measure is
24 to make sure that they don't need further, like,
25 neurocognitive screening, that they can pay attention, that

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1 if the results come up inconsistent, it wasn't because they
2 had a disorder related to attention.

3 Q: And you gave him the SASSI-4?

4 A: The SASSI, yes.

5 Q: And that really -- that really confirmed a substance
6 abuse problem; is that correct?

7 A: It indicated that he had likely a history of severe
8 substance use, but I really confirmed the diagnosis through
9 that measure, through talking to him, through the Abel, and
10 in his report of him saying that he had had a severe problem
11 with cocaine.

12 Q: All right. And so is there anything about the SASSI-4
13 that supports your diagnosis of pedophilia?

14 A: Not pedophilic disorder, no.

15 Q: Okay. You gave him the ASSI-3?

16 A: Yes.

17 Q: The Abel?

18 A: Yes.

19 Q: Okay. Was there anything in that -- the first part of
20 the Abel. Let's just talk about the first part, the first
21 part of the Abel. Is there anything in that part of that
22 test that supported your diagnosis of a pedophilic disorder?

23 A: Nothing that he put on the Abel supported a diagnosis of
24 pedophilic disorder. However, one of the reasons that I give
25 that measure is to look at defensiveness and how open they

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1 are to discussing and disclosing information, and there were
2 some concerns in the problematic range that he wasn't being
3 that forthcoming. So it's possible that there could've been
4 something on there that supported pedophilic disorder, but
5 not on the results that he produced.

6 Q: But as far as what the history was, you were just going
7 on what you read in the police reports; right?

8 A: I'm sorry. The history?

9 Q: Well, you said he was -- I'm sorry. Maybe I
10 misunderstood your answer. He was not being fully candid in
11 his disclosures?

12 A: Right. That wasn't based on the police report. That
13 was based on the standardized validity scales of that
14 measure.

15 Q: Okay. What was he not being candid about?

16 A: Well, that's the thing. It doesn't tell you which item,
17 but there are items in there that will ask questions such as
18 patience or impatience, things that typically you or I would
19 say, yeah, I can be impatient sometimes or I don't tell the
20 truth every day. He said no to enough of those questions
21 that there was some problems with validity in that he may not
22 have been as forthcoming, but it -- it -- there's no way to
23 measure which questions he wasn't forthcoming on.

24 Q: Okay. And again, your response doesn't support your
25 diagnosis? His response or your grading of his Abel does not

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1 support your diagnosis; is that correct?

2 A: Right. But I'm not searching for the diagnosis. This
3 is a full diagnostic evaluation exploring all the diagnoses.

4 Q: No. I understand that.

5 A: Yes.

6 Q: And then you gave him this controversial test that
7 you've talked about, the VRT, the visual reaction time?

8 A: The slides to the Abel, yes.

9 Q: That's the visual reaction time test? And in spite of
10 your indication that it's possibly controversial; was there
11 anything in that test that supports your diagnosis of
12 pedophilic disorder?

13 A: No. That test showed he had sexual interest in the
14 teenagers and the adults, but, as I mentioned, there was
15 possible evidence of manipulation or dissimulation in that
16 each of the bars were about the same length.

17 Q: And teenagers, that's possibly appropriate for a man to
18 have an interest in that; is that correct?

19 A: We call it bilaterally normal. Like I said, it's hard
20 to look at a picture of someone in a bathing suit and know if
21 they are 16 or 17 or 25, and so that's not pathological.
22 Like Mr. Bogle said, it's illegal, but it's not biologically
23 unusual.

24 Q: I think at one time I read something about an example
25 kind of to develop that point. There was a Super Bowl

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1 commercial with Britney Spears in it, and she was 15 at the
2 time. Are you familiar with this commercial?

3 A: No.

4 Q: Okay. Now, let's move to the Hair psychopathy test.

5 A: Yes.

6 Q: Not being a forensic psychologist, I think psychopathy
7 is going to tell you when somebody is a psychopath, but it
8 has a different meaning?

9 A: No. It tells you about characteristics of psychopathy,
10 but based on literature, studies, we know that people high in
11 psychopathy are at risk for reoffending. And there is some
12 data to suggest that sexually violent predators who are -- or
13 people who are later found to be sexually violent predators
14 who score really high on psychopathy measures are dangerous
15 and usually go on to -- sometimes go on to reoffend.

16 Q: What types of questions are a part of the Hair?

17 A: Well, the PCLR is something that somebody screens. So
18 you have to be trained in the administration and scoring I
19 should say of the PCLR.

20 And so there is a whole interview guide that goes along
21 that asks questions. You have to rate them on 20 different
22 items that go into psychopathy. From there, you can look at
23 different factors and different facets of psychopathy.
24 They're really scored on these 20 sets of items.

25 And so what we do at MUSC is we incorporate the

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1 questions from the PCLR into our interview guide. So usually
2 on the PCLR, you wouldn't ask questions about someone's
3 masturbation habits or their sexual interests. So we ask all
4 of those questions during our interview so that then we are
5 able to score the PCLR, similarly to the Static 99. We score
6 that off of information we have from them. It's not
7 administered to them.

8 Q: What is the -- and it's my understanding you have the
9 PCLR and then if you hit a particular number there's, like, a
10 second test; is that correct?

11 A: No. There's different versions --

12 Q: Okay.

13 A: -- of the PCLR. I believe that I gave him the short
14 version. There are different versions and so on the short
15 form, if they score above a certain item, then you should
16 either score them on the full version --

17 Q: Oh, okay.

18 A: -- or you can look at how high they scored and you can
19 look at tables of percentages to see, like, what their
20 estimated score on that full version would have been.

21 Q: But there was nothing in his responses to your questions
22 on the Hair psychopathy test that supports your diagnosis
23 that he's a sexually violent predator?

24 A: That's not exactly what it's measuring. I'm looking at
25 characteristics of psychopathy. Most people have a few

DR. EMILY GOTTFRIED - CROSS BY MR. FALK

1 characteristics of psychopathy, and Mr. Powell did, but not
2 enough to say -- if it's a yes or no, no, he's not a
3 psychopath.

4 Q: Okay. And did that in any way support your diagnosis
5 that he has a pedophilic disorder?

6 A: No. It isn't looking at pedophilic disorder.

7 Q: When did you start doing pre-commitment SVP evaluations
8 in South Carolina?

9 A: In South Carolina, I started doing them in 2015.

10 Q: Okay. And you have made some indication that you
11 practice -- you've been in Georgia. Have you done them in
12 any other state?

13 A: I have assisted. I worked in the state of California
14 for the -- for the state of California, and I worked on a sex
15 offender treatment unit where we did annual evaluations. We
16 had a couple people who were there under the Sexually Violent
17 Predator Act, and I helped with those as a student or as an
18 intern, but that was the only other state that I have that
19 experience.

20 Q: Okay. So your experience in sexually violent predator
21 pre-commitment evaluations is somewhat limited?

22 A: It's somewhat limited. So I work in the sexual behavior
23 clinic and lab, and the director of that lab, who is my boss,
24 consults with me. We go over these cases. He is an expert
25 in the field and so it's nice that, because I've only been

DR. EMILY GOTTFRIED - REDIRECT BY MR. BOGLE

1 doing these in South Carolina since 2015, I have that expert
2 and we discuss these cases.

3 MR. FALK: May I have a moment, Your Honor?

4 THE COURT: You may.

5 MR. FALK: Your Honor, we have no further questions.

6 THE COURT: Okay. Mr. Bogle?

7 MR. BOGLE: Yeah. Thank you, Your Honor. Very briefly.

8 REDIRECT EXAMINATION

9 BY MR. BOGLE:

10 Q: Mr. Falk asked you about the term likely to reoffend.

11 You're familiar with our Sexually Violent Predator law, are
12 you not?

13 A: I am.

14 Q: Okay. And in that law, the legislature defined the word
15 likely, as the judge may explain to the jury later on. Have
16 you seen that?

17 A: I guess I haven't. I thought it wasn't precisely
18 defined.

19 Q: Okay. In fact, look at -- well, this is the general
20 assembly when they passed the law. If you look at the
21 bracketed paragraph at the bottom of the page, does the law
22 define likely to reoffend?

23 A: Yes.

24 Q: Right there? Okay. And is that similar to one of the
25 questions I asked you a few minutes ago? Would you read it

DR. EMILY GOTTFRIED - REDIRECT BY MR. BOGLE

1 out loud?

2 A: Yes. It says likely to engage in acts of sexual
3 violence means the person's propensity to commit acts of
4 sexual violence is of such a degree as to pose a menace to
5 the health and safety of others.

6 Q: Okay. Now, there's some talk about age and him turning
7 60 three years from now?

8 A: Yes.

9 Q: The question right now is what's his risk right now
10 today?

11 A: That's right.

12 Q: Okay. Now, people that have pedophilic interests, they
13 can -- even if we waited three years to try this case, which
14 we're not, can a person's pedophilic desire and arousal last
15 many, many years past age 60?

16 A: Without intervention, which would be treatment to teach
17 somebody how to manage that arousal or that disorder, I mean,
18 yes, without an intervention, without anything to correct it,
19 there would be nothing that would make it just go away.

20 Q: Because we have people out there who have pedophilic
21 arousal, but don't act on it?

22 A: Yes. There are people who have pedophilic or are
23 pedophiles who are aware that they have sexual interest or
24 arousal fantasies to children. Sometimes they actually seek
25 treatment because they have this knowledge of this awareness

DR. EMILY GOTTFRIED - REDIRECT BY MR. BOGLE

1 and they don't want to offend against a child.

2 Q: Uh-huh. Now, counsel showed you some boxes on the
3 sentencing sheet, serious, most serious, things like that?

4 A: Yes.

5 Q: You don't know what those boxes mean? That's not your
6 training?

7 A: No.

8 Q: Okay. Would it surprise you to know that they have to
9 do with parole eligibility and 85 percent of your sentence
10 and three strikes you're out or two strikes you're out
11 concepts?

12 A: It wouldn't surprise me, but I don't know.

13 Q: Isn't your concern whether or not his convictions were
14 for sexually violent crimes?

15 A: Yes.

16 Q: And the Sexually Violent Predator law has a list of
17 those right there?

18 A: Yes.

19 Q: And these are?

20 A: Yes.

21 Q: Okay.

22 MR. BOGLE: Thank you, Doctor. Nothing further, Judge.

23 THE COURT: Anything further?

24 RECROSS-EXAMINATION

25 BY MR. FALK:

DR. EMILY GOTTFRIED - RECROSS BY MR. FALK

1 Q: So is it your testimony that somebody's awareness that
2 if they commit another crime they could be committed to
3 prison for life would play no role in his risk assessment?

4 A: I'm not going to say that it would play no role. We
5 know from the literature that a strong desire to not reoffend
6 doesn't prevent somebody from reoffending typically,
7 especially when they have that sexual interest in it. Nobody
8 wants to go to prison; so you could make that argument that
9 if it was powerful enough to prevent somebody to not offend,
10 then it would work.

11 Q: I'm sorry. Now, I'm not sure I know what your answer
12 is. If he has one or two strikes and he knows that he's
13 going to go away to prison for life, you're saying that has
14 no effect on his likelihood to reoffend?

15 A: Like I said, I'm not saying that it has no effect, but
16 we know that the desire to not offend isn't enough to keep
17 somebody from offending typically.

18 Q: And is it your testimony that you've not read the
19 statute as far as the definitions prior to today to know what
20 likelihood to reoffend means under the statute?

21 A: I have absolutely read the statute. That wasn't really
22 a precise definition to me. Increased propensity. I don't
23 know what really precisely that means --

24 Q: Okay.

25 A: -- either.

DR. EMILY GOTTFRIED - RECROSS BY MR. FALK

1 THE COURT: Anything further?

2 BY MR. FALK:

3 Q: Increased propensity -- you don't know how to define
4 that either?

5 A: I don't. I mean I don't know that you can assign a
6 number. Is it 51 percent? That's what I'm saying hasn't
7 been defined precisely to my knowledge.

8 MR. FALK: Thank you. No -- no further redirect.

9 THE COURT: Okay. Mr. Bogle, anything?

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

11 THE COURT: Any objection to this witness being excused?

12 MR. BOGLE: We do ask that she'd be.

13 THE COURT: Okay. Any objection?

14 MR. FALK: No objection.

15 THE COURT: You are excused, Doctor. Thank you.

16 Ladies and gentlemen, is now a good time for lunch? Are
17 y'all ready for a lunch break? We could start with the next
18 witness, but I think --

19 Are there some matters we're going to need to take up or
20 do you have any more witnesses, Mr. Bogle?

21 MR. BOGLE: There are some matters we need to take up
22 outside the jury's presence.

23 THE COURT: Okay. So my question is is now a good time
24 for lunch?

25 MR. BOGLE: I think so, Your Honor.

1 MR. FALK: May I approach, Your Honor?

2 THE COURT: Sure.

3 (WHEREUPON, a bench conference was held in the presence
4 of the jury but out of the hearing of the jury as
5 follows.)

6 MR. FALK: In the past, Mr. Bogle has always wanted to
7 rest on the record, if he's resting.

8 THE COURT: Okay. I need to know.

9 MR. BOGLE: What I want to do is I'm at the point of
10 resting my case. So what I'd like to do is rest in front of
11 the jury and then he starts in his case. So we could send
12 the jury out, I could rest, do the DV motions, and then bring
13 them back and I just --

14 MR. FALK: I thought you just wanted to rest in front of
15 the jury though.

16 MR. BOGLE: I can do that now.

17 THE COURT: Right now, yeah. Just rest in front of
18 them. I'm going to send them to lunch. Okay? Okay.

19 (WHEREUPON, the bench conference ended and the
20 proceedings resumed as follows.)

21 MR. BOGLE: Thank you, Your Honor.

22 THE COURT: Yes.

23 MR. BOGLE: Your Honor, at this time, the State would
24 rest.

25 THE COURT: Ladies and gentlemen, at this time, the

1 State has rested their case. There are some matters of law I
2 need to take up with the attorneys. It'll take just a few
3 minutes, but rather than have you wait, come back, and put up
4 15 minutes of testimony on behalf of the defense and then
5 break for lunch, I'm just going to send you to lunch right
6 now.

7 Ladies and gentlemen, by that clock at the back of the
8 courtroom, it is 12:25. I am going to ask that you be back
9 in the jury room at 1:45, ladies and gentlemen. We are going
10 to go ahead and continue with the trial of this case.

11 Go grab a bite to eat. I need to remind you though that
12 you're not to discuss this case with not only each other, but
13 with anyone else. Also, you're not to do any independent
14 research in regards to anything you've heard here today.

15 Go get a bite to eat. The bailiffs can tell you what's
16 local here where you can grab something quickly.

17 We just look forward to seeing you back in the jury room
18 at 1:45, where we're going to go ahead and continue with the
19 case. Okay? Thank you.

20 Leave your pads in your seats, please. And did you have
21 them mark them, Tom, some way so we know whose is who?

22 THE BAILIFF: Yes, ma'am.

23 THE COURT: Very good. Thank you.

24 (WHEREUPON, the jury exited the courtroom at 12:26 p.m.)

25 THE BAILIFF: The jury is clear, Your Honor.

1 THE COURT: All right. Any motions, Mr. Falk?

2 MR. FALK: Yes, Your Honor. We would move for a
3 directed verdict. I mean I can appreciate the standard, the
4 very low bar that the State has, and with that all being
5 said, this is a case that the only testimony is that his risk
6 to reoffend is 3.8 percent and whether or not as a matter of
7 law that could be a likelihood to reoffend under the
8 definition in the Sexually Violent Predator Act.

9 THE COURT: Okay. Mr. Bogle, do you want to respond?

10 MR. BOGLE: Your Honor, we would submit that under the
11 proper directed verdict standard looking at the light -- at
12 the evidence in the light most favorable to the nonmoving
13 party, we have submitted a factual basis for him being a
14 sexually violent predator.

15 We've got the criminal convictions. We've got the
16 mental abnormality. We have the likelihood to reoffend
17 testified by this expert and not limiting it just to the
18 Static 99-R. So I think we've raised a question for the jury
19 as to whether or not that's enough for them to go forward.

