

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

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SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF JIMMY RAY FILYAW,

APPELLANT

APPELLATE CASE NO. 2018-000425

RECORD ON APPEAL

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State of South Carolina	)	Court of Common Pleas
	)	Twelfth Judicial Circuit
County of Florence	)	Case No. 2016-CP-21-00044

In the Matter of the
Care and Treatment of
Jimmy Filyaw,

Transcript of Record

February 12-13, 2018
Florence, South Carolina

B E F O R E:

The Honorable D. Craig Brown, Judge; and a jury

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

James G. Bogle Jr.
Attorney for the State

James K. Falk, Esquire
Attorney for the Respondent

Krystal J. Smith
Circuit Court Reporter

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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

1 FEBRUARY 12, 2018.

2 (WHEREUPON, the proceedings began at 10:59 a.m.).

3 THE COURT: All right. Is the State ready to proceed?

4 MR. BOGLE: Yes, Your Honor.

5 THE COURT: Defense counsel?

6 MR. FALK: We are, Your Honor.

7 THE COURT: All right. Ladies and gentlemen, we are
8 about to select a jury in the case of the State of South
9 Carolina versus Mr. Jimmy Ray Filyaw.

10 What this case is about -- I'm going to give you a brief
11 synopsis about the case. This is a case that has been
12 brought by the State of South Carolina under the Sexually
13 Violent Predator Act. The State of South Carolina seeks the
14 civil commitment of Mr. Jimmy Filyaw for long-term control,
15 care, and treatment in a secure facility. This is not --
16 this is not a criminal proceeding seeking incarceration but
17 is rather a proceeding seeking a civil commitment.

18 The State of South Carolina alleges or claims that Mr.
19 Filyaw is a sexually violent predator under the law. Mr.
20 Filyaw has denied that he is a sexually violent predator and,
21 therefore, the burden of proof is on the State of South
22 Carolina to prove by evidence sufficient to satisfy you
23 beyond a reasonable doubt that Mr. Filyaw is a sexually
24 violent predator.

25 What we're going to do before we select a jury in this

1 case is there are a multitude of questions that I must ask of
2 you to determine your qualifications to serve on this
3 particular jury. Let me ask you this real quick.

4 Is there any member of the jury panel that's ever been
5 related by blood, connected by marriage, had a close
6 personal, business or social relationship with Mr. Jimmy Ray
7 Filyaw? If so, please stand.

8 (WHEREUPON, there was no response.)

9 THE COURT: I need the lawyers to approach, please, for
10 just a minute.

11 (WHEREUPON, a bench conference was held in the presence
12 of the jury panel but out of the hearing of the jury
13 panel as follows.)

14 THE COURT: You know what I didn't think about is, you
15 know, I'm assuming within these indictments you've got
16 victim's names or maybe you don't. I mean is that an issue
17 that we need to address, whether or not they know any of
18 these victims?

19 MR. BOGLE: Well --

20 THE COURT: They're not testifying, but you've got
21 victims here.

22 MR. BOGLE: We mention their names.

23 THE COURT: Sir?

24 MR. BOGLE: We mention their names. Some of the
25 indictments don't mention names; some do.

1 THE COURT: Well, I mean I don't want doctors to come in
2 here and testify to this, you know, so-and-so was the victim
3 in this case and the jury be sitting in that box and, well, I
4 know that person, I know about this case.

5 MR. BOGLE: I might --

6 MR. FALK: I've gone back and forth with him, and that
7 is one of my questions.

8 MR. BOGLE: Yeah.

9 MR. FALK: Usually, the judge doesn't want to ask it.

10 THE COURT: I'm just asking.

11 MR. FALK: I'm just saying because I usually think about
12 it.

13 MR. BOGLE: When my expert testifies, she'll refer to,
14 like, Mary S. or Jane G.

15 THE COURT: Okay.

16 MR. BOGLE: She doesn't testify to full names.

17 THE COURT: I just wanted to ask y'all about that --

18 MR. BOGLE: Yeah.

19 THE COURT: -- before we got any further. Thank you.

20 MR. BOGLE: Thank you.

21 (WHEREUPON, the bench conference ended and the
22 proceedings resumed as follows.)

23 THE COURT: All right. The following, ladies and
24 gentlemen, is a list of potential witnesses in this case.
25 They include Dr. Amy Swan and Dr. Colbi Sutton. Am I leaving

1 anyone off, Mr. Bogle?

2 MR. BOGLE: Not from the State, Your Honor.

3 THE COURT: Mr. Falk?

4 MR. FALK: Just my client.

5 THE COURT: Just your client?

6 MR. FALK: Yes.

7 THE COURT: Okay. I've already asked with regards to
8 Mr. Filyaw, but with regards to the witnesses I just named,
9 Dr. Amy Swan and Dr. Colbi Sutton, is there any member of the
10 jury panel that has ever been related by blood, connected by
11 marriage, had a close personal, business, or social
12 relationship with any of those potential witnesses? If so,
13 please stand.

14 (WHEREUPON, there was no response.)

15 THE COURT: All right. If at this time the attorney for
16 the State, followed by defense counsel, will stand and
17 introduce themselves.

18 MR. BOGLE: My name is Jim Bogle. I'm a lawyer out of
19 Columbia with the Attorney General's office.

20 THE COURT: Mr. Falk?

21 MR. FALK: I'm James Falk. I have an office in
22 Charleston, South Carolina. I'm a private lawyer, but I am
23 appointed by the State to represent Mr. Filyaw in this case.

24 THE COURT: All right. Is there any member of the jury
25 panel that's ever been related by blood, connected by

1 marriage, had a close personal, business or social
2 relationship or ever been represented by any of the attorneys
3 involved in this case? If so, please stand.

4 (WHEREUPON, there was no response.)

5 THE COURT: All right. Ladies and gentlemen, what I'm
6 going to do now is I have a questionnaire that my bailiff
7 here is going to hand out. It has on the bottom -- I need
8 you to answer these questions. At the bottom, it has a place
9 for your name and juror number. Do not put your name on
10 there. All I want is your juror number. Make sure you put
11 your juror number on there.

12 And these documents, after this jury selection, they'll
13 be shredded. Okay? They'll be shredded, but there are some
14 questions that I want you to answer for me as we go through
15 this process.

16 But before I go any further, I'm going to hand these
17 question -- have my bailiff hand these questionnaires out,
18 and there are pens in here. If you need a writing utensil,
19 let her know after she hands these questionnaires out.
20 She'll come back along.

21 Mr. Finklea, if you'd come forward, let Ms. Frances hand
22 the questionnaires out, and you follow her with the pens and
23 see how many you need on each row and hand them out, please,
24 sir.

25 I've handed a notepad to the deputy in case you need

1 something to press your paper on to write on; if you don't
2 have anything sufficient.

3 JUROR NUMBER 14: Could you explain the immediate
4 family?

5 THE COURT: You, your spouse, or your children. All
6 right. Tell me your name and number that just asked that
7 question?

8 JUROR NUMBER 14: Joetta Chambers, 14.

9 THE COURT: Thank you. Once you're -- once you're
10 finished answering that, if you want to fold it in half and
11 pass it to the end of the aisle, please. If you'll fold them
12 long ways, please. Long ways.

13 Mr. Bogle, Mr. Falk, I've given to my court reporter a
14 blank copy of that questionnaire as a Court's exhibit.

15 MR. BOGLE: A Court's exhibit?

16 THE COURT: Court's exhibit.

17 MR. BOGLE: Okay.

18 MR. FALK: Thank you.

19 (WHEREUPON, the blank questionnaire was marked as
20 Court's Exhibit No. 1.)

21 THE COURT: Mr. Falk, Mr. Bogle, I'm sorry to ask you
22 all up here again, but I need to ask you something.

23 (WHEREUPON, a bench conference was held in the presence
24 of the jury panel but out of the hearing of the jury
25 panel as follows.)

1 THE COURT: I'm trying to remember --

2 MR. BOGLE: It's not far. It's okay.

3 THE COURT: I'm trying to remember the last time. I
4 don't think I've tried but one of these cases since I've been
5 on the bench.

6 MR. BOGLE: Really? I thought you had one.

7 THE COURT: Huh?

8 MR. BOGLE: I thought you and I had one.

9 THE COURT: I said I think that's the only one.

10 MR. BOGLE: Okay.

11 THE COURT: I've just tried one.

12 MR. BOGLE: Okay. Well, that's enough.

13 THE COURT: When we select the jury here, I mean is it
14 three and three on the strikes?

15 MR. BOGLE: No. It's four and four.

16 THE COURT: Four and four?

17 MR. BOGLE: Like in a civil case. It's a regular Common
18 Pleas case.

19 THE COURT: Okay.

20 MR. BOGLE: She'll give -- the only question is how many
21 alternates you want to use, one or two.

22 THE COURT: I'll leave that up to y'all.

23 MR. FALK: Well, I told them originally two, but maybe
24 we ought to do one because we're going to run light on jurors
25 if you need 22.

1 MR. BOGLE: So we'll take, you know --

2 MR. FALK: You need 20.

3 MR. BOGLE: -- 23 to get some extras.

4 THE COURT: For one alternate.

5 MR. FALK: There's 38. I'm just saying.

6 MR. BOGLE: Yeah. Yeah. So 20 to pick our jury and the
7 next three to pick the alternate.

8 MR. FALK: One alternate maybe.

9 MR. BOGLE: Yeah. So 23 total.

10 MR. FALK: I'm worried about the guy in the back.

11 THE COURT: I'm going to have to have some time to go
12 through these.

13 (WHEREUPON, the attorneys conversed off the record,
14 after which the bench conference continued as follows.)

15 THE COURT: I'm going to have to have some time to go
16 through these.

17 MR. BOGLE: Yeah, I understand. You need your law
18 clerk.

19 THE COURT: Do what?

20 MR. BOGLE: You need your law clerk.

21 THE COURT: All right. I'm going to step down and go
22 through these real quick.

23 MR. BOGLE: Okay.

24 THE COURT: And then I'll come back and we'll finish
25 this because I don't want to finish my questions --

1 MR. BOGLE: Right.

2 THE COURT: -- and then go through these and then just
3 call those people up.

4 MR. FALK: Yeah.

5 MR. BOGLE: All right.

6 (WHEREUPON, the bench conference ended and the
7 proceedings resumed as follows.)

8 THE COURT: All right. Ladies and gentlemen, this is
9 where my law clerk would come in handy, of which I don't have
10 a law clerk right now, who is out this week. I'm going to
11 step down for just a minute. I'm going to run through these
12 questionnaires and separate them out how I'm going to need to
13 separate them out. It won't take me but a minute or a few
14 minutes, and then I'll be right back in here and we'll
15 continue with the qualifications for the jurors for this
16 trial. Okay?

17 (WHEREUPON, there was a break in the proceedings from
18 11:14 a.m. until 11:24 a.m., after which the proceedings
19 resumed as follows.)

20 THE COURT: All right. Listen very carefully, please.

21 All right. Does any member of the jury panel know
22 anything about the sex offenses that Mr. Jimmy Ray Filyaw was
23 convicted of? If so, please stand.

24 (WHEREUPON, there was no response.)

25 THE COURT: All right. Would the fact that Mr. Filyaw

1 has been convicted of a sex offense or offenses and has
2 completed his criminal sentence related to that conviction --
3 would that in any way prevent you from being able to be a
4 fair and impartial juror in the trial of this case? If so,
5 please stand.

6 (WHEREUPON, there was no response.)

7 THE COURT: All right. Does any member of the jury
8 panel have any training or experience in the fields of
9 psychiatry, psychology, or law? If so, please stand.

10 (WHEREUPON, one person stood.)

11 THE COURT: Name and number, please, ma'am?

12 JUROR NUMBER 117: Mary Wells, Number 117.

13 THE COURT: I know what area, but for the record?

14 JUROR NUMBER 117: Okay. I'm a retired attorney.

15 THE COURT: The fact that you're --

16 JUROR NUMBER 117: As well as a law clerk in federal
17 court for the last eleven years before I retired. Prior to
18 that, I was in private practice.

19 THE COURT: Okay. The fact that you stood in response
20 to that question and your answer, if you were selected as a
21 juror in this case, could you be fair and impartial to both
22 the State and the defense?

23 JUROR NUMBER 117: I would try to be. My husband was
24 actually in the Solicitor's Office for 35 years.

25 THE COURT: All right. I'm going to set you aside for

1 the trial of this case. Thank you. You may be seated.

2 All right. Has any member of the jury panel currently
3 or formerly worked in the fields of psychiatry, psychology,
4 or the law? If so, please stand.

5 (WHEREUPON, there was no response.)

6 THE COURT: All right. Has any member of the jury panel
7 been involved in a prison ministry, prison outreach program,
8 or any other program involving contact with incarcerated
9 individuals? If so, please stand.

10 (WHEREUPON, there was no response.)

11 THE COURT: All right. Has any member of the jury
12 panel, your close personal friends or relatives ever been
13 subject -- subjected to civil commitment proceedings or been
14 voluntarily or involuntarily civilly committed? If so,
15 please stand.

16 (WHEREUPON, there was no response.)

17 THE COURT: All right. Has any member of the jury
18 panel, their family or close personal friend ever been the
19 victim of a violent crime? If so, please stand.

20 (WHEREUPON, one person stood.)

21 JUROR NUMBER 80: Are --

22 THE COURT: Hold on. Stand, please, sir. Tell me your
23 name and number.

24 JUROR NUMBER 80: Foley Nettles, Number 80.

25 THE COURT: Can you approach, please? The lawyers may

1 approach as well.

2 (WHEREUPON, a bench conference was held with Juror
3 Number 80 as follows.)

4 JUROR NUMBER 80: I don't know if this applies or not.

5 THE COURT: Okay. I wanted to call you up here anyway.
6 Go ahead.

7 JUROR NUMBER 80: My brother-in-law, Kenny Kemmerlin --
8 he was shot to death here in Florence last year this time.

9 THE COURT: Okay.

10 JUROR NUMBER 80: Forty years ago, my oldest brother-in-
11 law was shot to death in a carjacking.

12 THE COURT: Okay.

13 JUROR NUMBER 80: Thirty years ago, my youngest sister-
14 in-law was killed by a serial killer. I don't know if that
15 qualifies for me or not, but it has no bearing on --

16 THE COURT: This case?

17 JUROR NUMBER 80: -- this case, no. And as far as that
18 other is concerned, that was my 28-year-old stepson and my
19 seven-year-old niece, but that got settled out of -- I mean
20 he took a plea bargain out of court to save from going to
21 court.

22 THE COURT: Okay.

23 JUROR NUMBER 80: But that doesn't have any bearing on
24 this. You know, that's a totally different thing.

25 THE COURT: Well, the question ultimately comes -- of

1 which you responded here.

2 JUROR NUMBER 80: Right. I can be fair and impartial.

3 THE COURT: To both sides?

4 JUROR NUMBER 80: Yes, sir.

5 THE COURT: And decide the case based solely upon the
6 evidence and testimony?

7 JUROR NUMBER 80: Yes, sir.

8 THE COURT: All right. Thank you, sir. You may be
9 seated.

10 (WHEREUPON, Juror number 80 exited the bench
11 conference.)

12 THE COURT: All right. Hold on a minute. I've got two
13 -- two more right there.

14 (WHEREUPON, the bench conference ended.)

15 THE COURT: Tell me your name and number, please?

16 JUROR NUMBER 61: Lilly Lai, 61.

17 THE COURT: Come on up, please, ma'am.

18 (WHEREUPON, a bench conference was held with Juror
19 Number 61 as follows.)

20 MR. FALK: What number did she say?

21 THE COURT: 61.

22 THE CLERK: 61.

23 THE COURT: Yes, ma'am?

24 JUROR NUMBER 61: One of my best friends -- his father
25 was shot when he was young, and he grew up without a father

1 and his younger brother and sisters never got to even know
2 their father.

3 THE COURT: Okay. Well, let me ask you this since
4 you're up here. On this questionnaire, you filled out that
5 you could not be fair and impartial.

6 JUROR NUMBER 61: Yeah.

7 THE COURT: You don't believe that you could be fair and
8 impartial and decide -- decide this case? Or do you believe
9 you could be fair and impartial in deciding this case solely
10 upon the evidence and testimony presented in this courtroom?

11 JUROR NUMBER 61: I can try, but I do have a very strong
12 opinion.

13 THE COURT: All right. I'm going to set you aside. I'm
14 going to set you aside for the trial of this case. Okay?

15 JUROR NUMBER 61: Okay.

16 THE COURT: Be seated right now. Okay? 61 is set aside
17 for the trial of this case.

18 (WHEREUPON, the bench conference ended.)

19 THE BAILIFF: Juror Number 69, Bridgette Matherly.

20 (WHEREUPON, a bench conference was held with Juror
21 Number 69 as follows.)

22 THE COURT: What number is she?

23 MR. BOGLE: Number 69. She has the construction
24 company.

25 THE COURT: Yes, ma'am?

1 JUROR NUMBER 69: You said yourself, friends, family,
2 all that stuff. My father was physically and mentally
3 abused, my mother was sexually and physically abused by her
4 father, and my stepfather's dad was murdered.

5 THE COURT: All right. If you were selected as a juror
6 in this case, could you be fair and impartial to both the --

7 JUROR NUMBER 69: I --

8 THE COURT: -- State and the defense and decide this
9 case based solely upon the testimony and evidence that's
10 presented in this courtroom?

11 JUROR NUMBER 69: I do think I could.

12 THE COURT: All right. Thank you.

13 (WHEREUPON, the bench conference ended.)

14 THE COURT: All right. Let's proceed.

15 All right. Has any member of the jury panel, their
16 family, or close personal friend been the victim of domestic
17 violence? If so, please stand.

18 (WHEREUPON, two people stood.)

19 THE COURT: All right. Tell me your name and number,
20 sir?

21 JUROR NUMBER 66: Joseph Lugo, 66.

22 THE COURT: Can you approach for a minute, please, sir?
23 And tell me, while he's coming, your name and number, ma'am?

24 JUROR NUMBER 61: 61, Lilly Lai.

25 THE COURT: All right. I've already set you aside for

1 the trial of this case. Okay? Thank you. You may be
2 seated.

3 (WHEREUPON, a bench conference was held with Juror
4 Number 66 as follows.)

5 THE COURT: Yes, sir?

6 JUROR NUMBER 66: My sister -- she was a victim of
7 criminal domestic violence with her ex-husband.

8 THE COURT: All right. If you were selected as a juror
9 in this case, could you be fair and impartial to both the
10 State and the defense?

11 JUROR NUMBER 66: I could.

12 THE COURT: And decide this case based solely upon the
13 testimony and evidence that's presented in this courtroom?

14 JUROR NUMBER 66: Yes, sir.

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

16 (WHEREUPON, the bench conference ended.)

17 THE COURT: All right. Does any member of the jury
18 panel believe that someone who suffers from pedophilia will
19 never be cured or that it is impossible to rehabilitate
20 individuals convicted of committing sex crimes against
21 children? If so, please stand.

22 (WHEREUPON, three people stood.)

23 THE COURT: All right. If you three would come forward,
24 please? Well, hold up just a minute. Hold up just a second.

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

1 the presence of the jury panel but out of the hearing of
2 the jury panel as follows.)

3 THE COURT: You know, the next -- the next question is
4 -- I mean I don't know that there is a question to follow up
5 with that, if you don't think they can be cured. But does
6 that play into whether or not they can decide this case or be
7 fair and impartial?

8 MR. FALK: It's not an issue of curing.

9 MR. BOGLE: Well, it's not an issue of curing. It's not
10 an issue of curing.

11 THE COURT: Right.

12 MR. BOGLE: Its whether or not long-term treatment can
13 teach them to avoid the impulses that get them in trouble. I
14 mean curing is kind of a strange word in this business.

15 MR. FALK: Well, I mean potentially I could argue that
16 he rehabilitated himself while he was in prison for ten
17 years. The thing is that they would already be predisposed
18 to say that's impossible.

19 MR. BOGLE: I wish you hadn't used the word. I wish you
20 hadn't used the word cured.

21 THE COURT: Well, I asked y'all to look at them.

22 MR. BOGLE: I wish he hadn't used the word you, you or
23 him.

24 THE COURT: Well --

25 MR. FALK: You've used that before?

1 THE COURT: Well, I don't know that I need -- other than
2 asking them whether or not they can decide this case,
3 understanding that curing is not a --

4 MR. BOGLE: I would suggest just without repeating the
5 question, just say based on your understanding, can you be
6 fair and impartial in this case.

7 MR. FALK: Well, that's fine.

8 MR. BOGLE: That's all we can do.

9 THE COURT: Okay.

10 (WHEREUPON, the bench conference ended.)

11 THE COURT: All right. Tell me your juror number.
12 Number 80 I believe?

13 THE BAILIFF: Number 80, Foley Nettles.

14 THE COURT: All right. Come on up, Mr. Nettles.

15 (WHEREUPON, a bench conference was held with Juror
16 Number 80 as follows.)

17 THE COURT: The same question as before. Could you be
18 fair and impartial to both the State and the defense?

19 JUROR NUMBER 80: If he's accepted Christ as his Savior,
20 that's the only way I believe you can be set free from sexual
21 oppression.

22 THE COURT: All right. I'm going to set you aside for
23 the trial of this case.

24 JUROR NUMBER 80: Okay.

25 THE COURT: Okay. All right. You can be seated though.

1 (WHEREUPON, the bench conference ended.)

2 THE COURT: Number 80 is set aside.

3 THE BAILIFF: Number 73, Michael McElveen.

4 (WHEREUPON, a bench conference was held with Juror
5 Number 73 as follows.)

6 THE COURT: Hey, Mr. McElveen. The fact that you stood
7 in response to that question --

8 JUROR NUMBER 73: Uh-huh.

9 THE COURT: Could you be fair and impartial to both the
10 State and the defense?

11 JUROR NUMBER 73: Well, I've had too many things happen
12 over the years, and plus I know some Filyaws. I'm not sure
13 if I know him or not.

14 THE COURT: Hold on. You know some what?

15 JUROR NUMBER 73: I know some Filyaws. Their last name
16 is Filyaw. I don't know them by their name, because of my
17 brother. But I don't recognize him though.

18 THE COURT: Okay. I mean on this questionnaire, you
19 indicated your beliefs about sex abuse would affect your
20 ability to be fair and impartial.

21 JUROR NUMBER 73: Because of the experience I've had,
22 yeah.

23 THE COURT: All right.

24 JUROR NUMBER 73: My mom was sexually abused as a child,
25 and then later on she got raped, and then my cousin got me

1 involved with all kinds of -- I was supposed to have
2 testified against him for -- he actually got accused back in
3 2006 as a child predator, and he's still trying to recover.

4 THE COURT: All right. You've indicated on here that
5 you couldn't be fair and impartial.

6 JUROR NUMBER 73: Uh-huh.

7 THE COURT: Is that --

8 JUROR NUMBER 73: Yes, sir.

9 THE COURT: -- still your answer?

10 JUROR NUMBER 73: Yes, sir.

11 THE COURT: All right. I'm going to set you aside for
12 the trial of this case. Be seated right now.

13 JUROR NUMBER 73: Okay.

14 THE COURT: Do not discuss that with anyone.

15 JUROR NUMBER 73: All right.

16 (WHEREUPON, the bench conference ended.)

17 THE BAILIFF: Number 69, Bridgette Matherly.

18 THE COURT: 73 is set aside.

19 (WHEREUPON, a bench conference was held with Juror
20 Number 69 as follows.)

21 THE COURT: Yes, ma'am?

22 JUROR NUMBER 69: I just stood because you asked the
23 question.

24 THE COURT: The fact that you stood in response to that
25 question, could you be fair and impartial to both the State

1 and the defense and decide this case based solely upon the
2 evidence and testimony that's presented during this trial?

3 JUROR NUMBER 69: If it's based on that question,
4 probably not.

5 THE COURT: All right. I'm going to ask that you have a
6 seat right now.

7 JUROR NUMBER 69: Okay. Okay.

8 (WHEREUPON, the bench conference ended.)

9 (WHEREUPON, a bench conference was held with counsel as
10 follows.)

11 THE COURT: You know, her deciding this case based upon
12 that question -- that's not what she's deciding.

13 MR. FALK: Yeah. In this case, both experts are going
14 to diagnose the guy as a pedophile.

15 THE COURT: Are they going to testify -- are they going
16 to testify that they can be cured?

17 MR. FALK: No one -- well, no one says that you can be
18 cured. You can be treated. I mean that's --

19 THE COURT: Any thoughts?

20 MR. BOGLE: Well, the big defense --

21 MR. FALK: Our argument is is that you probably can't be
22 cured as a pedophile.

23 MR. BOGLE: You're never cured of it.

24 MR. FALK: But you can no longer be a threat to the
25 community and you can be rehabilitated. I'm not sure she'll

1 ever believe that he could no longer be a threat.

2 THE COURT: Well, I didn't ask her that.

3 MR. FALK: I know. I know.

4 THE COURT: I mean I went along with y'all's questioning
5 here.

6 MR. FALK: And you did what I asked you to do.

7 THE COURT: And I probably shouldn't have on that one.
8 I'm going to let her stay right now. She'll stay right now.

9 (WHEREUPON, the bench conference ended.)

10 THE BAILIFF: Juror Number 45, Kevin Holcombe.

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

13 THE COURT: Come on up, Mr. Holcombe. How are you
14 doing, sir?

15 JUROR NUMBER 45: All right.

16 THE COURT: All right. The fact that you stood in
17 response to that question --

18 JUROR NUMBER 45: Yes.

19 THE COURT: Could you be fair and impartial to both the
20 State and the defense?

21 JUROR NUMBER 45: I can try, but I don't believe they
22 can be --

23 THE COURT: Let me finish my question. And decide this
24 case based solely upon the evidence and testimony presented
25 in this courtroom?

1 JUROR NUMBER 45: Yes.

2 THE COURT: You can do that?

3 JUROR NUMBER 45: I can do that.

4 THE COURT: All right. Thank you. You may be seated.

5 JUROR NUMBER 45: All right.

6 MR. FALK: Thank you.

7 (WHEREUPON, the bench conference ended.)

8 THE COURT: All right. Has any member of the jury panel
9 ever worked for or in any way been connected with a social
10 services agency, guardian ad litem program, court-appointed
11 special advocate program, a foster care program, or any other
12 entity, private or governmental, that investigates or
13 counsels victims of rape or sexual assault? If so, please
14 stand.

15 (WHEREUPON, one person stood.)

16 THE COURT: Okay. Juror Number 80 has stood. Sir, I've
17 already set you aside, but you may be seated.

18 All right. Has any member of the jury panel, their
19 family or close personal friend ever worked or currently work
20 with any law enforcement agency, whether it be city, county,
21 state or federal? If so, please stand.

22 (WHEREUPON, there was no response.)

23 THE COURT: All right. Has any member of the jury
24 panel's family, spouse, close personal friend ever worked for
25 any sort of county, state or federal correctional facility?

1 If so, please stand.

2 (WHEREUPON, two people stood.)

3 THE COURT: Your name and number, please?

4 JUROR NUMBER 23: 23, Zachary Denton.

5 THE COURT: All right. What relation to you is that
6 individual?

7 JUROR NUMBER 23: My dad was a corrections officer.

8 THE COURT: Where?

9 JUROR NUMBER 23: New York State.

10 THE COURT: All right. The fact that you stood in
11 response to that question, if you were selected as a juror in
12 this case, could you be fair and impartial to both the State
13 and the defense?

14 JUROR NUMBER 23: I believe I could.

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

16 Yes, ma'am? Your name and number?

17 JUROR NUMBER 85: Linda Peeples, Number 85.

18 THE COURT: And who might that -- what relation, if any?

19 JUROR NUMBER 85: Correctional officer. My brother is a
20 correctional officer.

21 THE COURT: And where might that be?

22 JUROR NUMBER 85: New Jersey.

23 THE COURT: Tennessee?

24 JUROR NUMBER 85: New Jersey.

25 THE COURT: Oh, I'm sorry. That was a long way off,

1 wasn't it? All right. If you were selected as a juror in
2 this case, could you be fair and impartial to both the State
3 and the defense?

4 JUROR NUMBER 85: Yes, sir.

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

6 All right. Does any member of the jury panel, their
7 family or close personal friend work as an EMT, a volunteer
8 fireperson or any occupation that can be described as a first
9 responder? If so, please stand.

10 (WHEREUPON, several people stood.)

11 THE COURT: Name and number again, please?

12 JUROR NUMBER 23: 23, Zachary Denton.

13 THE COURT: All right. If you were selected as a juror
14 in this case, could you be fair and impartial to both the
15 State and the defense?

16 JUROR NUMBER 23: Yes, sir.

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

18 Yes, ma'am? Juror Number 69?

19 JUROR NUMBER 69: Brigitte Matherly.

20 THE COURT: All right. The fact that you stood in
21 response to that question, if you were selected as a juror in
22 this case, could you be fair and impartial to both the State
23 and the defense?

24 JUROR NUMBER 69: Yes.

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

1 Yes, sir? Your name and number?

2 JUROR NUMBER 97: Robert Sellers, 97.

3 THE COURT: The fact that you stood in response to that
4 question, if you were selected as a juror in this case, could
5 you be fair and impartial to both the State and the defense?

6 JUROR NUMBER 97: Yes, sir.

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

8 Yes, sir? Name and number?

9 JUROR NUMBER 21: 21.

10 THE COURT: What's your name again?

11 JUROR NUMBER 21: Richard Davis, 21.

12 THE COURT: All right. The fact -- the fact that you
13 stood in response to that question, if you were selected as a
14 juror in this case, could you be fair and impartial to both
15 the State and the defense?

16 JUROR NUMBER 21: Yes.

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

18 All right. Is any member of the jury panel a member of
19 or contributor to any group which has as its primary concern
20 the promotion of law enforcement? Those groups might include
21 MADD, SADD, CAVE, Citizens Against Violent Crime, People
22 Against Rape, Rape Crisis Hotline, or anything of that
23 nature. If so, please stand.

24 (WHEREUPON, there was no response.)

25 THE COURT: All right. Any member of the jury panel --

1 is there any member of the jury panel that's related to
2 anyone on the jury panel? If so, please stand. Do you have
3 a cousin, etc., on the jury panel with you here today?

4 (WHEREUPON, there was no response.)

5 THE COURT: All right. Has any member of the jury panel
6 formed or expressed an opinion about any issue or matter
7 involved in this case? If so, please stand.

8 (WHEREUPON, one person stood.

9 JUROR NUMBER 95: Judge --

10 THE COURT: Hold on a minute. Tell me your name and
11 number, please?

12 JUROR NUMBER 95: Chadley Runyan, 95. In regards to --

13 THE COURT: Hold on a minute. If you'll have a seat,
14 please, sir, I'll have you come up here in just a minute.
15 Okay?

16 JUROR NUMBER 95: Yes, sir.

17 THE COURT: All right. Is any member of the jury panel
18 aware of any bias or prejudice toward either the State or the
19 defendant in this case? If so, please stand.

20 (WHEREUPON, there was no response.)

21 THE COURT: All right. Does any member of the jury
22 panel know of any reason, any reason whatsoever, why he or
23 she should not serve as a juror in this case, with particular
24 emphasis being placed upon your ability to be fair and
25 impartial to both the State and the defendant? If so, please

1 stand.

2 (WHEREUPON, there was no response.)

3 THE COURT: All right. Can the lawyers approach for
4 just a minute, please?

5 (WHEREUPON, a bench conference was held in the presence
6 of the jury panel but out of the hearing of the jury
7 panel as follows.)

8 THE COURT: All right. Do you have any additional
9 questions? I didn't ask all of them, but I asked pretty darn
10 close to every one of y'all's -- each of you's questions.

11 MR. FALK: I don't want to lose any more jurors.

12 THE COURT: Do what?

13 MR. FALK: I don't want to lose any more jurors.

14 THE COURT: Well, I mean we've got these I've got to
15 deal with.

16 MR. FALK: I know that.

17 MR. BOGLE: I'm done with my questions.

18 MR. FALK: I'm sorry. I was being glib. I'm done.

19 MR. BOGLE: Okay. We've covered all mine.

20 THE COURT: How many jurors have we got right now?
21 Because I'm fixing to excuse some more. It's 34.

22 MR. BOGLE: We need 23; right? If you're going to go
23 with one alternate, we need 23.

24 MR. FALK: But 73 is in that pile and you already
25 excused him.

1 THE COURT: I've already excused 73. It's not in this
2 pile. I've already taken him out.

3 MR. FALK: Okay.

4 THE COURT: All right. All right. I didn't want that
5 95 to say something. I didn't know what he might say.

6 MR. FALK: What? I wasn't -- what question did you ask?

7 THE COURT: Formed or expressed an opinion.

8 MR. FALK: Okay.

9 MR. BOGLE: Are you going to bring him up?

10 THE COURT: Uh-huh.

11 MR. BOGLE: Okay.

12 (WHEREUPON, the bench conference ended.)

13 THE COURT: All right. At this time, I'm going to ask
14 that Juror Number 94, 82, 103, 15, 85, and 59 -- and 95, if I
15 didn't say 95. If you all would come forward forming a line
16 over here to my right, to your left. If those jurors would
17 come forward, please.

18 THE COURT: What number?

19 THE BAILIFF: 94.

20 THE COURT: All right. Come on up, please, ma'am.

21 (WHEREUPON, a bench conference was held with Juror
22 Number 94 as follows.)

23 THE COURT: How are you today?

24 JUROR NUMBER 94: I'm doing.

25 THE COURT: You're doing? All right.

1 JUROR NUMBER 94: I'm doing.

2 THE COURT: I wanted you to come up here because in
3 response to this questionnaire you indicated on there that
4 you would have a hard time being fair and impartial to both
5 the State and the defense. My question to you is could you
6 be fair and impartial if you were selected as a juror?

7 JUROR NUMBER 94: When it comes to sexual abuse, I'm
8 against it.

9 THE COURT: That's not what my question is. Okay? My
10 question to you is if you were selected as a juror, could you
11 be fair and impartial to both the State and the defense and
12 decide this case based upon the evidence and testimony
13 presented in this courtroom?

14 JUROR NUMBER 94: No.

15 THE COURT: Okay. Thank you. I'm going to set you
16 aside for the trial of this case.

17 MR. BOGLE: She was 94?

18 THE COURT: 94.

19 (WHEREUPON, the bench conference ended.)

20 THE COURT: All right.

21 THE BAILIFF: Number 15, Troy Conyers.

22 THE COURT: All right. Hold on just a minute. All
23 right. Come on up, please, sir.

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

1 THE COURT: Yes, sir. All right. In response to this
2 questionnaire, you indicated that your beliefs would affect
3 your ability to be fair and impartial. My question to you
4 is, separate and apart from this form, if you were selected
5 as a juror in this case, could you be fair and impartial to
6 both the State and the defense and decide this case based
7 solely upon the testimony and evidence that's presented in
8 this courtroom?

9 JUROR NUMBER 15: No.

10 THE COURT: All right. Thank you. You may be seated.

11 (WHEREUPON, the bench conference ended.)

12 THE BAILIFF: 85, Linda Peeples.

13 (WHEREUPON, a bench conference was held with Juror

14 Number 85 as follows.)

15 THE COURT: Hey, Ms. Peeples.

16 JUROR NUMBER 85: Hey, how are you doing?

17 THE COURT: Let me ask you this.

18 JUROR NUMBER 85: Uh-huh.

19 THE COURT: Pursuant to this questionnaire that you all
20 filled out --

21 JUROR NUMBER 85: Uh-huh.

22 THE COURT: My question to you is if you were selected
23 as a juror in this case, could you be fair and impartial to
24 the State and the defense and decide this case --

25 JUROR NUMBER 85: Uh-huh.

1 THE COURT: -- based solely -- based solely upon the
2 evidence and testimony presented in this court?

3 JUROR NUMBER 85: Yes, sir.

4 THE COURT: You could?

5 JUROR NUMBER 85: Yes, sir.

6 THE COURT: All right. Thank you. I'm going to let you
7 stay with me.

8 JUROR NUMBER 85: Okay.

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

10 JUROR NUMBER 85: All right.

11 (WHEREUPON, the bench conference ended.)

12 THE COURT: All right.

13 THE BAILIFF: Number 82, Daryl Oliver.

14 (WHEREUPON, a bench conference was held with Juror
15 Number 82 as follows.)

16 THE COURT: Hey, Mr. Oliver.

17 JUROR NUMBER 82: Hello.

18 THE COURT: How are you doing?

19 JUROR NUMBER 82: Good.

20 THE COURT: Now, pursuant to your answer on this
21 questionnaire, I have to ask you this on the record. Okay?

22 If you were selected as a juror in this case, could you
23 be fair and impartial to both the State and the defense and
24 decide this case based solely upon the evidence and testimony
25 that's presented during the course of this trial?

1 JUROR NUMBER 82: I -- I don't think I could say yes to
2 that.

3 THE COURT: All right. I'm going to set you aside for
4 the trial of this case. Have a seat.

5 JUROR NUMBER 82: Yes, sir.

6 (WHEREUPON, the bench conference ended.)

7 THE COURT: All right.

8 THE BAILIFF: 103, James Smith.

9 THE COURT: Come on up, please, sir.

10 (WHEREUPON, a bench conference was held with Juror
11 Number 103 as follows.)

12 THE COURT: How are you doing today?

13 JUROR NUMBER 103: Doing great.

14 THE COURT: Question.

15 JUROR NUMBER 103: Uh-huh.

16 THE COURT: Pursuant to your response on this
17 questionnaire --

18 JUROR NUMBER 103: Okay.

19 THE COURT: If you were selected as a juror in this
20 case, could you be fair and impartial to the State and the
21 defense and decide this case based solely upon the evidence
22 and testimony that's presented in this courtroom?

23 JUROR NUMBER 103: Well, that I can't promise. I'm not
24 a fully informed jury. When it comes to this, I believe we
25 should also not alone just examine the facts of the case, but

1 to examine the law as well.

2 THE COURT: I mean I'm going to give you the law on it.
3 I'll instruct you as a juror that you're a finder of fact.

4 JUROR NUMBER 103: Uh-huh.

5 THE COURT: And then I'm going to give you the law based
6 upon the facts as you all find them, and you apply those
7 facts to the law that I give you. Could you make a decision
8 on it?

9 JUROR NUMBER 103: I can't promise that I'll be
10 impartial.

11 THE COURT: I'm going to set you aside for the trial of
12 this case.

13 (WHEREUPON, the bench conference ended.)

14 THE BAILIFF: 95, Chadley Runyan.

15 (WHEREUPON, a bench conference was held with Juror
16 Number 95 as follows.)

17 THE COURT: Hey.

18 JUROR NUMBER 95: Hey.

19 THE COURT: I didn't mean to just cut you off, but I
20 couldn't have you say something out in open court --

21 JUROR NUMBER 95: That's okay.

22 THE COURT: -- that might affect my entire panel. So
23 that's why I cut you off.

24 JUROR NUMBER 95: Fair enough.

25 THE COURT: All right. Tell me what --

1 JUROR NUMBER 95: What it was was I interpreted your
2 first question too narrowly. You asked about the training
3 and all. As a medical doctor, I did require rotations in
4 psychiatry in medical school and residency, but I don't
5 practice in that field.

6 THE COURT: Okay. If you --

7 JUROR NUMBER 95: But I wanted to clarify that.

8 THE COURT: Okay. I appreciate you doing that. The
9 fact that you came up here, could you be fair and impartial
10 to both the State and the defense and decide --

11 JUROR NUMBER 95: I could.

12 THE COURT: Okay. And decide this case based solely
13 upon the evidence and testimony in this courtroom?

14 JUROR NUMBER 95: Yes, sir.

15 THE COURT: Thank you.

16 JUROR NUMBER 95: Thank you.

17 THE COURT: I apologize for that, but I hope you
18 understand.

19 JUROR NUMBER 95: That's okay. After I sat there, I
20 thought I probably should've said something then.

21 THE COURT: That's okay. All right. Thank you.

22 (WHEREUPON, the bench conference ended.)

23 THE COURT: All right.

24 THE BAILIFF: 59, John Kelly.

25 (WHEREUPON, a bench conference was held with Juror

1 Number 59 as follows.)

2 THE COURT: Come on up, Mr. Kelly. How are you doing,
3 sir?

4 JUROR NUMBER 59: Good.

5 THE COURT: All right. My question to you is, pursuant
6 to your response on this questionnaire, if you were selected
7 as a juror in this case, could you be fair and impartial to
8 the State --

9 JUROR NUMBER 59: Yeah. Probably.

10 THE COURT: -- and the defense-- let me finish my
11 question.

12 JUROR NUMBER 59: Oh, I'm sorry.

13 THE COURT: That's okay. Could you be fair and
14 impartial to both the State and the defense and decide this
15 case based solely upon the evidence and testimony presented
16 in this courtroom?

17 JUROR NUMBER 59: Yes, sir. Uh-huh.

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

19 JUROR NUMBER 59: Okay.

20 (WHEREUPON, the bench conference ended.)

21 (WHEREUPON, a bench conference was held in the presence
22 of the jury panel but out of the hearing of the jury
23 panel as follows.)

24 THE COURT: All right. Anything else?

25 MR. BOGLE: Not that I can think of.

1 MR. FALK: Your Honor, would you -- would you show me
2 the questionnaire for 83 and 59?

3 THE COURT: Yes. There's 59. 83? 83 wasn't one of
4 them.

5 MR. FALK: Oh, I'm sorry. 85. I apologize. 85.

6 THE COURT: All right.

7 MR. FALK: She put just yes on the one.

8 MR. BOGLE: Okay.

9 THE COURT: I think both of them were. Okay.

10 MR. BOGLE: That's right there, and then another one.

11 THE COURT: All right. Anything else?

12 MR. BOGLE: Nothing from the State.

13 MR. FALK: Not at this time.

14 THE COURT: I mean that's it. Isn't it?

15 MR. FALK: Yes, that's it.

16 MR. BOGLE: Are you going to save all those?

17 THE COURT: All right.

18 (WHEREUPON, the bench conference ended.)

19 THE COURT: All right. Any further voir dire from the
20 State?

21 MR. BOGLE: No, Your Honor. Thank you.

22 THE COURT: Defense counsel?

23 MR. FALK: No, Your Honor.

24 THE COURT: All right. If you'll generate me a list,
25 please? How many did we end up with? Thirty?

1 THE CLERK: Thirty-something, yes.

2 THE COURT: Is one alternate going to be sufficient, Mr.
3 Bogle? Mr. Falk?

4 MR. BOGLE: I would think so, Your Honor.

5 THE COURT: Okay. All right.

6 MR. FALK: Yes, Your Honor.

7 THE COURT: Okay. Now, what's happening now, ladies and
8 gentlemen, is a list is being generated by the clerk, and
9 this is being done by computer. So just bear with us a few
10 minutes.

11 It used to be in years -- years ago now, that every one
12 of you's names was printed out on a little piece of paper.
13 All right? And your names were spread out in front of the
14 clerks over there and as we go through those list of
15 qualifications, etc., or questioning, if you were set aside
16 for a trial, they'd pull your piece of paper from in front of
17 them with your name on it.

18 And then once we get to the conclusion, if your name
19 happened to still be on the table and you weren't set aside
20 for that trial, it would be placed into a small capsule and
21 that capsule would be placed in this little drum up here, and
22 they'd roll that drum around and they'd pull each one out
23 individually, kind of like the lottery. And they'd pull your
24 name out and you might get selected and you might not.

25 Now, once we go through that qualification process, they

1 do everything with the computer, and all of that is done out
2 of Columbia. So I say that to say when the system in
3 Columbia is working, it works a lot faster and a lot
4 smoother, but if the system in Columbia shuts down, then it
5 throws everybody into a tizzy, so to speak.

6 But thankfully, that system in Columbia is working and
7 we're going to have a list here of you all that might serve
8 on this case and we're going to move forward as quickly as we
9 can in selecting a jury for this trial. So just bear with
10 us, please, a little bit longer.

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

13 THE COURT: All right. How long -- how long do you all
14 need to look at those lists, Mr. Bogle?

15 MR. BOGLE: If I may approach, Your Honor?

16 THE COURT: Mr. Falk?

17 MR. BOGLE: With Mr. Falk.

18 (WHEREUPON, a bench conference was held in the presence
19 of the jury panel but out of the hearing of the jury
20 panel as follows.)

21 THE COURT: We've got some on there that aren't supposed
22 to be on there?

23 MR. BOGLE: Juror Number 15, right there. I think he
24 was on the list. Juror Number 15. He's number 19 on the
25 list down at the bottom. He's Number 15. He was struck by

1 you.

2 THE COURT: I can't hear you.

3 MR. BOGLE: All right. This guy here, right here, he
4 was -- he was struck. He was excused.

5 THE COURT: Number 15?

6 MR. BOGLE: Yeah.

7 THE COURT: I didn't have him as being struck.

8 THE CLERK: He was called up in that last group, but I
9 didn't know he was struck.

10 THE COURT: 15?

11 THE CLERK: Uh-huh.

12 THE COURT: I did strike him. I did strike him.

13 THE CLERK: Okay.

14 THE COURT: I remember. A young guy.

15 MR. BOGLE: Okay. So just drop it down one?

16 MR. FALK: To be fair also, you put 59 in and I don't
17 see his name on the list.

18 THE COURT: Well, they didn't print all the people's
19 names on here. We had 32 left.

20 MR. FALK: Oh, I'm sorry.

21 MR. BOGLE: All right. So we're taking out 15.

22 THE COURT: 15.

23 MR. BOGLE: So now 1 through 21 -- 1 through 21 will be
24 our jury.

25 THE CLERK: You just want to go through 24?

1 MR. BOGLE: Yeah.

2 THE COURT: When you did it for two?

3 THE CLERK: Yes.

4 THE COURT: She did it for two alternates. So it should
5 be sufficient just picking one alternate.

6 MR. BOGLE: But the jury is now 1 through 21?

7 THE COURT: Right. Mr. Falk, did you get that?

8 MR. FALK: Yes.

9 THE COURT: 1 through 21. All right. Did you get that?

10 (WHEREUPON, the bench conference ended.)

11 THE COURT: How long do you need, Mr. Bogle?

12 MR. BOGLE: Ten minutes?

13 MR. FALK: The same.

14 THE COURT: All right. There are two separate rooms
15 back here. If you all want to split up into those two rooms
16 and look at the list or you can stay in the courtroom,
17 whatever you so desire.

18 MR. FALK: Is my client -- can he --

19 THE COURT: Yes, sir. Yes, sir.

20 All right. Ladies and gentlemen, those of you who are
21 seated out in the audience, does anyone need a break?

22 All right. If you do, if you need a break, you can step
23 out and go to the restroom while the attorneys look at that,
24 but please -- please come right back. Okay?

25 (WHEREUPON, there was a break in the proceedings from

1 12:05 p.m. until 12:25 p.m., after which the proceedings
2 resumed as follows.)

3 THE COURT: All right. Is the State ready to proceed?

4 MR. BOGLE: We are, Your Honor.

5 THE COURT: Defense counsel?

6 MR. FALK: We are, Your Honor.

7 THE COURT: All right. Madam Clerk?

8 THE CLERK: Okay. The plaintiff strikes first using
9 marginal numbers.

10 MR. BOGLE: Thank you, Madam Clerk. The State would
11 strike Number 2.

12 THE CLERK: The State, 2. Defendant?

13 MR. FALK: The respondent would strike Number 11.

14 THE CLERK: Defendant, 11.

15 MR. BOGLE: The State would strike Number 14.

16 THE CLERK: The State, Number 14.

17 MR. FALK: The respondent would strike Number 12.

18 THE CLERK: Respondent, 12.

19 MR. BOGLE: The State would strike Number 20.

20 THE CLERK: The State, Number 20.

21 MR. FALK: The respondent would strike Number 21.

22 THE CLERK: Respondent, Number 21.

23 MR. BOGLE: The State would strike Number 1.

24 THE CLERK: Number 1. Respondent?

25 MR. FALK: The respondent would strike Number 3.

1 THE CLERK: And for your alternate?

2 MR. BOGLE: The State would strike Number 25.

3 THE CLERK: The State, 25.

4 MR. FALK: The respondent, 24.

5 THE CLERK: The respondent, 24.

6 Okay. Gentlemen, please check your strikes.

7 The State struck 1, 2, 14, 20, and 25 for the alternate.

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

9 THE CLERK: Okay. The respondent struck 3, 11, 12, 21,
10 and 24.

11 MR. FALK: That's correct.

12 THE COURT: All right. Are there any matters of law
13 that we need to take up with regards to jury selection from
14 the State?

15 MR. BOGLE: There are none, Your Honor.

16 THE COURT: Defense counsel?

17 MR. FALK: There are none, Your Honor.

18 THE COURT: All right. Madam Clerk?

19 THE CLERK: As I call your name, please gather your
20 belongings and have a seat in the jury box.

21 Kreshelle Humbert.

22 (WHEREUPON, a black female came forward.)

23 THE CLERK: Juror Number 33, Pauline Frierson.

24 (WHEREUPON, a black female came forward.)

25 THE CLERK: Juror Number 95, Chadley Runyan.

1 THE COURT: Runyan.
2 THE CLERK: Runyan.
3 THE COURT: Runyan.
4 THE CLERK: Runyan.
5 (WHEREUPON, a white male came forward.)
6 THE CLERK: Juror Number 11, Barry Cantey.
7 (WHEREUPON, a white male came forward.)
8 THE CLERK: Juror Number 60, Jason Kirby.
9 (WHEREUPON, a white male came forward.)
10 THE CLERK: Juror Number 68, Bessie Mason.
11 (WHEREUPON, a black female came forward.)
12 THE CLERK: Juror Number 98, Courtney Shields.
13 (WHEREUPON, a white female came forward.)
14 THE CLERK: Juror Number 97, Robert Sellers.
15 (WHEREUPON, a white male came forward.)
16 THE CLERK: Juror Number 36, Jeremiah Gilchrist --
17 Gilchrist.
18 (WHEREUPON, a black male came forward.)
19 THE CLERK: Juror Number 65, William Little.
20 (WHEREUPON, a white male came forward.)
21 THE CLERK: Juror Number 71, Jamaal McCall.
22 (WHEREUPON, a black male came forward.)
23 THE CLERK: Juror Number 66, Joseph Lugo.
24 (WHEREUPON, a white male came forward.)
25 THE CLERK: And Juror Number 83, John Orr.

1 (WHEREUPON, a white male came forward.)

2 THE COURT: All right. Ladies and gentlemen, you all
3 have been selected as fair and impartial jurors in this case.
4 What I'm going to do is I'm going to ask you to step to the
5 jury room for just a minute -- just a few minutes. I'm going
6 to get you back out here as quickly as possible.

7 Do not -- you're going to hear me say this over and over
8 and over and over. Do not discuss this case at all until
9 you're instructed to do so. Okay?

10 Step in the jury room. I'll get you right back out here
11 in just a minute. Okay?

12 (WHEREUPON, the jury exited the courtroom at 12:31 p.m.)

13 THE COURT: All right. Ladies and gentlemen, those of
14 you that are seated out in the audience, you all were not
15 selected as jurors in this case. What I typically say is
16 that, doesn't mean you're not going to get selected this week.
17 However, in this particular situation, that does mean you're
18 not going to get selected this week.

19 This is the only case that we're going -- we're going to
20 try here this week for this one -- for this one-week term of
21 Common Pleas. I'm not exactly sure how many cases started
22 out on the roster this week, but a number of them were either
23 resolved in some way, shape or form or continued. So this is
24 the only case that we're going to try this week.

25 Before I release you all, I wanted to tell you how much

1 I appreciate you being here today. I know that jury service
2 never ever comes at a convenient time. However, our system
3 can't work without you. Our system cannot work without you.
4 I cannot express to you how vitally important your service as
5 jurors is to this community, to this state, and to this
6 country.