20 THE COURT: Okay. All right. Well, I respectfully -- I
21 do think there are other factors other than the Static 99
22 from which the jury could determine that he meets the
23 statutory requirements of the Sexually Violent Predator Act.
24 I'm going to respectfully deny your motion --

25 MR. FALK: Thank you, Your Honor.

1 THE COURT: -- and we're going to send it to the jury
2 for their determination.

3 Anything else we need to do? So tell me -- I see we
4 have a few people here that probably have the last name of
5 Powell or were on your witness list. Is your hope that when
6 we come back you put up Dr. Gehle, cross-examine her, get her
7 done, and then if we can get some of these witnesses, if not
8 all of them?

9 MR. FALK: My hope is Mr. Kline --

10 THE COURT: Okay.

11 MR. FALK: -- is working and he's sort of here on his
12 day off.

13 THE COURT: Okay.

14 MR. FALK: So what I would like to do is -- and he has a
15 very small piece to add to the puzzle.

16 THE COURT: Okay.

17 MR. FALK: It's only a couple of questions. At worst
18 case, I want to get Mr. Kline done today.

19 THE COURT: Of course. Okay. So I'll just make sure
20 that we get as many people as we can.

21 MR. BOGLE: Is it still safe to say even though we
22 seemed to move a little bit faster than I thought that we're
23 going to take the rest of the day and finish tomorrow?

24 THE COURT: We are. We're going to argue and charge
25 tomorrow. I just don't see by the time we come back at 1:45

1 with Dr. Gehle, there's no way we're going to finish before
2 3:30-ish with her testimony. I just don't see it happening.

3 MR. BOGLE: Okay.

4 THE COURT: So -- and all of these other witnesses as
5 well.

6 MR. BOGLE: Right.

7 THE COURT: So we'll just break and then come back. And
8 like I said, roughly we're going to shoot --

9 MR. BOGLE: If we were going to finish today, I'd go
10 check out, but --

11 THE COURT: Yeah. No, no, no. I don't think -- no,
12 we're not going to.

13 MR. BOGLE: Thank you.

14 THE COURT: Like I said, we're going to have to shoot
15 for roughly 11:00, 11:30 tomorrow because of my other
16 hearings. So that was my estimate.

17 MR. BOGLE: If I come watch, don't tell anybody I'm
18 here. Okay?

19 THE COURT: You got it.

20 MR. FALK: Sorry. I was talking to that witness. What
21 did we decide here?

22 THE COURT: We're going to keep going. We're going to
23 be back at 1:45. I'm going to get as much of the witnesses
24 as I can and what I said to him was, even if you get
25 everybody up, I don't see how in the world we would finish

1 with Dr. Gehle's testimony and cross and all of your lay
2 witnesses and that that would be accomplished before 3:00,
3 3:30-ish or so. So regardless, we're going to come back
4 tomorrow at 11:00 or 11:30, do closing arguments and the
5 charge. Okay?

6 MR. BOGLE: Thank you, Your Honor.

7 MR. FALK: My lay witnesses -- there's probably three
8 questions there, but Mr. Powell I believe will be on there
9 for a few minutes.

10 THE COURT: And I understand that, and I apologize. I
11 didn't mean to exclude him in any way. So that's fine.
12 We'll get as much as we can. My understanding is this jury
13 is willing to work late. Is that correct, Ray?

14 THE BAILIFF: Yes, ma'am.

15 THE COURT: If they need to. So I would like to get as
16 much as we could up as long as they aren't too tired. Okay.
17 All right. Y'all go grab something to eat. I'll see you all
18 back at -- just be back before quarter till. Okay?

19 MR. BOGLE: Thank you.

20 THE COURT: Thank you.

21 (WHEREUPON, there was a break in the proceedings from
22 12:30 p.m. until 1:52 p.m., after which the proceedings
23 resumed as follows.)

24 THE COURT: All right. Yes, sir?

25 MR. FALK: I'm just -- no. I'm just having a seat.

1 THE COURT: You're just standing. Just the need to
2 stand. I understand that, definitely.

3 All right. Are we ready to go?

4 MR. FALK: We're ready.

5 THE COURT: My understanding is the jury is all back.
6 Are you ready, Mr. Bogle?

7 MR. BOGLE: Yes, Your Honor.

8 THE COURT: All right. Let's bring the jury in.

9 (WHEREUPON, the jury entered the courtroom at 1:54 p.m.)

10 THE COURT: Thank you. Welcome back, ladies and
11 gentlemen. I trust you all had a good bite to eat, and we're
12 going to go ahead at this time and continue with the trial of
13 this case.

14 Mr. Falk, you can call your witness, please, or your
15 first witness.

16 MR. FALK: We would call Dr. Marie Gehle to the stand.

17 THE COURT: Dr. Gehle, come on forward to be sworn.

18 THE CLERK: Do you solemnly swear to truthfully answer
19 all questions asked of you by this Court, so help you God?

20 THE WITNESS: I do.

21 THE CLERK: Thank you. Could you please state your name
22 for the record, please?

23 THE WITNESS: Yes, ma'am.

24 THE CLERK: I'm sorry. Could you please state your
25 name?

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1 THE WITNESS: It's Marie Gehle, G-e-h-l-e.

2 DR. MARIE GEHLE, being first
3 duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. FALK:

6 Q: Dr. Gehle, where are you employed?

7 A: At the South Carolina Department of Mental Health.

8 Q: And what is your job title?

9 A: Chief psychologist.

10 Q: And how long have you been employed with the South
11 Carolina Department of Mental Health?

12 A: Since 2009.

13 Q: Okay. And what is your educational background?

14 A: I have a bachelor's degree in psychology, a master's
15 degree in clinical psychology from Xavier University, and a
16 doctorate in clinical psychology from Xavier University.

17 Q: Thank you. And have you done any fellowships or post-
18 graduate work?

19 A: Yes. I did a fellowship in forensic psychology,
20 forensic evaluations, at East Central Regional Hospital in
21 Augusta, Georgia.

22 Q: Okay. And you currently hold -- are you licensed to
23 practice psychology?

24 A: Yes.

25 Q: And where are you licensed?

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- 1 A: In South Carolina and in Georgia.
- 2 Q: And you have -- do you hold any academic positions?
- 3 A: Yes. I'm on faculty with the psychiatry department at
- 4 the Medical College -- the University of South Carolina and
- 5 at the Medical College of Georgia.
- 6 Q: Okay. And that's MUSC?
- 7 A: No. It's University of South Carolina, not --
- 8 Q: Okay. University of South Carolina.
- 9 A: Yes. In Columbia.
- 10 Q: All right. Thank you. And what type of teaching roles
- 11 do you have there?
- 12 A: I provide didactics where I give seminars to the
- 13 fellows. They are psychiatry -- forensic psychiatry fellows.
- 14 And I also train them how to do sexually violent predator
- 15 evaluations, if they're interested in that. So they observe
- 16 interviews and they come to court with me sometimes.
- 17 Q: So you give seminars to forensic fellows?
- 18 A: Yes. I give three seminars every year. I give one on
- 19 sexually violent predator evaluations, sex offender
- 20 evaluations, sexually violent predator treatment, and on
- 21 forensic risk assessment.
- 22 Q: Okay. So now, how much of your time -- what do you do
- 23 the majority of your time for the Department of Mental
- 24 Health?
- 25 A: Well, about a hundred percent of my time it's just -- a

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 hundred percent of my time is with doing pre-commitment
2 evaluations under the Sexually Violent Predator Act.

3 Q: Okay. And for pre-commitment evaluations, when did you
4 start doing those?

5 A: In 2011.

6 Q: Okay. And about how many pre-commitment evaluations
7 have you given?

8 A: It's around 145, right around there.

9 Q: Okay. And have you also given other types of
10 evaluations related to sexually violent predators?

11 A: Yes.

12 Q: And those other types of evaluations -- how many
13 approximately of those?

14 A: It's around 85.

15 Q: Okay.

16 MR. FALK: At this time, we would move to have Dr. Gehle
17 admitted as an expert as a forensic psychologist.

18 THE COURT: Any objection?

19 MR. BOGLE: If I may ask, just to clarify?

20 VOIR DIRE

21 BY MR. BOGLE:

22 Q: Dr. Gehle, have you been previously recognized by the
23 Circuit Courts in South Carolina as an expert in sexually
24 violent predator cases?

25 A: Yes.

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1 MR. BOGLE: No objection.

2 THE COURT: All right. Ladies and gentlemen, in this
3 case, Dr. Gehle is being qualified as an expert witness in
4 the area of forensic psychology. Just like Dr. Gottfried,
5 that allows her to give her opinion and the reasons for her
6 opinion, and that's for you to use as you see appropriate and
7 as compared to other evidence in the case.

8 BY MR. FALK:

9 Q: I was going to ask you that same question that Mr. Bogle
10 asked you, but sort of in a different sense. So you've been
11 admitted as an expert in these types of hearings right now?
12 Pre-commitment hearings?

13 A: Yes. I've testified in sexually violent predator
14 proceedings in South Carolina about a hundred times. I've
15 testified in sexually violent predator pre-commitment trials
16 roughly 40 times. And then some other hearings for pre-
17 commitment cases that weren't trials. They were hearings.

18 Q: Now, today you are actually testifying on behalf of the
19 respondent?

20 A: Well, I --

21 Q: So on behalf of the defendant I guess you could say?

22 A: I testify on behalf of my opinion. I'm always appointed
23 as the court-appointed expert, a neutral party, and so I -- I
24 testify on behalf of whoever is helped by my opinion,
25 regardless of which side that is.

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1 Q: Are there times -- so you've testified more than once
2 for the respondent in a case like this, have you not?

3 A: Yes.

4 Q: Okay. So when you do these evaluations, they don't
5 always -- they don't always necessarily favor the respondent,
6 do they?

7 A: No. Of the roughly 150 pre-commitment evaluations that
8 I've completed, I've recommended commitment in around 50 of
9 those; so about a third of them. And then the other ones I
10 have not recommended commitment. Sometimes I have to testify
11 for the respondent in those cases and sometimes the case is
12 dismissed.

13 Q: Okay. So we're talking about recommending commitment.
14 That's commitment to the sexually violent predator program;
15 is that correct?

16 A: Yes.

17 Q: Now, does everybody who commits a sexually violent
18 offense need to be in this program?

19 A: No.

20 Q: Does everybody who has a sexually related diagnosis of
21 paraphilic diagnosis need to be in the program?

22 A: No.

23 Q: Okay. I described here earlier sort of that this
24 program is designed for the worst of the worst. Is that sort
25 of your --

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- 1 A: Yes. That's what the law stipulates.
- 2 Q: Okay. Now, you did an evaluation in this case?
- 3 A: Yes.
- 4 Q: Okay. And that included an interview with my client?
- 5 A: Yes.
- 6 Q: And do you know about how long that interview took?
- 7 A: I did an interview and some testing with him, and that
- 8 lasted for 5 hours and 10 minutes.
- 9 Q: Okay. I'm looking at your evaluation here, and when it
- 10 talks about sources of information --
- 11 A: Yes.
- 12 Q: -- under a heading there, there's about 65 different --
- 13 yeah, 63 different pieces of information that you relied on?
- 14 A: Yes.
- 15 Q: And the --
- 16 A: Sixty-three different sources. Some of those were, you
- 17 know, multiple documents, multiple pieces of information.
- 18 Q: And those -- and you relied on incident reports from the
- 19 underlying convictions; is that correct?
- 20 A: Yes.
- 21 Q: Okay. And this is the type of information that you
- 22 would rely on in reaching one of these opinions; is that not
- 23 right?
- 24 A: Yes.
- 25 Q: Okay. Now, you agree with Dr. Gottfried about the

DR. MARIE GEHLE - DIRECT BY MR. FALK

1 diagnosis; is that correct?

2 A: Yes.

3 Q: And what is -- and how did you get there? How did you
4 reach that diagnosis?

5 A: Well, the diagnosis of paraphilia requires at least a
6 six-month pattern of behavior with that sexual interest in
7 mind. It can be sexual arousal as evidenced by urges,
8 fantasies, or behavior. And so we know that he -- he
9 committed these acts. He was convicted by a Court beyond a
10 reasonable doubt or he pled guilty to them. So I take that
11 as fact that they happened, and that was definitely longer
12 than a six-month period of time. So that led me to the
13 conclusion that he has pedophilic disorder.

14 Q: Okay. So the next step, once you reach a diagnosis
15 though, is really to determine whether or not he's a risk to
16 reoffend; is that correct?

17 A: Correct.

18 Q: And what is the -- what instrument do you use there to
19 determine the risk to reoffend?

20 A: Well, I use the Static 99-R, and then I also look at the
21 dynamic risk factors.

22 Q: And the Static 99-R -- that's the same document that Dr.
23 Gottfried referred to; is that correct?

24 A: Yes.

25 Q: And what score did he get on that?

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1 A: He got a score of 1.

2 Q: And again, just to remind the jury, what does a score of
3 1 signify?

4 A: So again, the range of scores are -3 to 12, and the
5 higher score means that they are of higher risk. And he has
6 a score of 1. That's a below average risk, and that
7 corresponds on the actuary tables to people with a score of
8 1, 3.9 percent of that group reoffended within 5 years. The
9 average score for a sex offender on the Static is 2, and so
10 he's below that. And so his expected recidivism rate is
11 below the average everyday sex offender getting out of
12 prison.

13 Q: How often does the average everyday sex offender getting
14 out of prison re-commit an offense? Is that a high rate?

15 A: No. It's very low.

16 Q: Okay. So what you're saying is the average rate is low
17 just in general and then he sits in a group that's even below
18 that?

19 A: Yes. A common misconception is that sex offenders get
20 out of prison and they do it again, but the research actually
21 shows that very few sex offenders reoffend. It's between 5,
22 10, 15 percent, depending on which studies you look at and
23 how long a period of time you looked. But most sex offenders
24 do not go out and do it again.

25 Q: Now, can we sort of walk through the scoring on the

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1 Static 99?

2 A: Sure.

3 Q: Do you have that there?

4 A: Yes.

5 Q: And so the first category -- we talked with Dr.

6 Gottfried about that. That's the age?

7 A: Yes.

8 Q: And you gave him the same -1 there?

9 A: Yes.

10 Q: Okay. And if he would have been 60 on the day you gave

11 that evaluation instead of 57, would he have had a lower

12 score?

13 A: Yes. He would have had a -3 instead of a -1.

14 Q: And do you have -- and just sort of under this

15 hypothetical, what would his risk to reoffend be then?

16 A: If we had adjusted his score from 1 to reflect an older

17 age?

18 Q: Yes.

19 A: And so he would -- he would lose two points. So he

20 would be at a -1, and I believe that the re-offense rate for

21 a -1 is 1.9.

22 Q: Okay. So what is your definition of likely to reoffend?

23 A: Well, I go by the statutory definition. It's of such a

24 propensity or propensity of such a degree as opposed to -- to

25 pose -- to pose a menace to the health and safety of others.

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1 And so I look at that as in terms of what their absolute
2 recidivism rate is and also how they are relative to other
3 sex offenders because we can't put all sex offenders into
4 this program, and so I have to look at, you know, who is more
5 serious and things like that.

6 Q: The sex offender program -- what is the relationship
7 between the Department of Corrections and the sex offender
8 treatment program? Excuse me. What is the -- what is the
9 relationship between South Carolina Department of Mental
10 Health and the sex offender treatment program?

11 MR. BOGLE: Objection. May we approach the bench, Your
12 Honor?

13 THE COURT: You may.

14 MR. BOGLE: The objection is relevance, but I'd like to
15 --

16 THE COURT: Come talk to me.

17 (WHEREUPON, a bench conference was held in the presence
18 of the jury but out of the hearing of the jury as
19 follows.)

20 MR. FALK: I misspoke.

21 THE COURT: You misspoke? Okay. So what's the right
22 question?

23 MR. FALK: I asked what's the relationship between DMH

24 --

25 THE COURT: Uh-huh.

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1 MR. FALK: -- and the program.

2 MR. BOGLE: This is getting into the fact that the
3 program is behind the wire at SCDC, and we talked about that
4 yesterday in my motion in limine.

5 MR. FALK: No. My argument is she's an employee of the
6 Department of Mental Health, and the Department of Mental
7 Health has some responsibility for the program. That's just
8 all.

9 MR. BOGLE: Okay.

10 THE COURT: That's -- okay. I mean if it's that
11 limited.

12 MR. BOGLE: If that's where you're going, but --

13 THE COURT: Okay.

14 MR. BOGLE: Why did the Department of Corrections even
15 play into this?

16 MR. FALK: I misspoke.

17 MR. BOGLE: Okay.

18 MR. FALK: And I'll go and tell them I misspoke.

19 MR. BOGLE: Okay.

20 THE COURT: Okay.

21 MR. BOGLE: I'm sorry.

22 THE COURT: Just go correct it. Thank you.

23 (WHEREUPON, the bench conference ended and the
24 proceedings resumed as follows.)