7 When I release you here today, you don't have to come
8 back this week. You will get -- you've heard the proverbial
9 statement that you'll get a check in the mail. You'll get a
10 check in the mail for being here today. I'll go ahead and
11 tell you do not plan on laying any large-ticket items aside
12 or anything of that nature. Okay? The truth of the matter
13 is we can't pay you for what your service is worth.

14 As I told you, you -- ladies and gentlemen, in my humble
15 opinion for what it's worth, you all are the most vital part
16 of our system here. You wouldn't want me or any other judge
17 walking in the court on Monday morning and looking at one of
18 these deputies and saying go find me the first twelve people
19 on the street and bring them up here and let's try this case.

20 You would want people such as yourself seated out in
21 that jury box or panel just like you all are if you were ever
22 involved in any cases up here for trial, whether they be on
23 the civil side or criminal side. I can promise you you'd
24 want people such as yourself. Nor would you want me or any
25 other panel of judges making all of these decisions. Okay?

1 This jury service, ladies and gentlemen, gives you --
2 gives you an opportunity to really say what goes on -- what
3 goes on in your community. You all, while you didn't get to
4 serve on a case this week, I hope that if at some point in
5 the future you're summoned for jury duty that you will
6 willingly be back up here like you were today. Again, I
7 can't express to you how important your service is.

8 You can chalk it up when you leave here today that you
9 would have been one of the last juries to serve in this
10 courthouse. All right? As you can see what's being built
11 across the street, they are in the final stages of that
12 courthouse, and I can't tell you how much this county has
13 been in need of that facility. You wouldn't realize it
14 unless you worked up here on a daily basis, but I can promise
15 you it is something that this county has needed for quite
16 some time for various reasons -- for various reasons.

17 I would encourage you -- this may be the first time that
18 you've ever been in a courtroom, maybe the first time, but I
19 would encourage you to come up here in one of these
20 courtrooms one week, whether it be criminal or civil, and see
21 what's going on. Some of you might be shocked what goes on
22 in your community, but you learn real quick that this isn't
23 television. This is not television. This is real life, and
24 you get a lesson separate and apart from what you see on TV.

25 Now, when I release you here today, if you see any of

1 these jurors that were selected, I don't want to hear them
2 come back and say, well, they told me they were released for
3 the week because if they do, I'm going to have a deputy go
4 find you and make you sit up here for the rest of this trial.
5 All right? So don't tell them if you see them that I cut you
6 loose for the week. All right?

7 Anything from the State or defense before I release the
8 balance of the panel?

9 MR. BOGLE: No, Your Honor, nothing.

10 MR. FALK: No, Your Honor. Nothing in response.

11 THE COURT: Thank you all again for being here today. I
12 hope you have a great rest of the week. Y'all have a good
13 day.

14 Oh, let me say this before -- you all hold on just a
15 minute.

16 I don't want you to feel like I misled you on something
17 earlier. These forms that you filled out -- I told you I was
18 going to have them shredded. The lawyers have asked me that
19 I not shred those forms, but place them under seal, which
20 means I'm going to put them under seal and they're not going
21 to be opened absent a court order. They're not going to be
22 opened absent a court order. Okay?

23 I just wanted to let you know that. I didn't want you
24 to think I misled you on that. Okay? Thank you.

25 (WHEREUPON, the jury panel was released and exited the

1 courtroom at 12:37 p.m.)

2 THE COURT: All right. I'm going to give them a few
3 minutes to get out of here and then I'm going to bring the
4 panel out and I'm going to excuse them for the balance of the
5 day because we've got some stuff we've got to deal with,
6 pretrial stuff downstairs.

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

9 THE COURT: All right. I'm going to cut them loose
10 until 9:30 in the morning. Okay?

11 If you'll bring me the jury, please, ma'am?

12 THE BAILIFF: Yes, sir.

13 (WHEREUPON, the jury entered the courtroom at 12:43
14 p.m.)

15 THE COURT: All right. Ladies and gentlemen, what I'm
16 getting ready to do is I'm going to excuse you all for the
17 balance of the day. There are some things that we need to
18 take up this afternoon and, rather than have you all wait in
19 hopes of getting this case started, I'm going to excuse you
20 for the balance of the afternoon. I do not like to make you
21 all wait. I understand you've got lives outside of this
22 courtroom and -- and your time is very valuable. I can
23 promise you that I will do my best to make the most efficient
24 use of your time as you're here.

25 Now, having said that, there may be some times that

1 you're sitting up here and you are having to wait, but I
2 promise you if you are in the jury room waiting that there's
3 work being done. It's something that maybe has to be done
4 outside of your presence at that time. Okay?

5 But what I'm going to do is I'm going to release you
6 here today and I'm going to ask you to be back tomorrow
7 morning at 9:30 -- at 9:30 on the fifth floor. When you get
8 off the elevator on the fifth floor, there will be a bailiff,
9 whether it's Ms. Frances or Mr. Finklea, one of them.
10 Somebody will be out there right when you get off the
11 elevator and directing you as to where you need to go.
12 There's a courtroom on the fifth floor, and that's where
13 we're going to be for the trial of this case.

14 Now, when I release you here today, I want you to
15 understand something clearly, and I told you this before you
16 stepped in the jury room. You are not to discuss this case
17 with anyone. You know very little about this case right now,
18 other than what I've told you. Okay? But you're not to
19 discuss this case with anyone. That means family, friends,
20 anyone until you're instructed to do so by this Court.

21 You are not to do any independent investigation on your
22 own. You're to decide this case based solely upon the
23 evidence and testimony that's presented during the course of
24 this trial and nowhere else. Okay?

25 As you serve this week, my advice to you is stay to

1 yourself or fellow jurors -- or with your fellow jurors. If
2 you see any of the attorneys involved in this case and they
3 don't speak to you, they're not being unfriendly. As you can
4 imagine, innocent conversations could be misconstrued. Okay?
5 Innocent conversations could be misconstrued.

6 Now, for planning purposes as we go through the trial of
7 this case, I'm going to have you back at 9:30 in the morning
8 and that's typically about what time we start. Okay? We try
9 to start about 9:30.

10 That gives -- puts you all in a position of not having
11 to rush tremendously to get here in the morning. It gives
12 everybody involved -- as you can see, there are a lot of
13 parts to this machine, so to speak, from court reporters to
14 bailiff to clerks to get things in place to start this trial
15 as promptly at that time as possible.

16 But we typically start at 9:30. I'll go for an hour and
17 a half, maybe two hours, and we'll take a break. All right?
18 We'll resume after that and typically we'll go to sometime
19 around 1:00. We don't typically break for lunch until around
20 1:00.

21 Now, if you need something to eat between 9:30 and 1:00
22 when we break for lunch, there will be snacks in the jury
23 room, crackers and something of that nature, that you can eat
24 or if you want to bring your own, you can bring that as well.
25 But we'll resume around 2:15 or thereabouts. Again, an hour

1 and a half to two hours at the most and a break and then
2 we'll resume.

3 I try to stop sometime around 5:00. Okay? If we go
4 that long, but I'm not sitting up here looking at the clock
5 and as soon as it strikes five stopping for the day. I just
6 don't do that.

7 If we're in the trial of this case and there's a witness
8 on the stand and it's 5:00, it will be my intention to finish
9 that witness for the day. Okay? Rather than have them stop
10 and come back the following day. By the same token -- well,
11 having said that, under very, very rare circumstances will
12 you be here beyond 6:00. Okay?

13 By the same token, if the next witness -- say, it's
14 around 4:30 or so and I'm advised by the lawyers that the
15 next witness may be lengthy, rather than take that chance of
16 pushing you beyond 6:00, I may let you go for the day at that
17 point. Okay? It will be my intention to not keep you here
18 beyond 6:00. I'm not going say that doesn't happen, because
19 it does, but it's my intention not to and I'm telling you all
20 of this for planning purposes for you. Okay?

21 As you serve this week, there's no telling what the
22 temperature in this building might be. All right? I want
23 you to be comfortable as you serve. I say that, but I also
24 say this. If I've got anything to do with the thermostat on
25 the fifth-floor courtroom tomorrow, it's going to be cool in

1 there. All right?

2 I'm hot natured and I sit up kind of elevated from
3 everybody else in the courtroom. I have an undershirt on, a
4 dress shirt with a necktie, and then I've got this blanket
5 pretty much wrapped around me as part of my uniform, so to
6 speak. So if I've got anything to do with it, it's going to
7 be cool in that courtroom. And usually the clerk staff --
8 they've got blankets or heaters under the desk when they're
9 serving down there with me. I say I want you to be
10 comfortable as you serve. Some people are hot natured; some
11 are cold natured.

12 You say -- you may be asking yourself, well, why you
13 keep it so cold in there if you know some people are cold
14 natured? When I went to college, I went to undergrad at The
15 Citadel down in Charleston. When I was in college at The
16 Citadel, we didn't have air conditioners down there. All
17 right? And so I learned real quick when you're hot, you
18 can't take off but so much clothes, but when you're cold, you
19 can layer up as much as you want to.

20 And I say that I want you to be comfortable. If you're
21 cold natured, please bring a jacket because I want you to be
22 comfortable. If you're hot natured now, I'm not going to let
23 you take off but so much clothes, but I'll let you layer up
24 as much as you want to. Okay?

25 I'm trying to think. Anything further from the State

1 before I release the panel for the balance of the day?

2 MR. BOGLE: No, Your Honor.

3 THE COURT: Defense counsel?

4 MR. FALK: No, Your Honor.

5 THE COURT: All right. Please be back tomorrow morning
6 at 9:30, again, on the fifth floor -- on the fifth floor, and
7 we'll start as promptly at that time as possible. I hope you
8 all have a great rest of the afternoon and I'll see you
9 tomorrow morning at 9:30.

10 You all stay right there. Let me tell you this while --
11 while it's on my mind. My court reporter just reminded me.
12 While it's on my mind and so I don't forget about it, the
13 questionnaires that you all filled out -- I told you I was
14 going to shred those questionnaires. After discussing such
15 with the lawyers, they've asked me to retain those
16 questionnaires.

17 So what will happen with them is I'm going to place them
18 in a sealed envelope. Okay? And it will be ordered by me
19 that they are not to be opened or disclosed absent a court
20 order, which means either me or some other Circuit Court
21 judge like me has to authorize it to be opened. Okay? And
22 it's got to be for good reason. Okay?

23 So I just didn't want you to feel like that was
24 something that was misled. At the time I told you they were
25 going to be shredded, that was my intention. Okay? But the

1 lawyers have asked that I retain that and I'll -- and so I'm
2 going to do so under those conditions. It'll be -- it'll be
3 under seal. Okay?

4 Thank you. You all have a -- have a good afternoon, and
5 I'll see you in the morning.

6 (WHEREUPON, the jury exited the courtroom at 12:50 p.m.)

7 THE COURT: All right. Anything before we break for
8 lunch?

9 MR. BOGLE: No, Your Honor.

10 MR. FALK: No, Your Honor.

11 THE COURT: 2:15 or thereabouts good with y'all?

12 MR. BOGLE: Yes, sir.

13 MR. FALK: That's fine. Thank you.

14 THE COURT: All right. 2:15 on the fifth floor. We'll
15 be on the fifth floor. Make sure -- hold on a minute, Mr.
16 Filyaw. Hold on. Have a seat.

17 I want to make sure that jury panel in its entirety is
18 clear before he exits this courtroom. Okay? I don't know if
19 any of them stepped into the bathroom or not. Ask Ms.
20 Frances when she comes back in. Just make sure that they all
21 stepped out of here.

22 MR. FALK: Your Honor, I have a question.

23 THE COURT: Sir?

24 MR. FALK: Appellate defense asked that any motions that
25 I file I ask you to take them as Court's exhibits, as opposed

1 to filing with the Court, because they said when the case
2 gets up on appeal, these cases are sealed and it just makes
3 their life easier. But if you'd prefer me filing them
4 downstairs, I'll do that.

5 THE COURT: That's fine. I mean I don't mind taking
6 them as Court's exhibits.

7 MR. FALK: Thank you.

8 MR. BOGLE: All your pretrial motions?

9 MR. FALK: Yeah.

10 MR. BOGLE: Okay. Do they want us to do the same with
11 ours?

12 MR. FALK: Well, he doesn't care about you.

13 THE COURT: Out of an abundance of caution, yes. I will
14 -- I will instruct you to do so.

15 MR. BOGLE: Okay.

16 THE COURT: Or I will do so, if you all will give clean
17 copies to my court reporter. I don't know if I marked on
18 them or not.

19 MR. BOGLE: Yeah. Mine are -- I emailed you the clean
20 copies and then colored on the ones that I brought. So I can
21 get clean copies emailed.

22 THE COURT: I can get them from my secretary.

23 MR. FALK: Okay. I'll do that.

24 (WHEREUPON, there was a break in the proceedings from
25 12:52 p.m. until 2:18 p.m., after which the proceedings

1 resumed as follows.)

2 THE COURT: All right. Mr. Bogle, I have clean copies
3 of your motions. There's two of them?

4 MR. BOGLE: Yeah. I emailed them to your office.

5 THE COURT: There's two of them?

6 MR. BOGLE: Yes, sir, just two.

7 THE COURT: I'm going to give those to her as a Court's
8 exhibit. These are the questionnaires.

9 MR. BOGLE: Yes, sir.

10 THE COURT: To be under seal.

11 MR. BOGLE: All as one exhibit?

12 THE COURT: Yes.

13 MR. BOGLE: Court's Exhibit 2?

14 THE COURT REPORTER: 2. The top one is blank.

15 THE COURT: The top one is blank and the rest of them
16 are not. All right.

17 (WHEREUPON, the questionnaires were sealed and marked as
18 Court's Exhibit No. 2.)

19 (WHEREUPON, defense motions were marked as Court's
20 Exhibits No. 3, No. 4, and No. 5.)

21 (WHEREUPON, State's motions were marked as Court's
22 Exhibits No. 6 and No. 7.)

23 THE COURT: All right. Whose motions do we want to deal
24 with first?

25 MR. BOGLE: If you don't mind, let's do the State's.

1 THE COURT: All right.

2 MR. BOGLE: Mine are short. Judge, for the record, this
3 is the case of the Matter of the Care and Treatment of Jimmy
4 Ray Filyaw, Docket Number 2016 --

5 THE COURT: Hold on a minute. Where's Mr. Filyaw?

6 MR. BOGLE: Oh, I'm sorry.

7 THE COURT REPORTER: They took him back to the jail
8 earlier. I saw them.

9 MR. FALK: Can we get Mr. Filyaw?

10 THE COURT REPORTER: They put him in the van and they
11 took him back.

12 THE COURT: Are you kidding me?

13 THE COURT REPORTER: No. That was only, like, an hour
14 and a half ago. He may not even be here.

15 THE COURT: They may have taken him back to the jail.

16 MR. FALK: I can waive his presence.

17 THE COURT: Not without him, you can't.

18 MR. BOGLE: Maybe he is here.

19 THE BAILIFF: Judge, they got him locked up or what?
20 Nobody is in the hold.

21 THE CLERK: I'll try to get in touch with the deputy.

22 THE COURT: Go ahead.

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

25 THE CLERK: He's gone, Judge.

1 THE COURT: Are they getting him back?

2 THE CLERK: It will probably take them another hour to
3 get him back, don't you think?

4 THE COURT: I don't know. Unbelievable.

5 THE CLERK: Do you want me to ask them?

6 THE COURT: Who are you talking to?

7 THE CLERK: Wayne Bellflowers.

8 THE COURT: Where is Wayne? Is he in the building?

9 THE CLERK: I didn't ask him. Maurice told Wayne that
10 we were done for the day.

11 THE COURT: Who did?

12 THE CLERK: Maurice, our deputy that was in here earlier
13 or on 11. So I guess it was a miscommunication.

14 THE COURT: Nobody asked me.

15 THE CLERK: I heard them say that. I mean I heard them.
16 I thought they said did we have him lunch. I thought they
17 were going to get him lunch. All three deputies up there
18 didn't --

19 THE COURT: Nobody asked me if we were done yet. Okay.
20 He doesn't have to be dressed out. He can be in his orange
21 jumpsuit now, but I need him back up here ASAP.

22 All right. We'll stand at ease for a few minutes.

23 MR. BOGLE: Thank you, Your Honor.

24 (WHEREUPON, there was a break in the proceedings from
25 2:21 p.m. until 3:13 p.m., until the respondent entered

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

3 THE COURT: All right. We now have Mr. Filyaw in the
4 courtroom. Is the State ready to proceed?

5 MR. BOGLE: Yes, Your Honor. Thank you.

6 THE COURT: Defense counsel?

7 MR. FALK: Yes, Your Honor.

8 THE COURT: All right.

9 MR. BOGLE: Let me --

10 THE COURT: Mr. Bogle?

11 MR. BOGLE: Starting again, the case is the Matter of
12 the Care and Treatment of Jimmy Filyaw, Case No. 2016-CP-21-
13 44. For the record, my name is Jim Bogle. I represent the
14 State.

15 The State's first motion in limine has to do with the
16 where. The elements the State has to prove is whether or not
17 the respondent has a mental abnormality or a personality
18 disorder, that he has difficulty controlling it, which makes
19 him likely to commit acts of sexual violence unless confined
20 for long-term care and treatment.

21 Any reference to a location of the treatment, which
22 currently is in two old prison wings behind the wall at Broad
23 River -- it's run by the Department of Mental Health. It's
24 totally sealed off from the Department of Corrections, but
25 that's where it is.

1 So any reference to it being a prison, a jail, a former
2 death row, which one of the wings is, would distract the jury
3 and might prejudice the State and not be one of the things we
4 have to prove. It would not be relevant to this case. The
5 only issue is whether or not he meets the definition.
6 Convicted of the right kind of crime, a sexually violent
7 offense, and having the mental abnormality, not the issue of
8 where he might be sent.

9 So we would ask that the issue of where, the where, the
10 location, any references to it being a prison or behind the
11 wire or on old death row would not be allowed. That's our
12 first motion in limine.

13 THE COURT: Mr. Falk?

14 MR. FALK: Your Honor, I believe that an element of
15 their -- of their proof is that not only that he has a
16 relevant mental health defect, but that he must be confined
17 to a secure facility. So I believe I am entitled to -- the
18 jury is entitled to some understanding of what a secure
19 facility means.

20 THE COURT: I mean I don't necessarily disagree with
21 that and will allow you to ask is it a secure facility, but I
22 mean if you liken it to a prison or --

23 MR. FALK: But I think --

24 THE COURT: -- kind of getting down -- go ahead. I'm
25 sorry.

1 MR. FALK: I mean maybe if I could hone it down further
2 I mean so the jury is clear that he can't come and go as he
3 pleases.

4 THE COURT: Right.

5 MR. FALK: He doesn't --

6 MR. BOGLE: Hold on.

7 MR. FALK: He doesn't have visitors all the time.

8 THE COURT: Right.

9 MR. FALK: He's in a cell or he's in a room that he
10 can't leave out of as well.

11 THE COURT: I think that's fair. Mr. Bogle?

12 MR. BOGLE: As far as I know, I'm not sure if the
13 individual's room that they live in are locked at night. I
14 don't know. I don't think they are, but the facility -- he
15 can't get out. I have no problem with it being argued or
16 described as a secure facility. He can't come and go. He
17 can't leave. He's got to stay there until the treatment is
18 completed.

19 THE COURT: I think that's fair enough.

20 MR. FALK: Thank you.

21 THE COURT: Okay.

22 MR. BOGLE: The second motion in limine filed by the
23 State has to do with the issue of treatment. And again, what
24 we have to prove is the type of conviction, the mental
25 abnormality, and whether or not it causes serious difficulty

1 in controlling himself to the extent that he needs to be
2 confined for long-term control, care, and treatment.

3 To talk about the treatment he's going to get or the
4 type of treatment or what it is would not be relevant. It
5 would be an additional burden upon the State to show exactly
6 what that is. It has nothing to do with the elements we have
7 to prove, and it might confuse the jury. It doesn't have any
8 probative value. He just has to be there for treatment.

9 And actually, the treatment is decided by the people who
10 run the place, which since December of last year I think is
11 now a private company called Correct Care. The Department of
12 Mental Health -- he would be committed to the custody of the
13 Department of Mental Health. They run the facility, but the
14 actual in-house day-to-day treatment is run by Correct Care,
15 who does the same thing in the state of Florida.

16 So we would think any going off on a limb of the type of
17 treatment he might get, how long it will last, is not
18 something we have to prove. It would distract the jury and
19 could prejudice the State.

20 THE COURT: Mr. Falk?

21 MR. FALK: Again, I believe that they have to prove that
22 he needs treatment in a secure facility and so, to the extent
23 that this is treatment, I think I'm entitled to some
24 discussion as to what type of treatment he would need,
25 whether or not this is something that can only be done at a

1 secure facility. I mean our contention would be that if he
2 needs any treatment, it could be gotten on an outpatient
3 basis and there's nothing unique about the type of treatment.

4 THE COURT: I mean are y'all going to have I guess
5 experts testifying as to -- I mean the people that come in
6 here and testify -- is it Dr. Swan?

7 MR. BOGLE: Swan is the State's expert, yes.

8 THE COURT: Okay. She may or may not. I don't know
9 what she's going to say. I mean I think I've tried one of
10 these cases since I've been on the bench for eight years, and
11 it was Mr. Bogle I think earlier -- mentioned earlier
12 upstairs. She may -- may or may not be qualified to even
13 testify as to what kind of -- what the specifics of his
14 treatment may be.

15 MR. BOGLE: I think the big -- it sounds like the
16 difference is we think it has to be in a secure facility,
17 they think it should be outpatient.

18 THE COURT: Right.

19 MR. BOGLE: I don't mind testimony about that.

20 THE COURT: Right.

21 MR. BOGLE: But as far as the day-to-day type of
22 treatment, what he's taught, what he learns, how many
23 sessions, that kind of thing, that would be getting too far
24 into the weeds.

25 MR. FALK: My point would be it would be treatment that

1 could be done on an outpatient basis. There's nothing unique
2 about it.

3 THE COURT: Well, I mean -- and I don't think that
4 that's -- that's the problem. I don't think that's a
5 problem, but I think Mr. Bogle has objected to the specifics
6 of the treatment.

7 MR. FALK: And I don't want to go down that route.

8 THE COURT: Okay. Fair enough. I mean I think -- I
9 think y'all are in agreement with that then.

10 MR. BOGLE: Thank you, Your Honor.

11 THE COURT: All right.

12 MR. BOGLE: That's the State's motions in limine.

13 THE COURT: All right. Hold on just a minute.

14 All right. Moving right along, we'll move to you, Mr.
15 Falk.

16 MR. FALK: Yes, Your Honor. I've got a couple of
17 motions in limine I want to discuss. One is sort of about
18 some general points.

19 I would expect that the State is going to -- in their
20 opening argument is going to talk about the legislative
21 history behind the Sexually Violent Predator Act. I'm just
22 not sure how relevant that is and to the extent that if it's
23 a matter of what the law is in this case, I think that's
24 appropriate for the Court to instruct the jury at the end,
25 but, you know, why we need to know on this type of case that

1 the legislature passed this law -- that the legislature
2 passed this law that it -- you know, that they carved out a
3 group of people with mental abnormality that are an extremely
4 dangerous group of sexually violent predators. I just think
5 that language is very prejudicial towards my client, and I'm
6 just not sure how relevant it is.

7 THE COURT: Which one of your motions?

8 MR. FALK: I have -- I have one that says respondent's
9 motion in limine to exclude certain testimony.

10 THE COURT: I've got it right here.

11 MR. BOGLE: It's the first -- this is a copy of the
12 statute. It's these two paragraphs right here and right here
13 out of the statute.

14 Usually, Judge, I read or paraphrase them to the jury at
15 the very beginning to explain to them what kind of case this
16 is. That this is not an auto wreck or a med mal. This is a
17 different kind of case and here's what the legislature said
18 about these people, and then I go into burden of proof. And
19 sometimes I read word for word all or part of those first two
20 paragraphs that I showed you.

21 MR. FALK: My client is not "these people" until the end
22 of this trial.

23 THE COURT: All right. Hold on just a minute.

24 All right. I'm looking, Mr. Falk, at your motion in
25 limine -- in limine to exclude certain testimony. I'm

1 assuming you're referring to number 1 right now?

2 MR. FALK: Yes, Your Honor.

3 THE COURT: And you're asking me to limit what he says
4 to the jury in his opening statements concerning the
5 legislative history of this?

6 MR. FALK: Yes, Your Honor.

7 THE COURT: In referring to your client as mentally
8 abnormal or extremely dangerous?

9 MR. FALK: Or possibly part of an extremely dangerous
10 group of sexually violent predators.

11 THE COURT: Well, I mean I'm not going to -- that's
12 something that the State has got to prove here. Right or
13 wrong? Is that right?

14 MR. FALK: Well, the State doesn't have to prove what
15 the legislative history of the act is. I mean I just --

16 THE COURT: No. You're right about that. But they
17 certainly have to prove a mental abnormality or, you know,
18 extremely dangerous. Not "or" but "and" extremely dangerous
19 group.

20 Now, I'm not going to -- whether it be you or Mr. Bogle,
21 I'm not going to necessarily tell you how to try your case.

22 MR. FALK: Yes, Your Honor.

23 THE COURT: Now -- and I think to some extent maybe the
24 jury needs to be educated as to why they're here at the end
25 of the day, you know. I'm going to tell them -- I mean I'm

1 the judge of the law, not Mr. Bogle, not you. I mean I'm the
2 judge of the law as it pertains to this case.

3 And I'll listen to his opening statement and if he
4 starts getting what I believe to be off on a --

5 MR. FALK: Thank you, Your Honor.

6 THE COURT: -- on the wrong road I mean -- and if you
7 want to object, I'll address it accordingly. I mean I don't
8 -- I mean I've never limited a lawyer concerning them
9 talking.

10 In federal court, I remember Judge Houck would not let
11 you talk to the jury about what the law was. He would
12 specifically tell you that is my job. Don't enter that
13 purview, period. I've never done that because, you know,
14 I've always told them, you know, at the end of the day you
15 can say whatever you want on that issue, but I'm the judge of
16 the law on it.

17 But certainly, that doesn't give Mr. Bogle an open door
18 to go down every piece of legislative history or whatever in
19 how he's trying his case. So I will listen to it and if
20 you've got an objection as we go --

21 MR. FALK: Thank you, Your Honor.

22 THE COURT: -- I'll certainly listen to you on that.
23 Okay?

24 MR. FALK: I feel a bit stronger about my second item on
25 that list.

1 MR. BOGLE: If I can have my copy back?

2 THE COURT: Yes, sir.

3 MR. FALK: I believe if my client is -- if the jury
4 finds that my client is a sexually violent predator, he's
5 going to be confined for an indeterminate period of time,
6 period.

7 THE COURT: Right.

8 MR. FALK: And the fact that he may be eligible for an
9 annual review once a year -- I think if the jury finds that
10 out, it is highly prejudicial because I think juries will
11 make it seem, well, maybe if he just needs one year of
12 treatment, that's fine, without -- without any type of proof
13 as to how long, you know, average treatments are, how
14 reasonable it is that somebody would get out in one year. I
15 think any mention of a one-year annual review is highly
16 prejudicial towards my client.

17 THE COURT: Well, I mean do you foresee under any
18 circumstances that you could open the door to a response on
19 that?

20 MR. FALK: I don't plan on opening the door, but I
21 possibly see that discussions of annual reviews and --

22 THE COURT: Well --

23 MR. FALK: -- maybe coming out from the State's witness.

24 THE COURT: Well, let me ask you this. I mean --

25 MR. BOGLE: I'm not going to really go there. Now, when

1 I qualify Dr. Swan and I think when he qualifies Dr. Sutton,
2 both of them do or have done annual reviews on the guys who
3 are already committed. So the word is going to be said.

4 THE COURT: I can foresee a door being opened on that.

5 MR. FALK: Uh-huh.

6 THE COURT: But if you get up as his lawyer and sitting
7 here and they're going to secure him forever possibly --

8 MR. FALK: Well, I can go --

9 THE COURT: -- and just keep pounding that to argue to a
10 jury that he doesn't ever or may never have a chance to get
11 out, when, in fact, he does have the opportunity for annual
12 review, I mean I don't think that's a fair argument to the
13 jury.

14 MR. FALK: And I think if I did that, I think I would
15 clearly be opening the door, but I think it is absolutely
16 accurate to say that he can be committed for an indeterminate
17 period of time, that he doesn't know when he will get out,
18 because that's absolutely the truth.

19 THE COURT: Well, I mean that's the truth, but the other
20 side of that is too. I mean I think you're still making that
21 argument to the jury that it's indeterminate, which says it's
22 never possibly, but I mean I think that's a fine line there.
23 I mean I think you're getting half of your cake and not
24 eating it too.

25 MR. FALK: I'm trying to lean on it. I mean there's no

1 question about that, Your Honor.

2 THE COURT: I understand, but I mean I think, you know,
3 in fairness -- and it's my job to make sure it's fair on both
4 sides here. I mean I think it's -- for you to sit there and
5 argue that to the jury without the other side of it, I don't
6 think is fair either --

7 MR. FALK: Okay.

8 THE COURT: -- to the State no more than I would think
9 it would be fair for them to, you know, argue one side, so to
10 speak, on that issue from -- you know, from them. So I'll
11 listen to it and how it plays out again and -- you know.

12 MR. FALK: Well, if one of these experts would happen to
13 know the average amount of time or how long it takes to get
14 through the program, would that be --

15 THE COURT: Well, I mean --

16 MR. FALK: If I'm going the other way. If I'm going the
17 other way.

18 THE COURT: Right. Well -- and I think too -- I mean
19 each case -- and I think --

20 MR. BOGLE: Oh, yeah.

21 THE COURT: Well, each case is different. Each person
22 is different. Some people -- you're right. They never get
23 out possibly -- probably.

24 MR. BOGLE: I've had guys get out in two or three. I've
25 got guys still there after ten or twelve.

1 THE COURT: I mean I've heard -- you know, I've heard
2 testimony on these things before in these cases before. I
3 can't remember, you know, exactly what the average length of
4 stay is. I do remember that coming up in the last case I
5 tried, whether it was in pretrial or what, but I want to say
6 maybe two and a half years.

7 MR. BOGLE: In the early days when I first started doing
8 this, they told us 44 months, but that was back in 2008.
9 Right now, with Correct Care taking over -- and they have a
10 much more structured phase 1, phase 2, phase 3, phase 4 type
11 approach to it than DMH did. And again, I'm not an expert on
12 that, but I have been briefed as to how they do it, and they
13 have a much more structured approach it seems like. And so I
14 can't -- I can't tell you how long it will take, and a lot of
15 times it depends on the guy.

16 THE COURT: Yeah. All right. Okay. Mr. Falk?

17 MR. FALK: So I'm not sure I understand where we are on
18 this one.

19 THE COURT: I mean what I said was, you know, for you to
20 argue that the jury should make a determination in this case
21 based upon concern --

22 MR. FALK: I don't --

23 THE COURT: -- that he may be confined indeterminately,
24 I don't think is a fair argument before the jury in the case.

25 MR. FALK: I'm sorry. As far as if there were people

1 here who knew how long he would be in treatment. I'm not --
2 what I'm saying is if I can't -- if I can't get out -- if I
3 can't stop the jury from hearing that they're entitled to a
4 review in one year --

5 THE COURT: Right.

6 MR. FALK: If there were people here who had an opinion
7 based on experience as to how long treatment usually lasts,
8 is that fair? I just -- I just want to know where I can go.

9 THE COURT: I understand. Mr. Bogle?

10 MR. BOGLE: Judge, I don't really ask my expert about
11 the right to petition at any time for the annual reviews.
12 I've had annual reviews, the existence of them, come up in
13 the testimony, depending on which way it goes. The door is
14 open there. That's not really what I'm going to ask Dr. Swan
15 about annual reviews.

16 Now, when I qualify her as an expert and she talks about
17 the different things she's done, she'll mentioned doing
18 annual reviews for guys already committed, both in Florida
19 and here. So it will come up that way. That's just part of
20 her qualification as an expert.

21 MR. FALK: Your Honor, if I think the door is open, can
22 I -- maybe I'll approach before I ask the question?

23 THE COURT: That's fine.

24 MR. FALK: Okay.

25 THE COURT: Let's do it like that. Okay.

1 MR. FALK: Your Honor, there is an inconsistency between
2 the South Carolina Rules of Civil Procedure --

3 THE COURT: Of civil procedure and the statute.

4 MR. FALK: Yes, Your Honor. And to the extent that
5 there is case law that says that under 35 SCRPC, a court-
6 appointed expert to provide a mental health exam, a clinical
7 psychologist is not qualified, and I'll give you the cite.

8 MR. BOGLE: We are aware of that, but we would raise
9 these points. Rule 44 says in any case in which the amount
10 in controversy exceeds \$100,000 and the mental or physical
11 condition including blood group of a party or a person in the
12 custody -- and it goes on, but without finishing the
13 sentence, it requires two things: the mental issue being
14 determined and there be an amount in controversy of \$100,000
15 -- in excess of \$100,000. So that takes that right away. It
16 takes this rule out because there's no money in controversy
17 here.

18 The second thing is you have a general rule being
19 superseded by a specific statute. Our statute at Section 44-
20 48-80, subparagraph D, specifically requires reference
21 transferring -- this is after a probable cause hearing. It
22 requires transferring the person to the Department of Mental
23 Health for an evaluation by -- and I quote -- a qualified
24 expert, appointed by the Court. And there's nothing there
25 about what type of qualified expert that has to be. In my

1 history with this program, most of my dealings have been with
2 psychologists. Some have been with psychiatrists or medical
3 doctors.

4 In addition, I would submit the time to object to this
5 would have been at the probable cause hearing in the instant
6 case. I would also note that Dr. Swan has testified and been
7 recognized as an expert witness previously on multiple
8 occasions by the circuit courts in this state as a
9 psychologist, and I believe Dr. Sutton has as well and she is
10 also a psychologist.

11 There's a case called Commitment of Michael Bohannon. I
12 can hand a copy up. This is out of the Supreme Court of
13 Texas from 2012, which dealt with that issue, and basically
14 said the act did not require the expert conducting the
15 evaluation be licensed as a medical doctor or a psychologist,
16 but this is -- and I'm looking at the comments on the first
17 page and, at page 5, they talk about they're considering the
18 qualification experts must have to testify in whether or not
19 a person is an SVP. On the next page, page 6 at the top,
20 they say the act does not prescribe the qualifications.

21 So the expert used to assess is not constitutionally
22 required to be a physician. This was, again, looking at a
23 law that reads like ours does.

24 THE COURT: All right.

25 MR. BOGLE: So this is precedent, albeit out-of-state,

1 that covers that issue. And again, it's something that could
2 have been -- and I think should have been objected to when --
3 at the probable cause hearing when Dr. Swan was appointed.

4 THE COURT: Mr. Falk, anything in response?

5 MR. FALK: Well, Your Honor, I don't think the fact that
6 there is not money at stake is relevant here. I mean
7 certainly my client's civil liberties are at stake for a
8 certain period of time. So if the \$100,000 is somehow an
9 indication of how serious the case is, I don't think that's
10 relevant here. I'm not -- I'm not persuaded by a decision
11 from the Texas court.

12 THE COURT: Well, I certainly don't believe that money
13 is more of an important issue than someone's freedom.
14 However, what I'm tasked with and what Mr. Bogle has argued
15 here -- and I don't -- I don't fault you for bringing this up
16 now. I mean, you know, if it's something to protect your
17 client's interests, I think it needs to be addressed and,
18 based upon my ruling, if I'm wrong, you would have needed to
19 protect the record on that issue now.

20 MR. FALK: Thank you, Your Honor.

21 THE COURT: Not necessarily when the doctor was
22 appointed. And so I certainly don't fault you at all with
23 regards to that. I think you need to bring it up now.

24 However, you know, what I have to look at is whether or
25 not a rule -- a rule takes precedent possibly over a statute,

1 and I believe that under the law the statute would preempt
2 here a generalized rule. Granted, it's a rule under our
3 Rules of Civil Procedure, but the entire Sexually Violent
4 Predator Act -- I mean that is a process and procedure that
5 was developed by our legislature that did not -- it says --
6 as Mr. Bogle argued here, the language that the statute uses
7 concerning the appointment of a physician, I guess, is
8 somewhat general and, therefore, while I certainly don't
9 fault you for bringing it up -- I think you should've brought
10 it up as you did. I'm going to deny your request on that.

11 MR. FALK: Thank you, Your Honor.

12 THE COURT: Okay. But your objection is so noted for
13 the record on that issue.

14 MR. FALK: Then we get into really my last three items,
15 4, 5, and 6, on that motion in limine. All sort of relate to
16 this Court's obligations as a gatekeeping function under
17 what's relevant and what is more prejudicial than probative.
18 And I also recognize the fact that in a proceeding like this,
19 the expert is allowed to rely on a bit of hearsay.

20 THE COURT: Right.

21 MR. FALK: That having been said, I think that prior
22 arrests for which we do not know the disposition of, even
23 though that it does possibly reflect a run-in with law
24 enforcement, to the extent there are any prior arrests where
25 I don't know if my guy was acquitted, nolle prossed, you

1 know, whatever, I don't think that it's fair for the jury to
2 hear anything about that. That information I would believe
3 would be more prejudicial than probative.

4 I also think that misdemeanor -- nonsexual misdemeanor
5 convictions that are over 15 years old are so attenuated to
6 the facts in this case that they also are more prejudicial
7 than probative.

8 And finally, I can appreciate the fact that expert
9 witnesses have to rely on a certain amount of hearsay. She's
10 going to read police officer reports and she's going to draw
11 some conclusions based on the police officer reports, but
12 when you get to the point where the declarant is not, in fact
13 -- all right.

14 So you have a police officer talking to a declarant and
15 said what do you know about this and he says, I don't know,
16 but somebody else said that that person did it. I think
17 we're getting some hearsay that is so attenuated that it is
18 not reasonable for an expert to be relying on it.

19 I can appreciate, again, if a police officer asks a
20 witness what that witness saw, that's -- I can appreciate
21 that's something probably that fits under 703, but if the
22 police officer asks that witness what that witness heard
23 somebody else say, I think we've gone too many steps.

24 THE COURT: Hearsay within hearsay within hearsay.

25 MR. FALK: Within hearsay.

1 THE COURT: Mr. Bogle?

2 MR. BOGLE: Yes, Your Honor. The issue of the doctors
3 testifying about the underlying details and whether or not it
4 crosses the line into hearsay, it was dealt with by our
5 Supreme Court in -- in the Court of Appeals rather in the
6 Ettel case. I've got a memo of law I submitted to you on
7 this topic.

8 The Ettel case from 2008. In that case, Dr. Pamela
9 Crawford testified about Dr. -- about Mr. Ettel's prior
10 sexual offenses, as well as a prior nonsexual conviction, and
11 some of those offenses had not even resulted in convictions.
12 Again, she's looking at his likelihood for need for
13 treatment, as well as -- and the key thing here is -- is the
14 ability to control his behavior in the future. She's also
15 looking for a pattern here. Because as Dr. Crawford says and
16 Dr. Swan will also say, future behavior can best be predicted
17 on past behavior.

18 In the Corley case from 2003, the Supreme Court held
19 that the probative value of the details underlying an ABHAN
20 charge and a criminal sexual conduct outweigh any danger of
21 prejudice under the Sexually Violent Predator Act. So past
22 criminal history was directly relevant to establishing
23 whether or not the guy was an SVP.

24 Likely to reoffend is based on previous convictions
25 being similar. Here, we have a man convicted of three

1 different lewd act charges in two counties. That's the case
2 before you today. So there's a pattern of behavior here,
3 whether or not the fact that he did it once, that should've
4 been a wake-up call, then he did it again is certainly an
5 issue of lack of control, and the underlying details go to
6 the criminal history and helping the jury understand exactly
7 what has happened here.

8 So the cases have spoken about this, both the Ettel case
9 and the Corley case, our Court of Appeals and our Supreme
10 Court. We would submit that Dr. Swan can testify about what
11 she's found out about the underlying details behind the
12 cases, and the jury has got to accept whatever weight --
13 whatever weight that may have.

14 MR. FALK: Your Honor, I still say that you're the
15 gatekeeper. I mean under the Ettel -- and in Ettel, they
16 were talking about an ABHAN case and a criminal domestic
17 violence case. That's violence and, you know, sex, but if
18 we're talking about charges of public intoxication from 15
19 years ago, I just don't see how that's relevant.

20 THE COURT: Well, let me ask this. Have y'all talked
21 about the prior record and what the State intends to rely
22 upon or what the experts relied upon in forming their
23 opinion?

24 MR. BOGLE: We have the reports from each expert.

25 THE COURT: Well, I mean that's not -- that's not my

1 question though. My question is whether or not the two of
2 you have talked and whether or not you agree upon -- there
3 may be some -- I mean the argument I'm getting right now is a
4 general argument --

5 MR. BOGLE: Uh-huh.

6 THE COURT: -- about don't let it in. Well, there's
7 certain -- the case law is pretty doggone broad on what can
8 come in. I get that, but there may be some things that the
9 State is not even -- or the State's expert is not even
10 relying upon and has absolutely no intention of even talking
11 about it, but yet I'm getting -- I'm getting a generalized
12 argument here about, you know, Judge, issue a blanket ruling
13 here on stuff that can't be relied upon or discussed, etc.,
14 with me not knowing what -- what I need to make a decision on
15 here. Does that make sense?

16 MR. BOGLE: Yes, sir. Basically, there's three sexually
17 violent convictions.

18 THE COURT: Okay. I heard that.

19 MR. BOGLE: We have convictions.

20 THE COURT: Right.

21 MR. BOGLE: Two in Florence, one in Darlington. There's
22 also a sexually violent arrest that did not result in
23 conviction. And what Dr. Swan had to do in looking for a
24 pattern of behavior was review the underlying reports, look
25 for similarities in ages, situations, what he did,

1 oftentimes, what the victims told the police that he did to
2 them, to justify her diagnosis not only of pedophilia, but
3 also the other specified paraphilic disorder, hebephilia,
4 which is going after teenagers, younger teenagers.

5 THE COURT: How old is that prior non-conviction or
6 arrest that we're talking about here?

7 MR. FALK: Your Honor, I'm talking about -- I can
8 appreciate what Mr. Bogle is saying. I don't think I can
9 stop that.

10 THE COURT: And I agree.

11 MR. FALK: But I have more concerns with the 1981
12 driving under the influence charge with a \$100 fine. In
13 1974, violation of drug law. 1986, public drunk. 1986,
14 public drunk.

15 THE COURT: Well, my question was -- and I understand
16 your concern, but my question I guess to each of you -- have
17 y'all talked? Have y'all talked about that at all? Because
18 --

19 MR. FALK: No, Your Honor.

20 MR. BOGLE: We haven't, Judge.

21 THE COURT: Again, his expert may not be -- not give a
22 rip about those prior arrests and/or convictions or fines or
23 whatever, and we're making this argument for just to talk at
24 this point. You know what I mean?

25 MR. FALK: I'm assuming anything in her report is what

1 she's relying on.

2 THE COURT: Okay.

3 MR. BOGLE: Okay. Where the prior convictions --

4 THE COURT: Yes.

5 MR. BOGLE: One of her diagnoses -- diagnoses was also
6 alcohol abuse in a controlled environment. He's got eight
7 arrests for DUI or DUI-related crimes, and some of them go
8 back a few years. So that's relevant to that portion of her
9 diagnosis.

10 THE COURT: Okay.

11 MR. BOGLE: And he's got I think a CDV.

12 DR. SWAN: Yes.

13 MR. BOGLE: Okay. And that's a red flag in sex offender
14 cases. Whenever it happens, that's something that also
15 played into her opinion.

16 Now, as far as if there's something about, you know,
17 smoking marijuana or something fairly minor like that, I can
18 take it out, but the alcohol offenses played a part in the
19 diagnosis -- one of her diagnoses.

20 THE COURT: And it was three different diagnoses;
21 correct?

22 MR. BOGLE: Yes.

23 THE COURT: Correct? If I remember correctly in reading
24 it.

25 MR. BOGLE: Pedophilia, other specified paraphilic

1 disorder: hebephilia, and the alcohol abuse in a controlled
2 environment.

3 THE COURT: Correct. That was the other one. That's
4 right.

5 MR. BOGLE: That's three.

6 THE COURT: All right. Mr. Falk, I'll listen to it. I
7 mean there are three different diagnoses here and depending
8 upon -- I mean if y'all want to proffer some of it and let me
9 hear it and make a decision, but if it goes into the basis of
10 that diagnosis, for instance, I think it's relevant and I
11 think it's admissible. Now, some of this stuff, it may not
12 be.

13 MR. FALK: Well, I can appreciate that, Your Honor. And
14 I do understand that she diagnosed him as an alcoholic, but
15 we're here to find out whether or not he has a mental disease
16 or defect that makes it likely that he's going to commit a
17 crime of sexual violence in the future. I mean --

18 THE COURT: Well, if -- and I'm just assuming -- I
19 didn't mean to cut you off. Did I cut you off?

20 MR. FALK: No.

21 THE COURT: If studies have shown, for instance,
22 alcoholism is a disease and if studies have also shown that
23 alcoholism is tied in some way, shape or form to somebody
24 committing the very acts that your client served time for and
25 they connect those dots, so to speak, I think it's certainly

1 relevant.

2 MR. FALK: Okay.

3 THE COURT: Does that make sense? And I don't know what
4 they're going to testify to, but I'm assuming that that's
5 going to be --

6 MR. FALK: Yes, Your Honor.

7 THE COURT: If that was a necessity of making that
8 diagnosis, I can guess educably [sic.], so to speak, an
9 educated guess and that's where those dots are going and so
10 -- but they're going to have to lay that foundation.

11 MR. FALK: Thank you.

12 THE COURT: They're certainly going to have to lay it.
13 If they don't lay it, they just get up here and say it
14 without laying the proper foundation on it, I think you've
15 got a legitimate viable objection at that point.

16 MR. FALK: Thank you, Your Honor.

17 THE COURT: All right.

18 MR. FALK: Now, can we talk about the PPG?

19 THE COURT: Yes, sir. That's what I've been waiting to
20 talk about.

21 MR. FALK: Your Honor, I'm making -- I have two separate
22 arguments for keeping the PPG test out, and one is based on a
23 Council --

24 THE COURT: Right.

25 MR. FALK: -- motion and the other is whether or not

1 just the PPG test is of the type of test -- if it amounts to
2 a violation of his private, -- an invasion of his privacy,
3 unlawful search and seizure of his person.

4 THE COURT: Well, let me ask you this. And again, did I
5 cut you off? I'm sorry if I did.

6 You know, there's case law out there, you know, that
7 says -- and I've read your memos and I appreciate you all
8 sending me all of this information because I read it. But
9 there's certainly case law out there, for instance, that says
10 that a warrant is not necessary for the swabbing of someone's
11 mouth for DNA. Right?

12 MR. FALK: I thought -- but you can request -- but what
13 is a Schmerber hearing? Isn't that where --

14 THE COURT: There's a federal case out there that deals
15 with that, and it talks about how minimally intrusive it is.
16 Is that not less intrusive than what was done here?

17 MR. FALK: This is --

18 THE COURT: I mean it's -- nothing goes inside.

19 MR. FALK: This is exponentially more intrusive. This
20 is sitting in a room with your pants off and something hooked
21 up to your genitalia, and you're shown images that are
22 designed to provoke a sexual response. I think it is
23 significantly more intrusive than a stick, a blood test
24 stick, or a swab of the mouth.

25 THE COURT: All right.

1 MR. FALK: That's my ...

2 THE COURT: All right. Well, do you all want to put up
3 some testimony?

4 MR. BOGLE: Yeah.. He's the moving party. So --

5 THE COURT: Let's go.

6 MR. FALK: I would call Dr. Sutton.

7 THE COURT: If you'd come around to be sworn. Place
8 your left hand on the Bible and raise your right hand,
9 please.

10 THE CLERK: Do you swear or affirm that the testimony
11 you give will be the truth, the whole truth, and nothing but
12 the truth, so help you God?

13 THE WITNESS: I do.

14 THE COURT: State your full name for the record, please,
15 ma'am, and spell your last name.

16 THE WITNESS: It's Colbi Sutton, S-u-t-t-o-n.

17 THE COURT REPORTER: How do you spell Colbi?

18 THE COURT: Hold on a minute, ma'am. Okay.

19 THE WITNESS: C-o-l-b-i.

20 THE COURT: C-o-l-b-i?

21 THE WITNESS: That's correct.

22 THE COURT: Okay.

23 MR. FALK: For the sake of time, can we both stipulate
24 experts for this? Well, that's fine.

25 MR. BOGLE: Yes, sir. Well, do a little bit. Do a

1 little.

2 DR. COLBI SUTTON, being first
3 duly sworn, testified as follows:

4 BY MR. FALK:

5 Q: Dr. Sutton, where are you employed?

6 A: I'm in private practice full-time where I exclusively do
7 forensic reports for the law and for the Court.

8 Q: And what experience -- what advanced degrees do you
9 hold?

10 A: I have a master's and doctorate in clinical psychology
11 with an area in forensics from Spalding University in
12 Louisville, Kentucky, and then I did a one-year fellowship in
13 forensic psychology at Emory.

14 Q: And have you had any post-doctorate?

15 A: I'm sorry?

16 Q: Did you have any post-doctorate work?

17 A: Yes. That was the one-year --

18 Q: Okay.

19 A: -- fellowship at Emory.

20 Q: All right. And do you hold any positions with the state
21 of South Carolina? Or do you have any contracts with the
22 state of South Carolina?

23 A: I do. I have several -- several with the Department of
24 Mental Health and several with the Department of Disabilities
25 and Special Needs.

1 Q: Do you have any that are specifically related to the
2 sexually violent predator commitment trials?

3 A: I do. I recently was offered and accepted a contract to
4 do sexually violent predator evaluations for the state, and
5 I'm also on the MDT committee.

6 Q: And what is the MDT committee?

7 A: It's a multidisciplinary team where when somebody is
8 finishing their sentence and they have a sexually violent
9 crime, then they are reviewed by us to determine if they need
10 further evaluation to determine if they meet criteria as a
11 sexually violent predator.

12 Q: So has most of your training and your -- and your
13 educational background -- has that been related to forensic
14 psychology?

15 A: Yes, it has.

16 Q: Okay. And just what is forensic psychology?

17 A: It's anywhere where psychology and the law meet. So
18 it's really applying psychological principles to forensic
19 questions.

20 Q: And what part of your training and work has been related
21 to sex offenders?

22 A: I studied under several people who specialize in sex
23 offender work that was in states that have sexually violent
24 predator laws and then those that don't. So it would be like
25 psychosexual evaluations.

1 Q: Have you ever been admitted as an expert to testify in a
2 sexually violent predator case?

3 A: Yes, I have.

4 Q: On how many occasions?

5 A: On three -- I think three.

6 Q: And that's been in the state of South Carolina?

7 A: Yes, it has.

8 MR. FALK: At this time, I would like to offer Dr.
9 Sutton as an expert in forensic psychology.

10 THE COURT: Mr. Bogle?

11 MR. BOGLE: No objection.

12 THE COURT: So admitted for purposes of this hearing.

13 MR. FALK: Thank you.

14 BY MR. FALK:

15 Q: Dr. Sutton, can you tell me what the PPG test is?

16 A: Yes. So it's a device that is used to measure increases
17 in the circumference of the penis when presented with
18 different stimuli. So that can be auditory and visual
19 stimuli, pictures, recordings, things like that.

20 Q: Okay. And do you know how it is used? What are uses
21 for this test? Why was this test developed?

22 A: Well, it was originally developed to determine if
23 somebody had -- was heterosexual or homosexual, but in
24 today's age it's mostly used to try to figure out if somebody
25 has arousal to deviant stimuli.

1 Q: And is there a difference between using a PPG in a
2 commitment proceeding?

3 MR. FALK: (Coughing.) Excuse me. I beg the Court's
4 indulgence.

5 Q: Is the PPG test ever used as a part of a treatment or to
6 measure treatment progress?

7 A: Yes. And more recently, it's become more accepted to
8 use to track progress in treatment to determine if they're
9 making any strides with --

10 Q: Is that --

11 A: -- deviant arousal.

12 Q: Is that -- are they -- are they making comparisons to a
13 baseline?

14 A: Yes.

15 Q: And so how -- how is that established? I mean how is it
16 used as a part of treatment?

17 A: Well, typically whenever you first come into treatment,
18 they would give it to you to determine sort of what deviant
19 arousals that you have and then they would give it to you
20 periodically to see if any of those reduced.

21 Q: Okay. Is there a difference between using it in this
22 setting where it's really more of a diagnostic tool?

23 A: Well, it's substantially different and the reason being
24 is because even though that this has been researched and
25 studied, published thousands of times, it has not

1 consistently shown high psychometric standards.

2 So because of this, using it -- it's not recommended to
3 be used in situations like this whenever you're determining a
4 sexually violent predator because the important implications
5 of a case like this -- like, in this instance, we are
6 actually deciding somebody's freedom. So when we use tools
7 in these cases, we want to make sure that they're not
8 controversial in the field and that they have very high
9 reliability and validity.

10 Q: Do you know if the Department of Mental -- the South
11 Carolina Department of Mental Health ever uses it as part of
12 a pre-commitment evaluation?

13 A: I know that the one state evaluator that's full-time
14 there, Dr. Marie Gehle, does not use them.

15 Q: Okay. You had some -- you have some concerns about the
16 reliability of using them in this type of setting?

17 A: I do. So the issue is, is that between all these
18 studies, they have not been able to consistently show that
19 the PPG is consistent or is reliable or valid. The largest
20 reason for this is because there's no universal agreement on
21 how to standardize or the procedures used in these -- in
22 these to give the PPG.

23 So the lack of standardization includes everything from
24 the stimulus cards to the gender and age of the technician to
25 where it's given, the environment to where it's given, and

1 the reason why standardization is so important and necessary
2 is because the more that you deviate from standardization,
3 the more varied the results are.

4 So a really good example would be that we often give
5 intelligence tests, but I can look at an intelligence test
6 because it's standardized and it doesn't matter if it was
7 given by any doctor in any state. It's going to have the
8 same results.

9 With the PPG, that's not the case. With the PPG, you
10 can give it in one lab and they'll come up with some results
11 and then, you know, most likely in another lab you can even
12 get contradicting results. And that's even mentioned or
13 highlighted in an article that has several authors, but one
14 --

15 Q: Let me bring you back to that article in a second.

16 A: I'm sorry.

17 Q: Now, you had talked about the stimulus cards.

18 A: Yes.

19 Q: All right. So somebody is hooked up to this machine and
20 they are given auditory -- they're hearing auditory
21 scenarios; is that correct? Stories? Stories given on a
22 tape?

23 A: It depends. I mean it depends on what their procedure
24 is, but it can be. Yes, it can be auditory stories with or
25 without visual pictures.

1 Q: And just to be clear, in the state of -- in the United
2 States, the images that they are seeing are not child
3 pornography; is that correct?

4 A: That's correct. It's illegal to show nude pictures of
5 children here.

6 Q: Okay. So now, what do you know about the
7 standardization of the stimulus sets that are used across the
8 country?

9 A: Well, there is no standardization.

10 Q: Are you familiar with Dr. Burke?

11 A: I've heard of him and read some of his research.

12 Q: Are you familiar with the Burke Real Child Voices
13 stimulus set?

14 A: I have heard of it, yes.

15 Q: Are you aware of any peer-reviewed article that shows --
16 that affirms the validity of the Real Child Voices stimulus
17 set?

18 A: I am not.

19 Q: And why would that be important?

20 A: Well, because we have to show that these stimulus cards
21 are reliable and valid. That they're measuring what we want
22 them to measure, not just in his lab because he has an
23 investment in it, but in other labs as well.

24 Q: Because the stimulus cards -- for example, you're going
25 to hear a scenario -- Dr. Burke breaks these down between

1 grammar school, high school, lots of different age groupings;
2 is that correct?

3 A: Yes.

4 Q: Okay. Do you know how it's standardized so that we know
5 that everybody who is hearing the test of somebody who was
6 supposed to be a 10-year-old little girl is going to think
7 that is a 10-year-old little girl's voice?

8 A: Can you repeat the question? I'm sorry.

9 Q: So one of the stimulus might be pre -- might be
10 preschool children?

11 A: Correct.

12 Q: Okay. And Dr. Burke uses the Real Child Voices test,
13 and that's an auditory -- that's an audio test or they're
14 hearing a tape recording?

15 A: Right. I think that they might also have visual slides
16 with it as well.

17 Q: But is there -- how do we know that's a 10-year-old
18 girl?

19 A: I'm not sure.

20 Q: And would that not be -- how would we know that somebody
21 listening to it would think it was a 10-year-old girl?

22 A: Well, they might not. I mean people's imaginations can
23 take them wherever it takes them. So it's hard to decide,
24 like, what they would interpret that as.

25 Q: But if somebody is opining that somebody is responding

1 sexually to what they're saying is a 10-year-old girl --

2 A: Right.

3 Q: -- what type of reliability is there in that?

4 A: Well, I think it's been shown that they can't
5 consistently prove high reliability. So ...

6 Q: What are some areas that can show inconsistencies in PPG
7 procedures?

8 A: You mean what can cause them?

9 Q: Yes. What can cause the variability?

10 A: Okay. Well, there's -- there's differences in the
11 subject. So studies have shown that the individual's mood on
12 that particular day can affect it, medications they're
13 taking, health problems, the last time that they ejaculated,
14 their level of intelligence. There's also external factors
15 that can impact it. So there's the brightness of the lights,
16 the loudness and pitch of the auditory stimuli.

17 The gender of the technician is very huge. So studies
18 have found that if you have a technician that is male and you
19 are homosexual, then you are more aroused -- become more
20 aroused than vice versa. If you have a female technician and
21 you're heterosexual, then your arousal level goes up.

22 They've also found that men that have a female technician --
23 it creates more anxiety, which can also impact the level of
24 arousal.

25 Q: Is it important to know how much downtime there is

1 between these different stimuli?

2 A: Yes.

3 Q: And is that uniform as to how labs in your experience
4 kind of -- somebody -- for example, somebody could hear a --
5 and I'm looking at the Real Child Voices stimulus set from
6 Dr. Burke. Is that familiar to you?

7 A: Yes.

8 Q: And one of his groups was child female violence?

9 A: Yes.

10 Q: Okay. And then right after child female violence, there
11 was one that was infant female; is that correct?

12 A: Yes.

13 Q: Now, how much downtime was there between those two? Can
14 you tell from this report?

15 A: No.

16 Q: So -- and what I mean by downtime, that's how much time
17 a person has gone back to a non-aroused state?

18 A: Right. I mean if you're aroused by one picture, you
19 need time to kind of recover from that so it doesn't carry
20 over to the next, I guess.

21 Q: So would that be something that you would want to know
22 before you were to determine if this report -- the
23 reliability of this report was knowing how much downtime
24 there was between?

25 A: Yes.

1 Q: Would you also want to know -- from this report, can we
2 tell how many -- how many, for example, child female violence
3 is, how many different scenarios he was exposed to?

4 A: No.

5 Q: Would that be something that you would need to know?

6 A: Yes.

7 Q: Would you want to know how many times the lab tech had
8 performed this evaluation?

9 A: I would, definitely.

10 Q: How can a lab tech affect the results?

11 A: I mean huge. I mean besides what I just said in terms
12 of gender and age affecting it, they're typically the ones
13 that are coaching the individual throughout, and so even just
14 hearing a female voice come through can affect level of
15 arousal.

16 The other issue is is that studies have shown that these
17 technicians often aren't certified. There's no national
18 certification. So one study found that on average they
19 receive one week or less of training and have 3.4 years of
20 experience. This is really concerning, especially whenever
21 you're trying to diagnose somebody with these -- with these
22 deviant arousals.

23 Q: I think I interrupted you before. You were referring to
24 an article that Dr. Burke was co-author on?

25 A: Yes, I was.

1 Q: And can you tell --

2 A: There were several -- several people on -- several
3 authors, but he was one of them.

4 Q: And did that -- did that article talk about the
5 reliability of the test going from lab to lab or the
6 repeatability of the results?

7 A: Yeah. And really what the article talks about is just
8 this issue of these not being standardized across labs, and
9 even a lot of times within labs. And so the article --

10 Q: And if you could, just identify the article?

11 A: Yeah. "Standardization of Penile Plethysmograph Testing
12 and Assessment of Problematic Sexual Interests" by Murphy and
13 colleagues.

14 Q: And what was that published in?

15 A: It was published in -- let's see -- the *International*
16 *Society for Sexual Medicine*.

17 Q: Would that be the type of article that people in your
18 profession would rely on in reaching opinions?

19 A: Yes, it would.

20 Q: Okay. Go on.

21 A: Well, the article talked about this problem with the --
22 all of these things not being standardized, and what they say
23 is it's causing a lot of issues in the courtroom.

24 MR. BOGLE: I'm going to object to her talking about
25 other conclusions. If all she's done is read the article and

1 just talk about their conclusions -- it's one thing to read
2 the article, but it's one thing to have been involved in the
3 testing or involved in the stimulus set --

4 THE COURT: Well, hold on a minute now. Does the rule
5 allow her to read the article into the record?

6 MR. BOGLE: I don't believe it does.

7 THE COURT: Sir?

8 MR. BOGLE: I don't believe it does.

9 THE COURT: Why should I not listen to what her review
10 of the article --

11 MR. BOGLE: Well, I think --

12 THE COURT: Let's look at the rule.

13 MR. BOGLE: She can rely on prior studies and prior
14 articles.

15 THE COURT: Give me just a minute here. I mean I'm
16 assuming that your objection to some extent is under the
17 hearsay rule?

18 MR. BOGLE: Yes, Your Honor.

19 THE COURT: I mean if you look under Rule 803(18), is it
20 -- is it classified or qualified as a learned treatise? An
21 expert that we have on the stand here relying upon another
22 expert? Is that right?

23 MR. BOGLE: I believe so, Your Honor.

24 THE COURT: Does it not say if admitted, statements may
25 be read into evidence but not received as exhibits. I mean

1 that's what the rule says I believe.

2 MR. BOGLE: Okay. I'll withdraw the objection, Your
3 Honor.

4 THE COURT: All right. You had me confused for a
5 minute, Mr. Bogle. Objection overruled. Ma'am, you may
6 continue.

7 THE WITNESS: Thank you.

8 BY MR. FALK:

9 A: So really what this article is talking about is because
10 of this lack of standardization across labs, it's problematic
11 in the courtroom because if the prosecution orders a PPG from
12 one lab and then the defense orders a PPG from another lab,
13 then those results can be vastly different and actually they
14 said that they can even be contradictory to each other, which
15 threatens the findings of the PPG. And obviously, with this
16 high of implications, it causes a lot of issues.

17 THE COURT: All right.

18 Q: How significant do you think the PPG test -- do you
19 think it's just one data point out of many that an expert
20 will rely on?

21 A: Yes. I think that even in treatment it's one -- it's
22 one data point that you look at.

23 Q: Do you think that -- do you have an opinion as to
24 whether or not jurors have a different response to hearing
25 about the PPG test versus hearing another test?

1 A: I think that they can, yes. I think that they can be
2 highly influenced and --

3 MR. BOGLE: We would object to this conclusion. I don't
4 think --

5 THE COURT: I would --

6 MR. BOGLE: -- based on her expertise for what jurors
7 might think of something.

8 THE COURT: I sustain the objection on that.

9 MR. FALK: Thank you, Your Honor.

10 BY MR. FALK:

11 Q: But that was Dr. Burke was one of the authors on that
12 article?

13 A: Yes, he was.

14 Q: And the point of the article was that there is
15 difficulty in repeatability of results for PPG tests?

16 A: That was one of the arguments that he was trying -- or
17 that they were trying to make in terms of encouraging people
18 to create more of a standardized approach to these.

19 Q: Are you aware of any standardized approach as to
20 stimulus sets that are used?

21 A: No. It differs across the country.

22 Q: And would you agree that the stimulus set, whether or
23 not they're used correctly or incorrectly, plays a big factor
24 in reliability of the PPG test?

25 A: Yes, it does.

1 Q: I mean because that's really what the test is about,
2 responding to these stimulus sets; is that correct?

3 A: It is about responding to the stimulus -- the stimulus,
4 absolutely. I think though that one of the major factors is
5 all of the other things that are influencing the arousal.

6 So in that same article, they talk about how men can
7 become aroused for various emotions, such as anxiety,
8 depression, during their sleep, even rapid eye movement. So
9 the problem is that there's so many things impacting arousal
10 that it's hard to tell if it's really the stimuli that's
11 causing it.

12 Q: How much of an arousal is considered significant?

13 A: Well, it varies. It varies between those that are
14 interpreting it. I think that in Dr. Burke's reports, he
15 does have a cutoff.

16 Q: We're talking about millimeters of increase in
17 circumference; is that correct?

18 A: Yes. Millimeters.

19 Q: So it's not a question of full arousal to flaccid to
20 full arousal; is that correct?

21 A: No. I think that they have sort of a certain amount
22 that is sort of their baseline and then they go from there to
23 see.

24 Q: Is it important that the person be given a consent to
25 take the test?

1 A: Yes.

2 Q: Is that part of the ATSA standards that they have --
3 that you receive consent before applying the test?

4 A: Yes.

5 Q: Why is that important?

6 A: Well, I mean this is a very intrusive test that can have
7 high implications. So you have to inform the individual and
8 then have their concern -- their consent to proceed.

9 Q: Do you know if there was informed consent for this test?

10 A: They said that he was informed and that he was able to
11 repeat back what he was told and that he -- that he advanced
12 forward without the written consent.

13 Q: I beg your pardon?

14 A: That they advanced forward without the written consent
15 of Mr. Filyaw. No, I'm sorry. He signed a release of
16 records. Yeah. So he could be advanced to this treatment
17 provider. So they're saying that it shouldn't be released I
18 guess after --

19 Q: Okay.

20 A: -- it was performed.

21 Q: Are you aware -- in forensic psychology, are you aware
22 of any courts where they have not admitted the PPG test?

23 A: Yes.

24 Q: And what was the -- do you recall the basis for why they
25 were not admitted?

1 A: The last one that I was involved with, it was found that
2 it was not reliable or valid enough to be admitted. It was
3 compared to the lie detector test.

4 Q: Is one of the bases for the variability in this the fact
5 that if you're introduced normal sexual material at the
6 beginning of the assessment, it tends to create subsequent
7 arousal to deviant stimuli?

8 A: Well, there is research showing that it's hard to
9 differentiate between non-deviant responders and those that
10 are deviant.

11 Q: Can men respond to this just by -- if you have somebody
12 who has been imprisoned for seven years and then they're
13 brought into a strange environment having their pants down,
14 can that cause a sexual response?

15 A: Absolutely. I mean, like I said, even the gender and
16 age of the technician can. Also, there's a lot of research
17 saying that you can become aroused just because the stimuli
18 is new to you. So one of the biggest issues of the PPG is
19 that we don't really know if the arousal in the lab would
20 equal arousal in the environment.

21 So a great example of this is if somebody is shown,
22 like, a violent rape in the lab and that's the first time
23 they've seen anything like that, they could become aroused
24 just because it's new. Now, if you show them that real-life
25 scenario in the environment, they could be horrified and not

1 aroused at all.

2 So there's been a large debate over the PPG and how
3 generalized it is to the environment. So probably a
4 comparable example would be if you were really excited
5 whenever you watched a thriller -- a thriller movie that was
6 very violent and action-packed, but then if you were in that
7 -- if you were in that scenario or saw it when you were in
8 the environment, you may be horrified. So there can be a big
9 difference between the lab and in the environment.

10 Q: And I think I skipped over this, but when we were
11 looking at the different -- Dr. Burke is making distinctions
12 between the two I used before, child female violence and
13 infant female. Do you know how many of each stimulus
14 category he was shown?

15 A: I do not. I tried to look up more of the details of the
16 system that he's using, but it does not specify. I also
17 tried to look up the training of the technician, but it
18 wouldn't let me access any of that information.

19 Q: Would it make a difference if they were shown two for
20 each set? Three for each set? As far as reliability?

21 A: I'm -- I'm really not sure. I would think so, but my
22 expertise is not giving or interpreting the results.

23 Q: Okay.

24 MR. FALK: I have no further questions of this witness.

25 THE COURT: Cross-examination.

1 MR. BOGLE: Thank you, Your Honor. May it please the
2 Court.

3 CROSS-EXAMINATION

4 BY MR. BOGLE:

5 Q: Dr. Sutton, good afternoon.

6 A: Good afternoon.

7 Q: You -- is the Diagnostic and Statistical Manual, Edition
8 5, the latest thing on the subject?

9 A: I'm sorry. The what?

10 Q: The DSM-5. You've heard of that?

11 A: Yeah. Yeah.

12 Q: It's called the Diagnostic and Statistical Manual,
13 Edition 5 or Version 5; right?

14 A: Correct.

15 Q: And that superseded Edition IV or whatever the previous
16 one was?

17 A: Yes.

18 Q: And you're aware, are you not, that the DSM-5
19 specifically mentions the PPG in at least two places?

20 MR. BOGLE: If I may approach the witness?

21 THE COURT: Yes, sir.

22 BY MR. BOGLE:

23 Q: I'm going to hand you the first section here and the
24 second section here --

25 A: Uh-huh.

1 Q: -- where the DSM-5 mentions the use of the PPG. It says
2 psychophysiological measures of sexual interest, such as the
3 PPG in males or viewing time in males and females. So it
4 mentions it right there?

5 A: Yes.

6 Q: And it also mentions it down here about the most
7 thoroughly researched and longest use of such measures is the
8 penile plethysmograph; right?

9 A: Uh-huh.

10 Q: And it wasn't in the DSM-IV? These weren't in the DSM-
11 IV; right?

12 A: I'm not sure.

13 Q: Have you looked?

14 A: At the DSM-IV?

15 Q: Yeah.

16 A: Well, we've been using the DSM-5 for quite some time,
17 but I'm very familiar with those passages.

18 Q: Okay. But they weren't -- my point is they weren't in
19 the DSM-IV and now they're in the DSM-5?

20 A: Okay.

21 Q: Okay. Would that not suggest a wider acceptance by the
22 psychological and psychiatric community of the use of the
23 PPG, particularly in these types of cases?

24 A: Well, I'd have to caution you that the DSM-5 also has a
25 whole page cautioning using the PPG -- or the DSM-5 in

1 forensic settings. The reason is is because it was developed
2 for clinical uses. So diagnoses, treatments. So we do
3 readily rely on the information to make diagnoses, there's no
4 doubt, but that statement is not implying that it is
5 appropriate in this context.

6 Q: Okay. Okay. So the DSM-5 also has the diagnostic
7 guidelines. If I'm going to diagnose someone with
8 pedophilia, I look in that book and find out what he's got to
9 have; right?

10 A: That's correct.

11 Q: Okay. Whether I'm trying to pre-commit him or whatever,
12 that's -- that's where I'd look for the definition and the
13 criteria he has to meet to meet that diagnosis, do I not?

14 A: Correct.

15 Q: Now, in this particular case, you yourself are not
16 trained in the PPG?

17 A: I am not.

18 Q: You've never seen one given?

19 A: No.

20 Q: You've never watched one given?

21 A: No.

22 Q: Did you interview Dr. Burke before testifying today?

23 A: No.

24 Q: Did you read his report?

25 A: Yes.

1 Q: And in his report, Mr. Filyaw gave consent to be tested
2 with the PPG; correct? That's covered in the first
3 paragraph.

4 A: Yes.

5 Q: Okay. Are you aware that the Department of Mental
6 Health within the last ten years owned a PPG?

7 A: I was aware of that.

8 Q: Okay. And you're aware that some people on contract
9 with the Department of Mental Health or formerly employed
10 full-time by them, such as Dr. Swan sitting behind me, who is
11 on contract, such as Dr. Donna Schwartz-Maddox, formerly
12 Donna Schwartz-Watts, who was full-time, now contract, both
13 of them advocate using the PPG in pre-commitment settings?
14 You're aware of that?

15 A: I am aware of that.

16 Q: Okay. So there's a difference of opinion. You say Dr.
17 Gehle doesn't use the machine or doesn't use the device.
18 There seems to be a different opinion among the experts
19 employed by the Department of Mental Health?

20 A: Which I think indicates how controversial it is, yes.

21 Q: Okay. But it also means some believe it's a valid tool
22 as part of an overall broad-based evaluation; correct?

23 A: Absolutely. There's literature on both sides.

24 Q: Okay. What was the date of the report you were reading
25 a few minutes ago, that article about lack of

1 standardization?

2 A: The one that I was referring to is 2015.

3 Q: Okay. Now, the -- so you've read that study and you've
4 read other studies about this; right?

5 A: Yes. Absolutely.

6 Q: But you haven't been involved in putting those studies
7 together or have been doing them, have you?

8 A: No.

9 Q: Okay. You haven't seen one done? These studies -- the
10 actual writing and putting together of these studies about
11 the PPG that you're talking about, you haven't been involved
12 in them in any way, shape or form; right?

13 A: Right.

14 Q: You're reading other people's articles about these
15 things?

16 A: That's correct.

17 Q: You would readily admit there's other articles in the
18 industry saying that the PPG is a good idea and part of a
19 valid -- valid evaluation, are there not?

20 A: Yes. It's very controversial.

21 Q: Meaning there's articles minus, articles plus; right?

22 A: Yes.

23 Q: In this case, now, are you aware of the company called
24 Correct Care that now does all the treatment at the sexually
25 violent predator treatment facility?

1 A: I am.

2 Q: And you're aware that they either have or are acquiring
3 a PPG to use as a regular basis of their treatment; is that
4 right?

5 A: For treatment, yes.

6 Q: Okay. And these Real -- Dr. Burke's -- let me find it
7 right here. The Real Child Voices stimulus set, the standard
8 that he uses, have you seen it?

9 A: I have not.

10 Q: Have you listened to it?

11 A: No.

12 Q: Okay. And you were talking about voices and things that
13 were shown. Is it safe to say if a guy like Mr. Filyaw is
14 shown a picture of a 10-year-old girl wearing a bathing suit,
15 not naked, and he hears a voice that sounds like a young girl
16 talking to him and he starts to get an erection that he's
17 aroused by what he's seeing?

18 A: Well, that's sort of the debatable part is that they're
19 saying that there are so many different factors that could be
20 affecting it at that time. For example, did the -- did the
21 technician come through and say something and he heard the
22 female voice? Were the lights very bright? What was the
23 tone, the loudness of the voice? I mean all of those things
24 have been shown to affect it. Was he anxious?

25 Q: And you haven't seen the thing done so you don't know if

1 they are too loud or if the lights are too bright or anything
2 like that, do you?

3 A: Well, no. And I don't think that the research knows
4 either.

5 Q: Okay. And as far as the downtime between the things the
6 person is shown, we have no idea of knowing what that
7 downtime was, do we?

8 A: I do not.

9 Q: I mean did you call Dr. Burke and ask him?

10 A: No, I did not.

11 Q: Okay.

12 MR. BOGLE: A moment, Your Honor? That's all, Judge.

13 THE COURT: Anything further, Mr. Falk?

14 MR. FALK: Your Honor, if I just may have a moment? Mr.
15 Bogle had said that Donna Maddox uses the PPG test. I'm just
16 trying to find the evaluations that she's done on other cases
17 when she hasn't used the PPG test.

18 THE COURT: Go ahead.

19 MR. FALK: If I could show those to you after this
20 hearing?

21 THE COURT: Okay. I mean do you have any more questions
22 of this young lady?

23 MR. FALK: No, Your Honor.

24 MR. BOGLE: Judge, we'll stipulate that these doctors
25 that use the thing don't use it in every case.

1 THE COURT: Ma'am, you may -- Doctor, you may step down.

2 THE WITNESS: Thank you.

3 THE COURT: What else as it relates to this matter?

4 MR. FALK: I would call Dr. Swan.

5 THE COURT: Well, we've probably gone about this thing
6 from the opposite direction. I think we went along in this
7 hearing with this doctor on the stand -- I mean you were the
8 one that -- you're the proponent of admitting it..

9 MR. BOGLE: Right. But he made a motion to keep it out.

10 THE COURT: It doesn't matter. I mean it's kind of like
11 in a Jackson v. Denno hearing in a criminal case. I mean the
12 defense lawyer makes a motion to suppress a statement. The
13 burden shifts to the State to show why it should be admitted.

14 And if I look at this testimony, you know, and the
15 Council factors, so to speak, I think the State has got to
16 put up evidence or evidence has got to be put up as to --

17 MR. BOGLE: We'd like to call Dr. Swan in response for
18 that purpose.

19 THE COURT: All right. Go ahead. How about that?

20 MR. FALK: Thank you.

21 MR. BOGLE: Thank you, Judge.

22 THE COURT: They should have called you first, Dr. Swan.

23 THE WITNESS: That's usually the way it goes.

24 THE COURT: I'm sorry.

25 THE CLERK: Do you swear or affirm that the testimony

1 you give will be the truth, the whole truth, and nothing but
2 the truth, so help you God?

3 THE WITNESS: I do.

4 MR. BOGLE: All right.

5 DR. AMY SWAN, being first duly
6 sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. BOGLE:

9 Q: Dr. Swan, you are under a contract with the Department
10 of Mental Health here in South Carolina to perform
11 evaluations under the Sexually Violent Predator law; is that
12 correct?

13 A: That is correct.

14 Q: How long have you had such a contract with the
15 department?

16 A: Since 2013. So five years.

17 Q: Okay. And you're a licensed psychologist in what
18 states?

19 A: Florida, Missouri, and South Carolina.

20 Q: And your home state is Florida?

21 A: That is correct.

22 Q: Okay. What is your educational background?

23 A: I have a doctorate in clinical psychology that I earned
24 in 1997.

25 Q: Have you also -- all right. And have you had post-

1 doctorate training in the field of forensic psychology?

2 A: Yes, I have. I've had 943 hours specifically in the
3 area of sex offenders, and some of those hours were in
4 learning to administer the PPG. I had training in 1999, and
5 I also updated my training in 2011.

6 Q: Okay. And as far as membership in professional
7 organizations, you were appointed by the governor of Florida
8 to serve on the Board of Psychology at one time; is that
9 correct?

10 A: That is correct. I served for ten years, and then I
11 served for six years on the probable cause committee as the
12 chairman, and I took a year and a half break and I was just
13 reappointed to that panel in November of 2017.

14 Q: And you've also worked directly in the treatment of --
15 and have you also worked directly in the treatment of sex
16 offenders?

17 A: Yes, I have. I did treatment of sex offenders until
18 about the year 2005.

19 Q: Now, about how many sex offenders have you evaluated of
20 all categories?

21 A: I believe that I am at 935 sexually violent predators
22 and about 500 other sex offenders.

23 Q: Okay. And your testimony has been both in Florida
24 regarding their SVP program and also in South Carolina, at
25 least for now?

1 A: And Missouri and Iowa as well.

2 Q: And how many times have you been recognized as an expert
3 witness in the sexually violent predator field in forensic
4 psychology in South Carolina?

5 A: Over 50.

6 Q: And do you do pre-commitment cases like this one in
7 South Carolina?

8 A: Yes, I do.

9 Q: Do you also do annual review cases where a guy has
10 already been committed and he comes up for a review each
11 year?

12 A: That is correct.

13 Q: Okay. And when a person does not meet the criteria to
14 be committed, what do you do?

15 A: I recommend that they not be committed.

16 Q: Have you also been hired by the other side in your
17 private practice by defense counsel in sexually violent
18 predator cases in Florida, for example?

19 A: Yes. In Florida, we have a different system and all of
20 the evaluators do defense and solicitor's work, and so I do
21 both in Florida.

22 MR. BOGLE: Your Honor, we'd ask that Dr. Swan be
23 recognized at this time as an expert witness in the field of
24 forensic psychology for the purpose of this hearing on the
25 PPG.

1 MR. FALK: No objection for the purpose of this hearing.

2 THE COURT: Without objection, so -- so granted.

3 BY MR. BOGLE:

4 Q: Now, Dr. Swan, what is the Limestone penile
5 plethysmograph or the PPG we're talking about in this case?
6 What is it?

7 A: There are two major types of PPGs or two manufacturers
8 of PPGs. One is Limestone and one is Monarch. And both of
9 those have computerized programs that run the PPG and are --
10 they are -- have standardized stimuli and they are
11 standardized across the administration as well.

12 Q: And the use of the PPG -- you're familiar with the DSM-
13 5, the Diagnostic and Statistical Manual, Edition 5?

14 A: That is correct.

15 Q: If I may approach and show you the quoted language from
16 the DSM-5 about the PPG?

17 A: Yes.

18 Q: Would you -- would you read into the record the two
19 paragraphs I have highlighted?

20 A: Yes.

21 The most widely applicable framework for assessing the
22 strength of a paraphilia itself is one in which examinee's
23 paraphilic sexual fantasies, urges, or behaviors are
24 evaluated in relation to their normophilic sexual interests
25 and behaviors. In a clinical interview or on self-

1 administered questionnaires, examinees can be asked whether
2 the paraphilic sexual fantasies, urges, and behaviors are
3 weaker than, approximately equal to, or stronger than their
4 normophilic sexual interests and behaviors. The same type of
5 comparison can be and usually is employed in
6 psychophysiological measures of sexual interests, such as
7 penile plethysmography in males or viewing time in males and
8 females.

9 Q: And during that passage, when you mentioned the word
10 paraphilia, you're referencing a deviant -- whether or not
11 the existence of a deviant sexual arousal; correct?

12 A: Deviant sexual arousal. That's correct.

13 Q: Such as pedophilia or something else like that?

14 A: Yes.

15 Q: Okay. And the second paragraph that's highlighted from
16 the DSM-5?

17 A: Psychophysiological measures of sexual interest may
18 sometimes be useful when an individual's history suggests the
19 possible presence of pedophilic disorder, but the individual
20 denies strong or preferential attraction to children. The
21 most thoroughly researched and longest used of such measures
22 is the penile plethysmograph.

23 Q: Now, was this type of language recognizing the
24 usefulness of the PPG in the book's predecessor, the DSM-IV?

25 A: No.

1 Q: And in this particular case involving Mr. Filyaw, he's
2 got three lewd act convictions; right?

3 A: That is correct.

4 Q: And doesn't he deny guilt in some of them?

5 A: He denied -- he admitted guilt in the very first one and
6 he denied guilt in all of the subsequent ones.

7 Q: So what you're looking for is some -- some reaction that
8 he still has which might not be the same or might contradict
9 his denial; correct?

10 A: Well, I think the important thing is that he denies
11 arousal to children. He says he doesn't know why he did the
12 first one, but he denies that he's aroused to children. And
13 so the PPG is useful because it tells us what his arousal is
14 now, and it's very important to note that the PPG results
15 were very specific to the arousal pattern revealed by his
16 victims.

17 Q: Okay. Now, going back to the PPG itself, we've heard
18 testimony from Dr. Sutton about how it works. Any difference
19 there? The guy puts a band around his penis and they show
20 him these things?

21 A: Well --

22 Q: Basically?

23 A: There is a difference in the testimony. In every case,
24 the individual is shown the slides, the pictures of clothed
25 individuals, and the theory behind that is that they don't

1 have to show you naked pictures because the individual's
2 arousal pattern is so deeply entrenched that they don't need
3 to see the genitals. All they need to see is the age person
4 that they're aroused to, and that arousal will be
5 demonstrated. And they also hear the voices of the stimulus
6 set, and I have to disagree with Dr. Sutton. The Real Child
7 Voices are a standardized stimulus set that are used all over
8 the country.

9 THE COURT: The voices are?

10 THE WITNESS: Pardon?

11 THE COURT: The voices are?

12 THE WITNESS: The child -- the Real Child Voices
13 developed by Dr. Burke are used all over the country.

14 BY MR. BOGLE:

15 Q: Now, how does this thing work physically? How does it
16 work to a person?

17 A: Okay. So what happens is that an individual is placed
18 in a lab, and the reason they use a laboratory setting is so
19 that there's no extraneous stimuli that could cause arousal.
20 And the individual sits in a reclining chair and he undoes
21 his pants and places a napkin over his penis so that it's not
22 fully exposed, and the technician sits in another room and
23 there's a window between the two rooms so that the technician
24 can look at the back of the individual and make sure that
25 they're not doing anything to divert the test, but yet he's

1 not seeing the individual's penis.

2 And what happens is that they take a calibration system
3 and they calibrate the strain gauge for each individual based
4 on the circumference of that individual's penis, and they
5 place that strain gauge on the penis and then they show the
6 different voices and the different pictures.

7 Typically, they show four slides of each scenario so
8 that they have an appropriate measure of -- you know, maybe
9 there was something about one picture that aroused the guy,
10 but another one didn't. So they need to have a pattern so
11 that they can tell that it's a true arousal.

12 And the individual -- between each set of pictures or
13 between each picture, the individual detumesces, and that
14 means the blood flow reduces in the penis. Now, they cannot
15 proceed with the next slide until the individual has
16 completely detumesced.

17 So the period of time between each picture -- it depends
18 on the individual person. There is no standard amount of
19 time because each man's erection detumesces at a different
20 rate, but it's calculated for this particular person by
21 showing them some test slides. They have a couple of
22 challenge slides that they use. And so when he detumesces
23 completely, then they show him the next set of pictures; so
24 there's no carryover to the next set of pictures.

25 Q: And when you mentioned scenarios, the scenario -- an

1 example of a scenario might be, say, grammar school female?

2 A: That is correct.

3 Q: Another scenario might be adult female in a consensual
4 situation?

5 A: That's correct. They show slides of four different age
6 groups: infant males and females, preschool males and
7 females, teenage males and females, and adult males and
8 females. And I think I left out grammar school males and
9 females.

10 But in each of those, and if an individual is aroused to
11 adult males or females, then that's considered normal because
12 that's the typical arousal. If they are aroused to -- they
13 have pictures of buildings. If they're aroused to buildings,
14 then typically what that means is that the guy is trying to
15 enhance his arousal to neutral things so that his deviant
16 arousal is not detectable. So there's a reason for all the
17 different slides in there.

18 Q: Now, Doctor, why is it important for experts like you to
19 conduct this assessment in the context of the sexually
20 violent predator pre-commitment process?

21 A: Well, obviously, individuals in this kind of context
22 where they could be committed involuntarily don't necessarily
23 tell the truth about their arousal, and this is one means of
24 getting a physiological measure that will either verify or
25 not verify their arousal pattern.

1 Q: Now, you're on a contract with the Department of Mental
2 Health; right?

3 A: That's correct.

4 Q: To do these types of hearings and the annual reviews I
5 mentioned earlier?

6 A: Yes.

7 Q: Have you always ordered a PPG in pre-commitment cases
8 like this one?

9 A: Not always.

10 Q: Was there a time when you didn't realize that one was
11 even available?

12 A: That is correct. And there are times when someone so
13 clearly doesn't meet criteria as a sexually violent predator
14 that I don't even bother to order a PPG because it's so clear
15 to me that they don't.

16 Q: And in those cases, where you felt one was needed, once
17 you learned the department would pay to send the guy down to
18 Summerville to see Dr. Burke, you started using them?

19 A: Yes.

20 Q: Again, depending on the case; right?

21 A: Yes. And although there may be some variability between
22 labs, it's not an issue in this particular case because Dr.
23 Burke does them all for the Department of Mental Health and
24 so his are all standardized.

25 Q: Has there been some criticism about the PPG among

1 different experts?

2 A: Absolutely. There are some individuals who believe it's
3 too intrusive and should not be used. There are others that
4 recognize theoretically its use, but just don't believe that
5 it's useful in their particular situation.

6 I've been involved with the PPG since 1999. So 19 years
7 now, and I think it's a very valuable tool. It's not the be-
8 all end-all. I mean I wouldn't base my entire case on that
9 because there are men who are aroused to children that never
10 act on it. So I wouldn't even think of using the PPG if
11 there had never been an issue that the individual had acted
12 on that arousal.

13 But for Mr. Filyaw, we have four cases where he's acted
14 on that arousal and then now he's telling me that he doesn't
15 have arousal to children. So it's important that I get a
16 source of information that will tell me if he's telling me
17 accurately about his arousal or if he's not.

18 Q: So that's basically the reason why you use it?

19 A: That is correct.

20 Q: Okay. And the DSM-IV, which you read a few minutes ago,
21 is -- what's the DSM-IV in relationship to your work? What
22 does that book mean or what's its role in relation to your
23 profession?

24 A: Well, it's the DSM-5 now and it's the diag --

25 Q: I'm sorry. DSM-5.

1 A: Yeah. The Diagnostic and Statistical Manual, and it's a
2 book that has in excess of 800 pages. And it delineates the
3 criteria for any different kind of mental disorder that a
4 person could have.

5 Q: Okay. So for example, if you're deciding whether or not
6 to diagnose Mr. Filyaw as a pedophile, the DSM-5 has the list
7 of things a person has to meet or criteria to be qualified as
8 a pedophile, to be diagnosed as a pedophile; is that correct?

9 A: That is correct.

10 Q: Okay. Now, has the PPG been subject to any peer review
11 and publication that you're aware of?

12 A: Yes, it has. It's been peer-reviewed and publicized
13 since the 1950s. I happen to have five-inch binders, and I
14 have six of those five-inch binders on all the research on
15 the PPG over the years.

16 Q: And has the PPG been previously used in sexually violent
17 predator cases in South Carolina?

18 A: Yes, it has.

19 Q: Okay.

20 A: In every state that -- that I have testified in.

21 Q: What are the quality control methods used with the PPG?

22 A: Well, there is a protocol, a standardized protocol, that
23 must be used for the PPG. As I said, the way that the napkin
24 is placed, the way the gauge is calibrated, the fact that the
25 individual places the gauge on his own penis so that there's

1 no arousal from a third party, and the laboratory setting
2 because you don't want anything extraneous in that setting
3 that would stimulate arousal.

4 So ATSA has provided the standard protocol and the
5 guidelines for setting up the room. Monarch and Limestone
6 both follow those guidelines.

7 Q: What is ATSA? A-T-S-A?

8 A: Oh, ATSA, the Association for the Treatment of Sexual
9 Abusers. It's a large international organization devoted to
10 the study and research of sex offenders.

11 Q: And you are a member of that?

12 A: Yes, I am.

13 Q: Okay. Is the PPG consistent with recognized scientific
14 laws and procedures?

15 A: Yes, it is.

16 Q: Did you use it in assessing Mr. Filyaw?

17 A: I did.

18 Q: Was it part of the basis of your opinion?

19 A: Part.

20 Q: Was it the be-all and end-all in your conclusions?

21 A: No, it was not.

22 Q: Was it the sole basis of your opinion?

23 A: No, it was not.

24 Q: Okay. In fact, would it be professionally acceptable to
25 solely base a pre-commitment opinion on the PPG?

1 A: Absolutely not.

2 Q: Okay. Back in the mid-19 -- mid-2000s, 2005, 2004,
3 around then, did you testify in another case where you
4 testified against the use of the PPG?

5 A: I did. This was a 2004 case, and the reason that I
6 testified against it at that time was the lack of
7 standardization in the stimuli. At that time, everyone sort
8 of used different slides and different materials, and there
9 was no rhyme or reason, nowhere to -- no way to compare
10 apples to apples and oranges to oranges, but since that time,
11 the two major producers of the PPG have all standardized
12 their stimuli so that you can make comparisons within the
13 Limestone and within the Monarch.

14 Q: So if I were to read you your testimony from 2004, that
15 would not be applicable right now, would it?

16 A: That's correct.

17 Q: Okay.

18 MR. BOGLE: One moment, Your Honor.

19 Thank you, Doctor. Please answer any questions that
20 counsel may have or the judge may have.

21 THE COURT: Mr. Falk, go ahead.

22 CROSS-EXAMINATION

23 BY MR. FALK:

24 Q: Just because you sort of opened up the door and I'll
25 come back to it maybe tomorrow, is the word hebephilia in

1 this book?

2 A: It's not.

3 Q: Thank you. Let me just go --

4 MR. BOGLE: Can she be allowed to finish?

5 THE COURT: I'll allow her to explain, if she so
6 desires. Doctor, if you want to explain --

7 THE WITNESS: Yes. Thank you.

8 THE COURT: Feel free to do so.

9 BY MR. FALK:

10 A: In the DSM-5, there are eight listed paraphilic
11 disorders or eight listed areas of sexual deviance. 547 have
12 been identified, and hebephilia is one of those. For all of
13 the 539 paraphilic disorders that are not listed in the DSM-
14 5, they have a category called other specified paraphilic
15 disorder, and that is where you would list the 539 other
16 ones. The ones that are in there are the ones that have had
17 the most research over the years. They're the most common
18 ones.

19 THE COURT: Okay.

20 Q: I'm sorry. Now you've confused me. Is the word
21 hebephilia in this book?

22 A: I don't believe the word hebephilia is in the book.

23 Q: Okay. What kind of consent was my client given before
24 he gave the test?

25 A: There's a standard consent that goes along with the PPG.

1 I was not at Dr. Burke's office. I don't know what was
2 given. Typically, it's a written consent.

3 Q: Can I just -- what I need to know is what you have
4 firsthand knowledge of.

5 A: Okay.

6 Q: Were you present when he was given the consent?

7 A: No.

8 Q: Do you have a copy of the consent?

9 A: I do not.

10 Q: Do you know what he was advised?

11 A: I do not.

12 Q: Do you know if -- do you know whether he was advised
13 what the implication would be if he did not submit to the
14 test?

15 A: I'm not aware of that.

16 Q: Okay. Can you identify specifically any peer-reviewed
17 article which attests to the validity of the Burke Real Child
18 Voices?

19 A: I'm not aware of any specific ones, but they are
20 standardized.

21 Q: But are you --

22 A: I'm not aware of any article that -- I'm not aware of
23 any article that discusses them.

24 Q: So why do you know that they're standardized?

25 A: Because Dr. Burke clearly says in his articles that they

1 are standardized, and I know of other -- other states that
2 use those same voices.

3 Q: Okay. But Dr. Burke, who is the author of them, is
4 saying that they are standardized; is that correct?

5 A: Yes. In order for him to say they're standardized, they
6 would have to be standardized, and they're based on research.

7 Q: But you have not seen any of his research?

8 A: I have not seen the research specifically on those.

9 Q: Do you even know if it exists?

10 A: I contacted -- I contacted Dr. Burke's office to make
11 sure that what was stated in his report that the voices were
12 standardized was accurate and they said, yes, indeed, they
13 were based on research and they were standardized.

14 Q: But they didn't share the research with you?

15 A: They did not.

16 Q: Why didn't you give my client a lie detector test, the
17 polygraph test?

18 A: I would like to give all of my individuals polygraph
19 tests, but they're not used by the Department of Mental
20 Health. I do give them in Florida because we're permitted.

21 Q: Would you agree that a polygraph test is less intrusive
22 than a PPG test would be?

23 A: It is less intrusive and in the Correct Care program all
24 of the individuals get polygraphs.

25 Q: And is there another less intrusive method for getting

1 some of these -- getting a clue to their sexual interests?

2 And I'm referring to the Abel visual.

3 A: The Abel assessment is available and is less intrusive,
4 yes.

5 Q: Did you get anything from Dr. Burke other than this
6 report?

7 A: No, I did not.

8 Q: Do you know how much training Christina Riley [ph.] had
9 prior to giving this test?

10 A: I do not.

11 Q: Would you agree with Dr. Sutton that there can be a lot
12 of variability if this test is not performed accurately?

13 A: There can be.

14 Q: And do you have any firsthand knowledge of knowing that
15 procedures were followed in this case?

16 A: It is a standard procedure based on the -- you know,
17 it's a computerized test and, in order for the program to run
18 correctly, it has to be a standardized administration. I'm
19 certain that in some labs that varies. I can't say. I've
20 not been in Dr. Burke's lab. I've been in other PPG labs,
21 and it's a very clinical cut-and-dried procedure that's
22 always --

23 Q: You've not been -- you've not been in Dr. Burke's lab?

24 A: I have not been in his lab.

25 Q: As far as whether or not the examiner put the strain

1 gauge -- whether or not the -- who puts on the strain gauge?

2 A: The individual puts it on himself and then a computer
3 program is run to see if it's placed properly.

4 Q: What kind of interaction does the lab tech have with the
5 person?

6 A: The man sitting in the chair with his back to the window
7 with the technician behind, and there's a microphone in his
8 room and a microphone for the technician and they communicate
9 back and forth.

10 Q: But that's based on what you believe is the standard
11 protocol; is that correct?

12 A: That is the standard protocol for a PPG lab.

13 Q: But you have no firsthand knowledge whether or not Dr.
14 Burke follows that protocol?

15 A: I have not been in Dr. Burke's lab.

16 Q: How many pictures is he shown of each scenario?

17 A: Typically, four.

18 Q: Do you have any firsthand knowledge of how many pictures
19 are used in -- that Dr. Burke uses?

20 A: I do not know.

21 Q: And can you describe the picture that was used to depict
22 a child -- let me just pull one of them. Do you have any
23 firsthand knowledge to describe the picture that was used for
24 the preschool female coercive?

25 A: I don't.

1 Q: Do you have any firsthand knowledge of the pictures that
2 were used for any of these?

3 A: I have seen the entire stimulus set for the Monarch PPG.
4 There are numerous slides for each age range, and so they
5 vary.

6 Q: But you have not seen --

7 A: Some of them are in bathing suits. Some of them are in,
8 you know, T-shirts and shorts.

9 Q: Thank you. You've not seen the stimulus set used in the
10 Limestone one, have you?

11 A: I have seen part of the stimulus set. I recently saw it
12 at ATSA when they were demonstrating the Limestone at ATSA.

13 Q: So you've seen some of the images?

14 A: Some of the images for the Limestone.

15 Q: Do you know if those are the same images that were used
16 in Dr. Burke's lab?

17 A: It's a standardized set. So they -- if he's using the
18 Limestone, he's using that standardized set.

19 Q: Have you heard the Real Child -- any of the Real Child
20 Voices audio scenarios?

21 A: I have heard them, yes.

22 Q: Have you heard all of them?

23 A: I have heard all of them.

24 Q: How do you -- how can you --

25 A: Well, I take it back. I don't think I heard the female

1 challenge or the adult male challenge because those are
2 neutral.

3 Q: Well, when you've heard the audio ones, how -- how do
4 you know, for example, if one of the groups is teen female
5 coercive --

6 A: Right.

7 Q: Okay. How can you distinguish that voice between
8 preschool female coercive?

9 A: Well, I think that would be pretty easily distinguished
10 because they take -- they take -- in developing the voices,
11 they typically get samples of the age range of the
12 individuals that are shown in the pictures and they make a
13 determination about which one accurately or best simulates a
14 10-year-old child, a preschool child, whatever, and that's
15 part of the standardization process.

16 Q: But when he heard the scenario for, for example, the
17 grammar school versus the preschool for either female --
18 let's say grammar school and preschool female coercive. Is
19 it identified at the beginning that it's a grammar school
20 child or a preschool child?

21 A: Not typically.

22 MR. FALK: One moment, Your Honor.

23 THE COURT: Okay.

24 BY MR. FALK:

25 Q: You're saying that they're not identified --

1 A: Well --

2 Q: -- at the beginning?

3 A: It's typically the tone and quality of the voices.

4 There's some references in there and I'm not exactly -- I

5 don't remember exactly what the references are that tell you

6 what age they are without mentioning a specific age because

7 one individual might be aroused to 8-year-old girls and a 6-

8 year-old girl wouldn't do it. So, you know, there's a

9 reference to how old they are without saying an age.

10 Q: You're familiar with the ATSA guidelines for using

11 philometry and viewing time in polygraphy testing?

12 A: Yes.

13 MR. FALK: May I approach the witness?

14 THE COURT: Yes, sir.

15 BY MR. FALK:

16 Q: Are you familiar with -- I'm showing you the front cover

17 of the practice guidelines?

18 A: Yes.

19 Q: And then are you familiar with the appendix?

20 A: Absolutely.

21 Q: Okay. And what I was really getting at is what they

22 were talking about right here where they're talking about

23 that you can use audiotape stimuli sets?

24 A: Yes.

25 Q: But does -- is it not saying that you need to clearly

1 identify?

2 A: But when they refer to clearly specifying the age and
3 sex, it's pretty easy to tell if the voices are male or
4 female, but the age is not -- I'm an 8-year-old girl. The
5 age is, you know, I'm in third grade or that sort of thing so
6 that the reference isn't to a specific age, but it clearly
7 identifies whether it falls in the category of grammar
8 school, preschool, teen.

9 Q: Okay. So how do you know that that was done with the
10 specific ones used in the Limestone test?

11 A: It's standard across all of the testing.

12 Q: But you would admit that it says -- this article says --
13 and this is the practice guidelines for the ATSA and we've
14 talked about the ATSA before?

15 A: Yes.

16 Q: And it says that audiotape stimuli may be used to assess
17 sexual interest in children. If used, these stimuli clearly
18 specify the age and sex of the depicted individuals?

19 A: It's very easy to tell from the voices what gender the
20 child is on the voices. And the age group is the age range
21 that falls into the category, like grammar school. I'm a
22 fourth-grade girl. You know, I'm a fourth grade --

23 Q: Well, is that how it starts? I'm a fourth-grade girl?

24 A: Well, not necessarily, but integrated into the voices,
25 you know, it's, like, I'm in third grade. I like playing

1 with my little friends. We play dolls, you know.

2 Q: When you testified at I guess that Washington case --

3 A: Yes.

4 Q: You were testifying, and you were trying to stop
5 somebody from using the PPG test; is that correct?

6 A: In that specific case.

7 Q: Okay.

8 A: And it was because the stimuli were not standardized.
9 The individual that gave that test is an individual out of
10 Washington state who was sanctioned by the board of -- he was
11 a licensed mental health counselor. He was sanctioned for
12 sexual misconduct with his clients, and he was using stimuli
13 that were some of the old Farrell stimuli that were child
14 pornography.

15 And because they were not standardized, we were
16 attempting to block the use of the PPG in that particular
17 case. And in fact, the prosecutor reviewed the materials of
18 this individual in Washington and had police standing by to
19 arrest him if there were any child pornography slides that he
20 brought to the demonstration. So that is the -- the reason
21 we blocked it in that case.

22 Q: Now, these calculations that were on the back of this
23 test, you didn't perform those calculations, did you?

24 A: I did not, but I do have to correct Dr. Sutton's
25 testimony. It doesn't vary what the percentage of arousal

1 is. It's 20 percent is considered across-the-board between
2 Monarch and Limestone as the measure of arousal, 20 percent
3 greater than a normal circumference, and that's typically 4.7
4 millimeters of stretch.

5 Q: Did you do the math that's on the back of this test?

6 A: I did not.

7 Q: Do you know how it's done?

8 A: It's computer-generated. I have never had to do it
9 because I've -- all of my training has been on the computer.

10 Q: If you had the raw data, could you calculate a Z-score?

11 A: Oh, I could calculate a Z-score, absolutely.

12 Q: Did you check to see if these were accurate?

13 A: I did not. A Z-score is standard statistical training
14 in psychology; so I could certainly do that. I don't like
15 doing it, but I could.