25 BY MR. FALK:

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1 Q: I apologize, Dr. Gehle. I misspoke when I asked you
2 that question. We're not talking about the Department of
3 Corrections. I wanted to know the relationship between South
4 Carolina Department of Mental Health and the sex offender
5 treatment program.

6 A: Do you mean the sexually violent predator program?

7 Q: Yes.

8 A: Okay. The Department of Mental Health I guess owns this
9 program. I mean it's by statute. It's a -- it's a treatment
10 program that is the responsibility of the Department of
11 Mental Health. Up until about I think December of 2016, all
12 the employees that were working in the sexually violent
13 predator program were employees of the Department of Mental
14 Health, but then the legislature decided to privatize the
15 program and so now it is run by Correct Care, a private
16 company. So employees in that program are employees of
17 Correct Care, and then it's overseen by the Department of
18 Mental Health.

19 Q: Okay. So the Department of Mental Health still has some
20 control over the program?

21 A: They have responsibility for the program.

22 Q: Well, let me ask you this.

23 A: And they have oversight over the program.

24 Q: And you're an employee of the Department -- South
25 Carolina Department of Mental Health; is that correct?

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1 A: Yes.

2 Q: And you don't think he needs to be in the program?

3 A: Correct.

4 Q: Now, let's go back to the -- and I think I -- let's go
5 back to the risk assessment. What's the second category on
6 the -- what is the second box on the Static 99?

7 A: Okay. So the second question on the Static 99 is --
8 ever lived with is the question. So has the person ever
9 lived with a romantic partner for a period of at least two
10 years.

11 Q: And what did you score him there?

12 A: Zero.

13 Q: Okay. And what are -- what are the choices?

14 A: Yes and no, and yes is a zero and no is a 1.

15 Q: Okay. So when you're doing scoring, it's favorable -- I
16 mean from his point of view, it's favorable if he's had a
17 long-term relationship for more than two years; is that
18 correct?

19 A: Yes.

20 Q: Okay. And why is that important?

21 A: Because this is an empirical actuarial, and it's looking
22 at what differentiated people who went out and committed
23 another sex crime versus those who did not, and that factor
24 was significantly related. If somebody had been in a
25 romantic relationship lasting at least two years and they

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1 lived together for at least two years, that lowers their risk
2 to reoffend sexually.

3 Q: All right. Then what's the next category?

4 A: The next question is index nonsexual violence, any
5 convictions, yes or no.

6 Q: And he got a point there?

7 A: No.

8 Q: Okay. What's the next category?

9 A: Number four is prior nonsexual violence, any
10 convictions, yes or no.

11 Q: What did the -- I'm sorry. What is three? What does
12 that mean? Index?

13 A: So index is their current sex offense. That's what we
14 call the index offense.

15 Q: And those are the three charges that we talked about?

16 A: Yes. Yes. So it's their last sex offense. And did
17 they get any nonsexual violent charge or conviction at the
18 same time that they got convicted of the index sex offense?
19 And he did not. He got charged and convicted of three sex
20 offenses and no other charges. So no nonsexual violence.

21 Q: And how would -- why is that important?

22 A: Because again, it was associated with recidivism in the
23 research studies.

24 Q: So I mean you've obviously seen a lot of these. Are you
25 looking at reports where, you know, somebody maybe gets a

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1 criminal sexual conduct charge in addition to a kidnapping
2 charge or something like that?

3 A: Yes. Yes. That would be an example. If they were
4 convicted of kidnapping and a sex offense, the criminal
5 sexual conduct, they would get a point for that index
6 nonsexual violence because kidnapping is considered nonsexual
7 violence.

8 Q: And then what's the next one?

9 A: So number four is prior nonsexual violence, any
10 convictions, and the responses are yes and no.

11 Q: And he has --

12 A: He gets one point for that because he has that criminal
13 domestic violence conviction in 1988 and that's considered
14 nonsexual violence on the Static 99.

15 Q: All right. What's next?

16 A: Number five is prior sex offenses, and then the
17 responses are -- this is a complicated -- this is the most
18 complicated question on the test, but you have to look at --
19 your choices are for charges, they have zero, they get zero
20 points. One or two charges, they can get 1 point. Three to
21 five charges, 2 points. And six-plus charges would be 3
22 points.

23 And then convictions. You look at if they have zero
24 convictions, zero points. One conviction, 1 point. Two to
25 three convictions, 2 points. Four-plus convictions, 3

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1 points, but you choose whichever is higher in that line.

2 Q: So you gave him how many points?

3 A: Zero. He has no priors.

4 Q: Why is that important?

5 A: Well, this is the most heavily weighted question because

6 you can get 3 points on this item. You can get a zero, 1, 2,

7 or 3, and so you can see a lot of -- like, a lot of people,

8 when I score the Static, this is where they get a bulk of

9 points. I mean that's -- all the other items are a zero or

10 1, except for the age at release is a 1, zero, a -1 or a -3.

11 So most of the points come from prior sex offenses often

12 times.

13 Q: So if you have --

14 A: So that's important.

15 Q: So he has no prior sex offenses?

16 A: That's correct.

17 Q: But there are three convictions there. How do you score

18 it when you have three convictions over a period of time, but

19 one sentencing day?

20 A: Well, it really depends on the case, but what we want to

21 see is what did they do after they got caught because after

22 you get caught, that changes things. Sex offending is a very

23 secretive kind of thing, and people depend on it staying

24 secret in order to keep getting away with it. If it's known,

25 it's harder to get away with. I mean people stop giving you

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1 their kids to take care of. Courts will take away your
2 custody rights, things like that. So things change when you
3 get caught.

4 So it's really important to look at what did he do after
5 he got caught. In his case, this is the very first time he
6 got caught and, when he got caught, he got charged with three
7 offenses. So he has not been given an opportunity or we
8 don't know what he's going to do back in the community since
9 he's been caught once, but so far he hasn't gone out and re-
10 offended. It wasn't that he got caught and then, you know,
11 punished by the courts and then he did it again and then he
12 got caught and punished by the courts and did it again. This
13 all was brought to the -- to the Court's attention at one
14 time, and he was punished for it all at one time.

15 Q: So the getting caught factor is why he scored 1 in that
16 box?

17 A: He scored zero in that box.

18 Q: Okay. Now, is it also important whether or not they
19 have been in prison before?

20 A: It depends.

21 Q: On a sexual crime?

22 A: Yes. That makes a big difference.

23 Q: Where does that come in?

24 A: On number five.

25 Q: Okay.

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1 A: So if he had a charge or conviction, it would depend on
2 how many charges and convictions, but he would get points on
3 Item 5, prior sex offenses, but he doesn't have that. He's
4 not reoffended after punishment from the Court.

5 Q: Of course,, he hasn't had, obviously, much of a chance
6 since he's still been in custody?

7 A: Right.

8 Q: But is it true that just the fact of being in custody
9 for a certain period of time, for ten years, could have an
10 impact on recidivism?

11 A: Of course. I mean a lot of things can impact
12 recidivism, but, you know, I think that's why prison time is
13 imposed in hopes that it will change people's behavior.

14 Q: So you said you have given about 150 of these pre-
15 commitment evaluations. You've looked at about 150 of these
16 pre-commitment evaluations?

17 A: Yes. I've done about 150 of these pre-commitment
18 evaluations.

19 Q: So, what -- on the 30 percent or 50 or whatever that you
20 recommended commitment, what do you usually see? What's
21 different between those cases in general and Mr. Powell's
22 case?

23 A: Well, for one, I see a much higher Static 99 score and,
24 in order for me to recommend commitment, it usually -- I
25 usually recommend commitment if they have the mental

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1 abnormality and it's all tied, but just in terms of the
2 Static 99, you know, below a 4 it's hard to justify. If
3 their score is below 4, it's hard to justify that they need
4 this commitment.

5 So usually, that would be a minimum score for me. I've
6 recommended commitment on people who have lower scores than
7 that, but it's been very rare and it's been in very limited
8 circumstances when the person has actually, you know,
9 reoffended, gotten caught, reoffended, gotten caught.
10 They've had multiple chances and they've not corrected their
11 behavior.

12 So that's the second thing that I need to see. So a
13 higher Static score, and then reoffending after legal
14 involvement, after sanction, after punishment, if you want to
15 call it.

16 Q: So you say the higher Static score and that these other
17 people it's usually recommending, where do they usually get
18 the higher Static score? How is theirs different? Just on
19 reoffending?

20 A: Well, a lot of the points in these cases come from the
21 prior sex offenses because a lot of people that I evaluate
22 have reoffended after being involved. You know, after being
23 in prison, they'll get out and do it again, and then that
24 changes the way that you score these, you know, with the
25 priors, but it can -- it can be from any items on the test

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1 they'll get points.

2 Q: So you get this Static score and that's never going to
3 change? Other than him aging out and the risk going down,
4 the Static points are never going to change?

5 A: No, it can change.

6 Q: How would they change?

7 A: Well, he could get another offense. He could disclose
8 other offenses and different types of victims, which could
9 change things because some of the questions are about
10 victims, which we haven't gotten to. His age could change.
11 His living situation could change, you know, potentially. I
12 guess with him, that wouldn't -- that wouldn't change.

13 Q: Well, what role did the dynamic risk factors play?

14 A: Well, they play a role. It's something that you need to
15 consider, especially in terms of treatment targets. It's
16 helpful in determining that.

17 Q: Which dynamic risk factors did you consider?

18 A: Well, I look at the dynamic risk factors that were
19 highlighted in a very large meta-analysis of lots and lots of
20 research studies. And so there's a whole list that I looked
21 at and I identified a few dynamic risk factors, very similar
22 to what Dr. Gottfried had said.

23 Q: Are there any dynamic risk factors that are positive
24 towards Mr. Powell?

25 A: Is your question that does he have any dynamic risk

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1 factors or --

2 Q: What are -- so you said similar. So what are those
3 ones?

4 A: So he has a history of sexual preoccupation, a history
5 of sexual preference for prepubescent children, a history of
6 emotionally -- or lack of emotionally intimate relationships
7 with adults, some lifestyle impulse -- impulsivity, and some
8 negative social influences.

9 Q: Okay. And what are the negative social influences?

10 A: Just that from his self-report he told me that he spent
11 a lot of time around other drug users, and that's what that
12 factor is looking at, who they surround themselves with.

13 Q: Did part of your evaluation talk about his drug use?

14 A: Yes.

15 Q: And how does his drug use you think relate to the -- his
16 arrest? His convictions? Is there any relationship between
17 his drug use and his -- well, is there any relationship
18 between his drug use and his paraphilic diagnosis?

19 A: Well, like Dr. Gottfried said, you know, it's important
20 to look at substance use because it can lower inhibition. It
21 can keep people from being able to stop behavior. But I
22 didn't see, that I can remember, a strong tie between the two
23 things, substance use and his offenses.

24 Q: Well, let's talk about -- one of the risk factors that
25 Dr. Gottfried talked about was the fact that he didn't have

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1 treatment. How does that rate in your evaluation, his lack
2 of treatment?

3 A: Well, it doesn't -- it doesn't rate as heavily for me as
4 it apparently does for Dr. Gottfried, but the research is
5 very mixed as to whether sex offender treatment lowers
6 recidivism for sex offenders, and it's especially mixed when
7 you look at low-risk guys. They can actually be harmed by
8 sex offender treatment, especially if they're in a treatment
9 program with very high-risk guys. They might learn new
10 behaviors. I'm not sure exactly why that is, but that's what
11 the research says. So just because you have a mental
12 abnormality doesn't mean that you need treatment in order to
13 stop yourself from reoffending.

14 Q: How else would you stop from reoffending?

15 A: Well, hopefully prison is a big reason that somebody
16 would stop themselves from reoffending, but, you know,
17 there's a variety of ways. People, as they get older, their
18 sexual interests typically decrease. So that can help a lot.
19 They might not like that prison time. It can be a deterrent.
20 They don't have the factors of having this secret behavior
21 going on. Their family and friends and community know that
22 they're a sex offender. They'll be -- they'll be registered
23 as a sex offender.

24 In his case, every single one of his victims was living
25 in the home with him. So it would be good that he won't have

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1 that access. Not living with -- with young children might
2 completely prevent him from doing it again.

3 Q: Is there a difference between people who have committed
4 crimes against children in their home versus stranger
5 victims, victims who are strangers?

6 A: Yes.

7 Q: And what is that?

8 A: Well, having a stranger victim is related to increased
9 likelihood that somebody will do it again. It's very
10 different offense dynamics. It can be related to
11 opportunity. I think it's probably scarier for a parent if
12 it is a stranger who offends their child, but that's probably
13 subjective. But it means that if he has just offended kids
14 in his family or in his -- in his home living in his home
15 with him, if he doesn't live with kids, there's a good chance
16 he won't do this again.

17 Q: And what about a relationship between if you're now
18 sober and you weren't sober in the past? Does that help your
19 risk not to reoffend?

20 A: Well, it doesn't necessarily tie into the actuarial risk
21 assessment, but it's hard to say. I mean with him I didn't
22 see a lot of strong evidence it wasn't -- I didn't see a lot
23 of strong evidence that his offenses were driven by substance
24 use. So I don't know how it would impact.

25 Q: So can you -- can you state with a reasonable degree of

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1 psychological certainty that he is not a sexually violent
2 predator?

3 A: It's my opinion that he's not, that he doesn't meet that
4 criteria.

5 Q: And you reached that -- reached that opinion based on a
6 review of the case file, a review of the case file including
7 all the incident reports, and your evaluation?

8 A: Yes.

9 Q: I mean and your interview?

10 A: Yes.

11 Q: And that's typically the stuff that you rely on; is that
12 right? Experts in your field, is that the type of
13 information that they would rely on? Is that correct?

14 A: Yes.

15 Q: Why did you not subject him to the Conners test?

16 A: It's a test that's unrelated to sexual recidivism or
17 diagnosis of paraphilias.

18 Q: Okay. Did you give him the SASSI test?

19 A: No.

20 Q: And why is that?

21 A: Because again, a substance abuse actually has a little
22 bit -- like, a minimal relationship with sexual recidivism,
23 and it's not a diagnosis. Substance use disorder is not
24 typically or maybe ever used to justify somebody's commitment
25 to the SVP program.

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1 Q: Did you give him the PAI test?

2 A: No.

3 Q: And why is that?

4 A: Well, I gave him a different personality measure called
5 the MMPI.

6 Q: Okay. And what does that do?

7 A: It's similar to the PAI. It's -- it's 500 and some true
8 or false questions. It asks things in a variety of manners.
9 It looks at the validity of somebody's responding, how they
10 approach the test, and things like that, and it tells you
11 about their various aspects of their personality and
12 functioning.

13 Q: And did you have any concerns on his results or how you
14 scored the MMPI as far as --

15 A: No. His results were that he was answering in a normal
16 way. It was -- he was not trying to look really good. He
17 was admitting to minor flaws that other people do admit to or
18 typically would admit to. And then he just generally
19 appeared honest, accurate, non-defensive on that test, and he
20 exhibited no psychopathology. So he had no scale elevations.

21 Q: So is there a relationship between the MMPI and the Hair
22 PCLR test?

23 A: Not -- not that I know of. I mean they're very -- two
24 very, very different tests.

25 Q: I thought that last thing you said when he took the MMPI

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1 no evidence of -- I thought you said psychopathology.

2 A: Psychopathology is different than psychopathy. Those
3 are two different words. Psychopathology just means, like,
4 mental illness, problems with their characteristics, things
5 like that.

6 Q: Okay. And do you ever give people the Hair, the PCLR?

7 A: I have in the past, yes.

8 Q: What types of questions are you asking there?

9 A: Well, it is an interview, and my interview that I do in
10 SVP cases is thorough enough to answer all the questions on
11 the PCLR. So it's -- it varies. I mean that -- that test is
12 scored based on information that you gather from the person,
13 but also from a review of the records.

14 Q: I see. So it's not like the MMPI where you're asking
15 500 specific questions?

16 A: No. And in the MMPI, I don't ask 500 specific
17 questions. I give them a book that has the 500 questions and
18 they answer them themselves.

19 Q: Okay. But you have the access to the Conner and the --
20 would you have had access? Could you have given him the
21 Conner test?