16 MR. FALK: Your Honor, no further questions of this
17 witness.

18 THE COURT: Mr. Bogle?

19 MR. BOGLE: No more questions, Your Honor.

20 THE COURT: All right. Hold on a minute, Doctor. I
21 have some -- some questions.

22 DIRECT EXAMINATION BY THE COURT

23 THE COURT: Mr. Bogle referenced this DSM-5 and he's
24 referenced it in his memo to me, which certainly references
25 this -- the penile plethysmograph, but does -- does it within

1 this DSM-5 talk about the reliability of it -- of this test
2 other than to say it's an alternative?

3 THE WITNESS: In the past, there was a reference to the
4 --

5 THE COURT: Now, that's a yes or no question.

6 THE WITNESS: Oh.

7 THE COURT: Answer my question and then you can explain
8 it however you see fit. Okay? My question is within the
9 DSM-5 does it talk about the reliability of the test?

10 THE WITNESS: No.

11 THE COURT: All right. Now, please explain what you
12 were going to say.

13 THE WITNESS: So in the past, it was considered not
14 especially reliable because there was no standardization of
15 stimuli and there were, you know, people willy-nilly not
16 using standard procedures. Now, because there are two main
17 producers and they all follow standard protocol, it is
18 considered reliable and valid to a greater degree, but there
19 is about 20 percent of individuals who do not respond to the
20 PPG.

21 And so in those cases, you cannot possibly get a valid
22 result, and it's theorized that for men who view especially
23 violent pornography, maybe the tame pictures that they show
24 are not enough to stimulate arousal. There are men who
25 cannot become aroused in an artificial situation like the

1 laboratory. And so for those reasons, about 20 percent of
2 men do not respond and, therefore, there is some variability.

3 THE COURT: All right. Now, in this particular test on
4 Mr. Filyaw, it was done under the Limestone?

5 THE WITNESS: A Limestone. That is the newest.

6 THE COURT: Okay.

7 THE WITNESS: And the -- the -- considered the -- the
8 best right now.

9 THE COURT: All right. Now, it's my understanding --
10 and maybe I heard you wrong. When you all were talking about
11 standardization --

12 THE WITNESS: Yes.

13 THE COURT: All right. Did Burke -- Dr. Burke says it's
14 standardized?

15 THE WITNESS: That is correct.

16 THE COURT: And that is solely what you base your
17 opinion on as it being standardized; is that right?

18 THE WITNESS: Well, standardized in psychology means
19 that it's based on research.

20 THE COURT: All right. Only on his research?

21 THE WITNESS: Well, I don't believe it's based only on
22 his research because in order for something to be
23 standardized, it must have been tested on some population
24 other than the target population. And so for something to be
25 standardized, it has to have been subjected to research and

1 then tested on another population in order for it to be
2 considered standardized.

3 THE COURT: Is there any peer-review of that research?

4 THE WITNESS: I am not aware of any peer-reviewed
5 research specifically on Dr. Burke's Real Child Voices.

6 THE COURT: All right.. You talked briefly when Mr.
7 Bogle was questioning you about -- I think a couple of
8 notebooks of peer review? Did I hear you correctly? When
9 Mr. Bogle was questioning you, you referenced I believe two
10 notebooks of peer-review information, but none of that, if I
11 heard you correctly just now, is peer review of Dr. Burke's
12 study?

13 THE WITNESS: That's correct.

14 THE COURT: Okay.

15 THE WITNESS: I have six volumes of five-inch notebooks
16 of research on the PPG. I have not looked recently, but I
17 don't recall any specifically. I have articles that Dr.
18 Burke has contributed on the article, but I don't have any
19 that I recall that were specifically on his Real Child
20 Voices.

21 THE COURT: Okay. I hope I'm not showing my ignorance
22 here in asking this question, but as qualified as an expert
23 in South Carolina, Florida, and Missouri, have you seen or
24 been associated wherein Dr. Burke's process was utilized by
25 other doctors in Florida, in South Carolina other than Dr.

1 Burke, and in Missouri?

2 THE WITNESS: Yes. There are basically two well-known
3 sets of Real Child Voices. One was set or established by Dr.
4 Laws, L-a-w-s, but his was a long time ago. So although they
5 are still in use, Dr. Burke's are the most well-known recent
6 -- of recent.

7 THE COURT: So you don't know if those in other states,
8 such as Missouri and Florida, are using the same ones that
9 he's using here?

10 THE WITNESS: I have seen his voices used in Missouri, I
11 believe in Iowa, and definitely in Florida and South
12 Carolina.

13 THE COURT: Well, that's not my question.

14 THE WITNESS: Okay. Let me understand that.

15 THE COURT: All right. You said it's been two different
16 sets of voices.

17 THE WITNESS: Right.

18 THE COURT: Did I understand you correctly?

19 THE WITNESS: Yes. Those are the main ones.

20 THE COURT: Okay.

21 THE WITNESS: There are other ones.

22 THE COURT: What Dr. Burke, for instance, used in this
23 case with Mr. Filyaw, do you know that those are the same
24 voices -- I mean it's evidently changed; correct? Or does he
25 still use both sets of voices just depending upon who --

1 THE WITNESS: He has --

2 THE COURT: -- he is examining?

3 THE WITNESS: He has one set of --

4 THE COURT: Okay.

5 THE WITNESS: -- Real Child Voices.

6 THE COURT: Okay.

7 THE WITNESS: And he uses it in all of his exams, and I
8 have also seen them used in Florida, South Carolina,
9 Missouri, and I think maybe Iowa. I'm not so sure about
10 Iowa.

11 THE COURT: Okay.

12 THE WITNESS: They're very well known.

13 THE COURT: All right. I think I misunderstood what you
14 were saying a minute ago.

15 Now, you testified that you had prior training in the
16 use of the PPG?

17 THE WITNESS: Yes.

18 THE COURT: Back in 2009 or when?

19 THE WITNESS: Well, 1999 and 2011.

20 THE COURT: Okay. '99 and '11. All right.

21 You talked about the lab setting in which this is done.
22 All right. Mr. Falk asked you if you knew anything about the
23 tech that was there that day.

24 THE WITNESS: That's correct.

25 THE COURT: And you did not?

1 THE WITNESS: I did not.

2 THE COURT: All right. Do you have any firsthand
3 knowledge whatsoever about the test, the PPG test, that was
4 performed on Mr. Filyaw on that date?

5 THE WITNESS: The only way that I could have knowledge
6 of that would have been to be present, and no one can be
7 present except for the individual and Dr. Burke and the
8 technician.

9 THE COURT: Both of which would have been behind him in
10 a closed area with a window viewing the back --

11 THE WITNESS: That's correct.

12 THE COURT: -- of Mr. Filyaw?

13 THE WITNESS: That's correct.

14 THE COURT: Now, let me ask you this. You testified I
15 guess that there are images shown and, if I recall correctly,
16 you know -- let me see exactly what I wrote down here.

17 If I remember correctly -- I don't see where my notes
18 are, but I believe you testified there were four sets of
19 images. Tell me those four sets again?

20 THE WITNESS: Okay. There would be infant male and
21 female, preschool male and female, grammar school male and
22 female, teen male and female, and then the adult set would
23 have either a persuasive interaction with a female or male
24 and a coercive because it's not deviant to have sex with
25 adults. So the only thing that would be deviant if it was a

1 coercive situation.

2 THE COURT: All right. Is there a specific order in
3 which those images are shown to individuals that are
4 undergoing that test?

5 THE WITNESS: Well, it's a random order so that one
6 slide doesn't impact the other slide. You don't want to show
7 all four of your infant slides, you know, where the guy might
8 be aroused and then the arousal would carry over. So you
9 have different slides shown in a different order. They're
10 usually shuffled to some degree.

11 THE COURT: Have you seen all of these slides?

12 THE WITNESS: I have seen all of the slides for the
13 Monarch. I have seen some of the slides for the Limestone.

14 THE COURT: But you have no idea -- you said some, but
15 you haven't seen all of the slides that were shown to him on
16 this particular day?

17 THE WITNESS: I have not.

18 THE COURT: Well, you testified earlier that some are
19 shown fully clothed, some in bathing suits, if I heard you
20 correctly?

21 THE WITNESS: Well, all of them have clothes on.

22 THE COURT: Okay.

23 MR. BOGLE: There is no naked ones at all.

24 THE COURT: Correct.

25 THE WITNESS: But some have bathing suits, some have

1 shorts and T-shirts, some have dresses.

2 THE COURT: Well, let me --

3 THE WITNESS: You know, they're all in different stages
4 of apparel.

5 THE COURT: Well, let me ask you this. A bathing suit
6 30 years ago, for instance, is a lot different than a bathing
7 suit in today's time.

8 THE WITNESS: Right.

9 THE COURT: I mean what differentiates -- I mean does
10 one bathing suit cover more? Does that matter than maybe
11 someone wearing a thong bathing suit for instance? Do you
12 understand what I'm saying?

13 THE WITNESS: Well, only the children are in bathing
14 suits, and the bathing suits are your typical tank bathing
15 suit that's one piece.

16 THE COURT: All right. But you don't know because you
17 haven't seen them all?

18 THE WITNESS: Well, I've seen all of the Monarch. I've
19 seen part of the Limestone, but I've never seen any of the
20 slides that have a very revealing bathing suit.

21 THE COURT: Okay.

22 THE WITNESS: And it's only the children that are in the
23 bathing suits. The adults are not or the older people are
24 not.

25 THE COURT: Okay. Are these -- in the lab in which

1 they're tested, for instance, are there videos in there? I
2 mean you've testified that he's covered?

3 THE WITNESS: Yes.

4 THE COURT: So there's nothing -- whoever is being
5 tested is covered. It's not revealed. Are there any videos
6 that show whether he's looking at these images or got his
7 eyes closed and imagining images? Is there anything -- how
8 do you know that he's not -- once he sees an adult image that
9 he's not closing his eyes and thinking about that adult as
10 opposed to continuing to look at the images?

11 THE WITNESS: As part of the test, there's a button
12 press, and every time you see, like, a real little red light
13 on the screen, you have to press a button to show that you're
14 looking at that picture.

15 THE COURT: Okay.

16 THE WITNESS: And if you miss a certain amount of button
17 presses, then that shows that you're not viewing the pictures
18 and that would be an invalid administration.

19 THE COURT: Okay. You testified -- Mr. Falk was asking
20 you about the test results and you indicated it's computer-
21 generated?

22 THE WITNESS: Yes.

23 THE COURT: What, if any, calibration of this computer
24 is necessary on a regular basis, if at all?

25 THE WITNESS: There is. It's calibrated for each

1 individual person. If you'll remember, I said that the
2 strain gauge is calibrated initially. It's put on a cone
3 calibration and it's recalibrated several times during the --
4 the process to make sure that the strain gauge hasn't
5 stretched or it hasn't become faulty in some way. So the
6 strain gauge is calibrated during the administration.

7 THE COURT: Well, the --

8 THE WITNESS: And the computer has a program that
9 calibrates --

10 THE COURT: Okay.

11 THE WITNESS: -- to make sure that what they're
12 measuring is accurate, and that's part of the computer
13 programming that you have to learn when you're learning to
14 administer the program is how to do the set up and run it to
15 make sure that it's working appropriately.

16 THE COURT: And is that something the tech would do or
17 is that something Dr. Burke would do?

18 THE WITNESS: Well, either one could do it. Dr. Burke
19 administers some of his own. So either one of them would do
20 it, but anyone who is administering it would do the
21 calibration.

22 THE COURT: But you don't know who did this one?

23 THE WITNESS: I don't know who did this one.

24 THE COURT: Okay.

25 (WHEREUPON, there was a pause in the proceedings, after

1 which the proceedings resumed as follows.)

2 THE COURT: What, if anything, do you know personally
3 about any kind of quality control that was implemented in the
4 carrying out of this test on this individual other than what
5 may be in a report?

6 THE WITNESS: I do not know because I was not there.

7 THE COURT: Okay. I believe you testified that there is
8 20 percent of individuals that don't --

9 THE WITNESS: That don't respond at all.

10 THE COURT: Okay.

11 THE WITNESS: And so what that tells you is if you have
12 someone who doesn't respond, you can't say anything about
13 their arousal pattern. You can't say they do have arousal.
14 You can't say they don't have arousal.

15 But if someone responds and it's discriminated like
16 they're not responding to every scenario, then you basically
17 can tell that you have a good test because there's a
18 difference between -- in his responses. For example, Mr.
19 Filyaw didn't show much arousal at all to adult females. His
20 arousal was all to the children and teens.

21 THE COURT: Okay. All right. I think that's all the
22 questions I have. Mr. Bogle, I'll give you a chance for any
23 follow-up questions pursuant --

24 MR. BOGLE: Nothing further.

25 THE COURT: -- pursuant to any questions that I asked.

1 MR. BOGLE: Thank you, Your Honor, but I have nothing
2 further.

3 THE COURT: Mr. Falk, any follow-up questions to
4 anything that I've asked?

5 MR. FALK: No, Your Honor.

6 THE COURT: All right. Doctor, you may step down.
7 Thank you.

8 All right. Anything else, Mr. Falk? Mr. Bogle?

9 MR. BOGLE: Other than to summarize why we think it
10 should come in, I mean I'm prepared to argue that very
11 briefly to you, but there's no more testimony.

12 THE COURT: All right. Any more testimony, Mr. Falk?

13 MR. FALK: No more testimony.

14 THE COURT: All right. Since it was your motion, let me
15 hear from you as to why you think it should not come in.

16 MR. FALK: Your Honor, it's --

17 THE COURT: Briefly.

18 MR. FALK: Your Honor, it's harder to get a breathalyzer
19 test before a Court than it would be to get this PPG test. I
20 mean if there was a breath -- I'm just saying that on a DUI
21 case, we have a -- we have a camera there supervising the guy
22 for 20 minutes. There's certification on all the tests, and
23 so I think that there needs to be more assurances of
24 reliability in this case.

25 And also, I think that we've got a huge problem is that

1 I should be able to cross-examine Dr. Burke as far as the
2 reliability of this test too, so that he could respond to
3 what kind of quality control procedures were in place and
4 what kind of testing that his tech has had.

5 So I know that experts are allowed to rely on hearsay
6 evidence, but at some point it becomes unreasonable for their
7 reliance when they have no assurances as to the reliability
8 of the testing that they're using.

9 THE COURT: All right. Thank you. Mr. Bogle?

10 MR. BOGLE: Thank you, Your Honor. May it please the
11 Court.

12 Under State v. Council as interpreted by State v. Jones,
13 here's what you're looking for. Will the evidence assist the
14 trier of fact? Is the expert witness qualified? Is the
15 underlying science reliable?

16 I think we can't dispute the fact that Dr. Swan is
17 qualified. As far as reliability, of the science, we have
18 peer-review, according to Dr. Swan. We have prior
19 application of the method in this state, as well as other
20 states that's she seen. And particularly, she's seen the
21 Burke Real Child Voices developed by him used in many states.
22 The quality control methods have been testified by her and
23 the consistent --

24 THE COURT: Tell me which quality control because I
25 heard her say she didn't know.

1 MR. BOGLE: Well, the quality control as far as the
2 computer, the guy putting the gauge on himself, the computer
3 standardizing how much arousal this guy will have, and then
4 the delay times between each time for him to, you know, quiet
5 down, if you will, and then get aroused again.

6 THE COURT: She didn't know what quality control
7 procedures were in place and whether or not they were carried
8 out by whomever administered the test, according to her. She
9 didn't know if it was a tech or Dr. Burke himself.

10 MR. BOGLE: Well, this kind of comes back to a side
11 question.

12 THE COURT: Yes, sir.

13 MR. BOGLE: As to whether or not she can testify about a
14 report written by somebody else. And in the expert witness
15 field, I think it's Rule 803(4) where the doctor testified an
16 exception to the hearsay rule there relates to statements
17 made for the purpose of medical diagnosis or treatment.

18 So she can testify about it. The same thing is if you
19 have a doctor who is examining you for a heart condition and
20 sent out for a blood test and it comes back and he tells you
21 about that blood test results, even testifies about it, it
22 doesn't necessarily call or bring in the guy that actually
23 ran the test. He's relying upon a test done consistent with
24 quality control methods by somewhere else.

25 Yeah, she wasn't there. She didn't see it. Neither did

1 Dr. Sutton. She's seen it used. She's seen it used a lot.
2 It's been used in South Carolina.

3 So I would submit that based on the testimony you've
4 heard, it meets the State v. Council criteria, and that Dr.
5 Swan can testify about the results of this test, particularly
6 as it applies to Mr. Sutton. Remember, he's got three lewd
7 act convictions. He's denying --

8 THE COURT: You mean Mr. Filyaw. You said Mr. Sutton.

9 MR. BOGLE: Filyaw. I'm getting ahead of myself.

10 THE COURT: Getting that record straight.

11 MR. BOGLE: Sorry, Your Honor. All right. Mr. Filyaw.

12 THE COURT: All right.

13 MR. BOGLE: He's got three lewd act convictions. He's
14 denying at least one of them. The test shows he's still
15 aroused to that type of thing. So Mr. Filyaw would fit in
16 the criteria.

17 Again, it's not the be-all end-all of her evaluation.
18 It's part of a comprehensive evaluation and it's a test used
19 by the Department of Mental Health and by other experts in
20 that field.

21 THE COURT: Well, I don't disagree with you, Mr. Bogle,
22 concerning Dr. Swan's qualifications, that it could assist
23 the trier of fact, but these other elements of which the
24 Court is required to look at, publication and peer review of
25 the technique. I mean did I miss something on that as far as

1 publications of Dr. Burke's technique? Because she certainly
2 testified in here there wasn't any peer review of his
3 technique that she was aware of, unless I misunderstood that.

4 MR. BOGLE: She did. She also mentioned I think an
5 article where he was a co-author of and how she'd seen his
6 thing used -- this test used in other jurisdictions.

7 THE COURT: But it wasn't any peer review.

8 MR. BOGLE: Not that I recall, Your Honor.

9 THE COURT: Okay. And I mean --

10 MR. BOGLE: Hold on, Judge. I think there was testimony
11 that the process, the technique has been peer-reviewed, not
12 necessarily Dr. Burke himself, but the process, just like the
13 process for testing your blood.

14 THE COURT: Okay. But I -- well, I disagree that that's
15 the same type of process here, and we can agree to disagree
16 on that. I think it's different. This is not a situation
17 wherein, say, you're a doctor and you say, Mr. Brown, you
18 need an x-ray of your arm. Go down here and let's get this
19 x-ray. And they come back and it shows that my arm is
20 broken. Certainly, without any question, the method and
21 manner in which -- or the procedure that that x-ray
22 technician went through in x-raying my arm doesn't matter
23 because that's something I can -- you can see. It doesn't
24 matter.

25 But I have some -- whether -- you might not believe it's

1 genuine or legitimate. I have some concerns about her
2 testifying as to what Dr. Burke's ultimate conclusions were
3 here when Dr. Swan -- she's been in front of me before.
4 She's testified in court and I have the utmost respect for
5 her, for you, Mr. Falk. I don't know this doctor, Colbi --
6 Colbi Sutton.

7 But I have some concern about her testifying as to how
8 all of this was done when she wasn't there and she wasn't
9 overseeing it and when she was certainly trained in the
10 method and manner of how it's supposed to be done and she's
11 simply relying -- and I don't know Dr. Burke, but there's a
12 problem there from getting to A to Z without filling in that
13 middle ground there, so to speak, and I have a concern about
14 that.

15 You know, she testified as far as quality control
16 procedures used to ensure reliability here, but she doesn't
17 know -- she can't testify to that. Or did I miss something
18 there? I mean I don't -- help me out.

19 MR. BOGLE: I thought she covered that. I asked her
20 specifically what the quality control methods were, and she
21 testified about it on direct in my -- in my examination.

22 THE COURT: I mean she talked about the lab and that
23 kind of stuff, but when I started asking specifics about
24 quality control, I don't think she could answer that, and
25 I'll allow her to fill you in like she did a minute ago if

1 she remembers anything.

2 I'll hear from you in a minute, Mr. Falk.

3 MR. BOGLE: Again, her testimony was that the guy was in
4 the standardized laboratory set up. That's reinforced by the
5 fact that she's seen these things used in other
6 jurisdictions, and that has been accepted in this state.

7 THE COURT: But she's never even visited this place.

8 MR. BOGLE: Well, none of us have, including Dr. Sutton.

9 THE COURT: Well --

10 MR. BOGLE: No one has been there.

11 THE COURT: But I think it's your -- with all due
12 respect, I think it's your burden on this motion to ensure
13 that those qualifications under this law under this case are
14 met. I may be wrong on that.

15 MR. BOGLE: You're right, but we just -- we think we met
16 that in her direct examination.

17 THE COURT: Well -- and I wrote down -- I stopped after
18 I questioned, but she says I'm not aware of any peer review
19 of Dr. Burke's Real Child Voices. I specifically wrote that
20 down.

21 When I asked about quality control, she says not sure
22 because I wasn't there. And I'm just hitting back on things
23 that I think I've got to consider here.

24 I'll go -- this is what I'm going to do. In fairness to
25 each of you, Mr. Falk, you indicated -- you stood up a minute

1 ago. I told you I'd come back to you. Anything you want to
2 tell me?

3 MR. FALK: No, Your Honor.

4 THE COURT: Okay. In fairness to each of you, I'll
5 allow you to go back through your notes overnight. I'm going
6 to go back through mine and look at it and further think
7 about it, but I'll tell you in fairness to both of you, I
8 mean I'm leaning towards not letting her testify to this
9 because I have some concerns about it.

10 Had Burke come in here and testified as to -- and she
11 ordered the procedure to be done, but I think I have some
12 concerns about it here, with all due respect. I'll let you
13 all look at it some more overnight and think about it, and
14 we'll reconvene at 9:00 in the morning -- at 9:00 before the
15 jury gets here.

16 If you all make sure Mr. Filyaw is back here at 9:00 and
17 dressed, not in an orange jumpsuit, but dressed in his
18 clothes so we can address any further argument and my ruling
19 on this at 9:00.

20 But I'm telling you that that's my leaning right now
21 just so y'all can plan accordingly for tomorrow.

22 MR. BOGLE: Thank you, Your Honor.

23 THE COURT: In case I stay with that ruling. Okay?

24 MR. BOGLE: Yes, sir.

25 MR. FALK: Just security, are you going to want him

1 shackled? Or are you going to want ankles and just leave
2 that to the bailiffs?

3 THE COURT: In the morning?

4 MR. FALK: Before the jury, yes.

5 THE COURT: He's not -- no, he's not going to be
6 shackled or anything.

7 MR. FALK: Okay. I just wanted to --

8 THE COURT: I mean I don't think that's appropriate.

9 MR. FALK: I agree, Your Honor.

10 THE COURT: I think the law is clear on that.

11 Now, tomorrow, Mr. Bogle and Mr. Falk, this big podium
12 here that's about ten feet tall, if y'all want to move it
13 around or whatever, I saw it and I meant to say something
14 when Dr. Swan was up here. I could tell you were kind of
15 peering around it, Mr. Bogle. If you all need to move that
16 tomorrow, y'all can move it however y'all deem appropriate.

17 MR. BOGLE: Thank you, Your Honor.

18 MR. FALK: Thank you, Your Honor.

19 THE COURT: All right. I'll see you all at 9:00 in the
20 morning. Please make sure he's here by 9:00.

21 (WHEREUPON, the proceedings adjourned for the day at
22 5:32 p.m.)

23 FEBRUARY 13, 2018

24 (WHEREUPON, the proceedings resumed at 9:09 a.m.)

25 THE COURT: All right. Anything further from the State

1 by way of argument concerning this matter that we've
2 concluded?

3 MR. BOGLE: No, Your Honor. I think I summarized our
4 position yesterday.

5 THE COURT: Okay. Anything further from defense
6 counsel?

7 MR. FALK: I'd be happy to re-summarize, but I think
8 it's not necessary.

9 THE COURT: Unless there's anything new, anything -- how
10 about this? Anything new other than what you argued to me
11 yesterday on this matter?

12 MR. FALK: Well, there was one thing I think I found
13 out.

14 THE COURT: Okay.

15 MR. FALK: Dr. Burke has a PhD in counseling. He has a
16 degree from The Citadel in psychiatry.

17 THE COURT: Okay.

18 MR. FALK: And so to the extent that that's the best I
19 could find on his CV, I thought that would be relevant to the
20 Court.

21 THE COURT: Okay.

22 MR. BOGLE: We know he has -- Dr. Burke has been
23 qualified as an expert in pre-commitment cases before and as
24 a defense witness in these cases.

25 THE COURT: Okay.

1 MR. BOGLE: He's got a lot -- he's done a lot of
2 sexually violent predator matters independent of the PPG,
3 just as an expert witness.

4 THE COURT: Okay. All right. Well, like I told each of
5 you yesterday when we broke, I told you where I was leaning
6 and what I was inclined to do, but in fairness I wanted to
7 tell you that so you could prepare accordingly, but I wanted
8 to go back and look at my notes, as well as some law
9 pertaining to the admissibility of expert evidence.

10 My ruling is going to remain the same. I'm not going to
11 allow the test results in on the PPG, and I'm going to go
12 through these factors that I have to consider that hopefully
13 you understand -- the State understands what my reasoning is.
14 It may not agree with it certainly, but I believe it's
15 appropriate.

16 One, whether the evidence will assist the trier of fact.
17 I'm not going to necessarily disagree with that. I think Mr.
18 Bogle hit on that and I think it could -- could assist them.

19 Two, whether or not the expert is qualified, whether Dr.
20 Swan is qualified. You know, without a shadow of a doubt,
21 she's certainly qualified.

22 Three, whether or not the underlying science is
23 reliable. And in determining reliability, the Court under
24 State v. Jones, 383 S.C. 535, which is a 2009 case, set out
25 several factors to determine reliability. Those factors

1 include the publications and peer review of the technique.
2 Two, prior application of the method to the type of evidence
3 involved in the case. Three, quality control procedures used
4 to ensure reliability. And, four, the consistency of the
5 method with recognized scientific laws and procedures.

6 You know, going back to the reliability and before
7 getting into the Jones factors, Dr. Sutton testified that you
8 can't show -- can't consistently show reliability. Dr. Swan
9 testified that there's 20 percent of individuals that are
10 tested who do not respond at all.

11 With regards to publications and peer review, there are
12 a multitude of publications concerning the PPG, many of which
13 support and many which do not support its utilization.
14 Suffice it to say that it's a controversial method. There's
15 no universal agreement and there are not the same results in
16 each case.

17 Each doctor -- and I went back through my notes. Dr.
18 Sutton, as well as Dr. Swan, said there was no peer review of
19 Dr. Burke's methods. In fact, Dr. Swan said that Burke had
20 not shared his research with Dr. Swan, and I'm not sure if
21 his research has been shared with anyone, at least I didn't
22 hear that.

23 Going down to -- and I'm going to skip factor number 2
24 under Jones, prior application of the method to the type of
25 evidence involved in the case. I mean I think that the State

1 apply pointed out through the DSM-5 that it is certainly --
2 the PPG is mentioned in there. And the question that I had
3 to Dr. Swan while she was on the stand yesterday, even in the
4 DSM-5 it doesn't talk about the reliability of this method.

5 Going on down to quality control, Dr. Swan testified
6 that she was not aware of quality control. She had not been
7 to Burke's lab, not sure who ran the test or the level of the
8 training of the individual that ran the test.

9 Dr. Swan testified she didn't know if Dr. Burke himself
10 -- and I'm assuming it's a male. Dr. Burke is a male?

11 MR. BOGLE: Yes.

12 THE COURT: But she was not sure if Dr. Burke performed
13 the test or if some tech performed the test. Furthermore,
14 there's no indication of what level of training, education,
15 experience that, if the tech ran it, what that level of
16 experience, training, education, etc., was.

17 Dr. Sutton testified that there were many factors that
18 go into this test that could cause deviation in the test.
19 And Dr. Swan also testified that there can be a variability-
20 in the test results if it is not performed correctly.

21 Finally, the consistency of method -- of the method with
22 recognized scientific laws. There certainly was some
23 testimony from Dr. Swan I guess concerning some
24 standardization, assuming that it's done according to Dr.
25 Burke, but the only testimony I heard as far as

1 standardization was that Dr. Burke says that it's
2 standardized and so it must be.

3 But Dr. Swan testified that to say it's standardized,
4 certain things must come into play there. Dr. Sutton
5 testified that it's not standardized among labs. So there's
6 somewhat some controversy or some discrepancy between the
7 testimony of the two doctors concerning that issue.

8 But at the end of the day in looking at all these
9 factors, I do have a genuine concern about the reliability of
10 such and, as the gatekeeper on the admissibility or the
11 inadmissibility of such, I do not believe that it would be
12 appropriate for it to be admitted in this case.

13 So that's my ruling. I think I've made as clear a
14 record on that as I -- as I could. You know, it's kind of
15 surprising to me in the number of years that we've been
16 dealing with these SVP cases in this state that this -- this
17 issue isn't or hasn't come up before our appellate courts for
18 them to make a ruling on it.

19 Now, it's been -- certainly, you've got cases in
20 Georgia, you've got cases in North Carolina, and we're kind
21 of sandwiched in the middle here on this issue. You know, if
22 the State disagrees with me on this, take it up. Let's find
23 out what our appellate courts have to say on it. If I'm
24 wrong, I want it corrected where it can be -- where it can --
25 where we can have some direction on this issue.

1 But I think --

2 MR. BOGLE: One of the problems we have is the PPG has
3 been mentioned when the Court has summarized the evidence
4 against the guy in several cases, but, like you say, no
5 direct issue on admissibility.

6 THE COURT: Right. Well, I know. I mean there's -- I'm
7 sure y'all disagree with me or at least the State -- you all
8 disagree with me.

9 You know, I was thinking about this thing last night
10 and, you know, it's -- you analyzed it somewhat to a drawing
11 blood maybe and I think it's just -- and you don't go into
12 the training or education of someone drawing blood, you know,
13 in an admissibility, but this is a different animal, so to
14 speak, I think and, you know, maybe it is more akin to a
15 polygraph, as argued by Mr. Falk. However, you know, there's
16 a case out of North Carolina that certainly differentiates
17 the polygraph as opposed to this PPG test and why, you know,
18 the polygraph is different than this test.

19 But that's going to be my ruling on this case. And like
20 I said, if the State feels so strongly about it, I mean
21 appeal it and let's find out what our Supreme Court says, but
22 I think it's the appropriate thing to do in this case and
23 that's why I'm doing it. So --

24 Okay? That's my ruling. Anything further from the
25 State?

1 MR. BOGLE: No, Your Honor.

2 THE COURT: Defense counsel?

3 MR. FALK: Your Honor, I was thinking about this last
4 night and hoping that you would agree with my opinion and,
5 having spent some time to try and keep this door closed, I
6 don't want to inadvertently open the door.

7 And what I was concerned about is there's some testimony
8 that my client gave to the forensic evaluator and I think my
9 evaluator about him not being able to sustain an erection.
10 And provided I don't -- provided Dr. Sutton doesn't say that,
11 I don't want that to somehow be, you know, the fact that he
12 had some response to the PPG to somehow opening the door, if
13 that comes in.

14 THE COURT: Well, I mean I don't know. Other than what
15 you're telling me right now, you know, during the process of
16 that test if it came out that he was able to sustain such, I
17 think you may -- if during that test -- you know, it's kind
18 of like you can somewhat get on a slippery slope there, so to
19 speak, and open that door I think.

20 MR. FALK: I'm not planning on opening the door is what
21 I'm saying.

22 THE COURT: Okay. Well, you may not, but, you know,
23 your witness very well could or, if your client takes the
24 stand, he could.

25 MR. FALK: Yes, Your Honor.

1 THE COURT: You know, you've seen many of times, as I'm
2 sure you have as well, you know, your witness get on the
3 stand and they testify and they open the door to something
4 that they don't need to open the door to. There's no turning
5 back at that point. So that's going to be --

6 MR. FALK: Thank you, Your Honor.

7 THE COURT: That's all I can say I mean, you know.

8 MR. FALK: I appreciate that, Your Honor.

9 THE COURT: Yes, sir. All right.

10 MR. BOGLE: One issue we talked about yesterday, the
11 exhibits that are coming into evidence on the case --

12 THE COURT: Yes.

13 MR. BOGLE: We've got certified copies of three
14 convictions.

15 THE COURT: Yes, sir.

16 MR. BOGLE: And what I'm talking about is the sentencing
17 sheet, the indictment, and in one of the cases there was a
18 separate sheet of paper where they just used in Florence
19 County back in 1995.

20 THE COURT: Okay.

21 MR. BOGLE: Where the guy just says he pleads guilty.
22 I've got this for all three. Now, on the --

23 THE COURT: Well, let me ask you this. On those
24 sentence sheets -- and I'm looking through the back side. It
25 appears that there are some redactions in some of it. Are

1 the sentences redacted?

2 MR. BOGLE: No, they're not. The only thing we're --
3 nothing is redacted from these.

4 THE COURT: Okay.

5 MR. BOGLE: Okay. My question is -- and Mr. Falk and I
6 talked about this. On the Florence County indictment, of the
7 three indictments, only one of them mentions the name of the
8 victim by name. It says [REDACTED] Minor 1. So what I'm
9 thinking is -- well, Mr. Falk mentioned this. You know,
10 during the voir dire, that name never came up, but what if
11 some juror knows the [REDACTED] family?

12 THE COURT: Well, I mean --

13 MR. BOGLE: What I'm suggesting we do is we just redact
14 it out of this certified copy, just black it out with a
15 Sharpie or something.

16 THE COURT: I think so because the ultimate issue here
17 is not who the victim was. It's whether or not he was
18 convicted of it.

19 MR. BOGLE: Right.

20 THE COURT: And that's what plays into whether or not
21 they decide he needs to be committed.

22 MR. BOGLE: Now --

23 MR. FALK: I think --

24 MR. BOGLE: During the testimony of both experts, when
25 they refer to the victims, I think Dr. Swan uses first name

1 and last initial. So she might say [Minor 1] I think in
2 Dr. Sutton's report, she may say [Minor 1]

3 DR. SUTTON: Right.

4 MR. BOGLE: So at no point does either expert mention
5 the last name of the victim.

6 THE COURT: Well, I'd ask that the experts be consistent
7 on how they reference these individuals, whether y'all can
8 agree on [Minor 1] or whatever the initials are, just to be
9 consistent so, one, it doesn't confuse the jury and, two, it
10 doesn't lead the jury to believe that there are two people
11 when in actuality maybe there's just one. Okay?

12 MR. BOGLE: So we need to --

13 THE COURT: So y'all just need to come to, I think, an
14 agreement on that, and I see them talking across the --

15 DR. SWAN: I'm just going to use the first name and no
16 last initial.

17 MR. BOGLE: Okay.

18 DR. SUTTON: I'll do the same.

19 MR. BOGLE: The first names are all different.

20 THE COURT: All right.

21 MR. BOGLE: So we need to black out the last name at
22 least on this indictment.

23 THE COURT: That's fine. Any objection, Mr. Falk?

24 MR. FALK: No, no. That's what I want to do.

25 THE COURT: Well, like I said, I just don't one there to

1 be confusion and a jury be -- a juror be confused about the
2 number of people involved.

3 MR. FALK: Yeah, that's fine.

4 MR. BOGLE: Okay.

5 MR. FALK: If they're going to use first names, then
6 yeah, just the last name.

7 MR. BOGLE: Right there and right there. As you and I
8 looked yesterday, only this indictment gave the name of the
9 victim. So this one here just says body of a child.

10 MR. FALK: Uh-huh.

11 MR. BOGLE: Okay. And this one here just says minor
12 less than so-and-so years of age. It doesn't give the name.
13 It says body of -- body of a child or a minor. Do you have a
14 stapler?

15 THE COURT: I was getting ready to ask that myself.

16 MR. BOGLE: Oh, you got the good one. Can I take this
17 back to Columbia?

18 THE COURT: All right. Can I -- can we bring the other
19 jurors in, if they're here?

20 MR. BOGLE: Yes.

21 THE BAILIFF: Yes, sir.

22 THE COURT: Do you want to go ahead and pre-mark those?
23 I mean are you all in agreement with that?

24 MR. FALK: Yes, sir.

25 THE COURT: Okay. Just to kind of speed the process

1 along.

2 MR. BOGLE: Right.

3 (WHEREUPON, the indictments were pre-marked as State's
4 Exhibits No. 1, 2, and 3.)

5 THE COURT: And I'm going to give the jury my opening
6 charge that I typically do in a criminal case, you know,
7 tailoring it to this particular case. There are some changes
8 in it, but that opening charge specifically deals with the
9 burden. It talks about the burden of proof too.

10 MR. BOGLE: To recap, as I understand your rulings
11 yesterday, I can read or paraphrase the legislative intent
12 from the statute? We talked about that yesterday.

13 THE COURT: I'm going to let you. I mean I'm going to
14 -- but I'm not going to sit here and let you go into some
15 long, drawn out history of the -- but I mean I don't think
16 it's unfair to allow you to give them some background on why
17 we're here because it is a different -- it's not your typical
18 civil case and it's not your typical criminal case. I mean
19 it's -- I don't have a problem with that.

20 MR. BOGLE: When they told their friends and family they
21 were coming in here in civil court, they're probably thinking
22 auto wrecks.

23 THE COURT: Right.

24 THE BAILIFF: They're out here, Judge.

25 THE COURT: Yes, sir. You can bring them on in. If you

1 all need to go to the restroom or anything, why don't you go
2 ahead? I'm going to step down because I need to grab
3 something.

4 (WHEREUPON, the jurors were escorted from the hall to
5 the jury room and there was a break in the proceedings
6 from 9:28 a.m. until 9:33 a.m., after which the
7 proceedings resumed as follows.)

8 THE COURT: Can the lawyers approach a minute, please?

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

10 THE COURT: I'm just looking at these opening general
11 charges here.

12 MR. BOGLE: Uh-huh.

13 THE COURT: Probably -- let's see. I think I'm going to
14 just give them the civil charge because I don't think it
15 talks about burden of proof at all, unless y'all would rather
16 me give them the criminal charge.

17 MR. BOGLE: It just doesn't mention burden of proof at
18 all?

19 THE COURT: That's what I was looking for.

20 MR. BOGLE: Yeah. I mean they'll hear plenty both in
21 the opening arguments and your closing charge about what the
22 burden of proof is here, and you told them yesterday I think.

23 THE COURT: I did.

24 MR. BOGLE: Well, you gave an introduction to the whole
25 -- the qualified panel --

1 THE COURT: Right.

2 MR. BOGLE: -- about the burden of proof. Has that
3 still got truth language in there or is that an older one of
4 yours?

5 THE COURT: Do what?

6 MR. BOGLE: That's your charge. Okay.

7 THE COURT: Yeah.

8 MR. BOGLE: We had to go take all the seek the truth
9 language out.

10 THE COURT: Yeah.

11 MR. BOGLE: I think I got it all.

12 THE COURT: Yeah. I think I'm going to do this. I
13 don't think there's any burden of proof stuff in here. The
14 only difference was is I read --

15 MR. BOGLE: You read part of my charge I think.

16 THE COURT: All right. Let me do this. In this
17 criminal charge, it talks over here that the defendant is
18 charged in the indictment -- I was just going to simply say
19 the State has brought this case --

20 MR. BOGLE: Yeah.

21 THE COURT: -- under the Sexually Violent Predator Act,
22 you know, seeking civil commitment of Mr. Filyaw. This is
23 not a criminal proceeding. Rather, it's seeking civil
24 commitment. The State bears the burden of proving its case
25 beyond a reasonable doubt.

1 MR. BOGLE: That's enough.

2 THE COURT: I'll just simply say that.

3 MR. BOGLE: That, and just remember to call him
4 respondent instead of defendant.

5 THE COURT: On this civil one and just --

6 MR. BOGLE: Yeah.

7 THE COURT: That's what I think I'm going to do. Okay?
8 I'll try to get it right on this.

9 (WHEREUPON, the bench conference ended and the
10 proceedings resumed as follows.)

11 THE COURT: All right. Anything from the State before I
12 bring the jury out?

13 MR. BOGLE: No, Your Honor.

14 THE COURT: Defense counsel?

15 MR. FALK: No, Your Honor.

16 THE COURT: All right. If you'll bring me the jury,
17 please, ma'am.

18 THE BAILIFF: Yes, sir.

19 (WHEREUPON, the jury entered the courtroom at 9:38 a.m.)

20 THE COURT: Good morning, ladies and gentlemen. I hope
21 you all had a nice evening yesterday and are ready to proceed
22 here today.

23 What we are going to do is before we begin the trial,
24 I'm going to ask the clerk if she'd swear the jury. Madam
25 Clerk, would you swear the jury, please?

1 THE CLERK: Yes, sir.

2 You shall -- or please raise your right hand.

3 THE COURT: Please stand and raise your right hand.

4 THE CLERK: You shall well and truly try the issues
5 joined in this case between the plaintiff and the defendant
6 and a true verdict render according to the law and evidence,
7 so help you God.

8 THE COURT: All right. Ladies and gentlemen, I'm going
9 to give you somewhat of an introduction to the trial of this
10 case before we begin.

11 As I told you yesterday in my general introduction to
12 this trial, the State -- the State has brought this case
13 under what's called the Sexually Violent Predator Act in this
14 state. The State seeks the civil commitment of Mr. Jimmy Ray
15 Filyaw for long-term control, care, and treatment in a secure
16 facility. This is not a criminal proceeding seeking
17 incarceration, but rather is a proceeding seeking a civil
18 commitment.

19 Now, as I said, the State has brought this case and,
20 therefore, the State must prove to you beyond a reasonable
21 doubt -- beyond a reasonable doubt -- and I'll further
22 explain that later -- beyond a reasonable doubt that Mr.
23 Filyaw is a sexually violent predator.

24 Now, before we begin the trial, I want to tell you that
25 this trial will probably be different from what you might

1 expect. Many people do not have the chance to attend actual
2 court sessions as you're doing now and may think from
3 watching television or movies or reading books that trials
4 are always full of high drama, intense action, and riveting
5 circumstances.

6 Now, while all of these things may be true at times,
7 this trial, ladies and gentlemen, is not for entertainment.
8 It is a fundamental part of our democracy, an effort to make
9 sure that justice is done between the parties. Making sure
10 that justice is done is often slow, deliberate, and
11 repetitive, the opposite of what you may have seen on
12 television or movies or read in books.

13 This courtroom is a place of honor dedicated to the
14 protection and preservation of citizens' rights through what
15 many have called the greatest justice system ever created.
16 The attorneys that are appearing before you are advocates for
17 the parties that they represent, but, first and foremost,
18 they are officers of the Court sworn to uphold the integrity
19 and fairness of our judicial system. You should expect them
20 to be professional, competent, and ethical in the
21 representation of their clients' interests.

22 Now, what I will now say is intended to serve as an
23 introduction to the trial of this case. These remarks are
24 not a charge on the law in this case. I will instruct you on
25 the applicable law at the end of the trial before you retire

1 to consider your verdict. This, ladies and gentlemen, is
2 merely an explanation of the procedure that we will follow in
3 the trial of this case so that you may better understand what
4 may be happening.

5 You have been selected as fair and impartial jurors
6 whose purpose is to find and determine the facts. You are
7 the sole judge of the facts. If at any time I make any
8 comment regarding the facts, you must disregard it. You are
9 to determine the facts from the testimony that you hear and
10 any other evidence that is -- that is presented.

11 You should not be influenced by any opinions or
12 statements you may have heard outside of this courtroom. It
13 is especially important that you perform your duty of
14 determining the facts diligently and conscientiously because
15 ordinarily there is no way to correct an erroneous
16 determination of the facts by a jury.

17 Now, when you comply with your oath to impartially
18 determine the facts of this case, you will have fulfilled
19 your duty as jurors and no one will have the right to
20 criticize your verdict.

21 Now, on the other hand and with equal emphasis, the same
22 law that makes you the judge of the facts makes me the judge
23 of the law. The law as given by the Court is the only law
24 that you may consider. You must accept and follow it, even
25 though you may disagree with it.

1 I cannot tell you all, ladies and gentlemen, what the
2 facts are, and you cannot disagree with me about what the law
3 is or should be. Your job is to take the law as I give it to
4 you and apply it to the facts as you find them from the
5 testimony of the witnesses and any other evidence that is
6 presented. After doing that, you will render your verdict
7 under the solemn oath that you just took as jurors.

8 Now, until I advise you to begin your deliberations, you
9 must not discuss this case with anyone, including your fellow
10 jurors, friends, family members, and anyone involved in the
11 case. The attorneys -- as I told you all yesterday, the
12 attorneys and parties involved in this case have been
13 instructed not to speak to you. So if you see them outside
14 of this courtroom and they do not speak, they are not being
15 unfriendly. They are simply following this Court's
16 instructions.

17 Now, during your deliberations, you may only discuss the
18 case in the jury room with your fellow jurors because they
19 have seen and heard the same evidence that you have. You
20 must not discuss the case with anyone other than your fellow
21 jurors until you have returned a verdict and the case is at
22 an end.

23 I remind you that you must decide this case based solely
24 on the evidence presented here in this courtroom. This means
25 that during the trial, you must not conduct any independent

1 research about the case, the facts of the case, the evidence
2 presented in the case, or the people or organizations
3 involved in any way in the case.

4 Please do not try to find out information from any
5 source outside of this courtroom. In other words, you must
6 not look at dictionaries or other reference materials, search
7 the Internet, websites or blogs, or use any other electronic
8 tools to get information about this case to help you decide
9 the case.

10 You may not use computers, telephones, cell phones,
11 smart phones, tablets, the Internet, or other tools of
12 technology with communication capabilities at any time while
13 you're in the courtroom or during your deliberations. Now,
14 during your breaks for meals or overnight, if necessary, you
15 may use these devices. However, you must not use them to
16 communicate with anyone about the case until the case is
17 over.

18 This means that you must not use phone calls, emails,
19 text messages, instant messages, Twitter, or any blog, chat
20 room or website, including Facebook, Google+, MySpace,
21 Linked, YouTube, or any social media websites to send or
22 receive information about this case. This includes
23 information about a party, a witness, an attorney, or a court
24 officer, news accounts about the case, research on topics
25 raised, any topics you may think would be helpful in deciding

1 the case, or any testimony presented by any witness.

2 During the trial, I do not believe there will be any,
3 but you are instructed not to read, listen to, or watch any
4 news reports about the case. This includes anything that may
5 be in the newspaper or on the Internet, radio or television.
6 You must not, ladies and gentlemen, consider anything you may
7 have heard about the case outside of this courtroom, whether
8 before or during the trial. Information on television,
9 radio, the Internet or from other sources might be wrong or
10 incomplete.

11 In our judicial system, it is important that you are not
12 influenced by anything or anyone outside of this courtroom.
13 If you become aware of another juror's violation of these
14 instructions, please inform the Court immediately.

15 It is important, ladies and gentlemen, that you keep an
16 open mind and not decide any issue in the case until all of
17 the evidence has been presented, the parties have made their
18 closing arguments, and I have instructed you on the
19 applicable law in this case.

20 Now, in just a moment, the attorney for the -- for the
21 State will make what is called an opening statement. The
22 attorney will explain to you the issues in this case or at
23 least what the attorney thinks the issues are in this case.
24 That attorney for the defendant will also make an opening
25 statement.

1 What the attorneys tell you, ladies and gentlemen,
2 during their opening statements is not evidence in this case.
3 It is only their contention as to what the issues are. The
4 evidence in this case will be presented to you by the
5 testimony of sworn witnesses from the witness stand and/or by
6 exhibits that may be introduced into evidence during the
7 course of this trial.

8 Now, from time to time during the trial, ladies and
9 gentlemen, you may hear one of the attorneys say something
10 like, Your Honor, I believe that we have a matter of law or a
11 question of law to discuss, or you may hear one of the
12 attorneys ask to approach the bench, or sometimes I myself
13 might find it necessary to excuse you from the courtroom
14 while the attorneys and I discuss a matter of law.

15 The reason for this, ladies and gentlemen, is because
16 you are the judge of the facts in this case and sometimes
17 when I am discussing matters of law with the attorneys, it
18 may be necessary for me to make some comment as to the facts
19 in connection with whether or not a particular law applies.
20 The reason I will excuse you is that so in no way -- in no
21 way will you be influenced by anything that I might say or do
22 in connection with the facts.

23 In determining what the facts are in this case, ladies
24 and gentlemen, you must decide whether or not the testimony
25 of the witnesses is believable. Now, it will be my

1 responsibility to rule as a matter of law as to whether or
2 not certain testimony is admissible, but once the testimony
3 is admitted, whether or not you believe it is solely for you
4 to determine.

5 Now, in deciding whether to believe a witness, you have
6 the right to consider the interest of any witness, the bias
7 of any witness, the prejudice of any witness, the opportunity
8 for the witness to have seen the matters and things about
9 which the witness may testify, and the way the witness acts
10 on the witness stand. You have the right to consider
11 anything that is in the record that will help you evaluate
12 the testimony of the witnesses.

13 That means that it is your duty to pay close attention
14 to these witnesses, to observe the witnesses, to listen to
15 the witnesses, and to pay close attention to the attorneys
16 and to the Court. Please do not let your thoughts wander,
17 but give strict attention to the testimony in this case so
18 that at the end of all the testimony, after the arguments of
19 counsel and the charge on the law by the Court, you will then
20 be in a position to determine what the facts are and to apply
21 the law to those facts and thus render a verdict.

22 Now, later in this case, ladies and gentlemen, a
23 foreperson will be selected to preside over deliberations in
24 the jury room. It will also be the foreperson's
25 responsibility to be the spokesperson here in court. It will

1 be the foreperson's responsibility as well to write the
2 verdict that you all decide in this case, but I will give
3 further instructions to the foreperson later during the trial
4 or at the conclusion of the case.

5 Now, in order to preserve everyone's rights, I will give
6 the parties an opportunity to object to anything that I have
7 said to you all.

8 Any objection or exception to anything that I have said
9 to the jury by the State?

10 MR. BOGLE: No, Your Honor.

11 THE COURT: Defense counsel?

12 MR. FALK: No, Your Honor.

13 THE COURT: All right. Ladies and gentlemen, we are now
14 going to begin the trial of this case. The State is
15 recognized for opening statements.

16 MR. BOGLE: Thank you, Your Honor. May it please the
17 Court.

18 THE COURT: Yes.

19 MR. BOGLE: Mr. Falk.

20 OPENING STATEMENT ON BEHALF OF THE STATE

21 MR. BOGLE: Again, ladies and gentlemen, my name is Jim
22 Bogle. I'm with the Attorney General's Office out of
23 Columbia.

24 Sometimes when people see these cases, they think, well,
25 how come our solicitor or our county attorney, somebody here,

1 is not presenting the case, and the reason is when the
2 General Assembly passed this law back in 1998, they gave the
3 responsibility to us. There's two of us back at the office
4 that have the responsibility of presenting these cases to
5 juries around the state, and we have the state divided up by
6 counties and by circuit, and I've got here.

7 I'd like to first thank you for your duties coming
8 forward. There's things we'd all rather be doing. It's very
9 important that you be here, both for the State and to Mr.
10 Filyaw, to decide the issues in this case.

11 Now, every case to me has a theme and, in this case, the
12 theme is called wake-up call. Forget the law. Forget the
13 jury. Forget your duties and just think about your own
14 common sense. What's a wake-up call?

15 Did you ever do something and make a mistake and think,
16 whoa, I shouldn't do that again? That's a wake-up call.
17 Because if I make that mistake again, I'll suffer the same
18 consequences. So you learn from your mistakes and you don't
19 do them again.

20 The problem here with Mr. Filyaw is I don't think he met
21 that wake-up call, and I'll explain why. The purpose of this
22 case -- let me tell you briefly what the General Assembly
23 said when they wrote this.

24 Back in 1998 when they passed this law, they said they
25 found that there is a mentally abnormal and extremely

1 dangerous group of sexually violent predators who require
2 involuntary civil commitment in a secure facility for long-
3 term control, care, and treatment, and the legislature went
4 on to find that the likelihood these sexually violent
5 predators will engage in repeated acts of sexual violence if
6 not treated for their mental condition is significant.

7 So that's what they said back in 1998, and that's how we
8 got here. I know when you told your friends you were picked
9 for jury duty, you were thinking you might hear a case about
10 a medical malpractice case or a car wreck or something like
11 that. That is not what we have.

12 Here's the situation. Under this law, the State is
13 seeking to civilly commit Jimmy Filyaw. To prove that, we
14 have to establish to you the burden of proof beyond a
15 reasonable doubt. Normally, in a civil case, it's
16 preponderance of the evidence. Think of a scale going 51
17 percent versus 49 percent.

18 Here, it's much stronger, beyond a reasonable doubt, a
19 doubt that leaves you firmly convinced that the State has
20 proved its case, and the judge will later on at the end of
21 the case explain to you in greater detail what that burden of
22 proof is, but here's what we have to prove.

23 First thing is, is Jimmy Ray Filyaw -- has he been
24 convicted of a sexually violent crime? The law in this case
25 has a list of crimes called sexually violent. There's about

1 16 of them in the law, and he's been convicted of three, and
2 you'll hear about them as the case goes on. We've got the
3 sentencing sheets and the indictments to hand up to you.

4 All three are lewd act on a child or lewd act on a minor
5 child. So the question is -- he first did this in 1994 or
6 1995. Okay? Now, he went to prison, which can't be a nice
7 place to go to, and I'd like to think that's the wake-up
8 call. Don't do this again. But no, move the clock ahead
9 2009 to 2011. He's doing it again.

10 When he first started doing this to these minor
11 children, he was about 40. The little girl was 8. The next
12 time, he was 41 and the child was 6. The next time, he was
13 between 53 and 55, and the child was between 8 and 10.

14 So we've got him convicted of a sexually violent crime,
15 but here's where the harder part starts. The State has to
16 prove to you that he suffers from a mental abnormality or a
17 personality disorder that makes him likely to commit these
18 types of crimes again if he's released unless he's confined
19 for long-term control, care, and treatment in a secure
20 facility. And by secure, I mean a place where he can't leave
21 until the treatment plan is over with.

22 That's the burden of proof we have to show. That he
23 cannot control this -- this problem, this mental abnormality.

24 Now, in this case, the mental abnormality you're going
25 to hear about is called pedophilia or pedophilic disorder, a

1 sexual attraction to prepubescent children. That's what this
2 guy has. Can it be cured? No. Can it be treated? Yes.
3 The question is can he control it, and the State is
4 contending that he cannot and that he is such a danger that
5 he needs to be confined for treatment after this trial is
6 over with.

7 He's finished his prison term. That's done with.
8 That's all passed. That's done with.

9 Now, in a normal, ordinary civil case, witnesses can
10 testify about things they see, things they hear, things they
11 smell, things like that. They can tell about facts using
12 their senses. They can't give opinions. Now, the witness
13 can say, you know, I saw the gun go off, I saw the light turn
14 red, I heard the man scream, things like that. They can't
15 give opinions, but in certain types of cases, if a person has
16 the education and the qualifications that will assist you in
17 deciding the case, they can be allowed to give an opinion.

18 Now, some time ago in a prior hearing in this case
19 pursuant to this law, the Court appointed Dr. Amy Swan, who
20 is sitting over there. She is a forensic psychologist. Her
21 job was to evaluate this guy and see if he had this mental
22 abnormality and see if he could control it, and she will be
23 recognized by the Court as an expert witness to give an
24 opinion about that to help guide you in your deliberations.

25 The law also allows the defense to get a second opinion,

1 if they want, and they have retained Dr. Colbi Sutton. She
2 is sitting behind us over there. She will also -- she will
3 testify for the defense that he's okay, that he can be
4 released. He's not such a danger as the State thinks he is.

5 You're going to hear both of these, but the point is
6 both of these people will be qualified as experts and be
7 allowed to give opinions.

8 Again, the burden of proof is beyond a reasonable doubt.
9 He's got the convictions. He's got the mental abnormality.
10 The question is can he control it. Does he have to be
11 civilly committed for long-term treatment and care? That's
12 what this case is all about, and I appreciate your patience
13 and your understanding today.

14 Your Honor.

15 THE COURT: Mr. Falk?

16 MR. FALK: May it please the Court.

17 THE COURT: Yes, sir.

18 MR. FALK: Mr. Bogle.

19 OPENING STATEMENT ON BEHALF OF THE RESPONDENT

20 MR. FALK: Ladies and gentlemen, let's not have any
21 misconceptions about the impact of your decision on my client
22 today. You will decide whether or not my client needs to go
23 to a secure facility for long-term control, care, and
24 treatment.

25 Let me assure you that we're not talking about whether

1 or not my client needs to go to the local psych ward at the
2 hospital. This is a secure facility where he's not going to
3 be free to come and go as he pleases. And because your
4 decision can have such a significant impact on my client's
5 civil liberties, you must reach a decision beyond a
6 reasonable doubt.

7 Now, I think this is going to turn out to be what you'd
8 kind of call a battling-experts case, but let me first tell
9 you how I got here. Mr. Bogle told you how he got here.

10 Years ago, when these cases came up, lawyers who were
11 practicing in Florence County who did civil cases were asked
12 to represent people like Mr. Filyaw because this is
13 considered a civil case. And so years ago, you could have
14 lawyers who did real estate closings their whole life or did
15 other kinds of stuff their whole life and then they'd be
16 asked to come in on this kind of case.

17 Well, they made some changes a few years ago into the
18 system and now certain lawyers are given a contract to
19 represent SVP cases like this, and I have the contract for
20 Florence County to represent SVP cases, represent respondents
21 in SVP cases. So that's how I got here.

22 And as I said, this is a battling-experts case. We have
23 two experts. One expert is going to suggest or opine that my
24 client is a -- suffers from various mental diseases and that
25 he poses a threat to the community and, therefore, he needs

1 to be confined for long-term control, care, and treatment.
2 My expert is going to agree that my client suffers from a
3 mental disease, but that she does not believe that he is a
4 threat to being released, that he does not need to be
5 confined for long-term control, care, and treatment. So
6 that's really what the difference is here.

7 Now, you can possibly think about other types of cases
8 that are maybe characterized as a battling-experts case. One
9 expert says this; one expert says that, and the jury has to
10 decide which expert to believe.

11 And those can be really significant cases, civil cases,
12 and one that would come to mind would possibly be a medical
13 malpractice case where you could have -- where a jury, just
14 like yourselves, could have a decision that would have
15 multimillion-dollar impact on the parties and could
16 significantly affect someone's livelihood or could
17 significantly affect whether somebody's going to get the, you
18 know, long-term medical treatment that they need or money to
19 help them, and that decision could rest with a jury and that
20 jury could make that decision based on what they call
21 preponderance of the evidence, like Mr. Bogle said, 51
22 percent standard.

23 But this is a whole different kind of battling-experts
24 case because you have to be so convinced that you've reached
25 a decision that my client -- in order to put my client in a

1 long-term care, control facility, in order to convict my
2 client in this case, you have to be convinced beyond a
3 reasonable doubt.

4 We spent a lot of time -- Mr. Bogle, the Court, and
5 myself, we spent a lot of time yesterday trying to weed out
6 any touch of prejudices that potential jurors may have about
7 the facts in this case because there's no question that this
8 case involves child victims, and I can understand how people
9 have strong opinions about people who commit offenses against
10 children. And we asked several questions of you yesterday in
11 order to try and pull out from you whether or not you were
12 harboring any of these kind of prejudices.

13 That you would -- what I want you to be able to do is to
14 be able to make your decision today based on what you hear
15 from the experts in this case and not based on some kind of
16 notion that you have as to what's fair and what you might
17 think about the people because there are bad facts in this
18 case. My client has been convicted of hurting children, but
19 we spent so much time yesterday trying to pick this jury
20 because we wanted to pick jurors who would agree that they
21 would set aside any kind of prejudices they may have about
22 that and just make their decision based on the facts that
23 they heard.

24 You all just took an oath. You swore that you would do
25 that. We spent a lot of time yesterday where we asked

1 questions and, based on your responses to those questions,
2 that's why you're in this jury box today.

3 So I want you to, again, just focus on whether or not
4 you think that the State is able to prove their case beyond a
5 reasonable doubt because that's really what the question is
6 here about my guy. You're going to hear testimony from two
7 experts, two experts who are qualified to give opinions in
8 this area. One expert says yes; one expert says no.

9 At the end of the day, I believe that you will find that
10 my client, although he may suffer from a mental disease, is
11 no longer of the nature that he needs to be confined for
12 long-term control, care, and treatment. Thank you.

13 THE COURT: All right. Mr. Bogle?

14 MR. BOGLE: Thank you, Your Honor. May it please the
15 Court. The State would call Dr. Amy Swan.

16 THE CLERK: Ms. Swan, if you'll place your left hand on
17 the Bible and raise your right hand. Dr. Swan, do you swear
18 or affirm that the testimony you give will be the truth, the
19 whole truth, and nothing but the truth, so help you God?

20 THE WITNESS: I do.

21 THE CLERK: Thank you.

22 DR. AMY SWAN, being first duly
23 sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BOGLE:

- 1 Q: Okay. ' Good morning, Dr. Swan.
- 2 A: Good morning.
- 3 Q: Again, your full name and state of residence, please?
- 4 Where do you live?
- 5 A: Amy C. Swan, and I live in Florida.
- 6 Q: Okay. What is your job? What do you do for a living?
- 7 A: I'm a forensic psychologist.
- 8 Q: How long have you worked in that capacity?
- 9 A: I have worked as a forensic psychologist for 20 years.
- 10 Q: What advanced degrees do you have?
- 11 A: I have a master's degree in clinical psychology that I
- 12 earned in 1993, and I have a doctorate that I earned in
- 13 clinical psychology in 1997.
- 14 Q: What states are you licensed to practice psychology in?
- 15 A: I am licensed to practice in Florida, South Carolina,
- 16 and Missouri.
- 17 Q: And very briefly, what is the study of psychology?
- 18 A: Psychology is the study of the mind and the brain.
- 19 Q: Now, you described yourself or I may have described you
- 20 as a forensic psychologist. When I use the word forensic in
- 21 connection with psychology, what are we saying there?
- 22 A: Forensic psychology means that you're applying the
- 23 principles of psychology to cases involved in the legal
- 24 system.
- 25 Q: Have you had specialized treatment or experience beyond

1 your doctoral degree?

2 A: I have. It's not easy to get training dealing with sex
3 offenders in a college program. There aren't that many of
4 them. And so we typically get our knowledge through
5 conferences and seminars. I've had 943 hours beyond my
6 doctoral degree specifically in the area of sex offenders,
7 and 298 of those hours are in the area of assessing the risk
8 that a sex offender would commit another sexual crime.

9 Q: Now, Doctor, in your capacity as a psychologist while
10 living in Florida, were you -- were you appointed by the
11 governor of Florida to the board that regulates psychology in
12 Florida?

13 A: Yes. The Board of Psychology in Florida regulates the
14 entire practice of psychology, who can get a license,
15 discipline, that type of thing, and I served on that board
16 for ten years. And after my full board service ended, I was
17 chairman of the probable cause committee, and that committee
18 determines if the complaints that are made about
19 psychologists are legally sufficient. And so I served five
20 years on the probable cause committee, and then I took a
21 break for a year and a half, and I just got reappointed in
22 November of 2017.

23 Q: Are you also a member of the Association for the
24 Treatment of Sexual Abusers called ATSA? A-T-S-A?

25 A: Yes, I am. That is the largest international

1 organization devoted to study and research on sex offenders.
2 I'm also a member of the American Psychological Association,
3 the International Association of Forensic Nurses, and the
4 Association of State and Provincial Psychology Boards.

5 Q: Now, does your work allow you to conduct or have you
6 conducting forensic evaluations on people?

7 A: Yes, it does.

8 Q: Have you had experience working directly with sex
9 offenders?

10 A: Yes. That's what all of my experience has been.

11 Q: Okay. For about how long? About how long working with
12 sex offenders?

13 A: Working with sex offenders, it would be 20 years.

14 Q: Okay. What type of evaluations of sex offenders have
15 you done over your career?

16 A: Well, I do pre-commitment evaluations. That's to assess
17 whether an individual has a mental abnormality or personality
18 disorder that makes them likely to commit future sexual
19 crimes. I do annual reviews to see if the individual who has
20 been committed has benefited from treatment enough to be
21 released. I do sentencing evaluations for sex offenders who
22 have pled -- pleaded guilty and then are waiting to be
23 sentenced. I do child pornography cases. And in Florida, I
24 work for the board assessing licensed individuals who have
25 engaged in sexual misconduct to determine if they're fit to

1 practice and under what conditions they're fit to practice.

2 Q: And, Doctor, in the course of your career, have you been
3 hired by the defense in a sexually violent predator case to
4 testify on behalf of the defense?

5 A: Yes, many times.

6 Q: Okay. Have you been recognized as an expert witness in
7 the field of forensic psychology with regard to sexually
8 violent predators by the courts of South Carolina and these
9 other states you're talking about?

10 A: Yes, I have.

11 Q: Overall on all the states, about how many times?

12 A: Approximately 280 times I've testified in sexually
13 violent predator cases.

14 Q: And in South Carolina, about how many times roughly?

15 A: Over 50.

16 Q: Okay.

17 MR. BOGLE: Your Honor, at this time, we'd like to offer
18 Dr. Swan as an expert witness in the field of forensic
19 psychology with regard to this sexually violent predator
20 case.

21 THE COURT: Any voir dire?

22 MR. FALK: No voir dire, but subject to my motion in
23 limine yesterday preserving that objection, I would have no
24 further objection.

25 THE COURT: All right. So noted.

1 All right. Ladies and gentlemen, before we go any
2 further, I'm going to give you this general charge or this
3 charge on expert testimony. Mr. Bogle kind of hit on it in
4 his opening statement to you, but as a matter of law I'm
5 going to give it to you.

6 Normally, a person cannot give opinion testimony.
7 Normally, when a person testifies, they must testify as to
8 what they either saw, heard, or sensed by smell or something
9 of that nature.

10 However, there is an exception when someone is qualified
11 because of education and experience. They are permitted to
12 give their opinion in certain areas, if the Court qualifies
13 them to do so.

14 This witness will be qualified in the area of forensic
15 psychology with regards to sexually violent predators to give
16 opinion testimony in that area.. That does not mean that you
17 must accept the opinion, but it is evidence for you to use in
18 any way that you see fit and give it the weight and
19 credibility that you believe is appropriate.

20 Mr. Bogle?

21 MR. BOGLE: Thank you, Your Honor.

22 BY MR. BOGLE:

23 Q: Now, Dr. Swan, let me just clear one thing up at the
24 outset. You've been a practicing psychologist for about how
25 long?

1 A: Twenty years.

2 Q: Have you ever -- in those 20 years, have you ever faced
3 a complaint or discipline by the board that licenses you?

4 A: No, I have not.

5 Q: And for South Carolina, do you have a contract with the
6 Department of Mental Health here in South Carolina to do
7 these types of cases here, even though you live in Florida,
8 but to do these types of cases here?

9 A: Yes, I do.

10 Q: Okay. Now, in these -- all these years as a practicing
11 psychologist, have you ever faced discipline from an
12 organization, not a licensing board, but an organization you
13 were a member of?

14 A: I have, once in 2014.

15 Q: Okay.

16 A: A complaint was filed.

17 Q: What's the difference between discipline by a licensing
18 organization and discipline by a complaint by just an
19 organization you're a member of? What's the difference?

20 A: Well, if you have a discipline by a licensing board, it
21 means that you have broken the law with regard to the
22 practice of psychology, and that has never occurred. If you
23 have discipline by a voluntary organization that you're a
24 member of, what it means is is that you violated one of their
25 guidelines.

1 Q: And in this particular case, what was the one complaint?
2 What was the voluntary organization that the complaint was
3 filed with?

4 A: This was the Association for the Treatment of Sexual
5 Abusers, and the issue was that I used an outdated interview
6 form.

7 Q: Okay. Why did you use the outdated form --

8 A: Well, it was --

9 Q: -- at the time?

10 A: It was commonly used in Florida at that time and it
11 provided some usable information.

12 Q: Okay. And based on this complaint, what did this
13 voluntary organization tell you to do?

14 A: They indicated that I should stop using the interview
15 and that I should submit two reports for supervision, which I
16 did.

17 Q: Did you -- did you -- did you qualify or satisfy those
18 requirements?

19 A: Yes, I did.

20 Q: Are you still a member of the organization?

21 A: I am. I'm still a member in good standing. The
22 individual also submitted a complaint to the American
23 Psychological Association, but they dismissed it as not
24 having merit.

25 Q: And had this been a serious infraction, could the --

1 could ATSA have kicked you out?

2 A: They could have.

3 Q: And they did not? You're still a member?

4 A: They did not. I'm still a member.

5 Q: Okay.

6 A: In good standing.

7 Q: Let's talk about Mr. Filyaw for a minute here.

8 A: Okay.

9 Q: How did you become involved in the case we're here about
10 today?

11 A: I was appointed by the Court to evaluate Mr. Filyaw.

12 Q: Now, with your contract with the Department of Mental
13 Health, are you paid to do these evaluations?

14 A: Yes, I am.

15 Q: Is it a flat fee?

16 A: It is a flat fee.

17 Q: Does the amount you're paid vary depending on what the
18 result of your evaluation is?

19 A: It does not. It's the same amount whether I find that
20 the individual meets criteria for commitment or does not meet
21 criteria for commitment.

22 Q: Okay. And when appointed by the Court in this
23 particular case, what was your job? What was your task
24 regarding Mr. Filyaw?

25 A: My job was to determine if he had a mental abnormality

1 or personality disorder that makes him likely to commit acts
2 of sexual violence if not confined in a secure facility for
3 long-term care, control, and treatment.

4 Q: What is the protocol or the step-by-step method you use
5 when doing these types of cases, these pre-commitment cases
6 like this one?

7 A: After I receive the order from the Court, I get a
8 package of information from the Attorney General's Office,
9 and this information includes police reports. It includes
10 victim statements. It includes court documents. It includes
11 probation records, anything pertaining to the sexual crimes
12 that this individual committed.

13 I review that before I go out to see the individual, and
14 I typically have an interview with the individual and I talk
15 to him about all the crimes. I talk to him basically about
16 everything that happened to him from the day he's born until
17 the day he's sitting in front of me because I want to know
18 what factors there are in his life that may have impacted him
19 committing these sexual crimes.

20 Q: In this particular case, in addition to getting this
21 information, this documentary information about Mr. Filyaw,
22 did you interview him?

23 A: I did. I interviewed him on March 24th, 2016, and I
24 spent two and a half hours with him.

25 Q: Is the guy you interviewed in the courtroom today?

1 A: Yes, he is. He's in the blue jacket next to Mr. Falk.

2 Q: Okay.

3 MR. BOGLE: Just for the record, Your Honor, let the
4 record reflect she's identified Mr. Filyaw.

5 THE COURT: So noted for the record.

6 BY MR. BOGLE:

7 Q: Did you explain the purpose of the evaluation to him?

8 A: I did.

9 Q: Did he agree or consent to be evaluated?

10 Q: He did.

11 Q: Now, the type of documentary information you talked
12 about a minute ago that you looked at in addition to talking
13 to Mr. Filyaw, is this the type of information that is
14 typically and reasonably relied upon by other experts in your
15 field?

16 A: Yes, it is.

17 Q: And did you consider and rely upon this documentary
18 written information about him, police reports, prison
19 records, all that kind of stuff, in addition to meeting the
20 guy and talking to him? Did you rely on all of this in
21 reaching an opinion about whether or not he should be
22 committed for treatment?

23 A: Yes, I did.

24 Q: Can you explain to the jury briefly how a person's past
25 sexual offense behavior relates to future behavior?

1 A: Yes. The best predictor of future behavior is past
2 behavior. And what we mean by that is if an individual is
3 arrested or convicted of a sexual crime and he receives a
4 punishment, that should be a lesson to him that he can't
5 engage in that behavior without a consequence.

6 So every time he does it again after he received that
7 punishment, then that increases his risk. So each time he
8 commits another sexual crime, his risk goes up.

9 Q: And in this case, we have a crime that occurred in 1994
10 that resulted in a conviction; right?

11 A: Yes. In fact, he committed two crimes in 1994 that
12 resulted in convictions. So that was a sanction or a
13 punishment for him because he went to prison.

14 So a normal person would say, you know, I didn't like
15 prison, I'm not going to do that anymore, but that didn't
16 stop Mr. Filyaw. He went on to do it again and again and
17 again because his desire to have sexual contact with children
18 is so strong that he could not control his behavior. So he
19 continued to assault children over 17 years. He sexually
20 assaulted a 9-year-old girl in 1996 and an 11-year-old girl
21 in 19 -- I'm sorry -- between 2009 and 2011, and a 13-year-
22 old boy between 2009 and 2011.

23 Q: So getting into it --

24 MR. BOGLE: If I may approach the witness, Your Honor?

25 THE COURT: Yes.

1 BY MR. BOGLE:

2 Q: Now, in reviewing the file on Mr. Filyaw, the documents
3 you looked at, and talking to him, has he been convicted of
4 crimes classified as sexually violent crimes under the law in
5 South Carolina?

6 A: Yes, he has three.

7 Q: Okay. I'd like to hand you what's been marked as
8 State's Exhibit No. 1. It's a certified copy of a sentencing
9 sheet and an indictment from Florence County. Is this a
10 document you've looked at and reviewed in the course of this
11 case?

12 A: Yes, it is.

13 Q: Okay. And what is the date he was sentenced on that
14 particular indictment?

15 A: The date he was sentenced was June 20th, 1995.

16 Q: Okay. In that particular case, what was the crime he
17 was convicted of?

18 A: He was convicted of lewd act on a minor.

19 Q: Now, were there other crimes charged against him in that
20 indictment besides lewd act that were dismissed?

21 A: Yes, there was. There was a crime that was assault with
22 intent to commit criminal sexual conduct on a minor.

23 Q: Okay. And this is a document you reviewed in the course
24 of your research --

25 A: Yes, it is.

1 Q: -- on Mr. Filyaw?

2 MR. BOGLE: We'd move to introduce State's Exhibit 1,
3 Your Honor.

4 MR. FALK: Without objection.

5 THE COURT: Without objection, so admitted. State's 1.

6 (WHEREUPON, State's Exhibit No. 1, sentencing sheet and
7 indictment, was admitted into evidence.)

8 MR. BOGLE: Okay.

9 BY MR. BOGLE:

10 Q: Now, on this particular case -- I'll just leave it up
11 here for right now. The indictment, the sentencing sheet,
12 and you had the police reports, things like that, is it
13 necessary to review all of this stuff, all of these things,
14 in reaching an opinion or trying to reach an opinion about
15 Mr. Filyaw?

16 A: Yes, it is.

17 Q: Are they part of the basis of your expert opinion about
18 Mr. Filyaw?

19 A: They are.

20 Q: Why is it necessary to go into the underlying details,
21 the victim's age, what happened to her, and things like that?
22 Why is it necessary to go into all that detail?

23 A: Well, my job is to determine if he has a relevant mental
24 abnormality or a personality disorder, and so I have to look
25 at the crimes that he's committed to see if there's a pattern

1 that fits into any of the diagnoses that are relevant under
2 this statute.

3 Q: Okay. Well, starting with the first one, what were the
4 underlying facts behind this case, what he did to that child,
5 that you find significant to explain to this jury?

6 A: Okay. Police officers met with [Minor 1] and her mother
7 and learned that [Minor 1] went over to Mr. Filyaw's trailer
8 because he promised to give this 8-year-old girl guitar
9 lessons.

10 When she entered the trailer, Mr. Filyaw invited her
11 into the bedroom to watch TV, but when she got in there, he
12 locked the door and attempted to pull down her pants. He got
13 her pants down to her thighs and he was manipulating them to
14 get them off her and then suddenly he stopped what he was
15 doing, and she pulled up her pants, unlocked the door, and
16 ran out of the trailer. After she contacted her mom and her
17 sister, they took her to the emergency room.

18 Q: So he would have been about 40 at the time this
19 happened?

20 A: That's correct.

21 Q: And the girl was about 8?

22 A: That's correct.

23 Q: Okay. What sentence did he receive after pleading
24 guilty to lewd act on a minor from the sentencing sheet in
25 front of you?

1 A: Mr. -- Mr. Filyaw received seven years' incarceration,
2 suspended to two years of incarceration and he has three
3 years of -- had three years of probation to follow.

4 Q: Okay. When you talked to him about this --

5 A: Yes.

6 Q: What did he say to you that you found significant?

7 A: He told me that he and -- that **Minor 1** and a bunch of
8 her friends were playing, and he thought they might have been
9 playing truth or dare. So she came running into the trailer
10 that he was in, took off all her clothes, and then the other
11 kids came running in and they look surprised and then they
12 all went running out.

13 He said he was working on his air conditioner and a
14 little while later he was arrested because **Minor 1** said that
15 he took her clothes off. So he denied that he offered to
16 give her guitar lessons. He denied that he tried to lure her
17 in the trailer.

18 He said that he was required to go to sex offender
19 treatment while he was on probation, but he said I told them
20 what really happened. In other words, he denied that he
21 committed that crime and they kicked him out because it's not
22 ethical to provide treatment for someone for a crime that
23 they say they don't do. You have to admit that you do the
24 crime in order for the sex offender treatment to work for
25 you. So they kicked him out and he was doing jail time on

1 the weekends, but then he was arrested five months later for
2 another crime against a little girl.

3 Q: Okay. So now, this thing about how he's saying the girl
4 comes into his house without notice and takes all her clothes
5 off?

6 A: Yes.

7 Q: You've worked -- this is not the first case involving
8 someone with pedophilic disorder you've worked with, is it?

9 A: It is not. I've worked with hundreds.

10 Q: Okay. Is that a common thing among some of these guys
11 that say that the girl did it? That these oversexed little
12 girls come in and just take all their clothes off or
13 something?

14 A: By and large, they always blame the victim for doing
15 something.

16 Q: Okay. Let's look at State's Exhibit No. 2. I hand you
17 a certified copy of a sentencing sheet and an indictment for
18 a conviction in Darlington County. Have you seen this
19 document before?

20 A: Yes, I have.

21 Q: Are these records you reviewed in the course of your
22 investigation and your analysis of Mr. Filyaw?

23 A: Yes.

24 Q: And is this document reflecting his conviction part of
25 the basis for your opinion?

1 A: Yes, it is.

2 Q: What does it show a conviction of? What crime?

3 A: Lewd act on a minor.

4 Q: And what is the sentencing date the judge sentenced him
5 on that crime?

6 A: October 30th, 1995.

7 Q: Okay.

8 MR. BOGLE: Your Honor, I'd moved to introduce into
9 evidence Exhibit No. 2 for the State.

10 THE COURT: Any --

11 MR. FALK: Without objection.

12 THE COURT: Without objection, so admitted.

13 (WHEREUPON, State's Exhibit No. 2, sentencing sheet and
14 indictment, was admitted into evidence.)

15 BY MR. BOGLE:

16 Q: Now, this is the same year, 1995, both convictions?

17 A: Yes.

18 Q: But they are separated by about six or seven months or
19 so?

20 A: Five months.

21 Q: Five months. What -- did you also, as part of your
22 evaluation, have to look at the underlying details behind
23 this crime as well?

24 A: I did.

25 Q: What are you looking for when you look for these

1 underlying details?

2 A: As I said, I'm looking for a pattern. For example, in
3 this particular case, we have little girls between the ages
4 of 5 or 6 and 11. So that's an important factor for me to
5 consider because that tells me something about his arousal
6 patterns.

7 Q: And what was the date of the sentencing on that case
8 that he pleaded guilty to?

9 A: October 30th, 1995.

10 Q: Okay. And the crime was lewd act on a child?

11 A: Yes, it was.

12 Q: He would have been about -- what? -- 41 and the girl was
13 about 6?

14 A: That's correct.

15 Q: What underlying facts -- what happened in this case that
16 you find significant to tell the jury about?

17 A: Well, during the police investigation, it was revealed
18 that Mr. Filyaw gave **Minor 2**, a 5- or 6-year-old girl, a comic
19 book to look at and then he began rubbing her on her vagina
20 and it hurt her. She told him to quit it and then she began
21 to cry and ran home. When the police came, they found the
22 comic book in a clear plastic bag outside the trailer, and
23 **Minor 2** identified it as the comic book that Mr. Filyaw gave
24 her.

25 Q: And when you talked to him, during your interview with

1 Mr. Filyaw, what did he have to say to you about this
2 offense?

3 A: Mr. Filyaw told me that [Minor 2] and her sister were
4 looking at a comic book while he and the girls' father were
5 drinking beer, and [Minor 2] kept calling him in the back of the
6 trailer with her and he said, yes, I did touch her on her
7 privates. I run my hand up that. And he went like this to
8 motion that he was rubbing her vagina.

9 And he said, yes, ma'am, I was stupid. I don't know
10 why. I don't know. I just done it and I felt bad afterward.
11 So I asked him if he was aroused by female children and he
12 said he -- I guess so, and I asked him if he did what he did
13 because of that arousal and he said, I guess so. So Mr.
14 Filyaw denied that he molested any other girls or boys in the
15 family, despite information in the police report that he
16 molested many other girls and boys in the family.

17 MR. FALK: Objection, Your Honor. I would object to the
18 implied hearsay in that statement.

19 THE COURT: Can y'all approach a minute?

20 (WHEREUPON, a bench conference was held in the presence
21 of the jury but out of the hearing of the jury as
22 follows.)

23 MR. BOGLE: Okay. Based on the direction your ruling
24 was yesterday, she's not saying that [Minor 3] said to the
25 police -- the police said [Minor 3] told me this. She's saying

1 what's in the police reports. I think that's within the
2 realm that she can do.

3 THE COURT: I'm going to allow that, but move on.

4 MR. BOGLE: Okay.

5 THE COURT: All right.

6 (WHEREUPON, the bench conference ended and the
7 proceedings resumed as follows.)

8 BY MR. BOGLE:

9 Q: What sentence did he get on this particular crime?

10 A: On this particular crime, he was sentenced to eight
11 years in SCDC.

12 Q: Okay. And was that time to run at the same time as the
13 previous one?

14 A: Yes. He was already serving that two-year sentence for
15 the other little girl five months previously.

16 Q: Uh-huh.

17 A: So this was running at the same time.

18 Q: Okay. Now, after all this was over, was there an arrest
19 of Mr. Filyaw in 1997?

20 A: There was.

21 Q: Now, let me ask you a question. We've talked about
22 convictions. I've handed you two and I've got one more
23 behind me. Is it necessary in doing these types of
24 evaluations to look at an arrest for a crime against a child
25 where there's been no conviction?

1 A: It's very important because the research that we have on
2 determining whether an individual is at risk to commit
3 another sexual crime tells us that even being arrested for a
4 sexual crime increases his risk because being arrested is
5 enough of a sanction or a punishment that they should learn a
6 lesson from that and not do it again.

7 So if they're arrested, even if they're not convicted
8 and they don't go to prison, it's still a wake-up call that
9 they should pay attention to. So if they don't, it's
10 important information for me as an evaluator to assess his
11 risk.

12 Q: And what information did you find about this 1997 arrest
13 that did not result in a conviction -- I understand that.
14 What significant information did you find that forms the
15 basis of your diagnosis of him that you can tell this jury
16 about today?

17 A: This involved a 9-year-old girl, **Minor 4**. During the
18 investigation, it was revealed that in September of 1996, Mr.
19 Filyaw knocked on the door of **Minor 4**'s trailer and **Minor 4**
20 let him in. She was sitting in a chair with a T-shirt and a
21 pair of panties, and she had a blanket on her. Mr. Filyaw
22 came in and he pulled the blanket off and rubbed her between
23 her legs on top of her panties. She jumped up and ran to her
24 mother's bedroom, but Mr. Filyaw ran back there too and he
25 said, oh, you know, to her mother, I must have scared her

1 when I came in the trailer. I didn't mean to scare her.

2 So in January of 1997, Mr. Filyaw came back to her
3 residence and told [Minor 4] that he would give her \$100 if she
4 would pull her pants down to let him see her. And so when
5 the police were called, she gave them exactly the same
6 information about those two incidents. And [Minor 4]'s mother
7 contacted Mr. Filyaw's probation officer because he was still
8 on probation when he committed this crime, and she said that
9 she contacted the probation officer because he'd made threats
10 to other children in the trailer park.

11 Q: Now, in this particular case, the case was eventually
12 not convicted because the witnesses wouldn't cooperate with
13 the government. Is that basically what happened?

14 A: That's correct.

15 Q: Okay. But there was an arrest?

16 A: There was an arrest.

17 Q: What did -- I'm sorry. What did Mr. Filyaw tell you
18 about this incident that you found significant?

19 A: Well, Mr. Filyaw denied that he committed this crime.
20 He denied that he touched the little girl. He said this was
21 my cousin's daughter, and my cousin asked me for \$40. I
22 didn't give it to her. She knew that I already had charges
23 for an offense against a little girl.

24 Q: Okay. Do you know from your research whether or not his
25 probation was revoked because of this and put him back in

1 prison or do you know -- or was it not revoked? He was
2 arrested, but not convicted.

3 A: I do not know if it was revoked for this offense.

4 Q: Okay. But the fact that he got arrested for this type
5 of crime while he was on probation from the same type of
6 crime, is that significant in your analysis of Mr. Filyaw in
7 this -- for this case?

8 A: It is very significant because the research that we have
9 on sex offenders tells us that an individual who violates
10 their probation with another crime, specifically a sex crime
11 in this case, is six times more likely to commit another sex
12 crime in the future. And this is really important because if
13 someone can't control their sexual behavior while they're on
14 probation and they're being watched and monitored very
15 closely, then they cannot control their sexual behavior in
16 the community when no one is watching.

17 Q: Okay.

18 MR. BOGLE: I'd like to approach her again if I could,
19 Your Honor.

20 THE COURT: Yes, sir.

21 BY MR. BOGLE:

22 Q: I'm handing you what's been marked as State's Exhibit
23 No. 3, a certified copy of a conviction here in Florence
24 County. Is that a document you've looked at, the conviction
25 and the sentencing sheet and the indictment? Are these

1 documents you've looked at in the course of your evaluation
2 of Mr. Filyaw?

3 A: Yes, they are.

4 Q: Okay. And what is the crime he pleaded guilty to in
5 Florence County on those documents?

6 A: He pled guilty to lewd act on a minor.

7 Q: Was there an additional crime that was also charged?

8 A: Yes. He was also charged with criminal sexual conduct
9 with a minor, first degree, and that was dropped when he
10 accepted a plea bargain, which is a deal for a --

11 Q: Okay. And when was he sentenced in this particular
12 crime?

13 A: He was sentenced in this crime on October 2nd, 2012.

14 Q: And what was his sentence?

15 A: His sentence was ten years in SCDC or South Carolina
16 Department of Corrections.

17 Q: And he got credit for about -- what? -- 400 and some
18 days?

19 A: 483 days.

20 Q: And this was days sitting in jail awaiting trial?

21 A: Yes.

22 Q: Okay.

23 MR. BOGLE: Your Honor, we'd like to move to --

24 BY MR. BOGLE:

25 Q: Is lewd act on a minor or lewd act on a child under 16,

1 the crime convicted of right here, is this also a sexually
2 violent crime under our law?

3 A: Yes, it is.

4 MR. BOGLE: We'd move to introduce State's Exhibit No. 3
5 into evidence, Your Honor.

6 MR. FALK: Without objection.

7 THE COURT: Without objection, so admitted.

8 (WHEREUPON, State's Exhibit No. 3, sentencing sheet and
9 indictment, was admitted into evidence.)

10 BY MR. BOGLE:

11 Q: So we've got three convictions for lewd act?

12 A: Yes.

13 Q: Here it's called lewd act on a child, lewd act on a
14 minor. It has different names here, but those crimes are
15 sexually violent crimes under our law; correct?

16 A: Yes, they are.

17 Q: Now, in that particular case, the one I just handed you,
18 State's Exhibit No. 3, what underlying details about the
19 crime that you looked up did you find significant in your
20 opinion in your diagnosis of Mr. Filyaw? Share that with the
21 jury, please.

22 A: So Mr. Filyaw was -- this crime involved **Minor 5**, who
23 was 11, and **Male Minor 1**, who was 13. So these children were
24 living in a home with ten people, where all of the adults
25 were using alcohol and drugs. So it was not a good

1 situation. The children were sleeping on the floor while Mr.
2 Filyaw, who was a registered sex offender at that time, was
3 sleeping just a short distance away on the kitchen floor.

4 So Mr. Filyaw molested his cousin, [Minor 6], when she was a
5 child right up until the age of 12, and many other girls and
6 boys in the family. He stuck his two fingers in [Minor 5]'s
7 vagina and it hurt.

8 He did it repeatedly for two years, and [Minor 5] lived in
9 three different houses with Mr. Filyaw and he repeatedly did
10 it over those three houses. He followed her when she took a
11 shower. He followed her when she went to bed. She was
12 scared because no matter where she went, he was there trying
13 to stick his fingers in her vagina. She told him to stop,
14 but it didn't matter how many times she told him to stop or
15 how many adults she told what was happening, he kept doing
16 it. He followed her from room to room, trying to touch her
17 vagina.

18 So she tried to stay near family members, and he did it
19 right under their noses. They turned their back and he'd be
20 trying to touch her vagina again. She would sit by her
21 grandma on the couch and Mr. Filyaw would come in and sit
22 down beside her right with the grandmother there and try to
23 touch her, and she'd moved to the other couch and he'd follow
24 her, and she'd move to the bedroom and he'd follow her there.

25 He told her I want to touch you, and then he'd try to

1 stick his fingers in her vagina. He'd offer her five dollars
2 and he said I can touch you for money. And when she said you
3 can't, it's against the law, he said I don't care if it's
4 against the law, and then he pointed to his own penis and
5 said I want you to touch this. So when he would do these
6 things to **Minor 5**, when he'd actually touch her, he'd say do
7 you like it.

8 So **Male Minor 1** was 13, and he and his brothers were playing
9 on the porch and they dropped one of their grandma's
10 knickknacks in the trashcan by accident, and he bent over to
11 pick it up and Mr. Filyaw touched his butt three times even
12 when **Male Minor 1** told him to stop.

13 Q: Now, so his age range in this time would have been
14 between -- it happened between '09 -- 2009 and 2011; right?

15 A: That's correct.

16 Q: And his age would be from about 53 to 55, and **Minor 5**
17 between 8 and 10?

18 A: That's correct.

19 Q: Maybe 11 later on?

20 A: That's correct.

21 Q: When you interviewed Mr. Filyaw about this, what did he
22 say to you?

23 A: Mr. Filyaw said that he was charged with crimes against
24 **Minor 5** and **Male Minor 1**, and he said my -- my brother had just
25 died, and I moved in with all these ten different people

1 because I was lonely. He said that his cousin, the one that
2 said he molested her from childhood on up to the age of 12,
3 tried to get some property that he owned and that she fought
4 him in court over that property and that she was angry
5 because she wasn't successful in that, and so she coerced
6 **Minor 5** to say that he touched her.

7 But then a short time later, he told me that **Minor 6** knew
8 I was living with her mother and she deliberately sent those
9 kids over to her mother's house to set me up, essentially
10 that he would molest them, but then he realized that he
11 slipped and, you know, said, oh, but I didn't do it.

12 Q: So he's basically telling you he didn't do this?

13 A: He did. He said that he did not molest **Minor 6**. He said
14 he did not molest any of the children that he was alleged to
15 have molested in the family or in the trailer park, and that
16 -- he said -- when I said -- you know, I talked to him about
17 his drinking and he said he was drunk all the time. I said
18 is there a chance you could have molested these children when
19 you were drunk and not remembered it, and he said, yeah,
20 there could be a chance.

21 Q: Yet in all of these three crimes, State's Exhibit 1, 2,
22 and 3, he pleaded guilty to all of them; right?

23 A: He did plead guilty.

24 Q: And that means he had to come before a judge, like the
25 judge here, and admit guilt in open court; right?

1 A: He had to take an oath and swear under oath --

2 MR. FALK: Your Honor, I object to the foundation here.

3 MR. BOGLE: Let me back up a minute and state it this
4 way.

5 THE COURT: Sustained.

6 BY MR. BOGLE:

7 Q: Are you familiar with how guilty pleas are taken in
8 South Carolina and in Florida?

9 A: Yes.

10 Q: Okay. At a guilty plea, does the judge examine the
11 defendant to make sure he's pleading freely guilty -- freely
12 and voluntarily?

13 A: He does. He asks him a series of questions to make sure
14 that the --

15 MR. FALK: Objection, Your Honor.

16 THE COURT: What's the grounds?

17 MR. FALK: Again, foundation. She's telling -- she's
18 not -- she's not -- firsthand knowledge of anything that
19 happened at this plea.

20 THE COURT: Overruled at this point. You may continue.

21 BY MR. BOGLE:

22 Q: So that's the first line of questioning?

23 A: Yes.

24 Q: And then -- and then in your experience having seen
25 these things happen, does the prosecutor, whoever that may

1 be, then tell the judge what happened, what the facts are?

2 A: That is correct.

3 Q: And then -- and the defendant is placed under oath, just
4 like you were today?

5 A: Yes.

6 Q: He's got to admit to those facts?

7 A: Yes. He --

8 Q: Admit to the crime?

9 A: That judge asks are you pleading guilty to this crime
10 because you did it, and he swears under oath that he did it.

11 Q: And then the judge pronounces sentence, whatever that
12 might be?

13 A: That is correct.

14 Q: Okay. And all these cases are all guilty pleas; right?

15 A: Yes.

16 Q: They're not trials?

17 A: No.

18 Q: All right. Now, what did the sentence he got again on
19 this last one, Exhibit No. 3?

20 A: He got ten years in the South Carolina Department of
21 Corrections.

22 Q: Now, what is it about his criminal history that you find
23 significant to your opinion in this particular case?

24 A: There are four things. The first one, as I said, he
25 received a punishment for those crimes back in 1994 and yet

1 he continued to do it three other times. So that shows that
2 his drive to have sexual contact with children is so strong
3 that he just can't control it.

4 There's -- the other thing is that he has a significant
5 history of alcohol abuse. He's been arrested, like, eight
6 times for alcohol-related offenses, but millions of people
7 get drunk every day and they don't molest children. So in
8 order for him to have molested children and tell me it was
9 because he was drunk, those thoughts about having sex with
10 children had to already be in his head for him to be able to
11 do it when he was drunk because someone that doesn't have
12 those thoughts in his head will not molest a child when
13 they're drunk.

14 As I said, the probation was a significant issue because
15 he violated it. He violated it with a new sex crime because
16 he couldn't control his behavior, and that makes him six
17 times more likely to commit another sex crime.

18 And the last thing is that Mr. Filyaw was convicted of
19 criminal domestic violence. Now, that's a violent crime and
20 so any conviction for a violent crime apart from his sex
21 crimes increases his risk for rape and other sexual crimes,
22 according to the research. So that's another factor that
23 places him at risk for another sex crime.

24 Q: Now, Dr. Swan, what did Mr. Filyaw tell you during your
25 interview with him about his sexual interests?

1 A: Mr. Filyaw denied that he was currently aroused by
2 children. He said that he had no fantasies about children
3 now. He said I used to be aroused to girls between the ages
4 of 9 and 12. However, he had a 5- or 6-year-old victim.

5 He said he first noticed that he was attracted to
6 children the first time it happened, and it happened just
7 that one time, the **Minor 2** that he admitted doing it. He
8 stated that he's not had sexual fantasies about past victims
9 or children since he was in SCDC, but then he went on to say
10 I don't even want to see a girl in a bathing suit and get my
11 heart beating fast, I'm scared, meaning he was telling me
12 right there in that interview he was still aroused by
13 children because if he saw a girl in a bathing suit, he'd be
14 getting excited again.

15 Q: Now, Dr. Swan, there's girls in bathing suits and
16 there's little girls in bathing suits. Did he -- was it
17 clear to you what he was talking about there?

18 A: Oh, it was very clear he was talking about the girls
19 that he said, 9 to 12.

20 Q: Okay. Go ahead.

21 A: Okay. That's it.

22 Q: All right. Now, in this particular case, did you then
23 look to see whether or not he'd had any sex offender
24 treatment while in prison?

25 A: I did.

1 Q: Is sex offender treatment offered by the Department of
2 Corrections?

3 A: It is.

4 Q: It's probably only at one facility; right?

5 A: That's correct.

6 Q: Okay. Why is it necessary to look and see if he's had
7 any sex offender treatment while he was locked up in prison?
8 Why is that necessary?

9 A: Well, my job is to see that he's at -- that he's at risk
10 for committing another sexual crime, and the only thing that
11 we know that -- well, one of the most important things that
12 we know that can diminish a person's risk to commit another
13 crime is sex offender treatment. So I look at whether
14 they've already had it in the past to see if they continue to
15 be at risk for another sexual crime or if maybe they did so
16 well in treatment that, you know, they don't need any more.

17 Q: Okay. In this particular case, did the records indicate
18 he had some kind of sex offender treatment back in the '95-
19 '96 timeframe?

20 A: Yes.

21 Q: It was called CSTAR?

22 A: CSTAR. He had CSTAR between November and February,
23 November of 1995 and February of 1996, after he'd committed
24 those first two sexual crimes. When I asked him to describe
25 it, he said, well, it was just little classes you go to in

1 the evening and they ask you different questions.

2 So I asked him about some of the things that go into sex
3 offender treatment, like doing a disclosure of all your
4 victims, you know, talking about the thinking errors that you
5 had that let you go ahead and molest children, and he said
6 that he didn't have any of those things. So not only was
7 that not considered substantial sex offender treatment, but
8 he didn't benefit because he went on and offended three more
9 times that we know of.

10 Q: Okay. So he's in prison back in '95 and '96, takes some
11 kind of sex offender treatment, yet he gets out and offends
12 again?

13 A: Right. Now, he also said that he had some treatment at
14 the Pee Dee -- some sex offender treatment at the Pee Dee
15 Mental Health Center, but he said he was terminated because
16 he told them that he didn't do the crime and shortly
17 thereafter he re-offended.

18 Q: Based upon your examination of Mr. Filyaw, the records
19 you did, looking at him and things like that, did you arrive
20 at a diagnosis of a mental abnormality or a personality
21 disorder or both?

22 A: I diagnosed him with a mental abnormality, pedophilic
23 disorder, sexually aroused by both, nonexclusive type.

24 Q: Okay. Now, let's break that down. Pedophilic disorder.
25 What does that mean he's attracted to?

1 A: Pedophilic disorder means that he's sexually aroused by
2 children who have not yet entered puberty, and we call that
3 prepubescent children. So these are children with no
4 breasts, no pubic hair. They are children.

5 Q: Okay. And then when it says sexually attracted to both,
6 nonexclusive, what does those -- what do those phrases mean?

7 A: Sexually attracted to both means that he's sexually
8 aroused by boys and girls because he had male and female
9 victims, and the nonexclusive means that he also has adult
10 partners as well.

11 Q: Now, the criteria for a sex -- for a pedophilic
12 disorder, being a pedophile, to meet that criteria, what do
13 you have to find in a guy?

14 A: So the technical definition for pedophilic disorder is
15 that over a period of at least six months -- six months is
16 the minimum, and we know of at least 17+ years for Mr. Filyaw
17 -- he must've had recurrent intense sexual arousal to
18 prepubescent children as manifested by fantasies, urges, or
19 behaviors involving sex with children.

20 Q: Is this something that can be cured?

21 A: It cannot be cured.

22 Q: Can it be treated?

23 A: Well, what we do in sex offender treatment is we teach
24 these individuals strategies to control those very strong
25 impulses toward children so that they don't go out and molest

1 them again. We can't get rid of the fantasies. If you have
2 fantasies about children at 17, you're still going to have
3 them at 70, but what we can do is teach you some methods to
4 control those urges and impulses so that you don't reoffend
5 against another child.

6 Q: Was there another diagnosis you made related to alcohol?

7 A: There was. I diagnosed him with alcohol use disorder.

8 Q: And what does that mean?

9 A: Alcohol use disorder means that he has a substantial --
10 the best word would be addiction to alcohol, and that he has
11 withdrawal symptoms when he stops, that he needs more and
12 more to keep -- keep being intoxicated, and there are a
13 number of things that we look at, but the essential thing is
14 a pattern of alcohol use that is non-adaptive over a period
15 of years.

16 Q: Now, did he tell you that four or five years ago he'd
17 stopped drinking? He had stopped drinking? Tried to stop?

18 A: He did.

19 Q: Does that impact upon your diagnosis based upon his
20 history and what you've looked at about this guy?

21 A: It does not because he's had all of those arrests for
22 alcohol-related offenses, and, you know, alcohol -- the last
23 one was 2002. So we know that people can relapse on alcohol
24 and we know that it's been a long pattern over a period of
25 years, at least --

1 Q: How did -- go ahead.

2 A: -- 21 years that I'm aware of.

3 Q: How does this diagnosis about alcohol use -- how does
4 that impact upon his risk to reoffend sexually?

5 A: Well, obviously, he said that he could have been so
6 drunk that he molested the children and didn't know about it.
7 So alcohol was involved in his offenses and so that's a risk
8 factor for him. If he starts using alcohol again, he's at
9 greater risk to commit another sexual offense.

10 Q: In these types of cases, are there certain types of risk
11 factors you look for in an individual?

12 A: Yes, there are.

13 Q: What are they called?

14 A: They're called static risk factors and dynamic risk
15 factors.

16 Q: Now, by static, does that mean something that's just not
17 going to change?

18 A: It means something that will not change.

19 Q: Okay. What type of -- based on your analysis of Mr.
20 Filyaw, the records you looked at, the convictions, the
21 interview you did with him, what type of static risk factors
22 did he have that you found significant?

23 A: His primary static risk factor -- and that's the one
24 that won't change -- is sexual arousal to prepubescent
25 children.

1 Q: Okay. Now, did you score him on something called the
2 Static 99-R?

3 A: I did.

4 Q: What is the Static 99-R?

5 A: The Static 99-R is a risk assessment tool that we use to
6 assess the risk that an individual will be arrested or
7 convicted of another sexual crime in five years.

8 Q: Okay. Is this a copy of your risk assessment that you
9 did on him, the form you filled out?

10 A: Yes, it is.

11 Q: Now, the Static 99-R, is this something that's commonly
12 used by experts in your field?

13 A: Yes. This is the most commonly used risk assessment
14 instrument around the world for assessing risk in sex
15 offenders.

16 Q: And is it based on studies of thousands of sex offenders
17 who have been reconvicted for sex offenses in multiple
18 countries?

19 A: It does. It's multiple countries, and the original
20 sample involved 30,000 sex offenders.

21 Q: Okay. And in this particular case, you used it to --
22 you scored Mr. Filyaw; right?

23 A: Yes, I did.

24 Q: And what score did Mr. Filyaw get on the Static 99-R?

25 A: He got a score of 3 on the Static 99-R.

1 Q: What is the lowest you can get and what's the highest
2 you can get on that doc -- on that instrument?

3 A: The lowest is a -3 and the highest is a 12.

4 Q: And a score of 3 puts him where?

5 A: Right in the middle of the average risk range.

6 Q: Okay. And speaking in numbers or percentages, where
7 does that put him in the likelihood to reoffend under the
8 rules that govern the Static 99-R and how you score it?