22 A: Yeah. I believe that we have it at the Department of
23 Mental Health, yes.

24 Q: Okay. So what is in the Department of Mental Health's
25 protocol for doing an evaluation here?

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1 A: Well, all of the evaluators at the Department of Mental
2 Health do a clinical interview, a file review, and they score
3 the Static 99-R. Some of them score the Static 2002-R as
4 well, and that's -- that's what they do. Sometimes they give
5 the PCLR, the psychopathy checklist. Sometimes they give the
6 MMPI. Sometimes they give the PAI.

7 Those are primarily the tests, and sometimes they might
8 give IQ tests. It would be a wide variety based specifically
9 on what -- on that person. It would be individualized. We
10 don't do a blanket protocol.

11 Q: Is there any literature as to the effectiveness of the
12 Static 99 as far as predicting risk?

13 A: Yes.

14 Q: And can you share that with us?

15 A: Yes. It's actuarial risk assessment. Empirical
16 actuarial risk assessment is --

17 Q: And that's what -- and that's what this was?

18 A: Which is the Static 99-R is the most accurate approach
19 to estimate and predict who's going to reoffend sexually. So
20 that's why I use that. And the effect size for the ability
21 of the Static 99-R to predict who is going to reoffend is
22 medium.

23 Q: And so what does that mean? What does the effect size
24 -- what does that mean?

25 A: It means it's not perfect. It's pretty good.

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1 Q: Okay. But are there any of them that are any better?

2 A: No. There is no risk assessment currently that's any
3 better.

4 Q: Okay.

5 A: There's no one risk factor that you can apply to a sex
6 offender and determine that they're going to reoffend.

7 Q: So at the end of the day, it's judgment and experience
8 that helps you reach an opinion?

9 A: Well, the Static 99-R looks at the risk factors in
10 combination, which is very helpful because you're not just
11 looking at one thing because you can't predict who is going
12 to reoffend based on one thing. You have to look at a
13 combination of things, and that test in particular says that
14 you will be more accurate if you rely on the results of that
15 test than anything else.

16 You can -- you can do risk assessments in a variety of
17 different ways. You can do them like an actuarial where --
18 which is what I do with the Static 99-R. You can look at a
19 couple other measures that there are that show -- that look
20 at -- have risk factors already decided these are going to be
21 the important ones to look at that don't have actuarial
22 tables that maybe give you a low, medium, high. You can do
23 that. Those aren't that bad.

24 You can decide what you think is important and evaluate
25 somebody for those risk factors and, if you do that, you'd be

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1 more accurate flipping a coin. And that's whether you have a
2 lot of experience or a little experience. You just won't be
3 good if you're trying to predict behavior based on an
4 unstructured method.

5 Q: And in your opinion, does the Conners test, the SASSI
6 test, the Abel test, do any of those help predict risk --
7 risk to reoffend, recidivism?

8 A: No. The Abel might have some relationship to
9 recidivism, but I'm -- but I'm not sure, like, how accurate
10 it is.

11 Q: Okay. So it's your opinion that even though he does
12 have a paraphilia, diagnosable paraphilia that you can find
13 in the book, that he still -- with a reasonable degree of
14 psychological certainty, you're saying that he is not -- he
15 does not fit the criteria of a sexually violent predator?

16 A: Right. I don't believe that he is likely to reoffend as
17 defined by the statute.

18 Q: And that's the issue, the likelihood to reoffend?

19 A: Yes.

20 MR. FALK: One moment, please. I have no further
21 questions. Please answer anything that Mr. Bogle has.

22 THE COURT: Mr. Bogle?

23 MR. BOGLE: Thank you, Your Honor. May it please the
24 Court.

25 THE COURT: Yes, sir.

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CROSS-EXAMINATION

1
2 BY MR. BOGLE:

3 Q: Good afternoon, Dr. Gehle.

4 A: Good afternoon.

5 Q: When you were describing what we're doing here, when you
6 characterize the statute as being after -- I think Mr. Falk
7 had used the words, in his opening argument about the worst of
8 the worst. You indicated that's what the statute was looking
9 for; right?

10 A: Yes.

11 Q: And -- but those words, that phrase worst of the worst,
12 does not appear anywhere in the statute, does it?

13 A: That's correct.

14 Q: Okay.

15 A: It uses different terminology.

16 Q: What terminology does it use?

17 A: Extremely dangerous.

18 Q: Okay. So just taking things from the top looking at
19 your report, you found as part of your diagnosis the cocaine
20 -- the cocaine use that he had; correct?

21 A: Yes.

22 Q: That was one of your two -- the diagnoses that you had
23 was the pedophilic disorder, but also the cocaine use
24 disorder in the controlled environment; right? Controlled
25 environment I think?

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1 A: Yes.

2 Q: Okay. Because on page 6 at the beginning of your
3 report, he acknowledged to you a heavy use of crack cocaine
4 and powder cocaine back when he was not in prison?

5 A: Yes.

6 Q: And then on page 8 or 11, we have reference to the CDV,
7 a criminal domestic violence conviction that you talked about
8 earlier, and I believe -- isn't it -- isn't it true that some
9 evaluators think that CDV because of the nature of the crime
10 against someone who is your household member can be a real
11 warning sign for future violence. Is that safe to say?

12 A: I don't know. I mean we -- it can give them a point on
13 the Static 99-R.

14 Q: Okay.

15 A: But I'm looking at sexual violence, not any violence.
16 So it depends.

17 Q: Okay. And as far as your -- are you members of any
18 professional organizations with regard to what you do as a
19 psychologist?

20 A: Yes.

21 Q: But one of them you're not a member of what I call ATSA,
22 the Association for Treatment of Sexual Abusers, are you?

23 A: That's correct.

24 Q: And would you agree with me that there's many sexual
25 crimes that just plain aren't reported?

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1 A: Yes.

2 Q: And in this particular case, looking at the exhibits --

3 MR. BOGLE: If I may approach the witness, Your Honor?

4 THE COURT: Uh-huh.

5 BY MR. BOGLE:

6 Q: I'll hand you State's -- I'll put them in order -- 1, 2,

7 and 3. As part of your work, you would review the criminal

8 conviction; right? These three indictments and the three

9 sentencing sheets?

10 A: Yes.

11 Q: Okay. Now, what we have here -- we have the three

12 convictions all happening on one day; right? The date of

13 sentencing is all the same day?

14 A: Yes.

15 Q: Okay. So he came to court and pled guilty to these

16 three different crimes all on one day?

17 A: Yes.

18 Q: Okay. And did you look into the issue of what kind of

19 supervision he might be facing from the Department of

20 Probation and Parole if he's released by the jury?

21 A: It was my understanding he would have community

22 supervision.

23 Q: But that expires in September of '18. Did you look into

24 that?

25 A: No. I heard Dr. Gottfried testify to that.

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1 Q: Okay. But you didn't check it out yourself?

2 A: Correct.

3 Q: Okay. What about the fact that Jesse's Law does not
4 apply to this guy and he'll not have to wear an ankle monitor
5 because of the date of his conviction? Did you check into
6 that?

7 A: Yes. I noted that in my report.

8 Q: Okay. So looking at these indictments here, J.P., one
9 of the initial -- one of the victims, she's about 7 when this
10 happens; correct?

11 A: Just a second.

12 Q: She's the one I believe -- I guess I'm looking at page
13 12.

14 A: According to the indictment here, did you say J.P.?

15 Q: Well, I'm looking at page 12 of your report. Let's just
16 talk about the different victims. One of them was J.P.;
17 right? It goes on to page 13 of your report and talks about
18 the records involving J.P. Are you with me?

19 A: Uh-huh.

20 Q: Okay. And J.P. -- when this all started, according to
21 the date of incident on the sentencing sheet, she was between
22 -- what? -- 5 and 7 years old when it started? Around 7
23 roughly?

24 A: No. J.P. happened one time and it says that she was 5.

25 Q: Okay. So she was 5. One time. Okay. And this is the

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1 girl that your records indicate that she -- there was the
2 damage to her rectum that was found by the medical report;
3 correct? You put that in your report?

4 A: Yes.

5 Q: Okay. And then A.P., another victim in another
6 indictment, her abuse began when she was about 3 and occurred
7 about a ten-year period according to the dates of the
8 incident on the sentencing sheet; is that right?

9 A: Yes.

10 Q: And then T.S. This is page 14 and 15 of your report.
11 With her, it starts at about age 5 and occurs for about a
12 5-year period; is that right?

13 A: Yes.

14 Q: And then the why. Why did he do this? He tells you,
15 like he told Dr. Gottfried, the reason I did this was -- or I
16 told these girls that your mother did not satisfy me enough
17 or words to that effect. He admitted that to you; right? On
18 page 16 of your report; correct?

19 A: No.

20 Q: Okay. But that was one of the things he told in the
21 police reports that you found; right?

22 A: No. This is what the victim said.

23 Q: What the victim said? Okay.

24 A: Yes.

25 Q: So based on your investigation of what the victims

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1 reported to police, one of the victims -- at least one of the
2 victims, perhaps two, told the police that the reason he gave
3 them was your mom is not satisfying me enough or words to
4 that effect?

5 A: That's what she reported and what was recorded in the
6 incident reports, yes.

7 Q: Okay. And on page 17, we have victim T.S., and the
8 issue there was both oral sex abuse and anal abuse, which
9 also occurred on one of the other girls; is that right?
10 That's on page 17 in your report.

11 A: Yes.

12 Q: Okay. And then when you talk to him, he denies it all.
13 None of this happened, despite the fact that he pleaded
14 guilty in court in front of a judge; right?

15 A: Yes.

16 Q: And you yourself, as a forensic psychologist, you've
17 probably in your career witnessed a number of guilty pleas,
18 have you not? Have you ever been to one? Watched them
19 happen?

20 A: I think so, yes.

21 Q: Okay. And in a guilty plea, like I was talking earlier,
22 they place the defendant under oath, just like we do with
23 you, and when the judge finishes asking questions about being
24 freely and voluntarily pleading guilty, the prosecutor tells
25 what happened, either reads the indictment or reads a summary

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1 of what happened?

2 A: Yes.

3 Q: And the judge turns back to the guy and says is that
4 what you did, and he's got to say yes or else the plea is not
5 going to happen?

6 A: Yeah. That's my understanding.

7 Q: So we have him denying it to you and saying it's all
8 some kind of conspiracy by the girl's mother or the little
9 girls, and yet he pleads guilty under oath in front of a
10 judge. Is that a concern to you that he's denying it, yet
11 he's -- on the other hand, he's telling a judge he did it and
12 yet telling you, no, I didn't? Is that a concern?

13 A: It is concerning on one hand, yes. I think it's always
14 better if they're telling the truth. And I take that as fact
15 if they were -- if they pled guilty to it and if they were
16 convicted of it.

17 Q: Okay. And the overall timeframe of all these crimes
18 against these three little girls covers about a 16 or so year
19 period from about 1986 until about 2004; is that right?

20 A: Yes.

21 Q: And we have the range of ages. The youngest girl he
22 starts doing it when she's about 3 and the oldest it ever got
23 was to about age 11?

24 A: Yes.

25 Q: Okay. And so -- and this led to your diagnosis of

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1 pedophilic disorder, nonexclusive, which means he's attracted
2 to adult of age appropriate women, but females because the
3 pedophilia is against little girls; right?

4 A: Yes.

5 Q: And your second diagnosis was the substance abuse
6 diagnosis we talked about a few minutes ago?

7 A: Yes.

8 Q: Okay. Now, as far as the -- the Static 99 goes, I guess
9 one of the confusions I had when I asked you about this -- in
10 this case, he comes to court and pleads guilty on one day to
11 three offenses?

12 A: Yes.

13 Q: Okay. So that's counted a certain way by the Static as
14 well, 1 point?

15 A: No. It's an index cluster and it depends on which item
16 you're looking at.

17 Q: Is it a zero? Is it a 1?

18 A: Well, I mean on what question?

19 Q: You tell me. You've got the report there in front of
20 you. What did he get for pleading guilty on one day to three
21 different victims? What did he get on your report on the
22 Static scoring sheet for that?

23 A: Okay. Well, there's not an item that says what did he
24 get for that. So --

25 Q: Okay.

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 A: I mean it depends. So he got -- he got a point for an
2 unrelated victim.

3 Q: Uh-huh.

4 A: That would have been in relation to that.

5 Q: That means somebody not related to him by blood or
6 marriage, I guess?

7 A: Correct.

8 Q: Okay.

9 A: But there's not a question that says how many did he
10 plead to today?

11 Q: Well, I guess my question is -- you mentioned this
12 earlier. If he'd have gotten caught, pled guilty, and gotten
13 punished by the Court, and then sometime later gets caught
14 again, pleads guilty, gets punished by the Court, and then
15 later on down the road again gets caught again and pleads
16 guilty and gets punished by the Court, that's three
17 convictions spread out over separate times with punishment in
18 between. Won't that get him a higher score on the Static?

19 A: Absolutely.

20 Q: Okay. So the Static makes no distinction between a
21 situation like that, conviction, release, conviction,
22 release, conviction, or a bunch of convictions on one day?

23 A: A Static makes complete distinction.

24 Q: It does, doesn't it?

25 A: Absolutely.

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 Q: Yes, it does.

2 A: I mean that's what the whole point of this test is is to
3 distinguish that or a big point of the test anyways. I mean
4 this test is designed to predict who is going to commit
5 another sexual offense versus who is not going to, and so
6 they -- they have to look at sex offenses -- I mean sex
7 offenders who has been -- who have been convicted again.

8 But if that would have been the case with him, if he
9 would have gotten charged, convicted, punished, charged,
10 convicted, punished, charged, convicted, punished, his score
11 on this test would be very different --

12 Q: Yeah.

13 A: -- from --

14 Q: It would be higher, wouldn't it?

15 A: Yes. From getting convicted one time of three different
16 offenses.

17 Q: So for scoring the Static, one time with different
18 offenses, it doesn't matter if it was three different
19 victims; right?

20 A: It can matter. It depends on what the dynamics were of
21 those -- what the demographics and stuff and the
22 relationships of those victims were.

23 Q: It doesn't -- there are three different victims here.

24 Okay?

25 A: Well, if he had a male --

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 Q: But the convictions --

2 A: -- victim and a female victim and a stranger victim and
3 those -- like, then he would get 3 points. So it depends on
4 what the victims' demographics were.

5 Q: These are three little girls. Okay? And the time
6 frames he victimized them were different, and their ages when
7 they were victimized were different, and maybe even the
8 places for all we know where they were victimized were
9 different, and yet it counts as -- it's a line item. It
10 counts as one block on the Static; right?

11 A: Well, it's his first time being caught. So it counts as
12 his index offense.

13 Q: Okay. And you talked about -- and I can acknowledge
14 this as a grandparent, but you talked about the person who
15 offends against the child he has access to, the child is in
16 the home, and that's maybe not quite as dangerous as the guy
17 that just grabs a child off the street and offends against
18 them. Okay? You talked about distinguishing between the two
19 different types of things a minute ago; is that right?

20 A: I'm not exactly sure exactly what I said.

21 Q: Well, you were -- okay. But offending against a child
22 who is in the home with you, that violates the trust that
23 that child has in a parent or stepparent who is around them
24 all the time --

25 A: Absolutely.

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 Q: -- and who has a relationship with their mother?

2 A: Absolutely.

3 Q: Now, as far as sex offender treatment, on page 19 I
4 think you wrote down that he thought they should have
5 contacted him or words to that effect. Is that kind of what
6 you're saying on page 19?

7 A: I think he said that he wished -- he wished that he
8 would've done sex offender treatment. He wished that they
9 would have contacted him.

10 Q: I wish they would have. Yeah, I wish -- he says -- he
11 said, quote, I wish I would have -- would've -- I wish they
12 would've contacted me. I wanted to do all that before now.
13 So he's telling you he wishes they'd reached out to him.
14 That's what he saying; right?

15 A: Yes. I saw that.

16 Q: He's had no sex offender treatment other than what he
17 could've gotten in the -- he's had no other sex offender
18 treatment; right? Not ever?

19 A: Correct.

20 Q: Okay. And did you have any evidence that he was so --
21 you talked about sobriety or Mr. Falk talked about sobriety.
22 Is there any evidence in the record that he's ever had any
23 kind of substance abuse treatment, which could be in the
24 Department of Corrections or any other place?

25 A: Let me check.

DR. MARIE GEHLE - CROSS BY MR. BOGLE

1 Q: Uh-huh.

2 A: I don't believe that I saw any evidence that he'd had
3 substance abuse treatment --

4 Q: Okay.

5 A: -- that I'm seeing from my report.

6 Q: And as far as his feeling about whether or not he
7 believes he needs sex offender treatment, at page 19 he
8 states -- I think he says -- he said he does not believe he
9 has a problem with his sexual behavior, nor does he need sex
10 offender treatment. I'm quoting on page 19. Is that -- is
11 that it?

12 A: Yes.

13 MR. BOGLE: Thank you. No further questions, Your
14 Honor.

15 MR. FALK: Just briefly.

16 REDIRECT EXAMINATION

17 BY MR. FALK:

18 Q: Mr. Bogle was asking you about had he been charged,
19 convicted, and sentenced, you know, in three separate
20 incidents?

21 A: Yes.

22 Q: And so if that had been the case, he would've gotten --
23 as I look at how to score number five, he would've gotten a 2
24 there; is that right?

25 A: Well, it really depends because that can change the

DR. MARIE GEHLE - REDIRECT BY MR. FALK

1 score altogether. If he had been charged and convicted of
2 two offenses before his current sex offense, he would have
3 gotten a 2 on that item.

4 Q: Okay. So we would be talking about a different person,
5 would we not?

6 A: In my opinion, that would be -- that could -- that would
7 be a different case. That Static score would be much higher
8 and -- and that might lead to a different opinion. I'm not
9 sure.

10 Q: But that would be somebody who had been convicted,
11 possibly been to prison, been re-convicted, possibly had been
12 to prison. That's a different case of somebody who is having
13 their first conviction, is it not?

14 A: Yes.

15 Q: And again, why is that?

16 A: Well, I mean it shows a pattern of behavior over time
17 and that they're not learning from their mistakes. That --
18 that the fact that they're exposed as a sex offender isn't
19 changing things in their day-to-day life, things like that.

20 Q: Does it not also show that the threat of prison is not a
21 deterrent?

22 A: I think that the threat of prison is a deterrent, but it
23 can --

24 Q: No, I mean to the person who keeps getting caught?

25 A: Yeah, absolutely. And I mean I think that's hopefully

DR. MARIE GEHLE - REDIRECT BY MR. FALK

1 why our society sends people to prison to help correct
2 people's behavior and to deter them from, you know,
3 continuing to commit these offenses.

4 Q: So my question before was somebody who had prior
5 convictions, had been to prison, and then re-offended having
6 gotten out of prison, wouldn't that show to you that that
7 person was not -- that that prison experience was not a
8 deterrent for him to act in the future?

9 A: Yes.

10 Q: Okay. And again, the reason -- and the -- in the
11 scoring sheet on here, that would -- was there a considerable
12 amount of study in determining as to how to make the Static
13 99 and how it's scored?

14 A: Yes.

15 Q: So the people who developed the Static 99 and use the
16 Static 99 would treat somebody who had multiple offenses
17 after prison convictions differently than somebody who had
18 just one offense?

19 A: Absolutely.

20 Q: Okay. And that's -- and again, this is the best measure
21 of the -- of the recidivism -- of the measures of risk going
22 forward, this is the best one, the Static 99?

23 A: It has the best predictive accuracy of determining
24 whether somebody is going to be -- going to sexually
25 reoffend, yes.

DR. MARIE GEHLE - REDIRECT BY MR. FALK

1 Q: And his likelihood, according to the Static, of
2 reoffending over the next 5 years is?

3 A: It's --

4 Q: 3.9 percent?

5 A: 3.9 percent, yes.

6 Q: Okay.

7 MR. FALK: No further questions.

8 THE COURT: Anything further?

9 RECROSS-EXAMINATION

10 BY MR. BOGLE:

11 Q: At the same time, Dr. Gehle, the people who designed the
12 Static, Hanson, the fellow that kind of designed the thing,
13 state in their manual that it is not the sole standalone
14 thing, don't rely just on it, don't they?

15 A: Yes.

16 Q: And if he'd have offended, gotten out of prison,
17 offended, gotten out of prison, offended, you say he'd have a
18 2 -- get 2 more points on the Static?

19 A: If he had two prior convictions --

20 Q: Yeah.

21 A: -- to his current sex offense, he would get 2 points on
22 that.

23 Q: Which would give him a bottom-line score of 3 or just a
24 bottom-line score of 2?

25 A: No. Two extra points. So it would be --

DR. MARIE GEHLE - RECROSS BY MR. BOGLE

1 Q: A 3?

2 A: -- a score of 3.

3 Q: But your testimony earlier was as a general rule in your
4 evaluation if the guy gets below a 4, you're usually not
5 recommending commitment; correct?

6 A: That's correct. Usually.

7 Q: So if you have gotten convicted, gotten out, in and out
8 of prison, and gotten 2 more points, we probably -- we
9 probably as a general rule would not have recommended
10 commitment?

11 A: Well, I mean, you know, it's really hard to say, like,
12 for me to just give a hypothetical opinion to that because I
13 have recommended commitment on lower scores -- people with
14 lower scores like that. So I'm not sure.

15 Q: Okay.

16 MR. BOGLE: Thank you.

17 THE COURT: Anything?

18 MR. FALK: No, ma'am.

19 THE COURT: All right. You may be excused. Without any
20 objection; correct, gentlemen?

21 MR. BOGLE: No objection, Your Honor.

22 THE COURT: All right. Ladies and gentlemen, we are
23 going to take a brief recess at this time. Again, do not
24 discuss this case. It wouldn't be appropriate to do so.

25 Leave your notes in your seats, and we'll be right back with

1 y'all. Okay? Thank you.

2 (WHEREUPON, the jury exited the courtroom at 2:56 p.m.)

3 THE BAILIFF: The jury is clear, Your Honor.

4 THE COURT: Thank you. All right. We're going to take
5 a ten-minute break, let them refresh themselves. We'll come
6 back. You can put up obviously your client and any other
7 witnesses, whoever you want. I say we keep going. I mean I
8 think we're doing fine as far as time. It's 2:55. We'll
9 come back at 3:05 and, you know, hopefully maybe we can
10 potentially wrap it all up today. Okay? Other than arguing
11 and charging, of course.

12 MR. BOGLE: Thank you, Your Honor.

13 THE COURT: Okay. Thank you.

14 (WHEREUPON, there was a break in the proceedings from
15 2:57 p.m. until 3:25 p.m., after which the proceedings
16 resumed as follows.)

17 THE COURT: All right.

18 MR. FALK: Your Honor, can we release Dr. Gehle?

19 THE COURT: Oh, I already released her when she was
20 sitting here. I released her.

21 THE WITNESS: I didn't realize.

22 THE COURT: Yes. I released you. You have been here.
23 Goodness.

24 THE WITNESS: All right.

25 MR. BOGLE: Judge, who is the foreperson?

1 THE COURT: Pardon?

2 MR. BOGLE: Who is the foreperson?

3 THE COURT: Mr. Donbrow. The man that's sitting in the
4 front left.

5 MR. BOGLE: Okay.

6 THE COURT: I think his last name was Donbrow.

7 THE BAILIFF: Donbrow, Number 85.

8 THE COURT: Yeah. Donbrow.

9 MR. BOGLE: Thank you.

10 THE BAILIFF: Do you want them to tell them about the
11 juror you released?

12 THE COURT: Oh, okay. The lady that fell in the parking
13 lot apparently gave way twice back in the jury room and at
14 one point was put in a wheelchair, and so I hope someone
15 walked her to her car, Rick. I'm sure someone walked her to
16 her car. Maybe they should've driven her home.

17 But anyway, so we have relieved her. So the first
18 alternate is going to step in her place. She obviously is in
19 no condition to be here.

20 MR. BOGLE: Thank you, Your Honor.

21 THE COURT: So we're going to go ahead and I will place
22 the first alternate.

23 MR. BOGLE: Just out of curiosity, do we know what the
24 number was of the lady that fell down?

25 THE BAILIFF: Selena Chisholm, Number 54.

1 THE COURT: Yeah.

2 MR. BOGLE: 54? And she's replaced by the first
3 alternate?

4 THE COURT: She is replaced by the first alternate,
5 which is Mr. Green, Number 124. Okay?

6 MR. BOGLE: Thank you, Your Honor.

7 THE COURT: You're welcome. All right. Let's bring the
8 jury in if we're ready to go. Who is your next witness going
9 to be?

10 MR. FALK: Mr. Kline and then his mother.

11 THE COURT: Very good. Okay. All right. Good to see
12 you, sir. Sit tight. We are going to call you just
13 formally.

14 THE WITNESS: Okay.

15 THE COURT: He's going to call your name and then you're
16 just going to walk over here and be sworn in. Okay? Thank
17 you.

18 (WHEREUPON, a bench conference was held correcting the
19 released juror to Number 290, Ms. Stoney.)

20 (WHEREUPON, the jury entered the courtroom at 3:27 p.m.)

21 THE COURT: Welcome back, ladies and gentlemen. It's my
22 understanding that we had a juror that had some health
23 issues. So, Mr. Green? There you are, sir. Welcome. You
24 are an official member of this jury now. This is why we have
25 alternates, and this is what I told you all earlier. So

ALPHONSO KLINE - DIRECT BY MR. FALK

1 thank you. I appreciate it, sir.

2 We are going to go ahead and continue. If the defense
3 will call their next witness?

4 MR. FALK: The defense will call Alphonso Kline.

5 THE COURT: Come on forward, Mr. Kline, to be sworn.

6 THE CLERK: Do you solemnly swear or affirm to
7 truthfully answer all questions asked of you by this Court,
8 so help you God?

9 THE WITNESS: Yes, ma'am.

10 THE CLERK: Could you please state your name for the
11 record?

12 THE WITNESS: Alphonso Kline.

13 THE CLERK: Would you spell your last name, please?

14 THE WITNESS: K-l-i-n-e.

15 THE CLERK: Thank you, sir.

16 MR. FALK: Are you ready, Mr. Kline?

17 THE WITNESS: Yes, sir.

18 THE COURT: Yes.

19 MR. FALK: You might want to come a little closer to the
20 microphone.

21 THE WITNESS: Oh, I'm sorry.

22 ALPHONSO KLINE, being first
23 duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. FALK:

ALPHONSO KLINE - DIRECT BY MR. FALK

1 Q: Mr. Kline, what do you do for a living?

2 A: Construction.

3 Q: And how long have you known Mr. Powell?

4 A: Probably over 30 years, 35 years, 40 years or in the
5 neighborhood.

6 Q: You spent -- you've been in touch with him over the
7 years?

8 A: Yes, sir. He wrote me quite a few times and he calls
9 me, you know, on the phone, you know, at least once a week or
10 every other week.

11 Q: So you know what charges he was convicted of; right?

12 A: Yes, sir.

13 Q: Okay. Now, have you ever worked with him?

14 A: Oh, yeah.

15 Q: What did y'all do together workwise?

16 A: Well, we -- we done a lot of good things, you know. He
17 taught me a lot of things. I taught him some things. You
18 know, he's a good carpenter. He's a good guy. We build
19 houses. We do siding. We do soffit. We do a lot of
20 different things, you know, interior trim. Whatever makes
21 the job -- get the job done, sir.

22 Q: Do you have a spot for him on your crew if he gets out?

23 A: Yes, sir. Oh, yeah. Oh, yeah, definitely.

24 Q: Okay. So I mean if he -- -- if he -- if he's released,
25 he can work for you; is that correct?

ALPHONSO KLINE - DIRECT BY MR. FALK

- 1 A: Yes, sir.
- 2 Q: Is there much work for that down here in Beaufort
- 3 County?
- 4 A: Right here in Beaufort County, sir.
- 5 Q: Yeah. But I mean is there a lot of work around here?
- 6 A: Oh, yeah. There's a lot of work. I work every day. I
- 7 mean I took a day off to be here, you know, to see my friend.
- 8 Q: And you would pay him; is that right?
- 9 A: Oh, yeah.
- 10 Q: Okay.
- 11 A: I always did, you know.
- 12 Q: And you'd pay him the same wages that you pay any
- 13 carpenter; right?
- 14 A: Well, with him, you know, he's -- he's a different type
- 15 of carpenter. You know, he's a real good carpenter.
- 16 Q: Okay.
- 17 A: I missed him the time he be gone, but he was good to me
- 18 and, you know, he's a good guy. That's all I can say.
- 19 Q: He'd be making decent money is really my question?
- 20 A: Oh, he'd make good money, you know.
- 21 Q: Okay.
- 22 MR. FALK: That's really all I have. Thank you.
- 23 THE WITNESS: Okay. Thank you.
- 24 MR. BOGLE: So --
- 25 THE COURT: Yes, sir.

ALPHONSO KLINE - CROSS BY MR. BOGLE

CROSS-EXAMINATION

1
2 BY MR. BOGLE:

3 Q: You've known him for, like you said, over 30 years?

4 A: Yes, sir.

5 Q: Have you known him outside of business or just as a
6 personal friend or just through the business connection, by
7 the employment connection or just outside of that as well?

8 A: I met -- I met Robert when I was much younger and he was
9 much younger. I was an electrician at that time and he was a
10 carpenter. I was working on Hilton Head. He was working
11 there. I didn't even know him then.

12 Q: Okay.

13 A: You know, he told me who he was.

14 Q: And so the last time y'all had a working relationship of
15 him working for you or working with you would have been prior
16 to him going to prison in 2006; right?

17 A: He was working for me when he went to prison.

18 Q: Okay.

19 A: He was working for me.

20 Q: About that time?

21 A: Yeah. They picked him up on my job, on my job I was
22 working on. But he was a good guy, you know. He was a hard
23 worker.

24 Q: Do y'all do residential construction, houses people live
25 in?

ALPHONSO KLINE - CROSS BY MR. BOGLE

1 A: Residential. Residential. Yes, sir.

2 Q: What about additions to houses? Not just new houses,
3 but adding on to a house that's already built?

4 A: It varies. You know what I mean? According to what
5 contract you're working for.

6 Q: Uh-huh.

7 A: We do additions. We do no -- very few commercial jobs.
8 Residential mostly.

9 Q: Residential?

10 A: Yes, sir.

11 Q: Sometimes building new houses from scratch, sometimes
12 adding on to houses where people already live in them?

13 A: Yes, sir.

14 Q: Okay.

15 MR. BOGLE: Okay. Thank you.

16 THE COURT: Anything further?

17 REDIRECT EXAMINATION

18 BY MR. FALK:

19 Q: I think what Mr. Bogle was trying to ask is if there
20 were children in the house, would it be a problem if he had
21 to leave the job site?

22 A: No children. There ain't no children. I never worked
23 on a job when children was around. Mostly when you're
24 renovating a house, doing remodeling, the house is vacant.
25 You know what I mean? The homeowners are not there. Mostly

ALPHONSO KLINE - REDIRECT BY MR. FALK

1 we do new-built homes, you know.

2 Q: Okay.

3 MR. FALK: No further questions.

4 THE COURT: Okay. Thank you. You may step down, sir.

5 THE WITNESS: Thank you, Your Honor.

6 THE COURT: You can call your next witness, Mr. Falk.

7 MR. FALK: We'd call his mother, Mrs. Powell, to the
8 stand.

9 THE COURT: Ms. Powell, come on forward to be sworn. Go
10 ahead.

11 THE CLERK: Do you solemnly swear to truthfully answer
12 all questions asked of you by this Court, so help you God?

13 THE WITNESS: Yes, ma'am.

14 THE CLERK: Could you please state your name for the
15 record?

16 THE WITNESS: Nora Powell.

17 THE CLERK: Thank you.

18 NORA POWELL, being first duly
19 sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. FALK:

22 Q: Hello, Ms. Powell. Are you ready?

23 A: (No verbal response.)

24 Q: Let me just hear you talk so I can make sure you're
25 close enough --

NORA POWELL - DIRECT BY MR. FALK

- 1 A: Yes, sir.
- 2 Q: Okay. You've been in touch with your son while he's
3 been incarcerated?
- 4 A: Yes.
- 5 Q: Okay. Where do you live?
- 6 A: Lobeco.
- 7 Q: In where?
- 8 A: Lobeco.
- 9 Q: Okay.
- 10 A: Beaufort, on the other side of the Whitbranch bridge.
- 11 Q: Okay. And where would you expect that Robert would live
12 if he got out?
- 13 A: With me.
- 14 Q: Okay. And so that house has room for both of y'all?
- 15 A: Yeah.
- 16 Q: Okay.
- 17 A: Yes, sir.
- 18 Q: And are there any, you know, 5 -- 6 -- 7-year-old kids
19 running around that house?
- 20 A: No, sir.
- 21 Q: So if he were to be released today, he would go home and
22 live with you; is that correct?
- 23 A: Yes, sir.
- 24 MR. FALK: I really have no other questions.
- 25 THE COURT: Okay. Anything?