9 A: Okay. So he is in the 66th percentile, and what that
10 means is that out of every hundred sex offenders, Mr.
11 Filyaw's risk is -- only 25 percent of people have higher
12 risk to commit another sexual crime than he does. I'm sorry.
13 Only 25 percent of people have greater risk to be arrested or
14 convicted of a sexual crime.

15 Q: Okay. So where -- where is he in the system -- in this
16 system? He has got a moderate risk to reoffend by that;
17 right?

18 A: Average risk to reoffend, and that is about one and a
19 half times the average sex offender.

20 Q: Okay. So he's one and a half times more times likely to
21 reoffend sexually than the average sex offender?

22 A: Yes.

23 Q: Okay. Does the Static 99 -- based upon your research
24 and your work in this area for some 20 or 30 years, does the
25 Static 99 underestimate the risk to reoffend?

1 A: It does. Because the Static 99 tells us his risk to be
2 arrested or convicted in five years, but what the Sexually
3 Violent Predator law wants us to determine is whether he will
4 commit another sexual crime in his lifetime, and we know that
5 less than 10 percent of sexual crimes results in a
6 conviction.

7 So you can see that there are -- it grossly
8 underestimates risk. Not only that, Mr. Filyaw had victims
9 other than the ones that we were -- that he was arrested --
10 other than the ones that he was convicted for. So that's an
11 underestimate as well.

12 Q: Now, Doctor, you also mentioned in addition to the
13 static factors there were dynamic factors. What do we mean
14 by the word dynamic factors or that phrase?

15 A: Well, dynamic risk factors are the ones that we target
16 in treatment for change so that the individual doesn't
17 reoffend. And there are a group of them that have been
18 identified in the research and, if you have them, they
19 increase your risk and, if you work on them in treatment and
20 reduce them, then you're less likely to reoffend.

21 Q: What type of dynamic risk factors did you find existed
22 regarding Mr. Filyaw?

23 A: So Mr. Filyaw was sexually preoccupied, and sexual
24 preoccupation is an abnormally intense interest in sex, in
25 his case with little girls and boys, that dominates

1 psychological functioning. In Mr. Filyaw's case, there's no
2 other way to explain what he did to [Minor 5] as far as
3 following her, molesting her under the nose of adults,
4 basically harassing her for a period of two years other than
5 sexual preoccupation.

6 Q: Okay. What other dynamic risk factors did he have in
7 addition to that?

8 A: He has lack of emotionally intimate relationships with
9 adults, and what that means is someone who doesn't have any
10 intimate relationship or the relationships are conflicted --
11 conflicted or there is alcohol abuse or infidelity.

12 And in his case, he had two marriages. He was an
13 alcoholic during those marriages. He was molesting children
14 during that time.

15 The next one is lifestyle impulsiveness, and this means
16 low self-control, chronic instability in employment and
17 housing, lack of meaningful daily routines, and irresponsible
18 decisions.

19 And Mr. Filyaw is an alcoholic. He had the eight
20 alcohol-related arrests. He clearly made irresponsible
21 decisions by not getting treatment for his sexual disorder
22 and continuing to molest children. And failing to deal with
23 his alcohol problems. So he definitely has the lifestyle
24 impulsiveness.

25 Q: Okay. What else? Any other dynamic risk factors that

1 he has?

2 A: He also has poor problem-solving, and what that means is
3 when you have a problem, you need to take a look at the
4 problem and identify it. Then you need to generate
5 alternatives to that problem and then you need to pick the
6 best one as a solution.

7 But Mr. Filyaw was not able to do that because he
8 continued to address his problem with children and alcohol.
9 He arrived at ineffective solutions to his problems, and he
10 failed to say, you know, if I do this again, I'm going to
11 prison. And so he kept doing the same thing over and over
12 and getting the same result, going to prison.

13 And the last one is a dysfunctional coping, and
14 dysfunctional coping is the way in which sex offenders manage
15 their negative emotions, like anger, anxiety, rejection,
16 humiliation, those things that all of us face. They do it
17 through externalizing behaviors or committing other crimes
18 against people or sexual responses.

19 And in Mr. Filyaw's case, he seemed to solve all his
20 problems by having sex with children.

21 Q: Are these dynamic risk factors, the ones you've listed
22 for us right now, are they significant with regard to your
23 ultimate opinion?

24 A: Yes, they are.

25 Q: Why is it important -- why is it important to look at

1 both the static factors, the unchangeable stuff, and the
2 dynamic or changeable factors? Why look at those?

3 A: It's important to look at both because you need to look
4 at -- you know, the static factors are not going to change
5 and it's important to note that Mr. Filyaw is 60 years old
6 and, even though he's 60 years old, most offenders' risk
7 decreases at 60.

8 However, that's not necessarily the case with child
9 molesters. Rapists -- you never hear of a rapist over the
10 age of 60. Well, with child molesters, they continue to
11 molest children as long as they're physically capable. I had
12 one who was 89 and still doing it. So his risk doesn't stop
13 at 60 like most sex offenders. It will keep on going as long
14 as he's alive and able to do it.

15 Q: He's over 60? He's 63 or 64?

16 A: He's 65 right now.

17 Q: Sixty-five now? Okay.

18 A: But as I said, the table stops at 60, but he will
19 continue to do it as long as he's physically capable.

20 Q: Now, Dr. Swan, do you -- based upon your research, the
21 scoring on the Static 99, the evaluation you did of this guy,
22 Mr. Filyaw, do you have an opinion to a reasonable degree of
23 psychological certainty as to whether or not Mr. Filyaw
24 suffers from a mental abnormality or a personality disorder?
25 We talked about that a minute ago. So again, what is it?

1 A: Pedophilic disorder, sexually attracted to both,
2 nonexclusive type.

3 Q: And then the alcohol use disorder as well?

4 A: Alcohol use disorder.

5 Q: Okay. Do you also have an opinion, again to a
6 reasonable degree of psychological certainty, as to whether
7 or not this diagnosis of Mr. Filyaw affects his emotional or
8 volitional capacity so that he is predisposed to commit
9 future sexually violent offenses?

10 A: Yes, I do have an opinion and, yes, he lacks the ability
11 to control his behavior.

12 Q: When I say volitional control, what am I saying there?
13 What does that word mean?

14 A: His ability to control his behavior.

15 Q: Okay. And also, do you have an opinion, again to a
16 reasonable degree of psychological certainty, does Mr. Filyaw
17 have the propensity to be dangerous and commit future
18 sexually violent offenses?

19 A: Yes, he does.

20 Q: Do you also have an opinion, again to a reasonable
21 degree of psychological certainty, as to whether or not this
22 propensity to commit future sexually violent offenses is of
23 such a degree that it poses a menace to the health and safety
24 of others?

25 A: Yes, it does. Specifically, children.

1 Q: Do you have an opinion, again to a reasonable degree of
2 psychological certainty, does Mr. Filyaw have serious
3 difficulty controlling his behavior and these propensities to
4 be dangerous?

5 A: That's correct.

6 Q: He does?

7 A: Yes.

8 Q: Okay. Do you have an opinion, again to a reasonable
9 degree of psychological certainty, does Mr. Filyaw's
10 diagnosis and all the things we've been talking about today
11 -- do they make him likely to engage in acts of sexual
12 violence if not confined in a secure facility for long-term
13 control, care, and treatment?

14 A: Yes.

15 Q: And do you believe or do you have an opinion, again to a
16 reasonable degree of psychological certainty based upon the
17 research and what you've done, that Mr. Filyaw does meet the
18 legal criteria to be civilly committed as a sexually violent
19 predator?

20 A: Yes, I do.

21 Q: Okay. Now, there's the question of outpatient treatment
22 versus confined for treatment?

23 A: Yes.

24 Q: Would outpatient treatment work for this guy?

25 A: Absolutely not. He -- when he was on probation and he

1 was mandated to get treatment, he couldn't do it. He
2 couldn't control himself well enough to do it. So if he is
3 released in the community, there's no way that he's going to
4 do it voluntarily because he couldn't even do it while he was
5 on probation and he could go back to prison for not doing it.
6 We know from research that sex offenders virtually never get
7 sex offender treatment unless they are mandated by probation
8 or the Court to do so.

9 Q: And is he facing any kind of probation or restrictions
10 right now? He's finished his prison term. Is he on
11 probation now?

12 A: He is not.

13 Q: Okay. Now, who is Dr. Colbi Sutton?

14 A: Dr. Sutton is the expert on Mr. Filyaw's behalf.

15 Q: Okay. She was retained by his lawyer --

16 A: Yes.

17 Q: -- to look at him just like -- okay.

18 A: Yes.

19 Q: The way you did. Now, did Dr. Sutton produce a report
20 and have you read it?

21 A: Yes, I have.

22 Q: Okay. Does she recommend that he be committed for long-
23 term control, care, and treatment as a sexually violent
24 predator?

25 A: She did not.

1 Q: Okay. So it's clear that you disagree with her
2 conclusions. Can you tell the jury why you disagree with her
3 conclusions?

4 A: I disagree with her conclusion because the Static 99,
5 which I believe she based her opinion on, she says that he
6 has pedophilic disorder, but she thinks he's at low risk
7 because of the Static 99. However, the Static 99-R
8 underestimates risk and specifically it underestimates risk
9 in Mr. Filyaw's case because there were victims that he was
10 not convicted for.

11 Q: Okay.

12 MR. BOGLE: Now, Dr. Swan, I'm done. Please answer any
13 questions that counsel may have or the Court may have.

14 THE COURT: All right. We're going to stand down for
15 just a minute.

16 MR. BOGLE: Okay.

17 THE COURT: We're going to take a break. Ladies and
18 gentlemen, I'm going to ask you to step to the jury room. Do
19 not discuss the case. I'll get you back out here in just a
20 moment. Okay?

21 (WHEREUPON, the jury exited the courtroom at 11:05 a.m.)

22 THE COURT: Hold on, Dr. Swan. Hold on.

23 THE WITNESS: Okay.

24 THE COURT: All right.

25 MR. BOGLE: Your Honor, before we just take a second,

1 one thing I want to just clear up. In her report, Dr. Swan
2 additionally diagnosed --

3 THE COURT: Well, when you say in her report, I'm
4 assuming you're referring to Dr. Swan's report --

5 MR. BOGLE: Yes.

6 THE COURT: -- because you've also asked about Dr.
7 Sutton's report as well.

8 MR. BOGLE: In Dr. Swan's report.

9 THE COURT: Okay.

10 MR. BOGLE: In Dr. Swan's report, she also diagnosed Mr.
11 Filyaw with something called other specified paraphilic
12 disorder, hebephilia, and it had to do with his sexual
13 attraction to younger teenage children.

14 Now, that diagnosis was primarily based upon his
15 reactions in the PPG, what he got aroused to. Since the PPG
16 is out, as you notice, there was no testimony about that
17 diagnosis. So I would ask that when Dr. Sutton testifies,
18 there also be no testimony about that diagnosis.

19 THE COURT: If they open that door, I mean I think
20 there's a possibility of her coming back in reply.

21 MR. BOGLE: Right, right.

22 MR. FALK: Yes, Your Honor.

23 THE COURT: Okay. Is that clear on that?

24 All right. Dr. Swan, you may step down, but you are not
25 allowed to discuss your testimony at all. Okay?

1 THE WITNESS: Yes, sir.

2 THE COURT: All right. We'll stand down for just a few
3 minutes.

4 MR. BOGLE: Thank you.

5 (WHEREUPON, there was a break in the proceedings from
6 11:07 a.m. until 11:18 a.m., after which the proceedings
7 resumed as follows.)

8 THE COURT: All right. Is the State ready to proceed?
9 Anything from the State before I bring the jury back out?

10 MR. BOGLE: No, Your Honor.

11 THE COURT: Defense counsel, anything before I bring the
12 jury out?

13 MR. FALK: No, Your Honor.

14 THE COURT: All right. Bring me the jury, please,
15 ma'am.

16 THE BAILIFF: All right.

17 (WHEREUPON, the jury entered the courtroom at 11:18
18 a.m.)

19 THE COURT: All right. I hope you all had a nice, quick
20 break. We're going to continue at this time. Mr. Falk,
21 you're recognized for cross-examination.

22 MR. FALK: Thank you.

23 CROSS-EXAMINATION

24 BY MR. FALK:

25 Q: Dr. Swan --

1 A: Yes.

2 Q: You testified that you've been admitted as an expert
3 over 50 times in South Carolina?

4 A: Yes.

5 Q: And was that testifying in pre-commitment evaluations?

6 A: Pre-commitment and annual --

7 Q: How many --

8 A: -- reviews.

9 Q: How many pre-commitment evaluations have you done?

10 A: I believe that I have done either 26 or 28.

11 Q: Okay. And is it fair to say that you usually -- on pre-
12 commitment evaluations, you usually recommend commitment?

13 A: My statistics overall of the four states that I work are
14 usually about 60 for commitment, 40 against, but it's
15 important to note that these are screened before I even get
16 them. So the low-risk individuals are screened out before I
17 even see them.

18 Q: Well, every state screens, don't they?

19 A: Absolutely.

20 Q: So if you're saying you're usually -- you said you're
21 usually 40 percent for commitment or for release?

22 A: Release.

23 Q: Okay. But every state screens?

24 A: Yes. So I'm only getting the higher risk individuals to
25 even evaluate.

1 Q: And you said that your nation -- your nationwide rate or
2 your multistate rate is 40 percent?

3 A: Release.

4 Q: And you -- and you said that you've testified 28 times
5 in a commitment evaluation?

6 A: No.

7 Q: I may have misunderstood you.

8 A: 280 times.

9 Q: In South Carolina?

10 A: No. In South Carolina, it would be close to 50.

11 Q: In a commitment evaluation?

12 A: Commitment? I don't have it separated out between the
13 annual reviews and the pre-commitments.

14 Q: Well, do you know how many times you've recommended
15 commitment in South Carolina?

16 A: I do not.

17 Q: Do you know how many times you've recommended release in
18 South Carolina?

19 A: I do not.

20 Q: If I gave you a list of some people who you have
21 rendered opinions on, would that help you --

22 A: Well, that --

23 Q: -- to get an idea of how many people?

24 A: But that wouldn't include all the ones I've done in
25 South Carolina. So --

1 Q: No.

2 A: Because there are other -- other defense attorneys
3 besides you.

4 Q: No. I appreciate that, but you said that you don't know
5 how many times you've recommended commitment?

6 A: I don't.

7 Q: Okay. And you don't know how many times you've
8 testified as an expert in a pre-commitment evaluation?

9 A: No. It would be obviously less than 28.

10 Q: And what was the 28 number?

11 A: That was the pre-commitment evaluations that I've done.

12 Q: Okay. You've done 28 pre-commitment evaluations?

13 A: That's correct.

14 Q: So if I gave you a list of individuals who you did a
15 pre-commitment evaluation on, would that help refresh your
16 memory as to how many times you've recommended commitment?

17 A: Well, it would not because there are other people that
18 have lists besides you. So you don't have my complete list.

19 Q: Okay. Do you remember doing a pre-commitment evaluation
20 on Jovan Brown?

21 A: Yes, I do.

22 Q: Did you recommend commitment?

23 A: I did.

24 Q: Do you remember doing a pre-commitment evaluation on
25 Michael Kaminski?

1 A: I do.

2 Q: Did you recommend commitment?

3 A: I did.

4 Q: Do you remember doing a pre-commitment evaluation on

5 John Dorsey?

6 A: I did.

7 Q: Did you recommend commitment?

8 A: Yes, I did.

9 Q: James Felder?

10 A: Yes.

11 Q: And yes is just -- so it gets repetitive, yes is, yes --

12 A: Yes.

13 Q: -- you remember and, yes, you recommended commitment?

14 A: Yes.

15 Q: Okay. Robbie Collins?

16 A: Yes.

17 Q: Micah Bilton?

18 A: Yes.

19 Q: Franklin Saunders?

20 A: Yes.

21 Q: Kenneth Martin?

22 A: Yes.

23 Q: Michael Cardwell?

24 A: Yes.

25 Q: Frederick Reaves?

1 A: Yes.

2 Q: Mr. Filyaw?

3 A: Yes.

4 Q: Wake Hunt?

5 A: Yes.

6 Q: Tarl Rollings?

7 A: Yes.

8 Q: Joshua Flowers?

9 A: Yes.

10 Q: That was one, two, three, four, five, six, seven, eight,
11 nine, ten, eleven, 12, 13, 14 -- that was 15 times?

12 A: Yes.

13 Q: Okay. Do you remember doing a pre-commitment evaluation
14 for a case with Anna Goode on Herman Archie?

15 A: I do.

16 Q: And that was, again, a commitment?

17 A: That's correct.

18 Q: Anthony Tucker?

19 A: That's correct.

20 Q: That was a commitment?

21 A: Yes.

22 Q: Franklin Mosier?

23 A: Yes.

24 Q: Edward Willis?

25 A: Yes.

1 Q: Leonard Jenkins?

2 A: Yes.

3 Q: Samuel Weston?

4 A: Yes.

5 Q: So that was another eight?

6 A: I counted 20 total.

7 Q: One, two, three, four, five, six, seven, eight, nine,

8 ten, eleven, 12, 13, 14 -- that was 15 with me?

9 A: Yes.

10 Q: Herman Archie, Anthony Tucker, Franklin Mosier, Edward

11 Willis, Leonard Jenkins, Sam Weston?

12 A: Yes.

13 Q: That's another one, two, three, four, five, six?

14 A: Okay.

15 Q: So it's 21?

16 A: That's correct.

17 Q: So just with -- between -- you said there were other

18 lawyers in the state, but just between me and Anna Goode, 21

19 of those cases out of potentially 28, you recommended

20 commitment?

21 A: That's correct. Because the low-risk individuals had

22 already been screened out.

23 Q: Now, how do -- you know, just help me. How does the

24 Department of Mental Health -- you were primarily practicing

25 in the state of Florida; is that correct?

1 A: Well, Florida, Missouri, and Iowa.

2 Q: Okay. So how did the South Carolina Department of
3 Mental Health find you?

4 A: Well, one of the psychologists who ran the treatment
5 program here in South Carolina actually came to run -- to run
6 the treatment program in Florida, and she was aware that they
7 were back-logged and she knew that I had a South Carolina
8 license. And so she gave me the name of the principal
9 contact and I contacted that person in the Department of
10 Mental Health.

11 Q: And so for a period of time when the chief psychologist
12 at the Department of Mental Health, Dr. Marie Gehle, got full
13 up, you were doing a lot of those?

14 A: Yes, I was.

15 Q: Okay. So you became sort of the go-to person for the
16 Department of Mental Health?

17 A: Well, anywhere they had a need, I did. I did also some
18 of the criminal responsibility, competency, and those things
19 too.

20 Q: Do you think that they liked having you on that list as
21 they could reasonably count that you would recommend
22 commitment?

23 MR. BOGLE: Objection to the question, Your Honor.

24 THE COURT: Sustained.

25 MR. BOGLE: Thank you.

1 BY MR. FALK:

2 Q: You had said that you were disciplined by one of your
3 professional organizations --

4 A: Yes.

5 Q: -- for using an outdated form; is that correct?

6 A: That's correct.

7 Q: Okay. What was the impact on the -- so in that setting,
8 you were interviewing somebody, whether or not -- regardless
9 of whether it was for release or pre-commitment, you were
10 interviewing whether or not that person was ready to be --
11 needed to be confined? Is that an accurate way to say it?

12 A: Well, it was whether they were ready for release from
13 treatment, whether they'd done well enough in treatment to be
14 released.

15 Q: So as a result of that evaluation, was he released on
16 that cycle?

17 A: Not that particular cycle, but the very next year, he
18 was released. He was on the borderline when I saw him, in my
19 opinion, and then the next year he was released by my
20 recommendation.

21 Q: But you still recommended that he wasn't ready for
22 release at that time; is that correct?

23 A: Yes.

24 Q: And using that form helped? Using that interview form
25 contributed to that opinion?

1 A: Well, it -- the form has no particular value. It's just
2 an interview form, just the same as the interview that I made
3 to do my -- you know, a number of my interviews, but it was
4 -- it was related to a theoretical model that was outdated.
5 And even though the form itself wasn't outdated, that
6 treatment model was outdated.

7 Q: Now, when you were going through the police reports and
8 when you were going through the underlying facts, you choose
9 to always accept the victims' statements as being accurate;
10 is that correct?

11 A: \ Well, I weigh what they say and decide what weight to
12 give it because, you know, obviously, there's sometimes where
13 victims are impaired or they might not be able to remember,
14 and I wouldn't give that as much weight as I would give
15 perhaps a child who has no vested interest to making up a
16 story.

17 Q: Is it possible in these situations that children could
18 have exaggerated stories?

19 A: Well, it's always possible. Anything is possible, but
20 none of these children alleged anything other than he rubbed
21 their vagina, and the older girl, **Minor 5**, alleged that he
22 actually inserted his fingers into her vagina. There are
23 whole other things -- many things that he could've done and
24 not any of the victims said that he did anything more than
25 that. So I thought that, you know, what they said was

1 accurate.

2 Q: But it is certainly possible that they were not -- that
3 they were exaggerating?

4 A: Well, I guess you can always say it's possible. I don't
5 believe so in this case.

6 Q: But you didn't talk to any of these victims; is that
7 correct?

8 A: I did not.

9 Q: The only thing that you looked at was the police
10 reports; is that correct?

11 A: That's correct.

12 Q: So that's your only basis for knowing that those facts
13 are true; is that correct?

14 A: Well, and the victims' statements that they gave the
15 police. That's correct.

16 Q: Okay. Now, you sort of choose to believe that my client
17 is not telling you the truth; is that correct?

18 A: Well, I'm very sure that he's not telling me the truth.

19 Q: And, for example, there was a discussion or there was
20 some conversation -- well, my client said that somebody --
21 that it was an aunt of his or there was some dispute about
22 some property; is that correct?

23 A: Right. And she coerced the child to make up these
24 allegations, but this was the child he was following around
25 the house and that the little girl told every adult, social

1 service, and the police the same thing.

2 Q: But she couldn't have been making that story up; is that
3 correct?

4 A: I don't think so. Without a doubt, I do not believe
5 that she's making that story up. But he --

6 Q: But her mother could have -- her mother could have told
7 her to make -- to tell that story; is that correct?

8 A: Well, the issue with people that make up stories is that
9 it's a set story, you know, and they say the same thing over
10 and over, but what you assess is all the factors around.

11 Like, if they can give a context, like she said that he
12 followed her in her bedroom, he followed her in the bathroom.
13 That she sat on the couch with her grandma and he tried to do
14 it with her grandma.

15 You know, typically, when someone's fabricating a story
16 or they've been coached, they say, oh, he tried to touch my
17 private part and that's all you get. You don't get all these
18 extraneous details. And so it was my decision that that
19 story was accurate.

20 Q: Well, wasn't part of the story that he offered her a
21 hundred dollars?

22 A: He offered her a hundred-dollar bill to let -- to pull
23 her pants down so he could see her vagina.

24 Q: Now, did you believe that story?

25 A: I did because he offered two other girls that I was

1 aware of money to look at their vaginas.

2 Q: But this is a hundred dollars; is that correct?

3 A: That's what he said.

4 Q: And this --

5 A: I don't think he had any intention of giving it to her,
6 but you can say anything.

7 Q: And this is a man that's living on a pallet in the
8 kitchen of somebody's trailer at the time; is that correct?

9 A: That's true.

10 Q: You had testified that -- when you were talking about
11 **Minor 5** and **Male Minor 1**, I believe your testimony was that he was
12 molesting many members of the family, many children in that
13 family?

14 A: That's correct.

15 Q: Were there arrests for those?

16 A: There was not. It's -- a pedophile, as I said, those
17 impulses develop around puberty when they first become
18 attracted to children. So he wasn't arrested until he was
19 40. So there was information in the police reports that he
20 was molesting all the kids in the family. It wasn't until he
21 actually molested the neighbor kids that he was actually
22 arrested.

23 Q: But you have no basis for knowing whether or not that's
24 true; is that correct?

25 A: I have -- **Minor 6**, the one that he molested up until the

1 age of 12, indicated that he had molested all the boys and
2 girls in the family, basically anyone he could get his hands
3 on.

4 Q: But that was not based on her firsthand knowledge, was
5 it?

6 A: Yes, it was. She was in the family and he molested her
7 as well.

8 Q: Well, that's one person. Out of all the other people,
9 she had no firsthand knowledge of that; is that correct?

10 A: She said that she did.

11 Q: She could have been exaggerating? She could have been
12 fabricating?

13 A: I think anything is possible, but as I said, it would be
14 very unusual for a man to be a pedophile and not arrested
15 until the age of 40. So it's more likely that he was
16 molesting all the kids in the family and then when he went
17 outside the family and molested a neighbor, they reported him
18 to the police. Whereas, the family told **Minor 6** just not to
19 tell anybody.

20 Q: Now, what did -- what was the testimony regarding a
21 piece of property and somebody --

22 A: Mr. Filyaw told me that there was a quarter acre of land
23 that he was left when his mother died I believe, and that he
24 sold it for \$500. And **Minor 6** wanted that land and she fought
25 him for it in court and, when she was not successful, she

1 coerced [Minor 5] into making up these allegations about him.

2 But then he gave a story that she sent those kids over
3 deliberately so that he would molest them to set him up. So
4 he gave a couple of different stories, neither of which I
5 found believable.

6 Q: Did you look to see if there was any type of litigation
7 about a piece of property?

8 A: I did not.

9 Q: Would that not have been important to see if there was
10 some type of bias?

11 A: Well, it doesn't matter whether there was litigation
12 about the property or not, and it doesn't matter, you know,
13 what happened. Basically, he was saying that she coerced
14 this little girl to make up the story. And this little girl
15 gave a long history of the times that he tried to molest her,
16 who she told to get him to stop molesting her, and she
17 finally -- you know, finally, DSS got involved when he had
18 been doing it for years.

19 Q: Based on her reports?

20 A: Well, based on [Minor 6] and based on [Minor 5]

21 Q: Let me talk about -- I mean my client pled guilty in
22 these cases; is that correct?

23 A: Yes.

24 Q: So there was no trial; is that right?

25 A: That's correct.

1 Q: So there was no opportunity for both sides to lay out
2 the facts and for a jury like this to make a determination as
3 to what happened?

4 A: That's correct.

5 Q: And you were not present at any of those plea agreements
6 -- at plea hearings; is that correct?

7 A: I was not.

8 Q: And did you have an opportunity to look at any of the
9 transcripts from those plea hearings?

10 A: I don't think I had any transcripts from the plea
11 colloquies.

12 Q: So you have no firsthand knowledge as to what was said;
13 is that correct?

14 A: I do not.

15 Q: You have no firsthand knowledge whether or not he swore
16 to anything; is that correct?

17 A: Well, I've been -- I've testified over a thousand times
18 in cases and, if you're accepting a plea, if you plead
19 guilty, you have to swear under oath that you were guilty and
20 that's why you're pleading guilty.

21 Q: Do you have any information whether or not these pleas
22 were under what we call Alford or maybe the jury would know
23 it as a nolo contendere plea?

24 A: I don't see on any of these forms that it was an Alford
25 plea.

1 Q: But you didn't read any of the plea transcripts to know
2 whether or not there was an Alford plea; is that correct?

3 A: I did not, but, typically they put it on the sentencing
4 sheet if he's accepting an Alford plea.

5 Q: Is that a state requirement that they're on the
6 sentencing sheets?

7 A: I don't know that it's a state requirement, but they
8 have a box that they check. And this one says as indicted.

9 Q: But you make a lot of the fact that he raised his hand
10 and said that he -- you know, that there was a statement of
11 facts that were given and that he raised his hand and said
12 yes?

13 A: That's correct. The prosecutor states the facts and the
14 individual under oath admits that he's pleading guilty
15 because he did the crime.

16 Q: But you don't know what facts the prosecutor read; is
17 that correct?

18 A: Well, they were the facts that were presented on the
19 information sheets, the charging sheets.

20 Q: You assume?

21 A: I know that's what happens in court. You can't cite
22 facts that don't support the charge that he's been indicted
23 for.

24 Q: Have you ever come across a situation where somebody may
25 be being charged for, say, criminal sexual conduct in the

1 first degree and they take a plea deal?

2 A: Absolutely. And what that means is that they make a
3 deal in order to plead guilty to a lesser charge in agreement
4 for their guilty plea, and that way they don't have to have a
5 trial.

6 Q: Do you think sometimes people may plead guilty because
7 they do not want to run the risk of facing the higher
8 charges?

9 A: Well, I think that's possible. It's hard for me to
10 imagine that I would say under oath that I did a crime that I
11 didn't, but I guess there are some people that do that.

12 Q: Do you know what the charges could be for-- what the
13 sentencing range is for somebody charged with criminal sexual
14 conduct in the first degree?

15 A: It's substantial, many years in SCDC.

16 Q: And is that a substantially longer sentencing range than
17 what he pled to?

18 A: Yes, it is.

19 Q: And he had already been in prison for -- he'd already
20 been in the local detention center for almost a year -- over
21 a year, almost a year and a half?

22 A: Over a year, 483 days.

23 Q: So it is possible that somebody may just decide that
24 they don't want to run the risk that the jury would believe
25 the little girl and not himself; is that correct?

1 MR. BOGLE: Objection. Calls for speculation.

2 THE COURT: Sustained.

3 MR. BOGLE: Thank you.

4 BY MR. FALK:

5 Q: But in the course of your professional career in
6 evaluating sexually violent predator cases, do you never come
7 across a situation where there's a possibility that somebody
8 is pleading guilty when they're not, in fact, guilty?

9 MR. BOGLE: Objection as far as relevance to this case,
10 Your Honor.

11 THE COURT: I'll allow her to answer the question.

12 MR. BOGLE: Thank you.

13 BY MR. FALK:

14 A: I'm not -- I'm not aware of anyone. I have guys that
15 tell me that, but I'm not aware of any cases where that was
16 actually truthful.

17 Q: Now, what was your diagnosis in this case?

18 A: It was pedophilic disorder, sexually attracted to both,
19 nonexclusive type.

20 Q: You prepared a report in this case, did you not?

21 A: I did.

22 Q: On the front page of your report, you're showing
23 pedophilic disorder, sexually attracted to females,
24 nonexclusive type?

25 A: I did. That's a typo. In the later part of my report,

1 I have the correct one. Oh, I'm sorry. I have females.

2 Q: Because if you --

3 A: There's a reason for that that I cannot -- okay.

4 Q: Okay. So what is your diagnosis?

5 A: It is sexually attracted to both.

6 Q: Okay. Well, if you'll look at page 22 of 28 of your
7 report?

8 A: Yes.

9 Q: You -- the first - the heading of the paragraph under
10 diagnosis says pedophilic disorder, sexually attracted to
11 females, nonexclusive type; is that correct?

12 A: That's correct.

13 Q: Is that another typo?

14 A: It is.

15 Q: Okay.

16 A: It's sexually attracted to both.

17 Q: What is the possibility that there are other -- that
18 you've made other mistakes in this report?

19 A: Well, I review it real carefully and sometimes I do make
20 mistakes, but there are no substantive mistakes in the report
21 because I've read it many, many times.

22 Q: What was his Static score?

23 A: The Static score was 3, and I initially said 4, but then
24 when I was reviewing it again, I changed that back to a 3.

25 Q: Well, that's a material typo in your report, is it not?

1 A: Yes, it would be.

2 Q: Okay. And when did you make that change?

3 A: I made it when I was preparing for trial.

4 Q: Does somebody help you prepare these reports?

5 A: I have --

6 Q: Do you have a staff? Do you have a --

7 A: Oh, yeah, I have staff. I have four different
8 individuals that assist me.

9 Q: What portion of the reports do they do?

10 A: They set them up, put them in the correct form, provide
11 information from the police reports, but the end report is my
12 responsibility and, you know, the diagnosis and the
13 conclusion section. No one does that but me.

14 Q: On page 3 of your report, you're saying that Mr. Filyaw
15 told you that he could not read and write. Was that
16 accurate?

17 A: That is correct.

18 Q: Did you find that that was consistent with the rest of
19 the stuff that he had -- the information that he had given
20 you?

21 A: I did.

22 Q: Because he also said that his father can't read and
23 write?

24 A: That's correct. And he wasn't even sure if his father
25 ever went to school because he worked on the farm and, you

1 know, sometimes when people work on the farm, they don't
2 think school is important.

3 Q: Can you repeat your testimony regarding his risk to
4 reoffend?

5 A: What part of it?

6 Q: What is -- how likely is it that he would reoffend?

7 A: Well, he was in the 66th percentile, which means that
8 only 25 percent of individuals are at greater risk than he is
9 to reoffend, and that it's one and a half times -- let me
10 just check back real quick. One and a half times more likely
11 on a relative risk.

12 The average sex offender has a risk of -- has a score of
13 2 and so -- yes, so he's in the -- about essentially 66th
14 percentile. Twenty-five percent of -- 25.7 percent of sex
15 offenders are higher risk and he's about one and a half times
16 more likely than the average sex offender, 1.39 times.

17 Q: Now, that's a comparative to Canadian sex offenders; is
18 that correct?

19 A: Well, the studies were done on -- on individuals all
20 over the world. These particular risk ratios are based on
21 the Canadian sample, but there's no different -- there's no
22 reason to believe that sex offenders in Canada are any
23 different from the ones in the United States. In fact,
24 they're pretty similar all over the world.

25 Q: So can you say today what his absolute risk to reoffend

1 would be?

2 A: I will not say what his absolute risk is because the
3 developers of the Static 99-R -- it was reformulated. The
4 coding rules were reformulated in -- in October of 2016, and
5 they said that we should not use the absolute risk because
6 they are too unstable. That we should use the percentile
7 rank and the -- the relative risk ranks.

8 MR. FALK: May I approach the witness?

9 THE COURT: Yes.

10 BY MR. FALK:

11 Q: Do you have this copy of the Evaluator's Workbook?

12 A: I do.

13 Q: Would you mind pulling it out?

14 A: Let me see.

15 Q: Or I could leave this with you.

16 A: Okay.

17 Q: Let me just show you this.

18 A: Okay.

19 Q: This is what I want to ask you about.

20 A: Okay.

21 Q: Can you tell me what that page is?

22 A: This says the Static 99-R recidivism estimate of 3 is
23 7.9 percent.

24 Q: Okay. Now, that -- is that -- do you think if you went
25 through your book and you found it, you'd find the same page?

1 A: Absolutely. And I also have this page from Leslie
2 Helmus, who developed and did the re-norming of the Static
3 99-R in 2016. Absolute recidivism rates are stable. Do not
4 use unless absolutely necessary.

5 Q: Is it not necessary right now to know what his absolute
6 recidivism rate is?

7 A: It is absolutely not because he -- the Static 99
8 dramatically underestimates this particular individual's
9 risk.

10 Q: Why is that?

11 A: Because he still has many years that he could reoffend.
12 We know that he -- his likelihood of being arrested or
13 convicted in five years is 7.9 percent, but we also know that
14 he had more victims than he was actually convicted for and we
15 also know that child molesters, in particular, can molest
16 into the advanced ages. So our table stops at 60. He's
17 already 65, but he could continue on as long as he's able for
18 the rest of his life, whereas that's not the case for
19 rapists.

20 Q: Can you just tell me though would it be your opinion
21 that a 7.9 percent risk to reoffend is a likelihood to
22 reoffend?

23 A: That is his likelihood to be arrested or convicted in
24 five years. That is not his likelihood to commit another
25 sexual crime.

1 Q: I'm just asking you whether or not if some -- if there
2 was an outcome that is a 7.9 percent likelihood to occur,
3 there's a 7.9 percent chance that something is going to
4 happen, is that likely to happen?

5 A: Typically, that would not be likely, but as we're
6 saying, our job is not to determine if he's likely to be
7 arrested or convicted, which that figure tells us. Our
8 decision is whether he's likely to commit another sexual
9 crime during the rest of his life.

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

11 THE COURT: Yes, sir.

12 MR. FALK: No further questions.

13 THE COURT: Any redirect?

14 MR. BOGLE: Very briefly, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. BOGLE:

17 Q: When asked about your, shall we say, alleged propensity
18 to commit people, you testified there's been prior screening
19 to weed out the low-risk people?

20 A: That is correct.

21 Q: So in this law, under our law for example, when a guy is
22 nearing the end of his prison term, his file is first
23 reviewed by something called the multidisciplinary team that
24 meets out at SCDC; right?

25 A: That is correct.

1 Q: And they vote yes or no to send the case forward?

2 A: That's correct.

3 Q: And then next it's reviewed by something called a
4 prosecutor review committee that meets at our office?

5 A: That is correct.

6 Q: And they vote yes or no?

7 A: That is correct.

8 Q: And then we file our petition in court and it's reviewed
9 by a circuit judge who decides whether or not it should go to
10 the next level?

11 A: That is correct.

12 Q: And then they have to go to a hearing where we have to
13 argue that he should -- that the guy should be evaluated and
14 a judge has to make a decision and, if he orders the guy to
15 be evaluated, then and only then might the case come to you?

16 A: That's correct.

17 Q: Okay. Now, all this talk about litigation of property
18 and did the victims exaggerate and were they set up and all
19 that, the bottom line is he pleaded guilty to all three of
20 his offenses; right?

21 A: That is correct.

22 Q: Okay. And there's nothing on the sentencing sheets that
23 say it was an Alford plea or a nolo contendere plea or a no
24 contest plea. It says guilty; right?

25 A: That is correct.

1 MR. BOGLE: Thank you.

2 THE COURT: Any recross, Mr. Falk?

3 RECROSS-EXAMINATION

4 BY MR. FALK:

5 Q: Do you have any firsthand information on how many cases
6 are weeded out before they can get to your desk?

7 A: I don't know in South Carolina. I do know in Florida.

8 MR. FALK: Thank you.

9 THE COURT: All right. Doctor, you may step down.
10 Thank you.

11 THE WITNESS: Okay.

12 THE COURT: As she is stepping down, can the lawyers
13 approach a minute, please?

14 (WHEREUPON, a bench conference was held in the presence
15 of the jury but out of the hearing of the jury regarding
16 scheduling off the record.)

17 THE COURT: All right. Ladies and gentlemen, what we're
18 going to do at this point is I'm going to let you go to lunch
19 right now. I told you we typically go until about 1:00, but
20 once you start getting witnesses in place and that's
21 typically what we do, but what I'm going to do now is I'm
22 going to let you go to lunch now. Okay? I'm going to ask
23 that you be back here at 1:15 -- at 1:15, and it is our
24 intention to resume this trial as promptly at that time as
25 possible.

1 Again, do not -- do not discuss this case at all with
2 anyone. As I've said from the outset, you're to decide this
3 case based solely upon the evidence and testimony that's
4 presented in this courtroom and nowhere else.

5 Now, when you come -- let me say this before I let you
6 go. When you come back at 1:15, I'm going to ask that you
7 all in the jury room select a foreperson. I'm going to let
8 you all select your own foreperson. I will tell you that Mr.
9 Orr -- Mr. Orr cannot be your foreperson. Okay?

10 But reduce or put in writing -- Ms. Frances, if you'll
11 make sure they have a writing utensil and something to write
12 on.

13 THE BAILIFF: Yes, sir.

14 THE COURT: Put in writing who your foreperson is and,
15 when we resume the trial this afternoon, the foreperson will
16 sit where this gentleman in the green shirt and glasses is
17 seated closest to me. Okay? The foreperson will be the only
18 person that has an assigned seat.

19 It's funny. You watch jurors come in and out of the
20 courtroom and they'll wait and let people go to this seat and
21 that seat and try to pick their seat and just creatures of
22 habit. All right? From the standpoint of picking your seat
23 when you come in and out of the courtroom.

24 But the only person -- the only person that has an
25 assigned seat is my foreperson, and they'll sit where this

1 gentleman is. The rest of you, as you come in and out, you
2 can sit wherever you so desire. If you feel comfortable in
3 one seat and that's the seat you want, then I'll let you get
4 that seat. Okay?

5 All right. Please be back at 1:15 and we will -- and
6 select your foreperson before you come out and give that to
7 Ms. Frances, so she can give it to me. See you back at 1:15.

8 (WHEREUPON, the jury exited the courtroom at 11:54 a.m.)

9 THE COURT: Mr. Bogle?

10 MR. BOGLE: Yes, Your Honor.

11 THE COURT: I'm sorry. I wasn't even thinking.

12 MR. BOGLE: Oh, that's okay. Let me -- I'm going to go
13 ahead and rest right now and let's do DVs. When we come back
14 from lunch when the jury is in, I'll rest, and Mr. Falk can
15 start his case. How about that?

16 THE COURT: That'll be fine. Is that all right with
17 you, Mr. Falk?

18 MR. FALK: Yes, Your Honor. May I ask a question?

19 THE COURT: Yes.

20 MR. FALK: Mr. Orr is not the foreman?

21 THE COURT: Mr. Orr is the alternate.

22 MR. FALK: Oh, oh.

23 THE COURT: He can't be the foreman.

24 MR. FALK: Oh, I'm sorry.

25 THE COURT: That's okay.

1 MR. FALK: Okay.

2 THE COURT: That's what I told them.

3 MR. FALK: You did.

4 THE COURT: Isn't that what I told them?

5 MR. FALK: You did. And I was trying to figure out what
6 was significant about him. I forgot he was the alternate.

7 THE COURT: He's the alternate. He cannot be my foreman
8 or foreperson.

9 MR. FALK: I would agree.

10 THE COURT: All right. Mr. Bogle has rested. Any --
11 any -- any motions, Mr. Falk?

12 MR. FALK: Your Honor, I certainly want to preserve any
13 prior objections that I made, and I'll make my motion for
14 directed verdict. Quite candidly, I appreciate that it's an
15 uphill battle for me, but I need to preserve the record.

16 THE COURT: Absolutely.

17 MR. FALK: I would say that the State has failed to
18 provide sufficient evidence that he presents a risk to
19 reoffend. I believe that Dr. Swan testified that his re-
20 offense rate, once we finally got to it, was 7.9 percent.
21 Whether or not as a matter of law a 7.9 percent likelihood of
22 an event to occur is the same as it likely to occur, as is
23 required under the statute, I believe that's the grounds for
24 my directed verdict motion.

25 THE COURT: All right. Mr. Bogle?

1 MR. BOGLE: Just responding very briefly, Your Honor,
2 the Static 99-R and all the percentages that go with it are
3 one part of a broader evaluation. Looking at a 15- to 17-
4 year career, if you will, of molesting children, I would
5 submit that that and the diagnosis of pedophilia determined
6 by Dr. Swan, we have shown he's convicted of the right kind
7 of crimes and his overall record is such that he satisfies
8 the requirements of the statute.

9 THE COURT: All right. The law as it pertains to
10 directed verdict -- the Court is not -- as you all well know,
11 is not in a position to weigh evidence. It has to look at
12 the existence -- the existence, and there's certainly the
13 existence of such evidence in this case, which necessitates
14 the Court giving it to the jury and letting them make a
15 decision.

16 So respectfully denied, and the Court's rulings as to
17 all of your prior motions and objections remain the same as
18 well.

19 MR. FALK: Thank you.

20 THE COURT: Okay. All right. Anything else before we
21 break for lunch?

22 MR. BOGLE: No, Your Honor.

23 MR. FALK: No, Your Honor.

24 THE COURT: All right. 1:15.

25 MR. BOGLE: Yes, sir.

1 (WHEREUPON, there was a break in the proceedings from
2 11:57 a.m. until 1:17 p.m., after which the proceedings
3 resumed as follows.)

4 THE COURT: All right. Is the State ready to proceed?

5 MR. BOGLE: Yes, Your Honor.

6 THE COURT: Defense counsel?

7 MR. FALK: We are, Your Honor.

8 THE COURT: Have we got all the jurors?

9 THE BAILIFF: Yes, sir.

10 THE COURT: All right. Bring me the jury, please.

11 (WHEREUPON, the jury entered the courtroom at 1:18 p.m.)

12 (WHEREUPON, the jury foreperson note was marked as
13 Court's Exhibit No. 8.)

14 THE COURT: All right. I have got all the jurors
15 present. I've gotten your note. Mr. Lugo, you are the
16 foreperson. That will be your assigned seat throughout the
17 remainder of this trial. Okay?

18 Mr. Bogle, let me hear from you, please, sir.

19 MR. BOGLE: Thank you. May it please the Court.

20 THE COURT: Yes, sir.

21 MR. BOGLE: The State would rest.

22 THE COURT: All right. Ladies and gentlemen, the State
23 has rested its case. We are now going to move forward with
24 the defense case. Mr. Falk, anything from you at this time?

25 MR. FALK: Not at this time, Your Honor.

1 THE COURT: Well, for the record, he's renewing all of
2 his prior motions, objections, etc. The Court's rulings
3 remain the same as to each. You're so recognized. Call your
4 first witness, please.

5 MR. FALK: Thank you, Your Honor. At this time, I'll
6 call Dr. Colbi Sutton to the stand.

7 THE COURT: All right.

8 THE CLERK: Dr. Sutton, put your left hand on the Bible
9 and raise your right hand, please. Do you swear or affirm
10 that the testimony you give will be the truth, the whole
11 truth, and nothing but the truth, so help you God?

12 THE WITNESS: I do.

13 DR. COLBI SUTTON, being first
14 duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. FALK:

17 Q: Can you please state your name and spell it for the
18 record, please?

19 A: It's Colbi Sutton, C-o-l-b-i S-u-t-t-o-n.

20 Q: And what is your educational background?

21 A: I have a bachelor's with a major in psychology from the
22 College of Charleston. I went on to get my master's and
23 doctorate in clinical psychology with an emphasis in
24 forensics from Spalding University in Louisville, Kentucky.
25 I received my doctorate in 2014. I then did a one-year post-

1 doctoral fellowship just in forensic psychology at Emory ,
2 University.

3 Q: And what is the Salisbury Veteran Affairs Medical
4 Center?

5 A: So it's one of the largest VA medical centers in the
6 country, and it's in Salisbury, North Carolina. As part of
7 my doctoral training, I went there for one year and worked
8 full-time doing a variety of neuropsychology, in-patient work
9 with various clients.

10 Q: And that was all under the umbrella of Emory
11 University's doctoral program?

12 A: The internship occurs whenever you're done with all of
13 your, like, supervised experiences in graduate school, and
14 then you go to your internship for one year of training
15 before you actually receive that doctorate.

16 Q: Oh, I see.

17 Q: And then from there, I went to Emory. But while I was
18 at Emory, I did work at another VA doing different
19 evaluations.

20 Q: Now, are you licensed to practice psychology in the
21 State of South Carolina?

22 A: I am.

23 Q: And just general information, what is psychology?

24 A: Well, psychology is the study of human thoughts,
25 feelings, and behaviors.

1 Q: And what is clinical psychology?

2 A: When you're talking about clinical psychology, it's the
3 study of mental abnormalities or mental disorders.

4 Q: And how does that differ from forensic psychology?

5 A: So forensic psychology is anywhere where psychology and
6 the law meet. So we're really taking psychological
7 principles to answer legal questions.

8 Q: What part of your practice right now concerns forensic
9 psychology?

10 A: All of it. So I'm in full-time private practice where I
11 exclusively do forensic evaluations.

12 Q: Do you have any work with the South Carolina Department
13 of Disabilities?

14 A: I do. I have a contract with them where I do forensic
15 evaluations related to a person's ability to go to trial.

16 Q: And do you have any other associations or contracts with
17 the state of South Carolina?

18 A: Actually, I have quite a few. I would say that 95
19 percent of my work comes from state contracts. So I have a
20 contract with the Department of Mental Health to do different
21 types of forensic evaluations than these. They're to see if
22 they can stand trial or to see if they meet criteria for not
23 guilty by reason of insanity.

24 I also recently was offered and accepted a contract with
25 them to do sexually violent predator evaluations. So the

1 pre-commitments, which is what we're talking about here
2 today, as well as the annual reviews.

3 Q: So you're on a contract with the Department of -- with
4 the South Carolina Department of Mental Health to do pre-
5 commitment evaluations?

6 A: That's correct.

7 Q: So that would be similar to -- do you think that's
8 similar to Dr. Swan's status? She has a contract with the
9 Department?

10 A: It's the same.

11 Q: Okay. Are you involved with any academic organizations?

12 A: I am. And I forgot to mention as well that one of my
13 contracts with the Department of Mental Health is for the MDT
14 meeting or the MDT team.

15 So as Dr. Bogle was talking about earlier, there's a
16 team that actually looks at these individuals who have
17 committed some sort of sexual offense after they're done with
18 their sentence; so whenever they're getting ready to be
19 released from prison. I'm a part of the team that actually
20 looks at them and screens them to see if they need to go
21 forward for further evaluation. Sorry, I forgot about that.

22 Q: I think you promoted Mr. Bogle beyond his education. I
23 don't think he's a doctor.

24 A: Sorry.

25 Q: So the MDT. How many people are on that committee?

1 A: There's five of us.

2 Q: Okay. And that's part of the prescreening process that
3 Dr. Swan was referring to?

4 A: Yes.

5 Q: And so how many times have you -- has the MDT committee
6 met since you've been a part of it?

7 A: I've been on it since July. There were a few months
8 that we did not meet just because somebody couldn't make it
9 or so forth, holidays. So I've probably been to four or
10 five.

11 Q: Do you have a handle on how many cases you all have
12 reviewed?

13 A: We usually review maybe 30 to -- I mean typically it's
14 around 30. But if we miss a month, then we might have closer
15 to 50.

16 Q: Okay.

17 A: Per month.

18 Q: So you have had an opportunity to be part of the
19 screening process on several of these --

20 A: Yes.

21 Q: -- cases? Let me go back. Are you affiliated with any
22 academic organizations?

23 A: I am. So I'm an assistant professor with the University
24 of South Carolina, and so I'm in their psychiatry and law
25 department. And so I teach didactics to medical students who

1 are interested in psychiatry and law. I also offer them
2 hands-on experiences; so they can come and sit in on my
3 evaluations with me, and I teach them about how these cases
4 work.

5 And then we also have sort of a peer review group. So I
6 meet with other psychiatrists and psychologists. They're all
7 doing forensic work, most of whom are for the state, and we
8 submit our own reports and then evaluate them and discuss
9 them.

10 Q: What is didactics?

11 A: It's like teaching a class.

12 Q: Okay. And so that teaching is related to forensic
13 psychology?

14 A: It is.

15 Q: Okay. When you were talking about that peer-review
16 group, is that the Sex Offender Civil Commitment Program
17 Network?

18 A: No. That's just a -- like, an association that I'm a
19 member of, and we have, like, LISTSERVs, so they'll send
20 emails to me and all the other people in the group and
21 they'll just ask our opinion and questions on things. It's
22 really helpful for consulting or if you want to make sure
23 that you're doing something the correct way, you kind of send
24 it out to get feedback from people in the field.

25 Q: Are there any other professional organizations that

1 you're a member of?

2 A: Yes. I'm a part of American Psychological and Law
3 Society. It's a forensic psychology organization. I'm also
4 a member of the Sex Offender Civil Commitment Program. Oh,
5 that's the one you mentioned. And then I'm a part of APA,
6 which is sort of, like, the biggest national organization for
7 psychologists.

8 Q: And what is that? What's the APA?

9 A: The American Psychological Association.

10 Q: Okay. Have you ever been recognized as an expert in the
11 field of forensic psychology?

12 A: Yes.

13 Q: On how many times?

14 A: Twelve times.

15 Q: And have you ever been recognized as an expert in
16 forensic psychology in the state of South Carolina?

17 A: Yes.

18 Q: Do you recall how many times?

19 A: So it would be nine times.

20 Q: Okay. Do you know approximately how many evaluations
21 you've conducted under the Sexually Violent Predator Act?

22 A: Yes. I've done nine.

23 MR. FALK: At this time, we would offer Dr. Sutton to be
24 able to testify in the fields of forensic psychology and
25 diagnosis in sexually violent predator evaluations.