NORA POWELL - CROSS BY MR. BOGLE

1 MR. BOGLE: Yes. Yes, ma'am.

2 CROSS-EXAMINATION

3 BY MR. BOGLE:

4 Q: Good afternoon, ma'am. Is there anybody else in the
5 household besides you?

6 A: No. I live by myself.

7 Q: How close -- how close is the closest neighbor that has
8 children?

9 A: I don't know.

10 Q: Is it a neighborhood with lots of houses in it?

11 A: No. No. I don't know. Maybe a mile or so, but I don't
12 know the people.

13 Q: Okay.

14 A: I've been there four years, but --

15 Q: Okay.

16 A: -- I don't know the people.

17 Q: Now, are you -- I take it you're retired and not working
18 right now; is that right?

19 A: Right.

20 Q: Okay.

21 MR. BOGLE: Thank you, ma'am. Nothing further.

22 THE COURT: Anything further?

23 MR. FALK: No further questions.

24 THE COURT: All right. You may step down, ma'am.

25 If you'll call your next witness, Mr. Falk.

ROBERT POWELL - DIRECT BY MR. FALK

1 MR. FALK: We'll call -- I was just waiting for her.

2 THE COURT: Okay.

3 MR. FALK: We'll call --

4 THE COURT: Sure.

5 MR. FALK: -- Mr. Robert Powell to the stand.

6 THE COURT: All right. Mr. Powell, come on up to be
7 sworn.

8 THE CLERK: Do you solemnly swear to truthfully answer
9 all questions asked of you by this Court, so help you God?

10 THE RESPONDENT: I do.

11 THE CLERK: And could you state your name for the
12 record?

13 THE RESPONDENT: Robert Powell.

14 THE CLERK: Thank you.

15 THE COURT: All right. Come on around, Mr. Powell. I'm
16 going to have to tell you or ask you to speak up, sir. Okay?
17 Just to make sure everybody can hear you and, hopefully, that
18 microphone is -- yes, it is on. You may have to adjust it.
19 Okay?

20 THE RESPONDENT: Okay.

21 THE COURT: Thank you, sir.

22 ROBERT POWELL, being first duly
23 sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. FALK:

ROBERT POWELL - DIRECT BY MR. FALK

1 Q: Can you just state your name so we can make sure we can
2 hear?

3 A: Robert Powell.

4 Q: Okay. Mr. Powell, where have you -- how long have you
5 been incarcerated?

6 A: Ten years, two months.

7 Q: Okay. And so when did you get -- when did you get
8 arrested?

9 A: 2006.

10 Q: Okay. And prior to your trial, were you held? Did you
11 make bail or were you in jail the whole time?

12 A: I was arrested in 2004 and I made bail and didn't go to
13 prison until 2006.

14 Q: Okay. And you have been in prison and then you served
15 out; is that right?

16 A: That's correct. I maxed out.

17 Q: And you had -- what was your sentence? Twelve years?

18 A: Twelve years.

19 Q: Okay.

20 A: Eighty-five percent of twelve years is ten years, two
21 months.

22 Q: All right.

23 MR. FALK: May I approach the witness?

24 THE COURT: You may.

25 BY MR. FALK:

ROBERT POWELL - DIRECT BY MR. FALK

1 Q: I'm going to talk to you about that right there. Now,
2 Mr. Bogle a couple times was talking about a plea when you
3 pled guilty. Did the -- when you pled guilty, did the judge
4 tell you anything about the seriousness of the offense?

5 A: It was strike two.

6 Q: Okay. So it's your understanding that you've got two
7 strikes; is that correct?

8 A: Yes, sir.

9 Q: And what is your understanding if you pick up another
10 serious or most serious offense?

11 A: If I get another strike, I go to prison for the rest of
12 my life.

13 Q: Okay. This is an obvious question, but what are you
14 going to do about that?

15 A: I'm not going to get in trouble.

16 Q: Do you want to go back to prison?

17 A: No, sir. I'm scared to death of it.

18 Q: Where all were you? What all yards were you at?

19 A: I was at Lee County for a year and a half. I was at
20 Ridgeland for seven and a half years, and I was at Evans for
21 almost two years.

22 Q: What was the worst one?

23 A: Evans.

24 Q: And what's wrong with Evans?

25 A: Stabbings, killings every day.

ROBERT POWELL - DIRECT BY MR. FALK

1 Q: So you want to stay away from that?

2 A: I'm going to stay away from it.

3 Q: There's been some -- there's been some testimony about
4 drug use, and you and I -- you and I have talked about your
5 drug use. Why don't you tell us a little bit about it?

6 Well, first of all, you went to school through the ninth
7 grade?

8 A: The ninth grade.

9 Q: Why did you drop out?

10 A: To go to work.

11 Q: Okay. And when did you really start kind of drug use?

12 A: I started drug use right here. This used to be a high
13 school in my ninth grade.

14 Q: And what drugs?

15 A: I was 15 years old. I started smoking pot. I've done
16 about every kind of drug there is. I started using cocaine
17 when I was 21, and I used cocaine up until 2006.

18 Q: What happened in 2006?

19 A: I went to prison.

20 Q: Okay.

21 A: It wasn't because I -- it wasn't because I went to
22 prison that I quit. I quit because I had enough of that
23 life. I could've done all the cocaine I wanted to in prison.
24 There's more drugs in prison than there is on the street. So
25 I chose to quit. I wanted to turn my life around.

ROBERT POWELL - DIRECT BY MR. FALK

1 Q: Why did you wait until then? What happened?

2 A: Prison. I come to prison. When I went to prison in
3 2006, I didn't -- I didn't think about my future much because
4 I didn't think I had a future. I thought I ruined -- ruined
5 my relationship with my whole family. In 2008, my mom and my
6 daughter come to see me, then next week my mom and my son
7 come to see me, and then the next week my mom and Alphonso
8 come to see me, and I knew I had a chance to get my
9 relationship back with my parents and my family.

10 And so I turned to God and I decided to change my whole
11 life and turn it around and stay off the drugs, and that's
12 what I'm going to do. I have plenty of plans for my future.
13 I want to build me and my mom a small house -- home. I own
14 four and a half acres out there.

15 I want to work. I want to work every chance I get. I
16 just want to do the right thing now. My whole -- my whole
17 life was all drugs. I got high every day. I didn't realize
18 how messed up I was until I went to prison. My life was --
19 it was a mess. That's all I cared about was getting high.

20 Q: Do you realize that you can get -- are you afraid that
21 if you pick up a serious drug offense that that's going to
22 give you a strike?

23 A: Yes, sir. Anything would.

24 Q: Okay. So you were making good money with Mr. Kline?

25 A: Yes, sir.

ROBERT POWELL - DIRECT BY MR. FALK

1 Q: Had you been -- were you socking it all away? Had you
2 been doing a lot of savings? What were you doing with your
3 money?

4 A: Like my son -- like my son told me, he said, daddy, you
5 could have anything you want if you'd just leave the drugs
6 alone. I did them all the time. I had been doing them so
7 long. I made good money. All my money -- pretty much all my
8 money went to the drug man. I had four or five different
9 people who I bought drugs from. I bought them some nice
10 stuff. I had nothing. I had a nasty habit.

11 Q: So if Mr. Kline offers you a job, are you going to be
12 able to work with him?

13 A: I will work with him. Yes, sir.

14 Q: And what kind of skills do you have?

15 A: I'm a carpenter. I can build a house from the ground
16 up. That's why I plan on building me and my mom a house on
17 my land.

18 Q: Do you have any plans with -- have you been in touch
19 with any of the prior wives or girlfriends?

20 A: Yes. My youngest daughter, Child 1 -- I mean Jessica's
21 mother. We've talked. I haven't talked to her, but I've
22 written letters back and forth while I've been in prison
23 because I've written my daughter, and my ex intervened with
24 the letters before she give them to my daughter, I guess.

25 Q: Do you have any plans to rekindle any of those

ROBERT POWELL - DIRECT BY MR. FALK

1 relationships?

2 A: With my daughters, yes. I already have. I already had
3 started with it. I've already apologized for being so wrong
4 with them. To my whole family, my mom as well, for putting
5 them through the trouble that I put them through in these
6 last -- in these last 20 years.

7 Q: Now, you've heard both Dr. Gottfried testify and you've
8 heard Dr. Gehle testify, and they said they asked you about
9 your offenses and that you denied them. Now, do you admit to
10 fondling those children?

11 A: Yes, I do. And I'm very sorry for that.

12 Q: Well, fondling, although it's awful, is not criminal
13 sexual conduct in the first. Why did you plead guilty to it?

14 A: I pled guilty. I pled guilty. My lawyer called me on
15 Friday and said we had trial --

16 MR. BOGLE: Objection, Your Honor, to conversations with
17 the lawyer.

18 THE COURT: Okay.

19 MR. FALK: Don't tell me what your lawyer said.

20 THE COURT: Thank you.

21 MR. FALK: I'll ask you this question.

22 BY MR. FALK:

23 Q: Based on -- did your lawyer make any recommendations
24 about whether or not you should plead?

25 A: Well, he said go and --

ROBERT POWELL - DIRECT BY MR. FALK

1 MR. BOGLE: Objection.

2 THE COURT: Okay. Sir, you can't say what your lawyer
3 told you.

4 THE RESPONDENT: Okay.

5 THE COURT: That's called hearsay. You can say though
6 what you did in response to your discussions with him. Okay?
7 So after discussing with him, you decided to do whatever.
8 Okay?

9 BY MR. FALK:

10 Q: So you had a discussion on the phone --

11 A: I was --

12 A: -- with your lawyer?

13 A: After discussion with him, I decided to take the plea
14 rather than get 25 years with the plea in order to get
15 twelve.

16 Q: And so you thought about getting 25 years. That was
17 after you consulted with your lawyer; is that correct?

18 A: That's correct.

19 Q: And so you got ten years; is that right? No, you got
20 twelve years?

21 A: Twelve.

22 Q: But how did your actions -- even though you're saying
23 now that they weren't as bad as CSC first, how did your
24 actions affect those girls?

25 A: Badly.

ROBERT POWELL - DIRECT BY MR. FALK

- 1 Q: What do you think about that?
- 2 A: I was -- I was definitely ashamed of what I -- what I
3 did, what I put them through. And like I say, I've been in
4 contact with them and I've apologized greatly to both of them
5 for the things that I have done.
- 6 Q: Did you -- have you had a -- again, I don't want you to
7 repeat anything that somebody told you. Okay? Have you had
8 any contact with Probation?
- 9 A: Yes, I have.
- 10 Q: Okay. And how did you have that contact? Did you go to
11 them? Did they come to you?
- 12 A: They come here.
- 13 Q: And coming here means they came to you at the detention
14 center?
- 15 A: Beaufort County. Yes, sir.
- 16 Q: Okay.
- 17 A: While I was incarcerated, yes.
- 18 Q: Now, what's your understanding of what's going to happen
19 while you're on probation?
- 20 A: I have two years. I had two years when he -- he come to
21 see me December 1st, 2016. I had two years' probation. I had
22 six months with a leg monitor.
- 23 Q: Okay.
- 24 A: I had two years with a sex offender program over in
25 Walterboro.

ROBERT POWELL - DIRECT BY MR. FALK

- 1 Q: You say -- what is it about this program in Walterboro?
- 2 A: I've got two years of it.
- 3 Q: Okay. So you're going to have to wear a leg monitor for
- 4 six months?
- 5 A: Correct.
- 6 Q: Okay. And what will happen if you don't go to your --
- 7 the program in Walterboro?
- 8 A: I would be violated and I would be sent back to prison.
- 9 Q: Do you know much about the program up there?
- 10 A: I do not.
- 11 Q: But it's your understanding that Probation can require
- 12 you to go?
- 13 A: That's correct.
- 14 Q: Are you going to participate?
- 15 A: Sure, I will.
- 16 Q: Do you think you can learn anything?
- 17 A: I probably will. Yes, sir.
- 18 Q: Now, you didn't get any treatment while you were in
- 19 South Carolina Department of Corrections; is that correct?
- 20 A: That's correct. They usually -- from my understanding
- 21 -- I've had roommates who went through the program. They
- 22 usually -- they wait until your last two years and
- 23 automatically send --
- 24 Q: Okay.
- 25 A: -- you to the program.

ROBERT POWELL - DIRECT BY MR. FALK

1 Q: So this --

2 A: So there was no reason for me to contact them. They
3 usually -- they would contact them. He was on a list, the
4 way I understood it..

5 Q: Okay. Has your mother stayed in contact with you since
6 you've been in?

7 A: The whole time.

8 Q: And Mr. Kline stayed in contact with you?

9 A: Yes, sir. The whole time.

10 Q: And some of your family -- other family members have
11 stayed in contact with you?

12 A: Yes, sir. My son had written. My daughter has come to
13 see me as well.

14 Q: Okay.

15 MR. FALK: I have no further questions.

16 THE COURT: Okay. Mr. Bogle?

17 MR. BOGLE: Thank you, Your Honor. May it please the
18 Court.

19 THE COURT: Yes, sir.

20 CROSS-EXAMINATION

21 BY MR. BOGLE:

22 Q: Mr. Powell, good afternoon. You say you've been in
23 contact with Probation?

24 A: Yes, sir.

25 Q: Where is the --

ROBERT POWELL - CROSS BY MR. BOGLE

1 MR. BOGLE: Did I walk off with his sheets?

2 MR. FALK: They might still be up with him.

3 MR. BOGLE: I'm sorry. Okay.

4 BY MR. BOGLE:

5 Q: The sentencing sheets where you got sentenced with these

6 three crimes -- if I may kind of lean over? You got twelve

7 years. It says twelve years here in the circle; right?

8 A: Correct.

9 Q: And there's nothing about probation, probation for blank

10 months or years, nothing filled in there; right?

11 A: Right.

12 Q: Okay. And that's on State's 1, Indictment No. 04-1902;

13 correct?

14 A: Right.

15 Q: And then if we look at State's Exhibit 2, Indictment No.

16 04-1901, again you got twelve years; right?

17 A: Right.

18 Q: Nothing written in for probation; right?

19 A: Right.

20 Q: And the deal -- it says here negotiated sentence was

21 checked. Do you see that?

22 A: Yes.

23 Q: So this is a plea bargain with the prosecutor; right?

24 A: Right.

25 Q: Okay. And that's checked on all three of them. It's

ROBERT POWELL - CROSS BY MR. BOGLE

1 just right there negotiated sentence; right? On Exhibit 1?

2 A: Yes.

3 Q: And finally, on Exhibit 3, again we have negotiated
4 sentence checked, we've got twelve years, and no mention of
5 probation?

6 A: Correct.

7 Q: So in reality, what you're facing is two years of
8 community supervision that began when you maxed out of
9 prison, and that clock is ticking right now; correct?

10 A: That's correct.

11 Q: And it's going to expire in September of this year?

12 A: Correct.

13 Q: Okay. And as far as sex offender treatment at prison,
14 you were kind of waiting for them to come to you and say to
15 you -- offer it to you; right?

16 A: From my understanding, that's the way it worked. Yes,
17 sir. I thought it was mandatory for somebody with my charge
18 to go to the program that they had the last two years of my
19 program -- I mean of my sentence.

20 Q: If you thought it was mandatory and that two years
21 starts coming close, did you, like, reach out to somebody and
22 say, hey, what about me, I want to enroll in sex offender
23 treatment?

24 A: Well, I did. I wrote the Attorney General's saying this
25 is what I did my last four years. When I got down to my last

ROBERT POWELL - CROSS BY MR. BOGLE

1 four years, I had a roommate and they sent him on his last --
2 when he got down to his last four years, they sent him and he
3 went and done two years in the program and then they sent him
4 back to prison, back to the same prison. I wrote the
5 Attorney General asking them to send me to the program my
6 last two years so I wouldn't have to come back to Ridgeland.