1 THE COURT: Mr. Bogle?

2 MR. BOGLE: If I may, Your Honor, just one or two
3 questions.

4 THE COURT: All right.

5 VOIR DIRE

6 BY MR. BOGLE:

7 Q: In doing the numbers, you said you've been recognized as
8 an expert witness in South Carolina nine times?

9 A: Yes. I believe that's correct.

10 Q: How many times have you been recognized as an expert
11 witness in sexually violent predator trials like this one?

12 A: This would be my fourth.

13 Q: Okay.

14 A: No, I'm sorry. Four times before this.

15 Q: Four times before this?

16 A: Yes.

17 Q: Okay. Were they annual reviews or pre-commitments or
18 both?

19 A: Both.

20 Q: All right. How many were pre-commitment cases like this
21 one?

22 A: One where I testified twice.

23 Q: Okay.

24 MR. BOGLE: Thank you. No further questions and no
25 objection to her.

1 THE COURT: Ladies and gentlemen, same charge I gave you
2 before with regards to expert witnesses. This witness will
3 be allowed to give expert testimony in the field of forensic
4 psychology as to give opinion in that area. That does not
5 mean that you must accept the opinion, but it is evidence for
6 you to use in any way that you see fit and give it the weight
7 and credibility that you deem appropriate.

8 Mr. Falk?

9 DIRECT EXAMINATION

10 BY MR. FALK:

11 Q: Dr. Sutton, how did you get into the courtroom here
12 today? Why are you here today?

13 A: Well, I was contacted by you, Mr. Falk, to evaluate or
14 give a second opinion on Mr. Filyaw to determine if he meets
15 criteria as a sexually violent predator.

16 Q: And you're being paid, are you not?

17 A: I am.

18 Q: Do you know how you get paid in this case?

19 A: Yes. I actually -- it's my understanding that you
20 petition the Court for funding and then the money is issued
21 to you and then you pay me.

22 Q: Okay. And does your pay vary depending on what type of
23 result you come up with?

24 A: No, it does not.

25 Q: And do you make any more money if -- is your rate of pay

1 any higher if you testify?

2 A: It is not. I charge a flat hourly rate.

3 Q: Okay. All right. So what type of protocol did you go
4 through in order to prepare or to start the evaluation in
5 this case?

6 A: It was very similar to Dr. Swan's. Mr. Falk gave me a
7 packet of legal information. I reviewed that packet. I then
8 interviewed Mr. Filyaw for 2 hours and 50 minutes on, I
9 think, October 27th, 2016. I gathered a bunch of information
10 from him about his background and assessed things that could
11 contribute to his risk to reoffend.

12 After that, I also requested additional records and then
13 I spoke to his sister for collateral information to make sure
14 -- to try to make sure that some of the things he was telling
15 me were correct. And then I wrote a report including all
16 that information and my opinion and submitted it to Mr. Falk.

17 Q: Okay. How long did you speak with his sister? Well,
18 what types of information were you trying to corroborate?

19 A: So just things about their family dynamics, especially
20 when they were growing up. I asked her about things like if
21 he could read and write because there was some discrepancy
22 there and he was telling me that even though he has a third-
23 grade level of education, he was able to read the forms
24 whenever I was there, and she confirmed that, that he could
25 read and write. I asked her about his functioning now, his

1 relationship with her, his relationship with other people,
2 his ex-wives, things like that.

3 Q: So based on that information, were you able to reach any
4 kind of conclusions as to what type of relationship he has
5 with his family? Does he still have an active relationship
6 with any members of his family?

7 A: It's my understanding that the only person that he is --
8 continues to be close with is his sister.

9 Q: Okay. Now, can you tell me what is a sexually violent
10 predator?

11 A: Yeah. So the Sexually Violent Predator Act says that
12 there's an extremely dangerous group of sex offenders who
13 have mental abnormalities and are dangerous. Okay? So we're
14 looking for the extremely dangerous group. This is the worst
15 of the worst.

16 So it gives specific criteria somebody has to meet in
17 order to be a sexually violent predator. So really what they
18 want to know is whether the person has a mental abnormality
19 or personality disorder that makes them likely to engage in
20 future acts of sexual violence.

21 Q: So does everybody who has a personality defect or a
22 psychological defect -- are they sexually violent predators?

23 A: No. And it works the opposite as well. There are
24 people that have committed sexually violent offenses that do
25 not have a mental disorder or abnormality.

1 Q: Okay. Now, does everybody who has committed a sexually
2 violent crime -- are they sexually violent predators?

3 A: No. Absolutely not.

4 Q: And why is that?

5 A: Well, because that's just one of the questions. The
6 first thing that we try to distinguish is does this person
7 have a mental abnormality that could -- but the second part
8 is that causes them or makes it likely for them to commit
9 another act of sexual violence.

10 Q: And it's your opinion that just having a mental
11 abnormality doesn't make you a sexually violent predator
12 either?

13 A: Right. Correct.

14 Q: Okay. Now how about if somebody has a mental
15 abnormality and has committed a sexually violent act? Does
16 that person necessarily become a sexually violent predator?

17 A: No.

18 Q: And why is that?

19 A: Well, because we have to make sure that they're likely
20 to commit a future act of sexual violence and so, again, this
21 law was created for the worst of the worst. There's a large
22 population in South Carolina that have -- are on the sexual
23 registry, and I think the last I checked in the SVP program
24 there are 200 people -- around 200 people. So again, we're
25 looking for the worst of the worst.

1 Q: So not everybody who is on the sexual offender registry
2 is supposed to be in the program?

3 A: No. I mean a small percentage.

4 Q: Now, you were here when Dr. Swan testified?

5 A: I was.

6 Q: And so just you would agree with that portion of her
7 testimony that he's committed a sexually violent offense?

8 A: I would.

9 Q: Okay. And so he meets -- in your opinion, he meets that
10 part of the statute; is that correct?

11 A: That's correct.

12 Q: Now, do you agree that he has a mental abnormality or
13 personality defect?

14 A: I do.

15 Q: And what would that be?

16 A: So I diagnosed him with paraphilic disorder,
17 nonexclusive type, sexually attracted to females.

18 Q: Okay. And kind of what does that mean?

19 A: I mean the short answer is that he is attracted to
20 females that are prepubescent. So these are females that
21 have not gone through puberty yet, and there's additional
22 criteria that these behaviors have to have occurred over a
23 six-month period.

24 Q: Now, Dr. Swan, I believe, said that she diagnosed him as
25 pedophilic disorder, sexually attracted to both, nonexclusive

1 type?

2 A: That's correct.

3 Q: There's some overlap in y'all's diagnosis there?

4 A: It is. There is.

5 Q: So what are the diagnostic criteria for your diagnosis?

6 A: Well, the official description in the DSM-5 -- which I
7 think you guys heard Dr. Swan testify about. It's the manual
8 that has all the lists of diagnoses and the symptoms
9 associated with that.

10 So it says that they have to have recurrent intense
11 sexual arousing fantasies, sexual urges or behaviors
12 involving sexual activity with a prepubescent child or
13 children over a period of at least six months. The
14 individual has acted on the sexual urges or the sexual urges
15 or fantasies caused marked distress or interpersonal
16 difficulty. And the individual is at least 16 years and at
17 least five years older than the child or children.

18 Q: So you believe that diagnosis fits Mr. Filyaw?

19 A: I do.

20 Q: And in reaching that diagnosis, did you go over the same
21 types of documentation that Dr. Swan did?

22 A: I did.

23 Q: And what would that have included?

24 A: All the legal documentation, her report, the interview
25 with him, and then the collateral information from the

1 sister.

2 Q: And part of that diagnosis, you said it was recurrent?
3 When you -- the definition. I think you said something about
4 recurrent urges?

5 A: Right. Recurrent, intense sexual arousing fantasies or
6 urges.

7 Q: Okay. But we're here today and you did not believe that
8 my client is a sexually violent predator; is that correct?

9 A: That's right.

10 Q: And why is that?

11 A: Well, because Mr. Filyaw does have this diagnosis, but
12 his risk to commit another sexually violent offense is very
13 low for a number of factors.

14 Q: Let me -- let me just interrupt you.

15 A: Okay.

16 Q: In order to have -- under the definition of a sexually
17 violent predator, you have to have the disease?

18 A: Right.

19 Q: And we're all admitting that he has some type of
20 paraphilia?

21 A: That's correct.

22 Q: But is there another component of the definition?

23 A: That makes him likely?

24 A: The likely to reoffend?

25 A: Right.

1 Q: Is it fair to say that you have to have two pieces? You
2 have to have a diagnosis, a qualifying diagnosis, but then
3 you also have to be a risk to reoffend?

4 A: That's correct.

5 Q: Okay. And you were explaining why he is not a sexually
6 violent predator.

7 A: Well, again, his risk is not high enough because of a
8 number of factors. His risk is considered in the average
9 range. So if you compare him to other sex offenders, like,
10 on static factors, the factors that do not change, he has the
11 same score as the most common score of sex offenders. So
12 again, we're looking for the worst of the worst, and his risk
13 is much lower than a lot of those people.

14 Q: Okay. You had talked about the static risk factors?

15 A: Yes.

16 Q: And I believe you were here when Dr. Swan testified
17 about the Static 99?

18 A: I was.

19 Q: And did you prepare a Static 99 evaluation for him?

20 A: I did.

21 Q: And do you have a copy of it there? I have one in my
22 hand.

23 A: I do.

24 Q: Okay. So when you compared his risk, what did you come
25 up with?

1 A: I gave him a score of a 2.

2 Q: And what does a 2 mean?

3 A: Again, it's the most common score among sex offenders.

4 Q: And that's in the category of average risk?

5 A: Yes. It's in the category of average risk, and so a
6 score of 2 is -- is considered average to reoffend. And if
7 you compare it to other offenders with at least one sexual
8 offense, on average 5.6 percent of these sex offenders with
9 the same score sexually reoffended within five years. Only
10 5.6 percent.

11 Now, they give you a range there, and really what it
12 means is that if you took 100 sex offenders with the same
13 score as him, the same score of 2, 93 to 96 of those
14 individuals would not be charged or convicted of a new sex
15 offense during the next five years. So I mean I think that
16 that really illustrates how low his risk is.

17 Q: Now, as part of your preparation to testify, I gave you
18 a copy of Dr. Swan's report; is that correct?

19 A: That's correct.

20 Q: And she also prepared a Static 99?

21 A: She did.

22 Q: And have you had a chance to look at that?

23 A: I did.

24 Q: And she got a different number than you did?

25 A: She did.

1 Q: And can you tell me where y'all disagree on that?

2 A: Absolutely. So the last question on the Static 99 asks
3 if there are any male victims, and Dr. Swan believes that
4 there are and I do not believe that there is sufficient
5 evidence to determine or to say that there were any male
6 victims.

7 Q: Well, you heard the same testimony that Dr. Swan -- you
8 heard Dr. Swan's testimony on that fact. Why did that not
9 convince you?

10 A: So the manual -- the Static 99 manual that we get, which
11 we follow very closely to make sure that we're scoring this
12 correctly because obviously this has huge implications,
13 specifically says that we have to use a balance of
14 probabilities, which means that the evidence has to weigh 51
15 percent or more in this case on the balance probabilities.

16 So the only things that we have about any male victims
17 were complete hearsay. In one case, I think that the victim
18 stated that her aunt told her that Mr. Filyaw had molested
19 other people in their family. Well, I don't know who those
20 people are. I don't know when it happened. I don't know if
21 anybody saw it. There were never charges. There were no
22 convictions. He actually has no charges or convictions of
23 any male victims.

24 And then there was another incident with a boy named
25 **Male Minor 1**, who was actually interviewed by law enforcement

1 because he was in the same home as Mr. Filyaw, and he stated
2 that on one day Mr. Filyaw popped him on the buttocks. The
3 investigators investigated it. There were no charges brought
4 forth. There were no convictions. And so that victim,
5 **Male Minor 1**, actually said that there had been no inappropriate
6 behavior between he and Mr. Filyaw.

7 And in my opinion, if popping a child on the butt is a
8 sexual deviance, then I feel like most adults would meet that
9 criteria. So I didn't find it founded and I don't think that
10 that qualifies as a male victim.

11 Q: Well, let's even speculate that it was something more
12 than a pop on the butt.

13 A: Uh-huh.

14 Q: Would one instance of conduct with a male be sufficient
15 or do you have to have -- or does it have to show a pattern
16 over a period of time?

17 A: For the diagnosis, it has to be over a period of time, a
18 six-month period.

19 Q: So one incident, even if it were more than a pop on the
20 butt, would not necessarily convince you?

21 A: It would not convince me that he would have qualified
22 for a paraphilic disorder.

23 Q: Thank you.

24 A: Sexually attracted to males.

25 Q: And it's your understanding -- is that the only

1 difference between your evaluation on the Static 99 and Dr.
2 Swan's?

3 A: That was the only difference in our score, yes.

4 Q: Okay. Let's assume that Dr. Swan's -- if you agreed
5 with Dr. Swan --

6 A: Right.

7 Q: -- that he got a 3 --

8 A: Uh-huh.

9 Q: -- would your opinion be different?

10 A: It would not.

11 Q: And why is that?

12 A: Because a 3 on the Static is still very low and, again,
13 we're looking for the worst of the worst. And so it would
14 still be in this average range.

15 Q: It would be higher than 5 percent though; right?

16 A: Yes, it would. It would be closer to 8.

17 Q: Okay.

18 A: So the risk would go up to where on average, I think,
19 it's like 7.6 percent of routine sex offenders with that
20 score sexually reoffended within five years.

21 Q: Now, when you were doing this, you don't rely solely on
22 the Static; is that correct?

23 A: That's right.

24 Q: And so you have to look at -- I think Dr. Swan testified
25 to dynamic risk factors?

1 A: She did.

2 Q: Can you tell me some of the dynamic risk factors that
3 you considered?

4 A: Yeah. So there's a sexual preference for prepubescent
5 children, sexualized violence, multiple paraphilias. So if
6 you have -- or if you have several sexual disorders, offense
7 supportive attitudes, lacking emotionality, or lack of
8 emotionally intimate relationships with adults, lifestyle
9 impulsiveness, poor problem-solving, etc.

10 Q: So did they all apply to Mr. Filyaw?

11 A: No, they did not.

12 Q: Okay. Which ones did you feel applied to Mr. Filyaw?

13 A: He did appear to have a sexual preference for
14 prepubescent children, and this was evident by the
15 convictions and charges that he had with children, with
16 female children ranging from 6 to 10 years old.

17 Q: Is that the only dynamic risk factor that you found?

18 A: It is.

19 Q: When I looked at the -- let's talk about part of -- part
20 of the records you reviewed were his records from the South
21 Carolina Department of Corrections; is that correct?

22 A: That's correct.

23 Q: Okay. And did that include whether or not he had any
24 disciplinary infractions while he was in?

25 A: It did. He has not had any.

1 Q: Now, does that have any significance in your mind?

2 A: That's huge. That -- that really speaks to his ability
3 in problem solving and coping skills, which is both -- which
4 are both dynamic risk factors.

5 The reason being is because prison is a very stressful
6 environment. You're constantly told what to do. There are
7 numerous rules. The people that you are with are not always
8 very nice, and you have to have the ability to cope and
9 problem solve effectively. When you don't have those
10 abilities, what happens is you see people who have lots of
11 infractions. They might get into fights. They break the
12 rules and, like I said, he hasn't had any infractions.

13 Q: Now, he has a paraphilia which I think you would agree
14 is an attraction to small children?

15 A: Yes.

16 Q: Small girls. And there are obviously no small girls at
17 the Department of Corrections?

18 A: That's correct.

19 Q: Now, would that mean -- does that have some
20 significance? Was that an explanation why he had no charges?

21 A: Well, he does not have access to what they would call,
22 like, a victim pool; right? To these young females.
23 However, dynamic risk factors are factors that we're looking
24 at now. We're not looking at his past offenses. Right?
25 Because that was before. We're looking at -- these are

1 things that could be targeted in treatment. So we're looking
2 at his behaviors, his attitude, and what's going on with him
3 now. And so that's less relevant.

4 Q: But he -- he had no acting out sexually; is that
5 correct?

6 A: That's right.

7 Q: Have you seen disciplinary reports for other people
8 where they acted out sexually, even if they weren't -- their
9 risk pool present?

10 A: Yes. So sexual preoccupation is also one of those
11 dynamic risk factors, and people who become very preoccupied
12 with sex, often you'll see them in jail, even if their --
13 their access to their, you know, victim pool is limited,
14 you'll see them masturbating a lot, which you get in trouble
15 for in prison. They will write incident reports. You can
16 see them possibly, like, trying to coerce other people into
17 sexual activities, things like that.

18 Q: There was no contraband pornography charges that he had;
19 is that correct?

20 A: That's correct.

21 Q: Now, I believe that you would agree that because of Mr.
22 Filyaw's past he's had problems with alcohol in the past. Is
23 that fair?

24 A: That's correct.

25 Q: Okay. Do you have any understanding or in your opinion

1 is there alcohol available inside the Department of
2 Corrections?

3 A: Unfortunately, it is pretty rampant. There's lots of
4 alcohol and drugs inside prison.

5 Q: And he did not have, again, any contraband charges for
6 alcohol?

7 A: None.

8 Q: Do you have an opinion about his current attitudes
9 towards alcohol?

10 A: Yes. So Mr. Filyaw would have a heart attack I believe
11 in 2015 and it was a very, very experience -- scary
12 experience for him, as you can imagine. So because of that,
13 he is very, very worried about his health and the possibility
14 that he could have another one, resulting in death. So he
15 now has a new motivation for not drinking because drinking
16 obviously can lead to heart attacks, strokes, and so he is
17 very -- he has a new motivation to prevent him or to remain
18 absent from using alcohol that he did not have before.

19 Q: Would you agree that the alcohol might have been a risk
20 factor for some of his prior offenses?

21 A: Yes. It appears that he was intoxicated for the
22 majority of his offenses.

23 Q: Would that include his conforming to the norms by not
24 drinking alcohol while he was in prison? I mean you're not
25 -- I'll withdraw the question.

1 So what other dynamic factors did you consider that were
2 positive towards your evaluation?

3 A: So there -- it was mentioned in Dr. Swan's report that
4 he lacked emotionally intimate relationships with adults. I
5 disagree with this. He had two 10-year relationships. Did
6 those relationships have problems? Yes. Most do. Did they
7 end in divorce? Yes, they did.

8 But to be able to sustain a relationship for that long
9 with somebody and especially at the beginning of those
10 relationships the way that he described them, they were very
11 intimately close. So he has the ability to create these
12 relationships and sustain them, which is what we're looking
13 at because that's what reduces risk.

14 Q: Okay.

15 A: Lifestyle impulsiveness is another one that was
16 mentioned in Dr. Swan's report that I also disagree with. I
17 do not think that this fits him. So this includes all life
18 solutions, including to everyday problems. Like I've already
19 said, you know, his behavior while in the prison has been
20 excellent.

21 In addition, he has a very stable work history and he
22 actually worked in the prison until he sustained his heart
23 attack. So that shows that he was wanting to create a
24 healthy everyday experience; right? With healthy activities,
25 working. So that also reduces his risk for sexual violent

1 offenses, as well as just general violence.

2 Q: I've seen the term prosocial attitudes.

3 A: Yes.

4 Q: What does that mean?

5 A: It means really just sort of like healthy attitudes that
6 are healthy and I guess consistent with positive attitudes
7 that we consider for society.

8 Q: And which one do you think -- which ones do you think
9 would apply to Mr. Filyaw?

10 A: Well, he has quite a few. I mean he's -- his work
11 ethic. Even in the past when he had problems with alcohol,
12 he's always maintained employment. He genuinely is close to
13 his sister, has a great relationship with her.

14 So, you know, he really does and has expressed a desire
15 to want to change and to live a healthy lifestyle. He has
16 plans on wanting to go out and create, like, his own little
17 business where he is selling yard furniture. He realizes
18 that he needs to have no contact with children. So he's
19 aware -- well aware of these things that can reduce his risk
20 to reoffend.

21 Q: So you would -- would you agree that some of these
22 prosocial attitudes that he has minimize his risk to
23 reoffend?

24 A: Yes.

25 Q: Okay. And his -- based on your Static 99 scoring of a 2

1 --

2 A: Uh-huh.

3 Q: He has a -- that means that he has a 5 percent chance to
4 reoffend in the next 5 years-ish? I mean is that kind of a
5 --

6 A: Yeah. I think it was, like, 5.6.

7 Q: So between now and when he's 70, there's a 5.6 percent
8 chance that he may reoffend?

9 A: That's correct. And I think that what's important to
10 mention along with that is that he is required to be
11 monitored. He's required to wear a leg monitor for the rest
12 of his life. So when you're considering risk, that also
13 reduces his risk of reoffending within the community because
14 he will be constantly monitored.

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

16 THE COURT: Yes, sir.

17 BY MR. FALK:

18 Q: So just to kind of summarize how we got here, you
19 believe that he has a paraphilia of some type?

20 A: Yes.

21 Q: And that paraphilia involves young prepubescent girls;
22 is that correct?

23 A: I do.

24 Q: But you don't believe that he has a risk to reoffend?

25 A: He has a very low risk.

1 Q: Okay. I should've said you don't believe he has -- so
2 he -- you don't believe he's likely to reoffend?

3 A: Correct.

4 Q: Okay. And that is -- in your opinion that he's not
5 likely to reoffend, that's not solely based on the Static 99
6 score, is it?

7 A: No. It's also based on several dynamic risk factors.

8 Q: And those are the ones that we've talked about?

9 A: That's correct.

10 Q: So can you say with a reasonable degree of scientific
11 certainty that Mr. Filyaw is not a sexually violent predator?

12 A: Yes.

13 MR. BOGLE: Object to the form of the question.

14 THE COURT: Sustained.

15 MR. FALK: I'm sorry. Pardon. I apologize for that.

16 BY MR. FALK:

17 Q: Do you agree within a reasonable degree of psychological
18 certainty that he does not -- that he is not a sexually
19 violent predator?

20 A: Yes.

21 Q: Thank you. And the information that you relied on in
22 reaching this conclusion, is that information that people in
23 your profession would normally rely on?

24 A: Yes.

25 Q: And you would agree with a reasonable degree of

1 psychological certainty that he does not pose a risk -- that
2 he is not likely to reoffend?

3 A: Correct.

4 MR. FALK: No further questions.

5 THE COURT: Cross-examination.

6 MR. BOGLE: Thank you, Your Honor. May it please the
7 Court.

8 THE COURT: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. BOGLE:

11 Q: Just so my notes are clear, at the very beginning when
12 Mr. Falk was asking you what your diagnosis was, you said
13 paraphilic disorder, sexually attracted to females, and you
14 meant to say pedophilic, didn't you?

15 A: I did. Sorry.

16 Q: Okay. Okay. Now, you have testified prior to this in
17 the two or three pre-commitment hearings like this one? Was
18 it two or was it three?

19 A: It was one. I testified twice in that one.

20 Q: Okay. And both times for the defense; right?

21 A: Correct.

22 Q: Okay. So it's safe to say your testimony in your career
23 so far has been a hundred percent for the defense?

24 A: That's incorrect.

25 Q: Well, in this state?

1 A: You mean just in testifying?

2 Q: Yes. In South Carolina when you've been recognized as
3 an expert witness in a pre-commitment like this, a sexually
4 violent predator case, a hundred percent of the time you've
5 testified for the defense? It's only two cases.

6 A: Well, I've done more than two cases, but there were
7 times when I did not agree with the defense and so I did not
8 testify. I only testified --

9 Q: I'm talking about times you've testified.

10 A: Right.

11 Q: It's been a hundred percent?

12 A: I'm sorry. Yes.

13 Q: Okay. Okay. And you have been licensed as a
14 psychologist since about -- was in March of 2016? Is that
15 right?

16 A: That's correct.

17 Q: All right. Prior to that, you mentioned working at a
18 veteran's hospital somewhere?

19 A: Yes. In Salisbury, North Carolina.

20 Q: But you've never worked at a prison, have you?

21 A: No.

22 Q: You've never spent time in a prison other than -- --
23 other than the multidisciplinary team meetings which are
24 housed -- which are held at the Department of Corrections in
25 the headquarters, you've never gone out to the prison per se,

1 have you, on sexually violent predator cases?

2 A: Not in South Carolina.

3 Q: Okay. So your -- your information about the wide use of
4 alcohol -- and I don't deny that there's some abuse of
5 alcohol in prisons, but your information about the use of
6 alcohol was based on what you've heard from other people who
7 have been in prisons; right?

8 A: That's incorrect. That's from the records that I get
9 from the South Carolina Department of Corrections.

10 Q: Okay. But there was no records in this case involving
11 wide use of alcohol at SCDC, were there?

12 A: No.

13 Q: Okay. Now, you said he's on a monitor system, but he's
14 not on probation, is he?

15 A: Not that I know of, no.

16 Q: Okay. In fact, the last time --

17 MR. BOGLE: If I may I approach, Your Honor?

18 THE COURT: Yes.

19 BY MR. BOGLE:

20 Q: The last sentencing sheet right here, Exhibit No. 3, he
21 got ten years --

22 A: Uh-huh.

23 Q: -- and nothing about probation in that part?

24 A: Right.

25 Q: All right. So he's on a monitor that he's got to wear?

1 A: Right.

2 Q: And all that will do is tell -- tell you where he is?

3 A: That's right.

4 Q: Not what he's doing?

5 A: That's my understanding.

6 Q: Okay. Are you a member of the Association for Treatment
7 of Sexual Abusers?

8 A: No.

9 Q: Do you do -- have you done -- do you have any -- have
10 you ever treated sexually violent offenders?

11 A: I have treated people who have sexually violent
12 offenses.

13 Q: Meaning sex offender treatment?

14 A: Yes.

15 Q: When you are in college?

16 A: During grad school and actually my dissertation is based
17 on most evidence-based treatment --

18 Q: Okay.

19 A: -- for sex offenders.

20 Q: Do you regard yourself as having expertise in the
21 treatment of sexually violent offenders? Treatment, not
22 evaluation, but treatment?

23 A: No.

24 Q: Okay. Now, the law that says -- the statute requires
25 who is going to be on the multidisciplinary team that you say

1 you're a member of?

2 A: That's right.

3 Q: It says that that person is a representative from the
4 Department of Mental Health who is a trained qualified mental
5 health clinician with expertise in treating sexually violent
6 predators. So you're on it, but you don't have that last
7 part; right?

8 A: Well, I've done a lot of treatment with people with
9 sexually violent offenses, but this -- most of the states
10 that I did my training in do not have this law. So am I
11 qualified to discuss the treatment and evidence-based? Yes,
12 I am. Have I done it with people who have been actually
13 determined by the legal system to be a sexually violent
14 predator? No.

15 Q: But two minutes ago, you said you don't regard yourself
16 as an expert in treating sexually violent predators; right?

17 A: Sexual violent predators, no.

18 Q: How about offenders?

19 A: No. I would say that I have the expertise. Like I
20 said, my dissertation was in the treatment for sexual violent
21 offenses, for people who have sexual violent offenses.

22 Q: All right.

23 A: But not those that have been determined by the law to be
24 sexually violent predators.

25 Q: Two minutes ago, you said you didn't and now you're

1 saying you do. Is that safe to say?

2 A: No.

3 Q: Okay.

4 A: I disagree there. I think it's just a difference of the
5 wording.

6 Q: All right. Now, you agree with Dr. Swan that this guy
7 is a pedophile and the difference is she's got him for young
8 girls and young boys, you've got him for young girls; right?

9 A: Yes.

10 Q: And what that means is prepubescent, pre-puberty
11 children the way Dr. Swan described them. In the case of the
12 girls, no breasts developed, no pubic hair. Same thing with
13 boys, if it's boys, little boys as well. Right? And he's
14 got the convictions in front of you. The first one in '94 or
15 it occurred in '94, July of '94. He was 40. I'm on page 6
16 of your report.

17 A: Correct.

18 Q: He was 40. The girl was 8. And that's the one where
19 she he claimed that she did it, she came over to his trailer
20 and took all her clothes off?

21 A: Correct.

22 Q: That's a fairly -- in your work, with the work you have
23 done with pedophiles, isn't that a fairly common defense they
24 use is, well, she came on to me, that kind of thing? Have
25 you heard that a lot with pedophiles?

1 A: I've heard it before.

2 Q: Okay. And then the next offense that happened on
3 December 24 of '94, he was 41. She was 6. We have the
4 arrest in 1997 for the 1996 act -- lewd act where he was 43
5 and the girl, **Minor 4**, was 8. And then the one that occurred
6 between '09 and 2011, he was 53 to 55 and she was 8 to 10.
7 That would be **Minor 5**?

8 A: Uh-huh.

9 Q: And that's the girl he followed around to the different
10 places where the families were living?

11 A: Yes. I mean it was my understanding that Dr. Swan and I
12 agree on those.

13 Q: Okay. And he's got that CDV conviction back in 1992
14 which shows a risk for violence, does it not?

15 A: It is.

16 Q: Okay. And at least six -- between six and eight
17 alcohol-related offenses. So when he was out, he had a real
18 problem with alcohol; right?

19 A: The last offense was in 2002, I believe, but --

20 Q: Yeah. They've got some age on them.

21 A: But yes.

22 Q: They've got some age on them.

23 A: He has a history of it.

24 Q: But when he was out, not in prison, he had a real
25 problem with alcohol; right?

1 A: Yes. In the past.

2 Q: Okay. And he told you I think at page 9 of your report,
3 he does not believe he needs sex offender treatment?

4 A: He said he does not need in-patient sex offender
5 treatment.

6 Q: Okay. Okay. And, of course, he got out -- he got
7 treatment at SCDC sometime in the past in the mid-'90s, but
8 apparently that didn't take because he re-offends again in
9 2009 to 2011; right?

10 A: The treatment you're referring to is more like an
11 educational class where they just sort of give you education
12 on sex offending, but yes.

13 Q: Were you familiar with the protocol they used back in
14 1995? I thought you were still in high school then?

15 A: I'll take that as a compliment. Thank you.

16 Q: Thank you. Were you familiar with the protocol they
17 used in 1995 and 1996 in prison for sex offender treatment?

18 A: No. I'm not seen it firsthand.

19 Q: Have you talked with the woman that administered it back
20 then?

21 A: I did not.

22 Q: Okay. And basically, I gather from your testimony
23 earlier that for Dr. Swan to get that male victim included
24 and get that extra point on the Static score -- because
25 that's the difference between your score and hers? She has a

1 male victim and you don't?

2 A: Correct.

3 Q: And she was taking it from the police reports, the
4 comments by **Male Minor 1** as how he described being rubbed up on
5 the butt by respondent, and the police reports involving that
6 circumstance about other children being molested as well. So
7 it was her judgment call to include that in as a point;
8 right?

9 A: Yes. But the standard that should be used, you know, is
10 supposed to be 51 percent. But yes.

11 Q: But her 51 percent was apparently not yours; right?

12 A: Correct.

13 Q: Okay. And as far as the dynamic changeable risk factors
14 that he's had, you've ruled out lack of emotionally intimate
15 relationship with adults; right?

16 A: Uh-huh. I did.

17 Q: Despite the fact that one marriage -- both marriages
18 ended in divorce, one with alcoholism, and the fact that he
19 offended children while being married. So that didn't --
20 that didn't raise a red flag to you?

21 A: No. Like I said, he definitely had problems, but due to
22 the fact that he had two relationships that were very long
23 and at a point he was very intimate in those relationships
24 shows that he's able to form that intimacy with an
25 appropriate-aged female. So that is -- that does lower risk.

1 Q: Okay. But he was sexually offending against young
2 children while he was in this appropriate, in your words,
3 relationship with this woman; right?

4 A: At some point, yes.

5 Q: Okay. So basically, what we have is a guy. He's been
6 convicted of three sexually violent offenses. There's no
7 question about that?

8 A: Correct.

9 Q: He's got a mental abnormality. No question about that?
10 You're saying pedophilic disorder with girls; Dr. Swan has
11 pedophilic disorder with boys and girls?

12 A: Correct.

13 Q: Okay. No question that's a deviant sexual behavior or
14 type mental abnormality?

15 A: Yes.

16 Q: He hasn't got a personality disorder. So the law
17 requires one or the other or both; right?

18 A: Right.

19 Q: Then the question boils down to risk to reoffend?

20 A: Correct.

21 Q: And your score on the Static is low enough that you say
22 he's not likely to commit acts of sexual violence; right?

23 A: It's between -- it's from the Static and the dynamic
24 risk factors; yes.

25 Q: Okay. The dynamic risk factors that you recognized

1 because some that Dr. Swan recognized -- y'all differ on
2 that; right?

3 A: That's correct.

4 Q: Okay. So a guy that basically has been doing this for
5 almost 17 years is not likely to do it again; right?

6 A: That is my belief, yes.

7 Q: Okay.

8 MR. BOGLE: Nothing further, Judge.

9 THE COURT: Any redirect?

10 REDIRECT EXAMINATION

11 BY MR. FALK:

12 Q: Let me just clear up some of your testimony. Now, you
13 have not testified for the State yet in a sexually violent
14 predator commitment trial; is that correct?

15 A: That's correct.

16 Q: But you are on the list that you could be assigned a
17 case?

18 A: Yes.

19 Q: Okay. And you've testified in court twice for the
20 defense; is that right?

21 A: In a -- yes, in a pretrial.

22 Q: Okay. But you've been hired by defense lawyers more
23 than two times; is that correct?

24 A: Many more.

25 Q: Okay. And in South Carolina, sexually violent predator

1 pre-commitment cases you've been hired by lawyers -- defense
2 lawyers, have you not?

3 A: Yes, I have.

4 Q: And in those cases, you did not testify in court; is
5 that correct?

6 A: That's correct.

7 Q: And why did you not testify?

8 A: Well, because when you're hired by the defense, if you
9 disagree with the defense, then you do not testify and you do
10 not write a report. So on those cases, I actually agreed
11 with the initial doctor and so my opinion wasn't helpful to
12 the defense.

13 Q: So had you been selected as the evaluator in that case,
14 you could have been testifying for the State in those cases;
15 is that right?

16 A: That's correct.

17 Q: Because you agreed with the State?

18 A: I would have -- I would have been, yes.

19 Q: So you can't characterize yourself as a defense expert;
20 is that correct?

21 A: Correct.

22 MR. FALK: No further questions.

23 THE COURT: Mr. Bogle, anything further?

24 MR. BOGLE: No, Your Honor. Thank you.

25 THE COURT: Doctor, you may step down. Thank you.

1 MR. BOGLE: We have no objection to her being released.
2 We've already released Dr. Swan.

3 MR. FALK: No objection.

4 THE COURT: Doctor, you're free to go. You have no
5 further responsibility here. Have a nice day.

6 THE WITNESS: Thank you.

7 THE COURT: Mr. Falk?

8 MR. FALK: Your Honor, may I speak with my client for
9 about five minutes before I decide whether or not we're going
10 to close?

11 THE COURT: All right. Yeah, we'll do that.

12 All right. Ladies and gentlemen, I'm going to ask you
13 to step to the jury room for just a minute. Do not discuss
14 the case. I'll get you back out here as quickly as possible.
15 Okay?

16 (WHEREUPON, the jury exited the courtroom at 2:07 p.m.)

17 MR. FALK: Your Honor, when we come back, we're going to
18 rest.

19 THE COURT: Okay. When you come back, you're going to
20 rest and just state for the record you renew all prior
21 motions and objections, and then we'll move right into
22 closing arguments.

23 MR. FALK: Thank you.

24 (WHEREUPON, there was a break in the proceedings from
25 2:07 p.m. until 2:18 p.m., after which the proceedings

1 resumed as follows.)

2 THE COURT: Before I bring the jury out real quick, Mr.
3 Falk, this is yours.

4 THE CLERK: I think she thought you said to bring them
5 out.

6 THE COURT: Tell her to hold up a minute. I didn't say
7 that. No. Hold on a minute. Hold on a minute. No. I said
8 before the jury comes out. I said before the jury comes out
9 real quick.

10 THE BAILIFF: Oh, I thought you said bring them out real
11 quick.

12 THE COURT: No. That's okay. Mr. Bogle had forwarded
13 me a verdict form and jury charge, which tends to be the
14 same.

15 MR. FALK: Did you get my jury charges?

16 THE COURT: Well, let's talk about these jury charges.

17 MR. FALK: They didn't come with my original batch.
18 They came on Sunday, I think.

19 THE COURT: Were they any different? What was the
20 difference in yours?

21 MR. FALK: Well, I mean Mr. Bogle has sort of a
22 comprehensive one, and I just wanted to talk about a couple
23 of specific things.

24 THE COURT: Well, let's deal with that now.

25 (WHEREUPON, there was a pause in the proceedings, after

1 which the proceedings resumed as follows.)

2 MR. BOGLE: Have you got a copy?

3 THE COURT: I'm looking at them right here.

4 MR. BOGLE: Okay. We are objecting on charge number 1.

5 THE COURT: Uh-huh.

6 MR. BOGLE: The sentence -- the last sentence beginning
7 with the word the mental abnormality. We don't -- we object
8 to that sentence. I think it's not part of the standard
9 charge given, and it's kind of -- }

10 THE COURT: Is it part of our statute?

11 MR. BOGLE: I don't believe so. It's not part of the
12 statute.

13 MR. FALK: It comes right out of the Supreme Court
14 opinion.

15 MR. BOGLE: It's language in those -- I don't doubt it's
16 one of those in those opinions, but it's not part of our
17 statute. It has never been used in a case that I've been in
18 in this state.

19 MR. FALK: Well, it's --

20 THE COURT: Do what?

21 MR. FALK: Kind of jadedly, I'd suggest that the State
22 has always done the charges and -- I'm not sure. There's
23 always been a lot of challenge to them, but --

24 THE COURT: Right. I understand.

25 MR. BOGLE: My charges come from three different circuit

1 court judges. That's where I've gotten them. Judge, I --

2 THE COURT: I mean I understand where Mr. Falk is coming
3 from.

4 MR. FALK: Yeah.

5 MR. BOGLE: Okay.

6 THE COURT: My hands are kind of tied I think with what
7 our law is and what our -- and it doesn't require that -- I
8 guess that next step, so to speak, in the mental abnormality.
9 And I'm not sure --

10 MR. FALK: Your Honor, I think when we get to my last
11 one is really what I think is a problem with the way this
12 case gets charged.

13 THE COURT: Yeah.

14 MR. FALK: Because I think it's confusing of what a
15 definition of a sexually violent predator because I think
16 that that has -- the State wants to say that the definition
17 is somebody who has committed the offenses -- and we're not
18 challenging that.

19 THE COURT: Right.

20 MR. FALK: And then they have the mental disease that
21 makes them likely to reoffend.

22 THE COURT: Right.

23 MR. FALK: And I really think that that's three
24 elements: the disease -- the prior convictions, the mental
25 disease, and the likelihood to reoffend. I mean that's what

1 I'm trying to bring forward in that last charge. That we
2 have to be convinced beyond a reasonable doubt that he has a
3 likelihood to reoffend. That you could be convinced beyond a
4 reasonable doubt that he has pedophilia --

5 THE COURT: Well, I mean -- I'm sorry. Go ahead.

6 MR. FALK: I'm sorry. That's my point is that I think
7 it's very easy for the jury to confuse and think, yeah, they
8 all agree that he has pedophilia.

9 THE COURT: Right.

10 MR. FALK: But it's the likelihood to reoffend that's a
11 -- I think they have to make a separate determination on
12 that, and that's what I'm trying to ask for.

13 MR. BOGLE: We've got that on page 14 of our jury charge
14 where we define mental abnormality, and in the second
15 sentence say that it must cause him serious difficulty
16 controlling his behavior.

17 THE COURT: Well, one of the different things that I
18 picked up in the testimony, of which Mr. Falk hit on, is, you
19 know, the score on the Static 99.

20 MR. BOGLE: Uh-huh.

21 THE COURT: Swan says 3. Sutton says 2. And it got
22 down to in your line of questioning on direct -- excuse me --
23 on cross and then on direct is this seven point whatever
24 percentage it was and 5.6, I think.

25 MR. FALK: It's 7.9 and I think 5.6.

1 THE COURT: Okay. And when you would ask Dr. Swan
2 likely to reoffend, her response was always likely to be
3 arrested and charged or arrested and convicted. So there was
4 a differentiation between the line of questioning you were
5 posing to Dr. Swan and what she was responding to you.

6 And she also said that 7.9 isn't a likelihood to
7 reoffend. It's to be arrested and convicted. Now, I don't
8 know that Dr. Sutton really made that differentiation because
9 your line of -- she's your expert and I understand that.
10 Okay? But it was certainly a clearly and a differentiation
11 between the questioning that you posed to Dr. Swan versus her
12 responses to you.

13 Now, I can go -- you're saying that they've got to prove
14 all three of those, the mental abnormality --

15 MR. FALK: The charge.

16 THE COURT: Right.

17 MR. FALK: Prior conviction.

18 THE COURT: Right. Prior conviction, mental
19 abnormality, and a likelihood of reoffending.

20 MR. FALK: Yes.

21 THE COURT: And I don't have the statute right in front
22 of me.

23 MR. FALK: I'll get it.

24 MR. BOGLE: I can give you a copy. All right. This is
25 -- it's further down from here, I think. It might be in the

1 definitions though.

2 MR. FALK: It's in the definitions.

3 MR. BOGLE: Yeah. Further back, like 44-48-30-ish.

4 Either 20 or 30 has the definitions at the very beginning of
5 the statute.

6 MR. FALK: It's --

7 THE COURT: I got it.

8 MR. FALK: -- 1(b).

9 MR. BOGLE: Uh-huh.

10 THE COURT: 44-48-30(1)(b)? Is that what you said?

11 MR. FALK: Yes. Well, I mean it guess it's all in one,
12 but I'm harping on (b), which I really think should be two
13 pieces.

14 MR. BOGLE: That's the definition of what he is.

15 MR. FALK: Yeah. That's the definition of what the
16 charge is.

17 MR. BOGLE: What the charge is. Mental abnormality is
18 subparagraph 3 and likely to reoffend is also further defined
19 in paragraph 9 under that same section. And those are quoted
20 verbatim.

21 Mental abnormality as defined in the statute is quoted
22 verbatim in our charge, as is likely to engage in acts of
23 sexual violence. We just took ours straight out of the
24 statute.

25 THE COURT: Well, I'm not going to differentiate outside

1 of the statute to make it a -- I mean it's defined here.

2 Let's see.

3 And I -- I mean I think at the bottom of page -- at the
4 bottom of page 13 and onto page 14, I mean it's saying what
5 you want it to say. It's just maybe not saying it exactly
6 the way you want it, but it's clearly -- it doesn't say the
7 word reoffend, but it's certainly and clearly saying in this
8 charge rendering him otherwise likely to commit a dangerous
9 act. I mean that's -- causes him serious difficulty in
10 controlling his behavior. I mean that -- it's just not
11 saying specifically what you're saying here. It's saying it
12 another way, I guess, semantics so to speak.

13 MR. FALK: Your Honor, I'll accept your ruling. I just
14 want to make mine part of the record.

15 THE COURT: And if you want to -- listen, if you want to
16 make your proposal an exhibit, please do so. Okay? Do you
17 want to make it your exhibit or a Court's exhibit? Whatever
18 you want to do.

19 MR. FALK: Just so it doesn't have to -- as long as it
20 comes with the transcript, which I think Court's exhibit.

21 MR. BOGLE: Court's?

22 THE COURT: That's fine. Yeah. That's fine.

23 MR. BOGLE: It would be Court's 3?

24 THE COURT REPORTER: 9.

25 MR. BOGLE: You're ahead of me.

1 (WHEREUPON, the proposed jury charges were marked as
2 Court's Exhibit No. 9.)

3 THE COURT: Well, because --

4 THE COURT REPORTER: Although, the motions --

5 THE COURT: All your prior motions -- oh, the motions.

6 MR. BOGLE: I forgot about those.

7 THE COURT: Right. So they'd be part of the record.

8 All right. Anything further before I bring the jury back
9 out?

10 MR. BOGLE: No, Your Honor.

11 MR. BOGLE: Nothing from the State, Judge.

12 THE COURT: All right. Now, Ms. Frances, bring me the
13 jury real quick, please.

14 THE BAILIFF: All right.

15 (WHEREUPON, the jury entered the courtroom at 2:30 p.m.)

16 THE COURT: All right. I've got all the jurors present.
17 Mr. Falk?

18 MR. FALK: Your Honor, at this time, we would rest.

19 THE COURT: All right.

20 MR. FALK: Now, we're renewing motions.

21 THE COURT: Thank you. All prior motions and objections
22 are so noted for the record. The Court's rulings as to each
23 remain the same.

24 All right. Ladies and gentlemen, you have heard all the
25 testimony that you're going to hear in this case. That which

1 remains are closing arguments by counsel and then my charge
2 on the law to you.

3 The order in which this will take place, Mr. Bogle will
4 go first, followed by Mr. Falk, and Mr. Bogle may -- we'll
5 see how the arguments go. He has an opportunity to close if
6 anything new is brought up by Mr. Falk in his closing.

7 I will remind you, ladies and gentlemen, as I told you
8 from the outset, I told you opening statements are not
9 evidence in this case. Closing arguments are not evidence in
10 this case.

11 At this time, Mr. Bogle, you're recognized.

12 MR. BOGLE: Thank you, Your Honor. May it please the
13 Court.

14 THE COURT: Yes.

15 MR. BOGLE: Mr. Falk.

16 CLOSING ARGUMENT ON BEHALF OF THE STATE

17 MR. BOGLE: Okay. I'm not one of these television
18 lawyers that can do this without notes. So please forgive me
19 for that.

20 Again, thank you for your time, your effort doing the
21 job for the city of Florence, for Florence County, and the
22 State of South Carolina and for Mr. Filyaw. It's our job to
23 sit in judgment of somebody, and that's what we all have to
24 do here today.

25 Now, what I want to talk about right now is how I think

1 that the State has met its burden of proof. Bear in mind
2 that we have to prove our case beyond a reasonable doubt.
3 Not the normal burden of proof you might see in civil court.
4 A higher burden of proof because of the nature of what's
5 happening. Because the end result, let's face it, will be --
6 could be the loss of Mr. Filyaw's liberty for treatment.

7 So we have to prove our case beyond a reasonable doubt,
8 and I would suggest to you that one way of thinking of that
9 is what that means is we don't have to overcome every
10 possible doubt, just beyond a reasonable doubt. In other
11 words, if you've heard the evidence, the testimony from that
12 witness chair, looked at the three exhibits, and you're
13 firmly convinced that Mr. Filyaw is a sexually violent
14 predator, then by your oath you're obligated to return a
15 verdict for the State. On the other hand, if you have some
16 reasonable doubt that he might not be a sexually violent
17 predator, then you have to return a verdict in his favor.

18 So what do we have? Remember the term wake-up call that
19 I used? Well, here they are. In July of '94, he offends
20 against one girl. She's about 8 or so. December of '94, he
21 defends against another. He's convicted two times in '95,
22 different times in 1995.

23 He goes to prison. I'd like to think there's the wake-
24 up call. Wait a minute. Prison is not a fun place to be.
25 This is -- my liberty is totally cut off. I can't do

1 anything. I can't see my sister. I'm really limited here.

2 Don't do this again.

3 And what happens? He does it again in 1996 and gets
4 arrested in 1997. Those charges get dismissed, but he still
5 gets in enough trouble to get arrested. And then he gets
6 convicted again in 2012 for crimes that happened from 2009 to
7 2011 when the little girl was between 8 and 10 years old. So
8 the wake-up call didn't take.

9 Sex offender treatment. He got some at the Department
10 of Corrections, but I'm not sure what based on what you've
11 heard. But he got some there. But that was back in '95 or
12 '96, and it must not have taken because he re-offends in '97
13 to get himself arrested. He reoffends in 2009 until '11 and
14 gets himself convicted. So whatever it was, it didn't seem
15 to take.

16 And the age ranges. He's 40 and the girl is 8 in one of
17 them. He's 41 and she's 6 in the other. He's between 53 and
18 55 and the girl is between 8 and 10 in the last one. So we
19 have a -- we have a clear situation of him for almost 17
20 years he's doing this over and over again.

21 Now, like the judge told you at the beginning and like I
22 mentioned earlier, normally in a case in court, witnesses
23 only testify about things they see, they smell, or they hear,
24 about facts. I saw the light turn red. Remember, I said
25 that yesterday. That's an example. They can't give

1 opinions.

2 In this case, we've had the benefit of having two
3 persons qualified by the judge as experts to testify and give
4 their opinion as to whether or not Jimmy Filyaw satisfies the
5 definition of a sexually violent predator.

6 Now, to recap, what does that mean? First off, he's got
7 to be convicted of at least one sexually violent offense.
8 Over here, we have three, and you'll have them back in the
9 jury room, right here.

10 The next thing, he's got to have a mental abnormality or
11 a personality disorder. Here, he's got a mental abnormality.
12 He's a pedophile. One doctor has him sexually attracted to
13 both girls and boys based on the evidence and the judgment
14 call she made about that. The other doctor for the defense
15 has him just attracted to little girls.

16 The bottom line, it's a deviant sexual behavior. It's
17 hard-wired to Mr. Filyaw. That is what he is. And he's
18 acted out. And has it lasted over -- more than -- longer
19 than six months to qualify for the guidelines in the
20 diagnostic manual? Yeah. It's gone on for almost 17 years.
21 So we have that.

22 The next question, the tough question for you is going
23 to be is he likely to reoffend, and what do we have there?
24 Well, we have two doctors testifying. Now, think a minute.
25 I look at this thing and I think, okay, there are two docs,

1 both qualified as experts, both saw the same guy, looked at
2 the same stuff for the same reason. We've got a problem.

3 You've got to look at the qualifications and the
4 expertise of each doctor, I think. Both of them are
5 qualified people. Both can give an opinion. No doubt in
6 that. But which one really has the time in place, the time
7 on the job to know what they're doing, know their -- know
8 their expertise better than the other?

9 Dr. Swan is licensed in three states. Dr. Sutton, one.
10 Dr. Swan has testified more than 200 times in these types of
11 cases, 20 or so in South Carolina under the Sexually Violent
12 Predator law.

13 Dr. Sutton has testified nine times as an expert. I
14 think this is her third time in a sexually violent predator
15 pre-commitment case.

16 Neither of them -- the thing about did you talk to the
17 victim. Well, none of them did. We don't talk to the
18 victims. Dr. Swan admitted it. The question was never asked
19 of Dr. Sutton. She never said she did.

20 Both of them found a score on the Static and they
21 differed. Dr. Swan, using the information she had, found
22 enough evidence in her judgment as a professional to find
23 that there had been an offense against a young boy, and so
24 she found the pedophilic behavior to be for both boys and
25 girls.

1 Dr. Sutton didn't see it that way. She found just
2 girls, but you still have the pedophilic behavior, which
3 means a deviant sexual interest in children who are younger
4 than puberty. So they are in agreement in a lot of things,
5 disagreement on some.

6 One key thing that I picked up on was there's this thing
7 about dynamic risk factors. Dr. Sutton didn't find very
8 many, but Dr. Swan did, and she gave you a valid reason for
9 each of them.

10 First off is sexual preoccupation, 17 years of this.
11 Over 17 years his offenses have spanned. He didn't just
12 stop. He stopped for a while and he started up again.

13 Lack of emotional relationship with adults. Yeah, he's
14 been married and both times long times, but both marriages
15 affected by either alcohol or infidelity, and he sexually
16 offended while he was married. So I'd like to say the
17 emotional relationship didn't really click there.

18 The lifestyle impulsiveness, chronic instability.
19 Remember the testimony about him living on the floor of these
20 different trailers and the crimes involving Minor 5?