7 Q: Okay. For this process right here? The process you're
8 going through right now? You wanted to avoid that; right?

9 A: Yes, sir.

10 Q: So you're saying you wrote my office asking --

11 A: No, sir. No, sir. I didn't know nothing about this
12 process until 2016.

13 Q: Okay. So you're claiming that you wrote a letter to my
14 boss asking him to do something about the Department of
15 Corrections?

16 A: To send me to that program for SCDC.

17 Q: Now, you've heard both of these doctors testify. They
18 both interviewed you at length, Dr. Gottfried and Dr. Gehle?

19 A: Correct.

20 Q: And both of them said that you told them you didn't
21 think you needed sex offender treatment; is that correct?

22 A: That's right.

23 Q: Okay. Now, as far as plans for sex offender treatment,
24 I understand your testimony is you're going to go if
25 Probation makes you go to that place in Walterboro; right?

ROBERT POWELL - CROSS BY MR. BOGLE

- 1 A: Yes.
- 2 Q: Okay. And do you know where it is or what it's called?
- 3 A: No, I don't.
- 4 Q: Do you know the name of anybody there who is going to be
- 5 treating you?
- 6 A: No, I don't.
- 7 Q: Have you got --
- 8 A: I --
- 9 Q: Okay.
- 10 A: I guess -- I guess I'll find out as soon as -- when I do
- 11 get out, I'll report to my probation officer and I guess
- 12 he'll ask.
- 13 Q: Okay.
- 14 A: And line everything up for me.
- 15 Q: So no appointment has been made for, like, say, next
- 16 week or something like that?
- 17 A: No, sir. I guess that'll get sent to me when I get out.
- 18 Q: Okay. Now, you mentioned the lengthy history of
- 19 substance abuse to cocaine, the pot, stuff like that, and
- 20 your intention to get off of that?
- 21 A: Correct.
- 22 Q: But that didn't stop you from smoking at least one joint
- 23 at the Department of Corrections and they caught you and
- 24 disciplined you; right?
- 25 A: That's -- that's not -- that's not so. That was not a

ROBERT POWELL - CROSS BY MR. BOGLE

1 -- that was not a joint and the reason they didn't charge me
2 with marijuana. He said it was marijuana and then when I
3 went to court, they wrote it as contraband.

4 Q: Contraband? Okay.

5 A: Because it was not marijuana. It was a cigarette. I
6 don't even smoke cigarettes. I picked it up off the floor in
7 my room and give it to my roommate in front of the police.

8 Q: Okay.

9 A: The police didn't say nothing to my roommate. He took
10 my badge number and that was it.

11 Q: Have you had any -- have you had any substance abuse
12 counseling while at the Department of Corrections?

13 A: No. Ten years was enough for me.

14 Q: And in these three guilty pleas that you're looking at
15 right there, you had to appear in front of a judge just like
16 this one; right?

17 A: That's correct.

18 Q: And they placed you under oath; right? Just like you're
19 under oath today? And the judge asked you a series of
20 questions to make sure you were pleading guilty freely and
21 voluntarily; right? Not being forced to plead guilty?

22 A: That's right.

23 Q: He asked you if you were satisfied with the services of
24 your lawyer and you said you were?

25 A: Yes.

ROBERT POWELL - CROSS BY MR. BOGLE

1 Q: And then the judge turned to the prosecutor and said
2 summarize -- tell me what happened, and the prosecutor read
3 the charge against you in the indictment?

4 A: That's right.

5 MR. FALK: Objection. Calls for speculation.

6 MR. BOGLE: Is that what -- he said, yeah, that
7 happened. Right? Is that what happened?

8 THE WITNESS: That's what happened.

9 MR. BOGLE: Okay. And then the judge --

10 THE COURT: He can answer it.

11 MR. BOGLE: I'm sorry.

12 THE COURT: Go ahead, if he can answer it.

13 BY MR. BOGLE:

14 Q: And then the judge turns to you and says is that what
15 happened, and you said yes?

16 A: Yes.

17 Q: Okay. And in the case involving Indictment No. 1902,
18 the prosecutor would have read regarding victim --

19 MR. FALK: Objection.

20 Q: -- J.P. --

21 THE COURT: Okay.

22 BY MR. BOGLE:

23 Q: Is this what was read to you? Let me ask you this.

24 From the sentencing sheet? Were you told that you penetrated
25 the victim's vagina as well as her rectum with your fingers

ROBERT POWELL - CROSS BY MR. BOGLE

1 and that's what you --

2 A: Yes.

3 Q: -- pleaded guilty to?

4 A: Yes.

5 Q: Okay.. And on Indictment 1901, that you also penetrated
6 the victim's vagina and rectum and did cunnilingus or oral
7 sex on her and you --

8 A: Yes.

9 Q: -- pled guilty to that? And the final one involves
10 unlawfully touching which then led to full sexual
11 intercourse, and the victim -- this is the victim whose
12 initials are A.P.?

13 A: Yes.

14 Q: And this is what you pleaded guilty -- this is what you
15 had to admit to doing to plead guilty; right?

16 A: Right.

17 Q: Okay.

18 MR. BOGLE: That's all, Judge. Thank you.

19 THE COURT: Okay. Mr. Falk?

20 REDIRECT EXAMINATION

21 BY MR. FALK:

22 Q: Based on your conversations with your lawyer, what did
23 you think your sentence would be if you were convicted of
24 criminal sexual conduct first, penetrating? If you had
25 penetrated one of those -- if you got convicted for that at

ROBERT POWELL - REDIRECT BY MR. FALK

1 trial, what did your lawyer think that you could get?

2 A: Twenty-five years.

3 Q: And that's why you entered a plea agreement?

4 A: That's correct.

5 MR. FALK: No further questions.

6 THE COURT: Anything further, Mr. Bogle?

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

8 THE COURT: All right. You may step down, sir.

9 THE RESPONDENT: Thank you, Your Honor.

10 THE COURT: Anything further, Mr. Falk?

11 MR. FALK: We would rest.

12 THE COURT: All right. Come forward and talk to me,
13 y'all, for scheduling purposes.

14 (WHEREUPON, a bench conference was held in the presence
15 of the jury but out of the hearing of the jury off the
16 record, after which the proceedings resumed as follows.)

17 THE COURT: Okay. All right. Ladies and gentlemen, we
18 were just talking about scheduling. At this time, the
19 respondent has rested his case as well.

20 There is a rule of thumb for judges. We do not send a
21 case to a jury after about 3:00 or 3:30 in the afternoon,
22 plus you haven't heard everything yet. There's still a
23 matter of law I have to take up with the lawyers. You would
24 have to hear their closing arguments, I would charge you on
25 the law of this case, and then it would get sent to you.

1 So this is what we're going to do, ladies and gentlemen.
2 We are going to go ahead and break for the evening, and I am
3 going to see you tomorrow morning back in your jury room at
4 11:30.

5 I have another hearing that I have to have in the
6 morning and I want to tell you just to start I expect a lot
7 of media coverage in regards to it. So if you come and you
8 see a lot of reporters and coverage, it has nothing to do
9 with this case. So I don't want you concerned in any way.

10 I'm hoping by the time you get here we will have been
11 long finished because that hearing is starting at 9:00 a.m.
12 in the morning. I hope that we're long done and you're gone,
13 but I just want to make sure that you understand and you all
14 are not concerned in any way.

15 Even though the media won't be here in reference to this
16 case, they are never permitted to take a picture or to do
17 anything or film a jury. That's just not allowed. So I
18 don't want to concerned about that. Obviously, your
19 anonymity will be maintained in this case.

20 Ladies and gentlemen, what's going to happen is at 11:30
21 the lawyers are going to make their closing arguments. Their
22 closing arguments will probably last about 15 minutes each.
23 My charge on the law is probably going to be about another 15
24 or 20 minutes, and then we're going to send the case to you.
25 I'm asking our clerk of court to bring in lunch to you.

1 So, what the thought is is all of that should take
2 roughly 45 minutes to an hour. If you get here at 11:30 and
3 we start then, I'm going to have lunch brought in right about
4 12:15 or 12:30. So right when I send the case to you, you
5 all can start your deliberations and you can eat at the same
6 time. Okay? That's the goal.

7 Of course, I have no idea how long you're going to
8 deliberate. Whatever that is is up to you, but that's just
9 to explain to you scheduling tomorrow.

10 And we will go as late as you wish to go. I can tell
11 you that sometimes I have juries that get tired and, as they
12 get into the late afternoon or the evening hours, they may
13 say we want to break and come back the next day. That is
14 completely up to you. I will also state that if you all are
15 still talking and still deliberating, we can stay late if you
16 all wish to stay late. It is completely governed by what you
17 all want to do as a jury, and I'll look to your foreperson to
18 instruct me what the jury's wishes are, whatever we're doing.
19 Okay?

20 So I just want to make sure that's acceptable. I want
21 to for the last time again tell you do not discuss this case
22 with anyone. Do not do any independent research in reference
23 to anything you've heard here, ladies and gentlemen. Go
24 home. Get a good night's sleep.

25 We look forward to seeing you at 11:30. Again, I can't

1. start until every one of you are here. So if someone has a
2. problem over the evening, please call in to the clerk's
3. office because I'm going to be looking for you. All right?

4. I appreciate it, ladies and gentlemen. You all are
5. excused for the evening.

6. (WHEREUPON, the jury exited the courtroom at 4:01 p.m.)

7. THE BAILIFF: The jury is clear, Your Honor.

8. THE COURT: All right. Any motions?

9. MR. FALK: I would renew my motion for directed verdict
10. and any other evidentiary objections that I have made.

11. THE COURT: Thank you. Mr. Bogle, based on the same
12. grounds, you're respectfully asking that I deny those?

13. MR. BOGLE: I am, Your Honor.

14. THE COURT: All right. And again, based on my prior
15. ruling, I am denying any motion. I think it's a jury issue
16. and we're going to send it to them.

17. MR. BOGLE: Thank you, Your Honor.

18. THE COURT: We need to talk about the jury charge very
19. briefly. I didn't think there was a a lot of debate to it.
20. What specifically, Mr. Falk, are you asking for?

21. MR. FALK: Well --

22. THE COURT: Yes, sir.

23. MR. FALK: The standard package.

24. THE COURT: Yeah.

25. MR. FALK: I'm adding this about respondent not

1 testifying, which is obviously not applicable here.

2 THE COURT: Right.

3 MR. FALK: I like the wording how I had it on Number 4
4 as far as that we're not adding -- my sense was I was trying
5 to say if you wanted to give him more time, that's not what
6 we're here for.

7 THE COURT: Uh-huh.

8 MR. FALK: That if you're dissatisfied with his criminal
9 sentence, you know, the purpose here -- that's the message I
10 was trying to convey.

11 THE COURT: Okay. It is -- do you have any case law
12 that --

13 MR. FALK: The law was not enacted so as to add criminal
14 punishments and impose upon individuals that commit sexually
15 violent crimes.

16 THE COURT: Do you have any case law that states that?

17 MR. FALK: Well, I --

18 THE COURT: I mean I think it's inherent and we know
19 that, but that sounds to me more like argument of what you
20 would tell a jury.

21 MR. FALK: I think it's inherent. I'm not sure I've
22 seen --

23 THE COURT: Okay.

24 MR. FALK: -- a case on it.

25 THE COURT: Okay. And that's your Number 4?

1 MR. FALK: Yeah.

2 THE COURT: Okay. Mr. Bogle, do you have any objection
3 to it?

4 MR. BOGLE: His Number 4, the second big sentence
5 beginning with the words South Carolina's sexually violent
6 predator law was not enacted, again, I think that's more
7 argument than statute.

8 THE COURT: Uh-huh.

9 MR. BOGLE: The jury charge you got from us comes from
10 about three other circuit court judges' jury charge that may
11 well resemble yours.

12 THE COURT: Uh-huh.

13 MR. BOGLE: Primarily, again, about three others from
14 different jurisdictions. I added the argument of counsel
15 part. I got that from Judge Newman's charge in the Slager
16 trial down in Charleston.

17 THE COURT: Uh-huh.

18 MR. BOGLE: Just because I liked it, but the sentence
19 you're talking -- the extra sentence beginning with the words
20 South Carolina's sexually violent predator law on Number 4 to
21 me is more like argument than it is anything else. I've got
22 some stuff in my jury charge about, you know, not being a
23 friend or a foe to anybody and make your own independent --
24 that's part of the end of our charge.

25 THE COURT: Okay. I mean at the end I always say you

1 owe no support or sympathy to anyone.

2 MR. BOGLE: Right.

3 THE COURT: Obviously.

4 (To law clerk) Do you have a copy of their request to
5 charge for me? Thanks.

6 MR. FALK: My bigger issue on the jury was if my client
7 wasn't going to testify, I was going to make more of a point
8 on that.

9 THE COURT: Okay. All right. I'll take a look at that,
10 Mr. Falk. Anything else that I need to look at closely other
11 than, you know, the standard charge? I mean you've seen it.
12 I know you've been through these a number of times.

13 MR. FALK: Yes, Your Honor.

14 THE COURT: So I pretty much had planned on charging
15 what I knew to be the standard bench book charge, but I'm
16 going to look at your language on Number 4 and --

17 MR. FALK: Thank you.

18 THE COURT: -- see if I like it. Okay? See if I like
19 it and see where it comes from. Okay?

20 MR. BOGLE: Are Numbers 1, 2, and 3 at issue or are we

21 --

22 MR. FALK: Four -- 4 and 5 were the ones I was really
23 concerned about. I'm not concerned about 5 anymore. So it's
24 fine.

25 THE COURT: Okay. So just Number 4. Okay.

1 MR. BOGLE: Thank you, Your Honor.

2 THE COURT: Let me take a look at it. I'll let you know
3 before we close, gentlemen, and just if for some reason I
4 don't, remind me. Okay.

5 (To law clerk) I just want to look at Number 4.
6 Respondent's request to charge Number 4, if I can.

7 What I want to do, Mr. Falk, is let me look at the whole
8 thing --

9 MR. FALK: Sure.

10 THE COURT: -- just as a whole. I want to look at it
11 and just decide whether or not I think it's appropriate to
12 put it in. Okay?

13 MR. FALK: Thank you.

14 THE COURT: Okay. Anything else? Y'all okay? And I am
15 so sorry about our schedule tomorrow.

16 MR. FALK: That's fine.

17 THE COURT: I know we're kind of throwing things off a
18 little bit for you.

19 MR. BOGLE: Better you than me, Judge.

20 THE COURT: Okay. As you can imagine.

21 All right. So, ladies, you're fine for 11:30
22 regardless. Do me a favor though. If I am still going in
23 here on that other case, don't be bringing him up. I don't
24 want him in the courtroom. When I say him, Mr. Powell. I
25 don't want them bringing you in if there's media here and

1 other things going on still. So if you know something is
2 still going on up here, just sit tight. Okay? And just keep
3 him downstairs, if that's okay with y'all. Okay?

4 THE GUARD: Yes, ma'am.

5 THE COURT: I appreciate it.

6 MR. BOGLE: 11:30?

7 THE COURT: Yeah. And if I were y'all, I'd stay out of
8 the courtroom too, you know. It's just always --

9 MR. BOGLE: I'll use the back -- the back media room if
10 I come in.

11 THE COURT: I'd hide if I were you. So --

12 MR. BOGLE: I don't think they know me.

13 THE COURT: You're lucky. Hold on a second. Let me
14 see.

15 Mr. Falk, looking at Number 4, let me just go read the
16 case law that you cited.

17 MR. FALK: Okay.

18 THE COURT: If that's okay. Let me take a look at it.
19 Okay?

20 MR. FALK: Thank you.

21 THE COURT: I appreciate it.

22 (WHEREUPON, the proceedings adjourned for the day of
23 4:06 p.m.)

24 FEBRUARY 28, 2018

25 (WHEREUPON, the proceedings resumed at 11:31 a.m.)

1 THE COURT: All right. I know Crystal just gave you all
2 a copy of the jury charge. Is there any objections to it?

3 MR. BOGLE: Mr. Falk and I have been talking about this,
4 and I apologize for my ignorance. There was a PCR case --

5 THE COURT: Yeah.

6 MR. BOGLE: -- appeal that came out I think last
7 December.

8 THE COURT: Okay.

9 MR. BOGLE: And while the Court did not grant the
10 applicant relief -- Mr. Falk remembers that better than I do
11 -- there was some concern about the jury charge.

12 THE COURT: Uh-huh..

13 MR. BOGLE: The language like seeking the truth, finding
14 the truth. They said to take all that out.

15 THE COURT: Okay.

16 MR. FALK: And verdict comes from the Latin word for
17 truth.

18 THE COURT: Veredicto. Yeah.

19 MR. FALK: Yeah.

20 MR. BOGLE: They simply --

21 MR. FALK: But you didn't use them in this, but they
22 still have concerns about the truth and justice at the very
23 end.

24 THE COURT: Let me see.

25 MR. BOGLE: Page 2, you mentioned that at the bottom of

1 the --

2 THE COURT: Let me see.

3 MR. BOGLE: -- middle section.

4 THE COURT: Okay. Hold on.

5 THE LAW CLERK: There's one at the bottom of 1.

6 THE COURT: You should not determine the truth merely by
7 counting the number of witnesses presented by each side.

8 MR. BOGLE: Yeah.

9 THE COURT: You have only one objective and that's to
10 seek the truth. So you want me to get rid of --

11 MR. BOGLE: Yeah. We replaced that with you should not
12 decide the case based on the number of witnesses.

13 THE COURT: Okay.

14 MR. BOGLE: We modified our jury charge just for --

15 THE COURT: Okay.

16 MR. BOGLE: -- something like that.

17 THE COURT: Decide --

18 MR. BOGLE: We're here to seek the truth, regardless of
19 its source.

20 THE COURT: Okay. Hold on a second. I can just get rid
21 of that. You should not decide the case merely by counting
22 the number of witnesses presented by each trial -- or by each
23 side, and then get rid of this. Okay.

24 THE LAW CLERK: And then just delete that last sentence?

25 THE COURT: Yeah. On that portion of it. And then let

1 me --

2 MR. BOGLE: On page 7, when you close, you talk about
3 truth and justice.

4 THE COURT: Yeah. Let me --

5 MR. BOGLE: Which is fine with me, but I just -- the
6 Supreme Court seemed to -- and I'm not sure that phrase is
7 quite the same as seeking the truth. So maybe it's a
8 different way. It might be okay.

9 MR. BOGLE: It was a PCR.

10 MR. FALK: I thought it was Daniels.

11 THE COURT: Yeah. No support or sympathy. I mean the
12 lawyers always ask me to say you owe no support or sympathy
13 to anyone.

14 MR. BOGLE: Yeah, that's fine. That's fine about --

15 THE LAW CLERK: It's about seeking truth and justice.

16 MR. BOGLE: No friends to reward, enemies to punish.

17 THE COURT: Uh-huh. Right.

18 MR. BOGLE: It's said different ways.

19 THE COURT: I've done that too. Yeah. So you want me
20 to get rid of the Court is of the confirmed opinion that
21 whatever verdict you reach will represent truth and justice?

22 MR. BOGLE: Well, it's not quite the same as saying
23 seeking the truth.

24 THE COURT: Right.

25 MR. BOGLE: When that opinion came out, I kind of hit

1 the panic button and searched the word truth in all my jury
2 charges --

3 THE COURT: Okay.

4 MR. BOGLE: -- and took it out --

5 THE COURT: Okay.

6 MR. BOGLE: -- and replaced it with something else like
7 validity or accurateness or correctness --

8 THE COURT: Okay.

9 MR. BOGLE: -- or some word.

10 THE COURT: Okay.

11 THE LAW CLERK: It's State v. Daniels.

12 THE COURT: Yeah.

13 MR. BOGLE: Is that it?

14 THE LAW CLERK: Instruction to the jury that whatever
15 verdict you reach will represent truth and justice for all
16 parties that are involved in this case was improper.

17 THE COURT: Okay. Well, there, that's the portion of
18 it.

19 MR. BOGLE: That's pretty clear.

20 THE COURT: That's it exactly. Okay. I'm just going to
21 take it out.

22 MR. BOGLE: Uh-huh. And I think when the opinion came
23 out, these charges were still on the Court's website. So
24 there was some confusion about --

25 THE COURT: Okay. So I just took that portion out. I'm

1 just going to end with everyone is entitled to justice in
2 this case, both the State and the respondent.

3 MR. BOGLE: Uh-huh.

4 THE COURT: You owe no support or sympathy to anyone.
5 And then I'm just going to say your verdict must be
6 unanimous. It must be the verdict of all twelve jurors.

7 MR. BOGLE: Uh-huh.

8 THE COURT: Okay? So we'll take that out and I'll take
9 out the other portion in number -- page number 2, like you
10 said. You should not decide the case merely by counting the
11 number of witnesses presented by each side, period. And I'm
12 getting rid of the last portion. Okay?

13 MR. BOGLE: Okay.

14 THE COURT: Is that okay?

15 MR. FALK: Thank you.

16 THE COURT: Absolutely. And how about the verdict form?

17 MR. BOGLE: It looks fine.

18 THE COURT: Are you okay with that?

19 MR. FALK: It's fine.

20 THE COURT: Okay. Okay. Have you got it? So you've
21 got an extra copy of the verdict form? Do you want to -- so
22 were going to need twelve copies of this. Okay. She needs
23 the one verdict form back. Okay?

24 MR. BOGLE: What was the name of the case she found?

25 MR. FALK: It's Daniels.

1 THE COURT: It's Daniels.

2 MR. FALK: Your Honor, I've got the cite for you.

3 THE COURT: Okay.

4 MR. FALK: I didn't have a copy of the whole opinion
5 though, but I'm going to get it.

6 MR. BOGLE: I can look it up. It was last December,
7 wasn't it?

8 MR. FALK: It was a 2012 case.

9 THE COURT: Time is flying, isn't it?

10 MR. BOGLE: No, this was recent.

11 THE LAW CLERK: 401 S.C. 251.

12 MR. BOGLE: Okay.

13 THE LAW CLERK: And it's from the Supreme Court in
14 October of 2012.

15 MR. FALK: October 10th, 2012.

16 MR. BOGLE: Wasn't there something more recent?

17 MR. FALK: I don't have a good cite.

18 THE COURT: Okay.

19 MR. FALK: 401 S.E. -- 737 S.E.2d 473.

20 MR. BOGLE: 737 S.E.2d --

21 MR. FALK: 473.

22 MR. BOGLE: Okay.

23 THE COURT: Okay.

24 MR. BOGLE: Thank you, Your Honor. I thought Judge
25 Fugue did the dissent.

1 MR. FALK: No. There was another thing that came out.
2 Wasn't it part of the -- Beatty? Wasn't it part of the
3 decision where they just changed who could argue last?

4 MR. BOGLE: Yeah. It might have been there.

5 MR. FALK: It might have been in that.

6 MR. BOGLE: And that was much more recent.

7 MR. FALK: Yes. That was --

8 MR. BOGLE: Like, December? Or November?

9 MR. FALK: Well, time flies, but it's been at least a
10 year. Yeah.

11 MR. BOGLE: Yeah.

12 THE COURT: Okay.

13 (WHEREUPON, there was a pause in the proceedings, after
14 which the proceedings resumed as follows.)

15 THE COURT: And I don't say the word fair anywhere in
16 there, do I? Because I'm looking at Daniels and it just says
17 -- I want to make sure that you also can't say fair, like
18 just or fair, it says.

19 MR. FALK: Well, you say weighing it fairly and
20 impartially, but I think that's in a context that's livable.

21 MR. BOGLE: You know, that's fine.

22 THE COURT: Okay.

23 MR. FALK: Yeah.

24 THE COURT: Okay. Okay. All right. So other than
25 that, are we okay?

1 MR. BOGLE: Yes, Your Honor.

2 THE COURT: We're fine?

3 MR. FALK: Yes, Your Honor.

4 THE COURT: Okay. And she's cleaning it up obviously
5 because I'm sending copies back to the jury because I'm
6 telling them I'm doing that.

7 MR. FALK: I mean I'm making an argument for fairness;
8 so I have no problem with the word fair. It's truth and
9 justice.

10 THE COURT: Okay.

11 MR. FALK: That's two different things.

12 THE COURT: Okay.

13 MR. BOGLE: And you're going to send a complete copy of
14 the charge to the entire jury?

15 THE COURT: Yes.

16 MR. FALK: Okay.

17 THE COURT: Yes. I think we actually said -- I think
18 that actual charge says that they will each individually get
19 a copy of it.

20 MR. BOGLE: All right.

21 THE COURT: So we'll do that obviously.

22 THE LAW CLERK: I can change it or do you want to just
23 --

24 THE COURT: No, no, no. Just to give them each -- I
25 don't see how it helps one of them just having it, quite

1 frankly.

2 MR. BOGLE: They've all got to have it. There was an
3 objection about that.

4 THE COURT: Well, I think so too. I just --

5 MR. BOGLE: You can't give them part of it.

6 THE COURT: No, no, no. I'm not talking about part of
7 it. I'm talking about that everyone has a copy. Just having
8 one and passing it around isn't good. Okay. Yeah?

9 THE LAW CLERK: Okay. Just to make sure I'm clear, am I
10 deleting that entire paragraph where it talks about truth and
11 justice?

12 THE COURT: No. Let me see. I just -- I marked through
13 what it was. No. I didn't think so.

14 THE LAW CLERK: Oh, the last part. I see. I got it. I
15 didn't --

16 THE COURT: Okay.

17 THE LAW CLERK: -- I realize it was on it.

18 THE COURT: I think we're okay.

19 MR. BOGLE: It's the last sentence; right?

20 THE COURT: Right.

21 MR. BOGLE: And I think --

22 THE COURT: Yeah.

23 MR. BOGLE: I think the case law says that for the
24 record I have to consent or not consent to the jury charge
25 going back, and we do.

1 THE COURT: Okay.

2 MR. BOGLE: We have no problem with that.

3 THE COURT: Okay. And you as well, Mr. Falk?

4 MR. FALK: Yes.

5 THE COURT: Thank you.

6 MR. FALK: I think it's better to actually have them all
7 back there because if you send one back, then that one guy
8 starts --

9 THE COURT: I agree.

10 MR. FALK: Yeah.

11 MR. BOGLE: Writing on it, coloring on it, whatever.

12 MR. FALK: Right.

13 THE COURT: Okay. All right. We're ready to go. So
14 you open first. You're going to open first, obviously?

15 MR. BOGLE: My understanding is I open in full.

16 THE COURT: Right.

17 MR. BOGLE: He does his thing.

18 THE COURT: And then --

19 MR. BOGLE: If he brings up something new, I can add to
20 it. That rarely happens.

21 THE COURT: Right. Respond to it. Okay. All right.

22 (WHEREUPON, there was a pause in the proceedings, after
23 which the proceedings resumed as follows.)

24 THE COURT: Okay. All right. Let's bring the jury in,
25 Rick. What time will the food be here? 12:15?

1 THE BAILIFF: 12:15.

2 THE COURT: Perfect.

3 (WHEREUPON, the jury entered the courtroom at 11:40
4 a.m.)

5 THE COURT: Good morning, ladies and gentlemen.

6 THE JURY: Good morning.

7 THE COURT: I trust y'all have had a better morning than
8 I have. With that said, we're going to go ahead and finish
9 this case. You're going to hear the closing arguments from
10 the lawyers, I'm going to charge you on the law that's
11 applicable to this case, and then we're going to send it to
12 you. All right?

13 So with that said, if you'll give Mr. Bogle your
14 attention.

15 MR. BOGLE: Thank you, Your Honor. May it please the
16 Court.

17 THE COURT: Yes, sir.

18 MR. BOGLE: Mr. Falk..

19 CLOSING ARGUMENT ON BEHALF OF THE STATE

20 MR. BOGLE: I'm not one of these television lawyers who
21 can do this all from memory. So, if you please, I have notes
22 to look at.

23 First, I'd like to thank you for your service. Okay?
24 There's places I think we'd all rather be. It was beautiful
25 weather yesterday, but at the same time, it's a very

1 important case, not just for the State, but to Mr. Powell and
2 Beaufort County, and I appreciate you doing your job and
3 coming in here and listening to all this.

4 Now, the way it works right now is we have the closing
5 arguments. I will open. I will give you my full argument.
6 Mr. Falk will then present his. If he brings up something
7 new, I can reply to it, but that rarely happens.

8 Remember the theme I talked about yesterday, 16 years.
9 Sixteen years of time, and look again at what we're doing
10 here. The burden of proof, of course, is on the State. We
11 have to prove to you beyond a reasonable doubt that Robert
12 Powell is a sexually violent predator.

13 Now, what do we have to show? First, has he been
14 convicted of a sexually violent crime, and that is not in
15 dispute. You'll have back in the jury room the three
16 sentencing sheets and the three indictments, and this is for
17 criminal sexual conduct with a minor in the first degree and
18 that is a sexually violent crime under our law. So you'll
19 have that back in the jury room.

20 The next question is does he have a mental abnormality,
21 and I think everybody agrees that he does. He's a pedophile.
22 Pedophilic disorder is the technical name for it. What it
23 is, of course, as you heard yesterday, is a deviant sexual
24 attraction to young prepubescent children, and here it's
25 little girls. It's also called nonexclusive because he has

1 had sexual relationships with age-appropriate women, but in
2 this case, he has the urge to have sex -- to have sexual
3 encounters with the young girls talked about in the
4 indictments.

5 So what this case really boils down to I think in many
6 respects it's a medical mental health issue, and that's what
7 you've got to decide. You've got to look at the evidence
8 that you heard because you're the ultimate conclusers on what
9 happened in this case. You heard the evidence. You'll have
10 the exhibits. You decide what the facts are in this case and
11 you decide also what to believe.

12 Now, in one case, I think it's safe to assume that where
13 would you stop this guy. Sixteen years of conduct. What
14 stopped him was he got arrested and went to prison, and now
15 he's about to get out. He's done with his prison time. He's
16 served that. We're over that. The question is should he be
17 released into the community or should he be confined for
18 treatment.

19 He has some witnesses for his defense that talked about
20 -- his mom is going to have him live with her. He's got Mr.
21 Kline. He's going to work for Mr. Kline. But, you know, if
22 you look at the dates involved on those indictments of when
23 these crimes happened -- Mr. Kline says he's known the guy
24 for almost 30 years and he worked for him before he went to
25 prison. So back when he was working for Mr. Kline, I think

1 the dates will indicate from the sentencing sheets that he
2 was still offending.

3 If you look at the upper right-hand corner of each
4 sentencing sheet right here, it says date of offense, and
5 that's very important. That's where we get the 16 years
6 because in one case the date of offense was for five years
7 with a little girl, the other for almost ten.

8 Now, in this case, you heard expert witnesses. And like
9 I said on Monday -- on Tuesday morning rather, normally a
10 witness can just say what they see or what they hear, the
11 facts that they perceive with one of their five senses.

12 But if a witness is qualified through education and
13 training and experience, they can give you an opinion about
14 something, and that's what happened today. Both Dr. Gehle
15 and Dr. Gottfried were qualified by the Court to give expert
16 opinions.

17 Now, at the same time -- and here's -- I know what you
18 might be thinking. Okay. Two people, both qualified by the
19 judge to give opinions, look at the same guy, look at the
20 same stuff, and came up with different opinions. So what's
21 going on here?

22 And I think you have to look at the detail and what they
23 did. Okay? Dr. Gehle is a very qualified mental health
24 doctor. She's done lots of these cases and she found lots of
25 bad things about Mr. Powell that are not in dispute. She ran

1 the one test, the Static 99, got a low score, a 1, which is a
2 3.9 percent chance of reoffending over five years, and she
3 stopped there.

4 Now, Dr. Gottfried hadn't done as many of these, but
5 she's done a lot of mental health evaluations with the same
6 thing. What is the risk a person has? Like the risk to
7 reoffend as a sexual predator, the risk to reoffend as a,
8 say, a medical doctor offending his patients. She's done a
9 lot of those as well.

10 Has she been declared an expert witness as many times in
11 these types of cases as Dr. Gehle? No. She has not, but she
12 has done enough. And the question there is, I think if you
13 look at Dr. Gottfried, she seems to have gone a step further.
14 There was a whole battery of tests and examinations run on
15 Mr. Powell at the office in Charleston.

16 Now, did some of those make a difference? No. Did some
17 help Mr. Powell? Yes. Did some hurt him? Some made him
18 sound like he wasn't quite being as honest about himself.

19 Let's talk about that Conners test. Remember the first
20 one, the Conners test she gave him? What did that have to do
21 with it?

22 Well, it gave her a base point. Is Mr. Powell smart
23 enough, does he have enough intelligence to respond to the
24 future interviews and testing? That's what the Conners test
25 is about. Because there's some people that don't have it,