21 Lack of good jobs. The alcoholic problem that he had
22 when he was out, certainly that's been a problem that's been
23 dogging him for most of his life.

24 Poor problem-solving. Avoiding addressing the problems,
25 trying to work things out by getting sex offender treatment

1 on the outside or doing something to keep himself from
2 reoffending.

3 And then what she called dysfunctional coping. His way
4 of responding to stress is to externalize behaviors that
5 aren't appropriate.

6 So she finds more of these dynamic factors than Dr.
7 Sutton did, and you've got to decide that. You've got to
8 weigh the credibility because, like the judge will tell you,
9 the fact that a person has been declared an expert witness
10 allows them to give an opinion, but you, as jurors, make the
11 final decision on what to believe from that witness stand.
12 You decide what to believe and what not to believe.

13 And by that, I mean you're free to believe everything a
14 witness says, none of what a witness says, or whatever in-
15 between suits you, whatever in-between is what you think you
16 should believe. That's totally up to you. Not me, not the
17 judge, not Mr. Falk, not anybody else. That is totally up to
18 you.

19 So that's where we are. We've got two experts that saw
20 this person, but I think with all due respect to Dr. Sutton
21 that the one with the qualifications has done this for an
22 awful long time in different states and all, she sees more
23 things than Dr. Sutton did. Yeah, the Static 99 is pretty
24 low. There's talk of 5.6 percent re-offense rate over five
25 years from Dr. Sutton, seven point -- was it nine from Dr.

1 Swan.

2 But, you know, you're thinking, okay, the State's got to
3 prove this beyond a reasonable doubt. 7.9 percent or 5.6
4 doesn't seem very high. Shouldn't it be 50 or 60 percent?
5 Well, think about it. We're not talking about his chance of
6 knocking off a convenience store or stealing cigarettes or
7 something like that. We're talking about his chances of
8 reoffending a child. Okay?

9 Would you send your child to visit your neighbor if you
10 knew your neighbor had a 5.6 percent chance of offending
11 against that child? No.

12 So you've got to put those numbers in perspective. The
13 bottom line is I would submit to you that we have indeed
14 proven to you beyond a reasonable doubt Jimmy Filyaw is
15 indeed a sexually violent predator under the law.

16 Thank you.

17 Your Honor.

18 THE COURT: Mr. Falk?

19 MR. FALK: May it please the Court.

20 THE COURT: Yes, sir.

21 MR. FALK: Mr. Bogle.

22 CLOSING ARGUMENT ON BEHALF OF THE RESPONDENT

23 MR. FALK: What we're talking about today, I believe, is
24 the risk to reoffend. This case is not about the past. I
25 know a lot of time was spent with Dr. Swan's testimony about

1 the past. I think I probably told you in my opening argument
2 that there are problems in the past. My client has committed
3 crimes and pled guilty to crimes, crimes against children,
4 and there's a bad past, but this case is about the future and
5 this case is about the likelihood to reoffend.

6 Now, I think Dr. Sutton sort of put it pretty clearly
7 where she said that he has a 5.8 percent likelihood to
8 reoffend in the next five years. And even if she agreed with
9 Dr. Sutton -- Dr. Sutton said 5.8 percent chance to reoffend
10 in the next five years, and even if she agreed with Dr. Swan
11 as far as what kind of score he would get on that Static 99
12 test, his likelihood to reoffend over the next five years is
13 7.9 percent.

14 Now, I know Dr. -- I know Mr. -- I know that the State
15 wants you to say that if there's any chance to reoffend in
16 the future, you ought to consider it likely to reoffend and
17 therefore commit him, but the judge is going to instruct you
18 on the law. And I believe the judge is going to instruct you
19 on the law that you have to be convinced that he has a sexual
20 -- has a psychological defect, some type of abnormality, that
21 makes it likely for him to reoffend in the future.

22 The State may want the law to be something else, but the
23 law is that he has to be -- that you're here to decide
24 whether or not it's likely he's going to reoffend in the
25 future. You have to decide whether 5.6 percent, 7 percent, 8

1 percent is a likelihood to reoffend in the future.

2 Granted, you know, if you go on an airplane and you hear
3 there's a 1 percent chance that the plane is going to crash,
4 well, maybe you don't get on the plane, but that's not what
5 we're talking about here. We're talking about this man.
6 We're talking about where he's going to go, what kind -- what
7 his civil liberties are going to be in the future. And
8 whether or not this jury is going to be -- carry out its
9 obligation to decide whether or not the State has proven
10 their case beyond a reasonable doubt.

11 Part of their case beyond a reasonable doubt is that he
12 is going to offend in the future. You can't get away from
13 that. Based on the State's closing argument, I think they
14 want the law to maybe be something that if there's any chance
15 for him to reoffend in the future, but that's not what the
16 law is. You're obligated by your oath to carry out the law.
17 You're obligated to make your decision based on a reasonable
18 doubt.

19 Now, there's no question Dr. Swan is older than Dr.
20 Sutton. No question that Dr. Swan has more experience than
21 Dr. Sutton in these affairs. There's also no question that
22 Dr. Swan has testified 22 or more times in this state,
23 arguing about commitment, saying that the person has to be
24 committed, and you've got to understand that. Is she just
25 one of these people who the State calls on because they know

1 that she's going to testify for commitment?

2 Now, Dr. Sutton -- she's testified twice for defense
3 counsel in these kind of cases saying that the person didn't
4 need to be committed. She's been talked to -- she's been
5 retained by defense counsel on several more occasions when
6 she could not under her, you know, professional ethics go up
7 there and disagree with the State.

8 So when Dr. -- when Dr. Sutton agrees with the State,
9 she tells the other side, look, I can't help you. I agree
10 with the State. When she agrees with the defense, she
11 testifies for the defense. So granted, somebody may have
12 more experience in this case, but then somebody also may be
13 more experienced at being fair and testifying in South
14 Carolina on both sides of the coin.

15 Regardless if it's Dr. Sutton or Dr. Swan, it's easy to
16 kind of confuse, I think, the basis for the diagnoses in this
17 case. You know, they're doctors. We're talking about
18 diagnosis, and it's very easy to kind of equate that with a
19 medical diagnosis, like that you've got a broken arm. But
20 the testing for, you know, those kind of situations, you've
21 got a broken arm, you go get an x-ray, any doctor in the
22 state, probably any doctor in the country can agree, yeah,
23 that arm is broken.

24 But this is not that same kind of precision in the
25 testing. There's a lot of factors that each side has to

1 consider, and that's very soft.

2 Dr. Sutton looks at all his dynamic risk factors and
3 thinks he's not the guy. He's not the worst of the worst. I
4 think that was her terminology. She thinks that this
5 statute, these proceedings are designed to put the worst of
6 the worst into a secure facility for long-term control, care,
7 and treatment. She said that's not Mr. Filyaw. He's not the
8 worst of the worst.

9 Granted, he's got a sexual crime. He's got sexual
10 offenses. He's committed sexual offenses against children.
11 We're not getting away from that. But the issue is is he the
12 worst of the worst. Is he the type that it's going to be
13 likely for him to commit a crime in the future -- commit
14 crimes of sexual violence in the future?

15 I contend that there is plenty of doubt in this case
16 about whether or not he's going to commit a crime of sexual
17 violence in the future. First of all, we have two experts.
18 One expert says yes; one expert says no. I think there's
19 doubt right there.

20 Now, there's even more doubt because even if you think
21 the expert's definition -- she's saying that he scored a 3 on
22 the Static 99, and Dr. Sutton told us that based on the
23 scoring that somebody who scores a 3 on the Static 99,
24 there's a 7.9 percent chance that he's going to be convicted
25 of a crime in the future.

1 So I mean there's doubt there whether or not 7.9 percent
2 is likely to reoffend. There's doubt because whether or not
3 -- one expert -- one expert says yes and one expert says no.
4 There's doubt.

5 Now, granted, you may think that Dr. Swan has more
6 expertise. Dr. Sutton is qualified as an expert in this
7 case. Dr. Sutton -- and she's not just any expert. The
8 state of South Carolina is putting her -- they put her on the
9 panel that screens these people in the -- at the very
10 beginning. Now, she was not on -- she was not on the MDT
11 committee, the multidisciplinary task -- I think that's what
12 it is. She was not on that committee when Mr. Filyaw's case
13 was sort of being screened through, but she's on it now. I'm
14 not sure how many cases she says that she's testified to, but
15 40 or maybe 30 of them each time, four or five times, but the
16 state thinks that she's qualified to make those kind of
17 determinations.

18 She has a contract with the state to be making these
19 types of evaluations going forward in the future. If the
20 South Carolina Department of Mental Health thought she was
21 not qualified to be making opinions, she would not have these
22 contracts. She would not be on the multidisciplinary
23 committee.

24 I will give you that Dr. Swan has got more time in the
25 field. That doesn't mean that Dr. Swan maybe has gotten

1 jaded from all her time in the field, you know. I guess
2 there's that expression that if you're a hammer, all the
3 problems look like nails.

4 I'm not going to tell you that Mr. Filyaw is a saint,
5 but I'm here to tell you that there is sufficient doubt in
6 this case. There is more than reasonable doubt in this case
7 about whether or not there's a likelihood that he's going to
8 commit a crime of sexual violence unless he's committed to a
9 facility for long-term control, care, and treatment.

10 I want you to listen carefully to how the judge
11 instructs you on the law. I think when he instructs you on
12 the law, he will talk to you about the kind of -- about the
13 likelihood to reoffend. Listen to that. Listen to what he
14 says.

15 And at the end of the day, I hope that you'll give
16 thoughtful consideration to how the Court instructs you on
17 the law and that you'll reach a verdict that my client is not
18 a sexually violent predator.

19 Thank you.

20 THE COURT: Mr. Bogle, anything in reply?

21 MR. BOGLE: No, Your Honor. Thank you.

22 CHARGE ON THE LAW

23 THE COURT: All right. All right. Ladies and
24 gentlemen, Mr. Foreman, it is now my duty as the trial judge
25 under the Constitution of this state to charge and instruct

1 you on the law applicable to this case. It is your duty as
2 jurors to accept and apply the law as I will now state it to
3 you.

4 The State has brought this case under the Sexually
5 Violent Predator law of South Carolina. The State seeks the
6 civil commitment of Jimmy Ray Filyaw, the respondent, for
7 long-term control, care, and treatment in a secure facility.
8 This is not a criminal proceeding seeking incarceration, but
9 rather is a proceeding seeking civil commitment.

10 The State of South Carolina alleges or claims that the
11 respondent, Mr. Jimmy Ray Filyaw, is a sexually violent
12 predator under the law. The respondent denies that he is a
13 sexually violent predator and the burden of proof is,
14 therefore, on the State of South Carolina to prove by
15 evidence sufficient to satisfy each of you beyond a
16 reasonable doubt that Mr. Filyaw is a sexually violent
17 predator. If the State is unable to meet that burden of
18 proof as to one or more of the elements of this claim, the
19 respondent is entitled to a finding that he is not a sexually
20 violent predator.

21 Ladies and gentlemen, I want to make sure that you
22 understand that Mr. Filyaw is not accused of committing a
23 crime in this proceeding. As you heard from the testimony,
24 he did have previous charges for which he was sentenced by
25 the Court. The respondent has now completed his sentence for

1 those charges, and the State is now alleging that Mr. Filyaw
2 is a sexually violent predator. The State has the burden of
3 proof in this case and must prove its case, again, beyond a
4 reasonable doubt.

5 If you find the State has not met this burden,
6 respondent will be released. If you find that the State has
7 met its burden of proof and find that the respondent is a
8 sexually violent predator, he will not be released, but will
9 be committed to a secure treatment facility in Columbia
10 operated by the South Carolina Department of Mental Health.

11 Now, during this trial, ladies and gentlemen, you and I
12 have had separate duties to perform. As the trial judge, it
13 is my responsibility to preside over this trial, and I also
14 have the duty to rule upon the admissibility of the evidence
15 offered during the process of this trial.

16 In that regard, you are to consider only the competent
17 evidence before you and you are to disregard from your mind
18 any testimony ordered stricken from the record of this case
19 during the progress of this trial, if there was any. You are
20 to consider only the testimony which has been presented from
21 this witness stand, together with any exhibits admitted into
22 the record of this case, and any stipulations of counsel made
23 into the record, if there were any.

24 Furthermore, I have the additional duty to charge you on
25 the applicable law of this case and, in that regard, I am the

1 sole and exclusive judge of the law in this case. It is your
2 duty to accept and apply the law as I know state it to you.
3 If you have any preconceived ideas as to what the law is or
4 what the law ought to be and it does not agree with what I
5 tell you the law is, you are obligated under your oath to
6 abandon these preconceptions because you are sworn to accept
7 the law precisely as I state it to you.

8 Now, in this trial, you, ladies and gentlemen, are the
9 exclusive and sole judge of the facts, and I am the judge of
10 the law. Do not infer that I have a -- have an opinion about
11 the facts in this case from anything that I have said during
12 the course of this trial in ruling upon the admissibility of
13 evidence or otherwise or from anything that I now say during
14 the course of this charge to you. In this regard, the law
15 simply does not permit me to have an opinion about the facts.
16 As jurors, it is your duty alone to determine the effect,
17 value, weight, and truth of the evidence presented during the
18 course of this trial.

19 Now, while the argument of counsel is a beneficial part
20 of every trial, you should remember that the statements made
21 by counsel are not evidence in this case. In presenting
22 arguments, counsel often refer to the evidence. However, you
23 should base your verdict on the evidence as you remember it.
24 Therefore, if there are any conflicts between the
25 recollection of counsel about the evidence and your own

1 recollection, you should rely upon your own understanding or
2 recollection of the evidence.

3 Now, ladies and gentlemen, in most civil cases tried in
4 the Court of Common Pleas, the burden of proving a claim is
5 by a preponderance or greater weight of the evidence.

6 However, in this type of case under this particular statute,
7 the State's burden is greater than that. Here, the State
8 must prove -- must prove its case beyond a reasonable doubt.

9 As already stated to you, the State has the burden of
10 proof. Under the law of this state according to the Sexually
11 Violent Predator statute, the State must prove its case to
12 the standard of proof beyond a reasonable doubt. If the
13 State fails to meet this high burden, then you must find that
14 Mr. Filyaw is not a sexually violent predator.

15 Now, what is a reasonable doubt in the law? Proof
16 beyond a reasonable doubt is proof that leaves you firmly
17 convinced that the respondent is a sexually violent predator.
18 Ladies and gentlemen, there are very few things in this world
19 that we know with absolute certainty and, in this type of
20 case, the law does not require proof that overcomes every
21 possible doubt.

22 If, based on your consideration of the evidence, you are
23 firmly convinced that Mr. Filyaw is a sexually violent
24 predator, then you must return a verdict for the State. If,
25 on the other hand, you think there is a real possibility that

1 he is not a sexually violent predator, you must give him the
2 benefit of the doubt and return a verdict for the respondent.

3 Reasonable doubt may arise from evidence that is in this
4 case or from the lack of evidence in this case. It is up to
5 you, the jury, to determine whether or not a reasonable doubt
6 exists in this case.

7 Now, there are two types of evidence, ladies and
8 gentlemen, which are presented during a trial: direct
9 evidence and circumstantial evidence.

10 Direct evidence is the testimony of a person who claims
11 to have actual knowledge of a fact, such as an eyewitness.
12 It is evidence which immediately establishes the main fact to
13 be proved.

14 Circumstantial evidence is proof of a chain of facts and
15 circumstances indicating the existence of a fact. It is
16 evidence which immediately establishes collateral facts from
17 which the main fact may be inferred.

18 Circumstantial evidence is based on inference and not on
19 personal knowledge or observation. It is proof that does not
20 actually establish the fact in question, but that asserts or
21 describes something else from which you may either reasonably
22 infer the truth of the fact or at least reasonably infer an
23 increase in the probability that the fact is true.

24 For circumstantial evidence to be sufficient to warrant
25 the finding of a fact, the circumstances must lead to that

1 fact with reasonable certainty. The facts and circumstances
2 should be considered in light of ordinary experience and
3 common sense. The existence of a fact cannot be based on
4 speculation, surmise, or conjecture.

5 The law makes absolutely no distinction between the
6 weight or value to be given to either direct or
7 circumstantial evidence, nor is a greater degree of certainty
8 required of circumstantial evidence than of direct evidence.

9 Now, ladies and gentlemen, in determining what the facts
10 in this case are, you must judge the credibility, which
11 simply means the believability of the witnesses and the value
12 of weight to be given to their testimony. You alone must
13 decide the force, effect, and validity of the testimony.

14 In making this decision, there are many things that you
15 may and should take into consideration, such as the
16 appearance and manner of the witness on the stand, a
17 characteristic often referred to as the demeanor of the
18 witness. Was the witness forthright or hesitant? Was the
19 witness's testimony consistent or did it contain
20 discrepancies?

21 What was the ability of the witness to know the facts
22 about which he or she testified? Was there some reason a
23 witness would want to give testimony which would help or hurt
24 one side or the other? In other words, was the witness
25 biased or prejudiced?

1 Was the testimony of the witness reasonable when
2 considered in light of all the evidence in the case and in
3 the light of your own experience and common sense? Was the
4 testimony of the witness corroborated or made stronger by
5 other testimony and evidence or was it made weaker or
6 impeached by such other testimony and evidence?

7 As jurors, please understand that you have the right to
8 believe a small portion of a witness's testimony and discard
9 the larger portion or vice versa. You may believe all of a
10 witness's testimony or none. You may believe the testimony
11 of a single witness against that of many witnesses or the
12 other way around. And of course, you do not determine the
13 validity merely by counting the number of witnesses presented
14 by each side.

15 The fact that testimony is not controverted does not
16 mean that you must accept it as valid and undisputed. You
17 still must gauge the credibility of the witness to determine
18 the believability of the facts offered through the testimony.

19 In exercising your mental processes in attempting to
20 decide the validity of testimony, the law simply requires
21 that you exercise your good judgment, your common sense, your
22 sense of logic and reason, and your experiences in life. You
23 then apply these attributes to the evidence and apply the law
24 as I am going to state it to you and thus arrive at a
25 verdict.

1 Now, ladies and gentlemen, during the course of this
2 trial, you heard the testimony of individuals that were
3 qualified as expert witnesses. I previously gave you a
4 charge concerning expert witnesses, and I'm going to give you
5 a charge again. Okay?

6 As I told you previously, the rules of evidence
7 ordinarily do not permit witnesses to testify to opinions or
8 conclusions. Instead, they can testify as to facts they
9 perceived, such as what they saw, smelled, heard, or touched.

10 However, an exception to this rule exists for witnesses
11 that we call expert witnesses. A witness who has special
12 knowledge, skill, experience, training, or education in a
13 particular field may state an opinion as to relevant and
14 material matters in which the witness claims to be an expert.

15 Now, in determining the weight to be given to such an
16 opinion, you should likewise consider the qualifications and
17 credibility of the expert, and the reasons given for the
18 opinion. You are not bound by such opinion. Rather, you
19 should give it the weight, if any, which you think it
20 deserves.

21 The value and effect of expert testimony is a matter to
22 be solely estimated by you, the jury. No opinion of an
23 expert can be accepted in and of itself as accurate or
24 reliable, but must be weighed by you and convince your
25 judgment beyond a reasonable doubt and with the same force

1 and effect as any other fact proved in this case before you
2 can rely upon it.

3 You must consider expert testimony in the same manner as
4 you do any other testimony and give to it such weight as you
5 believe it to be entitled when considered with all the other
6 evidence in this case. Such testimony is given for the
7 purpose of helping you and not for the purpose of controlling
8 your judgment.

9 Now, ladies and gentlemen, as I told you, the State
10 seeks a finding that Mr. Filyaw is a sexually violent
11 predator. As I've told you before, the State must prove
12 beyond a reasonable doubt certain elements. The elements
13 which the State must prove beyond a reasonable doubt are
14 this.

15 That the -- that the respondent has been convicted of a
16 sexually violent offense, and I charge you that lewd act on a
17 child under 16 is a sexually violent offense, and that the
18 respondent suffers from a mental abnormality or personality
19 disorder that makes him likely to engage in acts of sexual
20 violence if not confined in a secure facility for long-term
21 control, care, and treatment.

22 Inherent in these two elements is that the State must
23 prove the requirement that the respondent's mental
24 abnormality or personality disorder causes him serious
25 difficulty in controlling his behavior. In other words, the

1 State must prove beyond a reasonable doubt that the
2 individual it seeks to commit suffers from a mental illness
3 which he cannot sufficiently control without the structure
4 and care provided by a mental health facility, rendering him
5 otherwise likely to commit a dangerous act.

6 In order for you to better understand the elements of
7 the State's cause of action, I'm going to define for you some
8 of the terms that I have just used.

9 Mental abnormality means a mental condition affecting a
10 person's emotional or volitional capacity that predisposes
11 the person to commit sexually violent offenses. This mental
12 abnormality or personality disorder must cause Mr. Filyaw
13 serious difficulty in controlling his behavior.

14 Likely to engage in acts of sexual violence means the
15 person's propensity to commit acts of sexual violence is of
16 such a degree as to pose a menace to the health and safety of
17 others so that he is dangerous to others.

18 Again, I remind you that the burden of proof is on the
19 State to prove to your satisfaction beyond a reasonable doubt
20 that the respondent has been convicted of a sexually violent
21 offense, as I have instructed you, and that he also suffers
22 from a mental abnormality or personality disorder that makes
23 him likely to engage in acts of sexual violence if not
24 confined in a secure facility for long-term control, care,
25 and treatment.

1 If the State carries its burden of proof and convinces
2 you beyond a reasonable doubt as to each of the two elements
3 of its cause of action, it is entitled to a finding that Mr.
4 Filyaw is a sexually violent predator. If the State does not
5 meet that burden of proof as to one or both of these
6 elements, the respondent is entitled to a finding that he is
7 not a sexually violent predator.

8 Now, Mr. Foreman and ladies and gentlemen of the jury,
9 as you retire to begin your deliberations in this case, I
10 wish to express the hope that each of you will be mindful of
11 the importance of your responsibility. You are not -- you
12 are not called upon to serve as jurors very often, and the
13 proper performance of the duty requires that each of you --
14 that each of you reach the height of freeing your mind of all
15 improper influences.

16 As the presiding officer of this Court, I am vitally
17 concerned that whatever verdict you will find will be the
18 result of you going into that jury room and confining your
19 consideration to the evidence and the law that you have heard
20 in this courtroom, weighing it fairly and impartially, as I
21 have every confidence that you will do.

22 Your verdict in this case, ladies and gentlemen, cannot
23 -- cannot be based on sympathy, compassion, prejudice or
24 emotion or some other consideration not found in the
25 evidence. Remember -- and I will tell you your verdict,

1 ladies and gentlemen, must be your unanimous verdict.

2 Now, Mr. Foreman, this is the verdict form. It has one
3 question. Has the -- and I'll read it.

4 Has the petitioner, the State of South Carolina, proved
5 beyond a reasonable doubt that Jimmy Ray Filyaw is a sexually
6 violent predator under South Carolina Sexually Violent
7 Predator Act?

8 We, the jury, unanimously answer the question as
9 follows.

10 If the State has proven beyond a reasonable doubt that
11 Mr. Jimmy Ray Filyaw is a sexually violent predator, you will
12 mark yes on here, that they have done so.

13 If you find -- if you unanimously find that the State
14 has not proven beyond a reasonable doubt that he is a
15 sexually violent predator, your answer will be no.

16 Once you all have reached a unanimous verdict -- and I
17 emphasize that it must be unanimous. It must be the verdict
18 of each and every one of you. Then, Mr. Foreman, you will
19 sign the verdict form and date the verdict form.

20 Now, during your deliberations, should you have any
21 questions, paper and pen will be -- or pencil will be in the
22 -- in the jury room with you all. Mr. Foreman, it will be
23 your responsibility to reduce such question to writing, knock
24 on the door and let the bailiff know that you have a
25 question. She'll get it to me, and I'll answer it however I

1 deem appropriate.

2 As well, once you all reach a verdict, a unanimous
3 verdict, and you have filled out the verdict form, knock on
4 the door as well. Let the bailiff know that you've reached a
5 unanimous verdict and I will get you -- we will get you back
6 into the courtroom as promptly as possible.

7 Now, before you begin your deliberations, I have a
8 couple questions. I have one question to ask you all in
9 particular. Is everyone on the jury feeling okay? Anyone
10 not feeling well?

11 (WHEREUPON, there was no response.)

12 THE COURT: All right. Now, I'm going to ask you to
13 step to the jury room, but do not begin your deliberations at
14 this point. The law requires that I consult with these
15 attorneys to make sure that I have not left anything out of
16 these instructions.

17 Once I've consulted with the attorneys, the bailiff will
18 bring in the items of evidence that have been introduced,
19 along with my verdict form -- along with this verdict form
20 and instruct you to begin your deliberations at that point.
21 But do not -- again, do not begin your deliberations until
22 you're instructed to do so.

23 Please step to the jury room at this time.

24 (WHEREUPON, the jury exited the courtroom at 3:11 p.m.)

25 THE COURT: As they're exiting, do y'all want to come up

1 and make sure they have all the items of evidence? There
2 weren't but three. Just those three? Just those three.
3 Okay.

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

6 THE COURT: All right. Before I send anything back, any
7 exception or objection to the charge by the State?

8 MR. BOGLE: No, Your Honor.

9 THE COURT: Defense counsel?

10 MR. FALK: Well, Your Honor, I did submit other proposed
11 jury instructions. I would like to say that.

12 But there is one other thing that I let slip and if I
13 waived it by waiting too long -- I would ask you to charge
14 them your standard charge that you would use in a criminal
15 case when somebody does not testify. Now, I know that South
16 Carolina law from about 20 years ago has said that he's not
17 entitled to that instruction, but to the extent that maybe
18 the Court will realize that at some point he does have
19 significant civil rights at stake and that he is prejudiced
20 by that.

21 THE COURT: Well --

22 MR. BOGLE: There's a case on that --

23 MR. FALK: I don't --

24 MR. BOGLE: -- at that point where they ask for an
25 instruction about the failure to testify, and the Court

1 declined and the Supreme Court upheld it. I think it was the
2 Ettel case, E-t-t-e-l.

3 MR. FALK: I don't doubt that that is -- I know that
4 that's the case law. I was thinking sometime it's time to --

5 THE COURT: Well, just note your objection for the
6 record. You know, I think I'm bound by current case law.

7 MR. FALK: But if there had to -- but you -- I'm asking
8 you to use your standard --

9 THE COURT: Okay.

10 MR. FALK: -- criminal --

11 THE COURT: Well, you've asked for it. I am
12 respectfully denying it -- to charge it. I don't think I'm
13 required to under the law.

14 MR. FALK: My comeback was only to identify what I was
15 asking.

16 THE COURT: Right.

17 MR. FALK: You know, for further review.

18 THE COURT: Okay.

19 MR. FALK: Not to argue further.

20 THE COURT: Okay. Anything else, Mr. Falk?

21 MR. BOGLE: Nothing from the State.

22 THE COURT: All right. If you'd get Mr. Orr out. Make
23 sure you've got items of evidence, the verdict form.

24 THE BAILIFF: This is all over here?

25 THE COURT: Yes, ma'am.

1 THE BAILIFF: Okay. I've got a clear pad and a pen in
2 here.

3 THE COURT: Yes. And you can -- once you get Mr. Orr
4 out, you can tell them they can begin their deliberations.
5 Give them those items of evidence.

6 (WHEREUPON, jury deliberations began at 3:13 p.m.)

7 (WHEREUPON, the alternate juror entered the courtroom.)

8 THE COURT: Mr. Orr?

9 JUROR NUMBER 83: Yes, sir.

10 THE COURT: If you'd come up here, please, sir? You can
11 bring that with you. How are you doing?

12 JUROR NUMBER 83: Good. How are you?

13 THE COURT: Doing good. The law does not allow -- once
14 the case goes to the jury, the law does not allow alternate
15 jurors in there.

16 JUROR NUMBER 83: Yes, sir.

17 THE COURT: That's why I asked if everybody feels okay
18 before I sent the case back. When I release you, you're free
19 to go.

20 JUROR NUMBER 83: Okay.

21 THE COURT: You can stay if you want. You're not
22 required to. If you want to stay and see what happens or
23 not. It's up to you.

24 JUROR NUMBER 83: All right.

25 THE COURT: I told you when this case started and I told

1 you when you were picked yesterday not to talk about this
2 case. When you leave here today, you can talk about it as
3 much as you want or as little as you want.

4 JUROR NUMBER 83: Okay.

5 THE COURT: But nobody can make you talk about it.

6 JUROR NUMBER 83: All right.

7 THE COURT: If somebody tries to talk to you about it
8 and you tell them you don't want to talk about it and they
9 won't leave you alone, you let the clerk's office know and I
10 promise you it will be handled.

11 JUROR NUMBER 83: Okay.

12 THE COURT: A check will be mailed to you for your
13 service. In no way, shape or form will it, you know,
14 adequately compensate you --

15 JUROR NUMBER 83: Yes, sir.

16 THE COURT: -- for what your service is worth. I
17 appreciate your time, your attentiveness. All of you were
18 very attentive throughout this trial.

19 When I let you go here today, you're free. We can't get
20 you back up here at least for the next three years.

21 JUROR NUMBER 83: Yes, sir.

22 THE COURT: But I hope you understand how important your
23 service is.

24 JUROR NUMBER 83: Yes, sir.

25 THE COURT: You know, it's not often that you get

1 called, but it's vitally important. All right. Do you have
2 any questions?

3 JUROR NUMBER 83: Huh-uh..

4 THE COURT: Okay. Do you need a work excuse or
5 anything?

6 JUROR NUMBER 83: No, I don't.

7 THE COURT: Okay. Like I said, you're free to go.

8 JUROR NUMBER 83: All right. If I want to stay --

9 THE COURT: You have a great -- sir?

10 JUROR NUMBER 83: Can I sit in the back?

11 THE COURT: Yeah.

12 JUROR NUMBER 83: Because you said if I want to stay.

13 THE COURT: Yes, sir. If you want to.

14 JUROR NUMBER 83: All right. Thank you.

15 (WHEREUPON, the alternate juror was released at 3:15
16 p.m.)

17 (WHEREUPON, there was a break in the proceedings from
18 3:15 p.m. until 3:41 p.m., after which the proceedings
19 resumed as follows.)

20 THE COURT: All right. It's my understanding that the
21 jury has got a verdict in this matter. Anything from the
22 State before I bring the jury back out?

23 MR. BOGLE: No, Your Honor.

24 THE COURT: Defense counsel?

25 MR. FALK: No, Your Honor.

1 THE COURT: All right. If you'll bring me the jury,
2 please.

3 (WHEREUPON, the jury entered the courtroom at 3:43 p.m.)

4 THE COURT: All right. Madam Clerk?

5 THE CLERK: Do you have the verdict?

6 THE COURT: All right. You may publish the verdict.

7 VERDICT

8 THE CLERK: State of South Carolina, County of Florence,
9 in the Court of Common Pleas, 12th Judicial Circuit. In the
10 Matter of the Care and Treatment of Jimmy Ray Filyaw,
11 Respondent. Case number 2016-CP-21-44. Verdict form.

12 Has the petitioner, the State of South Carolina, proved
13 beyond a reasonable doubt that Jimmy Ray Filyaw is a sexually
14 violent predator under the South Carolina Sexually Violent
15 Predator Act?

16 We, the jury, unanimously answer the question as
17 follows: Yes, Jimmy Ray Filyaw is a sexually violent
18 predator.

19 Signed foreperson, Joseph Lugo, February 13th, 2018,
20 Florence, South Carolina.

21 THE COURT: All right. Anything from defense counsel
22 before I release the jury?

23 MR. FALK: If you'd poll the jury?

24 THE COURT: All right. Madam Clerk, would you poll the
25 jury, please?

1 THE CLERK: Kreshelle Humbert, is this your verdict?
2 JUROR NUMBER 48: Yes.
3 THE CLERK: Is this still your true verdict?
4 JUROR NUMBER 48: Yes.
5 THE CLERK: Pauline Frierson, is this your verdict?
6 JUROR NUMBER 33: Yes.
7 THE CLERK: Is this still your true verdict?
8 JUROR NUMBER 33: Yes.
9 THE CLERK: Chadley Runyan, is this your verdict?
10 JUROR NUMBER 95: Yes.
11 THE CLERK: Is this still your true verdict?
12 JUROR NUMBER 95: Yes.
13 THE CLERK: Barry Cantey, is this your verdict?
14 JUROR NUMBER 11: Yes.
15 THE CLERK: Is this still your true verdict?
16 JUROR NUMBER 11: Yes.
17 THE CLERK: Jason Kirby, is this your verdict?
18 JUROR NUMBER 60: Yes.
19 THE CLERK: Is this still your true verdict?
20 JUROR NUMBER 60: Yes.
21 THE CLERK: Bessie Mason, is this your verdict?
22 JUROR NUMBER 68: Yes.
23 THE CLERK: Is this still your true verdict?
24 JUROR NUMBER 68: Yes.
25 THE CLERK: Courtney Shields, is this your verdict?

1 JUROR NUMBER 98: Yes, ma'am.

2 THE CLERK: Is this still your true verdict?

3 JUROR NUMBER 98: Yes, ma'am.

4 THE CLERK: Robert Sellers, is this your verdict?

5 JUROR NUMBER 97: Yes.

6 THE CLERK: Is this still your true verdict?

7 JUROR NUMBER 97: Yes.

8 THE CLERK: Jeremiah Gilchrist, is this your verdict?

9 JUROR NUMBER 36: Yes, ma'am.

10 THE CLERK: Is this still your true verdict?

11 JUROR NUMBER 36: Yes, ma'am.

12 THE CLERK: William little, is this your verdict?

13 JUROR NUMBER 65: It is.

14 THE CLERK: Is this still your true verdict?

15 JUROR NUMBER 65: It is.

16 THE CLERK: Jamaal McCall, is this your verdict?

17 JUROR NUMBER 71: Yes, ma'am.

18 THE CLERK: Is this still your true verdict?

19 JUROR NUMBER 71: Yes, ma'am.

20 THE CLERK: Joseph Lugo, is this your verdict?

21 JUROR NUMBER 66: Yes, ma'am.

22 THE CLERK: Is this still your true verdict?

23 JUROR NUMBER 66: Yes, ma'am.

24 THE CLERK: John -- I'm sorry. That's all.

25 THE COURT: All right. Anything further from defense

1 counsel?

2 MR. FALK: No, Your Honor.

3 THE COURT: Anything further from the State?

4 MR. BOGLE: No, Your Honor.

5 THE COURT: All right. Ladies and gentlemen, I want to
6 thank you for your service. When I release you here today,
7 you're done for the week. All right? This is the only case
8 we had to try this week. There were multiple -- there were
9 other cases that were on the roster that we have settled or
10 resolved in some other way, shape or form. Okay?

11 When I release you here today, you're done for the week.
12 In fact, you can't be called back up here to serve as a juror
13 at least over the next three years. All right? However, if
14 you're called to city court, magistrate's court or federal
15 court, you're going to have to serve, but you can certainly
16 -- if you're called back up here within the next three years,
17 you can be excused, if you so desire.

18 I would -- certainly, if you're called to serve, whether
19 it be in another court or this court again, that you would
20 willingly serve like you did this time. I can't stress to
21 you the importance of your service to this community, to this
22 state, and to this country.

23 Jury service is really -- it's really the only remaining
24 service that we have in this country. It is not a situation
25 where you can get drafted into the military and you have to

1 go away for a period of time, like grandfathers or great-
2 grandfathers, grandmothers maybe. I don't know. It's not
3 that situation anymore. This is really your only true
4 remaining service in this country.

5 I know that jury service never ever comes at a
6 convenient time. I know you have lives outside of this
7 courtroom and things going on, but anything worth having --
8 my grandfather used to say anything worth having takes
9 sacrifice. This is a sacrifice for us to maintain the jury
10 system that we have in this country.

11 I can promise you if you were seated at either one of
12 these tables, whether it be in a civil or a criminal matter,
13 you'd want people such as yourselves seated in that jury box
14 making decisions. You wouldn't want me or any other judge
15 walking in the courtroom on Monday morning and looking at one
16 of these deputies and saying go find me the first twelve
17 people on the street and bring them up here and let's try
18 this case. Nor would you want me or any panel of judges
19 sitting up here making all of these decisions. This gives
20 you -- jury service gives you a unique opportunity to say
21 what goes on in your community.

22 So when I release you here today, I've told you since
23 you started with this case -- since you were selected
24 yesterday, I told you not to discuss this case at all with
25 anyone. When I release you here today, you can discuss this

1 case as much as you want to or as little as you want to, but
2 no one -- no one can make you discuss or talk about this case
3 if you don't want to talk about it. All right?

4 When you leave here today, if somebody approaches you
5 and tries to talk to you about it and you tell them you don't
6 want to talk about it and they don't leave you alone, you let
7 the clerk's office know and I promise you it will be taken
8 care of. Okay?

9 Now, when I release you here, I'm not sure if any of you
10 need a work excuse. If you need a work excuse, hang tight
11 and this young lady can get you a work excuse. Otherwise --

12 THE CLERK: It will be included with their check.

13 THE COURT: It will be included with your check. You've
14 heard the proverbial statement the check is in the mail. The
15 check is in the mail. All right? I don't know when it will
16 be put in the mail, but it's going to be in the mail.

17 Don't -- don't go lay any large ticket items aside
18 thinking that you're going to be able to get it because of
19 your check that you're getting for your service. The truth
20 of the matter is -- I don't know if they still run that
21 MasterCard commercial about things that are priceless. Your
22 service is priceless. You can't put a price tag on it. All
23 right? If they tried to -- if they tried to, the governments
24 would be in a lot more trouble than they are with their
25 budgets. I can promise you that, and that's all I'll say.

1 Okay?

2 But I want to thank you for your service because I can't
3 tell you how valuable it is. Anything further before I
4 release the jury?

5 MR. BOGLE: Nothing from the State, Your Honor.

6 THE COURT: Okay.

7 MR. FALK: No, Your Honor.

8 THE COURT: Thank you all for your service. I hope you
9 have a great rest of the week. Thank you.

10 (WHEREUPON, the jury was released and exited the
11 courtroom at 3:50 p.m.)

12 THE COURT: That's it.

13 (WHEREUPON, the proceedings ended at 3:52 p.m.)

14

15 --- END REQUESTED TRANSCRIPT ---

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**Florence County Courthouse
RANDOM STRIKE SHEET**

JUDGE NAME : Craig Brown

TRIAL TYPE : Civil

PANEL ID : 2016CP2100044

COURTROOM 11

DESCRIPTION : State VS Jimmy Fay Filyaw

Sorted by: Random Nbr

Trial

NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1 Leahey, John J	63	W	M	(✓)	()	()	
2 Keith, Larry D Jr.	58	B	M	(✓)	()	()	
3 Howard, Willie E	47	B	F	()	(✓)	()	
4 Humbert, Kreshelle B	48	B	F	()	()	()	1
5 Frierson, Pauline B	33	B	F	()	()	()	2
6 Runyan, Chadley M	95	W	M	()	()	()	3
7 Cantey, Barry G	11	W	M	()	()	()	4
8 Oliver, Daryl D	~~82~~	~~W~~	~~M~~	~~()~~	~~()~~	~~()~~	~~struck earlier~~
9 Kirby, Jason G	60	W	M	()	()	()	5
10 Mason, Bessie D	68	B	F	()	()	()	6
11 Matherly, Bridgette W	69	W	F	()	(✓)	()	
12 Peebles, Linda L	85	B	F	()	(✓)	()	
13 Shields, Courtney L	98	W	F	()	()	()	7
14 Fowler, Donald C	31	W	M	(✓)	()	()	
15 Sellers, Robert B	97	W	M	()	()	()	8
16 Gilchrist, Jeremiah D	36	B	M	()	()	()	9
17 Little, William R II	65	W	M	()	()	()	10
18 Conyers, Troy A	~~45~~	~~W~~	~~M~~	~~()~~	~~()~~	~~()~~	~~struck earlier~~
19 McCall, Jamaal A	71	B	M	()	()	()	11
20 Davis, Richard A	21	W	M	(✓)	()	()	
21 Smith, Mary S	104	W	F	()	(✓)	()	
22 Lugo, Joseph A	66	W	M	()	()	()	12
23 Orr, John T III	83	W	M	()	()	()	alt
24 Evans, Jordan D	28	W	M	()	(✓)	()	

State of South Carolina)

) Certificate

County of Florence)

I, the undersigned, Krystal J. Smith, Notary Public and Official Court Reporter for the Twelfth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing pages, numbered 1 through 366, constitute a true, accurate, and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the above captioned case, relative to appeal, in the Court of Common Pleas for Florence County, South Carolina, on the 12th and 13th days of February, 2018.

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

s/Krystal J. Smith

Court Reporter

Florence, South Carolina

June 9, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

In Re Care and Treatment of)

Jimmy Filyaw)

Respondent,)
_____)

IN THE COMMON PLEAS COURT

FOR THE 12th JUDICIAL CIRCUIT

CASE NO.: 2016-CP-21-00044

JUROR QUESTIONNAIRE

Please circle your response

1. Have you or anyone in your immediate family ever been charged, accused, or convicted of a crime involving any kind of sexual abuse?

YES

NO

2. Have you or anyone in your immediate family ever been charged, accused, or convicted of criminal sexual conduct (i.e. CSC)?

YES

NO

3. Have you or anyone in your immediate family ever been a victim of criminal sexual conduct or sexual abuse whether reported or unreported?

YES

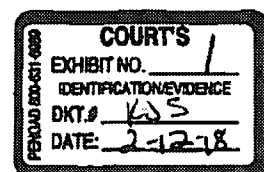
NO

4. Do you have strong beliefs about sexual abuse of any kind that would affect you in being fair and impartial in your consideration of the evidence in this trial?

YES

NO

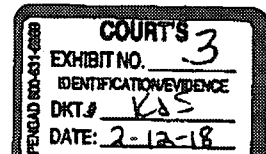
Name: _____ Juror #: _____



STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
COUNTY OF FLORENCE	)	FOR THE 12th JUDICIAL CIRCUIT
In Re Care and Treatment of	)	CASE NO.: 2016-CP-21-00044
	)	
	)	
Jimmy Filyaw	)	RESPONDENT'S MOTION
Respondent,	)	IN LIMINE TO EXCLUDE
	)	CERTAIN TESTIMONY

Respondent, by counsel moves the Court *in limine* to exclude the utterance or introduction of certain testimony and or statements described below from the State's opening statement, case in chief, and closing argument. As grounds for this motion Respondent asserts that the utterance or introduction of such testimony and statements would violate his right to due process as protected by the 5th Amendment to the United States Constitution and Article 1 Section 3 of the South Carolina Constitution. Moreover Respondent asserts that the probative value of such information would be substantially outweighed by the risk of unfair prejudice that such information would inject into these proceedings.

1. Any statements relating to the legislative history of S.C. Code Ann. § 44-48-30 et seq. including without limitation the terms **mentally abnormal**, and **extremely dangerous group of sexually violent predators**.
2. All references to whether Respondent may have the right, if committed, to petition annually for release from the SVP program, and whether he would receive annual evaluations.
3. All testimony regarding a mental examination of Respondent by someone who is not a licensed physician. Rule 35 SCRPC provides:
 - (a) Order for Examination. In any case in which the amount in controversy exceeds \$100,000 actual damages, and the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or



mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made, and shall be delivered to the person or persons making the examination.

See Green v Lewis Truck Lines, 314 S.C. 303, 443 S.E.2d 906 (holding that for purposes of Rule 35(a) SCRCP a clinical psychologist is not qualified to provide testimony regarding a physical or mental health examination).

4. Information regarding Respondent's prior arrests the disposition of which is unknown.
5. All non-sexual misdemeanor convictions for which more than 15 years has elapsed since the date of conviction or release from confinement.
6. All hearsay statements that Dr Swan mentioned in her report where the out-of-court declarant had no first-hand knowledge regarding the incident(s) they discussed. As an example in her report, Dr Swan describes an interview between a DSS worker and a victim identified as **Minor 5**. In response to a question whether **Minor 5** knew of any other children that Jimmy Filyaw may have done things to, **Minor 5** responded that her Aunt Lisa told her that Jimmy Filyaw touched **Minor 5**'s Aunt **Minor 6**.

Respectfully Submitted,



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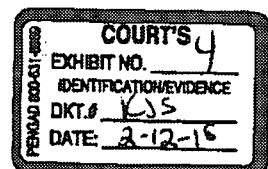
STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	
COUNTY OF FLORENCE	)	FOR THE 12th JUDICIAL CIRCUIT
	)	
In Re Care and Treatment of	)	CASE NO.: 2016-CP-21-00044
	)	
JIMMY RAY FILYAW	)	
	)	
Respondent,	)	
_____	)	

**RESPONDENT'S MOTION IN LIMINE FOR COUNCIL HEARING REGARDING
THE ADMISSIBILITY OF OPINION TESTIMONY FROM DR. AMY SWAN**

Respondent by and through undersigned counsel moves the court *in limine* to conduct a hearing pursuant Rule 702 SCRE; State v Council, 515 S.E.2d 508 (S.C. 1999); and Watson v Ford Motor Company, 699 S.E.2d 169, SC regarding the admissibility of certain testimony expected to be offered from Petitioner's expert witness, Dr. Amy Swan regarding a penile plethysmograph test ("PPG") Respondent underwent on or about March 16, 2016. Contemporaneous with the motion, Respondent's Counsel also files a motion *in limine* to exclude this same PPG testimony on separate grounds.

FACTUAL BACKGROUND

1. On March 15, 2016 the Florence Circuit Court appointed Dr. Amy Swan was appointed to perform and evaluation and give an opinion whether Respondent met the statutory criteria for classification as a Sexually Violent Predator.
2. On June 18, 2016 Dr. Swan completed her evaluation and prepared a report in which she opined that Respondent suffered from three specified mental diseases and or personality disorders namely, 1) Pedophilic Disorder, Sexually Attracted to Females, Non-Exclusive Type; 2) Other Specified Paraphilic Disorder, Sexually Attracted to Young Prepubescent Females (Hebephilia); Alcohol Use Disorder, in a Controlled Environment. Dr Swan



opined further that it was likely he would commit crimes of sexual violence if not confined for long term control, care and treatment.

3. In reaching her conclusions Dr. Swan relied upon a May 20, 2016 report and the results from a PPG examination that Southeastern Assessments, Inc. performed on Respondent.

Legal Argument

A PPG test is similar to a polygraph examination in that it measures a subject's non-verbal physiological responses to external stimuli as a means of assessing the veracity of a subject's verbal response to the external stimuli. Evidence regarding results from polygraph examinations is routinely excluded. State v. Pressley, 290 S.C. 251, 349 S.E.2d 403 (1986). "Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible." Id. at 252, 349 S.E.2d at 404. In re Robert R., 340 S.C. 242, 531 S.E.2d 301 (Ct. App. 2000). See also Rule 702, SCRE; State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). A PPG test is no more reliable than a polygraph examination and the results from PPG testing should be given no more credence in Court than that given to a polygraph examination.

Before an expert's testimony can be published to the jury the court, in exercising its gatekeeping duties, must make three preliminary findings. First, the Court must find that the subject matter is beyond the ordinary knowledge of the jury. Second, that the proffered expert has acquired the necessary knowledge and skill to qualify as an expert on the subject matter. Third, the Court must evaluate the substance of the testimony and determine whether it is reliable. Id. Watson 699 S.E.2d at 175. Respondent's challenge to Dr. Swan's testimony regarding the PPG centers upon the lack of reliability for the underlying science.

Under Rule 702, Council, and Jones, the trial court must determine whether the "underlying science is reliable." Council at 20, 515 S.E.2d at 518. In making this determination, the court should examine "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Id.

"Courts generally have held [the PPG] inadmissible to show the presence or absence of pedophilia." David H. Kaye, David E. Bernstein, and Jennifer L. Mnookin, The New Wigmore: Expert Evidence, § 8.8.2 at n.21. The Fourth Circuit held the PPG did not meet the scientific standards for admissibility in United States v. Powers, 59 F.3d 1460, 1470-71 (4th Cir. 1995). The court noted the "extensive, unanswered evidence weighing against the scientific validity of the penile plethysmograph test." Id. at 1471.

The Virginia Supreme Court held that an expert's report that relied on PPG testing was inadmissible, even at a sentencing hearing. Billips v. Commonwealth, 652 S.E.2d 99, 101-02 (2007). The Billips court approached PPG testing with a critical eye:

Advancements in the sciences continually outpace the education of laymen, a category that includes judges, jurors and lawyers not schooled in the particular field under consideration. Consequently, there is a risk that those essential components of the judicial system may gravitate toward uncritical acceptance of any pronouncement that appears to be "scientific," and the more esoteric the field, the more difficult it becomes for laymen to greet it with skepticism. That tendency has given rise to frequent complaints of "junk science" in the courts. To guard against that risk, we continue to require a "threshold finding of fact with respect to reliability of the scientific method offered. . . ."

Id. at 101-02 (emphasis added). It is hard to imagine any field more "esoteric" than PPG testing. The court concluded that the PPG "evidence, lacking foundation, was

inadmissible in the sentencing proceeding." Id. at 102. See also United States v. Medina, 779 F.3d 55, 65 (1st Cir. 2015) (discussing the problems with the reliability of PPG testing where such testing was imposed as a condition of supervised release); Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1266 (9th Cir. 2000) ("In fact, courts are uniform in their assertion that the results of penile plethysmographs are inadmissible as evidence because there are no accepted standards for this test in the scientific community."); United States v. White Horse, 177 F.Supp.2d 973, 975-76 (D.S.D. 2001) (citing the DSM-IV for the proposition that the PPG "is not accepted as a reliable or valid diagnostic tool"); State v. Spencer, 459 S.E.2d 812, 815 (N.C. Ct. App. 1995) ("We agree with the trial court that the evidence before it by no means established the reliability of the plethysmograph; there is a substantial difference of opinion within the scientific community regarding the plethysmograph's reliability to measure sexual deviancy."); Gentry v. State, 443 S.E.2d 667, 669 (Ga. Ct. App. 1994) ("Given the rejection of penile plethysmograph evidence by other states, and particularly the uncertainty within the scientific community of its reliability, we hold that it is inadmissible in Georgia.").

In 2005 Dr. Swan testified at an SVP commitment hearing for Isaac Washington in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County Florida; Petition No. 00-33239 CA24. At the hearing Dr. Swan testified that the use of PPG tests in SVP commitment actions was problematic because of the lack of standardization for the stimulus sets used in the testing. Dr. Swan was asked:

Q. In the field of psychology, with respect to risk assessment, is there controversy about relying on the PPG for evaluations?

A. Well, evaluation of risk assessment, yes, there is a very extensive controversy.

Q. Is using the PPG for evaluation different than using PPG in conjunction with treatment?

A. Yes, it's recommended that the PPG is an excellent tool for establishing baseline sexual arousal and monitoring treatment progress. However, it is not indicated in the use of risk assessment.

Q. And have you seen numerous studies that support that?

A. Yes, there are numerous studies, and some of the leaders in the field have introduced studies. For example, Marshall in 1996 indicated it was his strong recommendation that the PPG be withdrawn from use because it is not reliable and valid at this time, and the discriminative validity is poor, which means that it doesn't discriminate between, for example, rapists and non-sexual offenders.

Hearing transcript P. 43 lines 6- 25.

Later Dr. Swan was asked:

Q. From your experience as a psychologist, is there any way to objectively measure the effectiveness of a test where the stimuli is changed for the individual that is being tested?

A. No, there is not. Standardization is very important because you have to measure apples to apples. Therefore, it has to be the same stimulus set. For example, Monarch is very adamant in their training. You must use their stimulus set if you are going to use their machine. Otherwise, the result doesn't have the validity that you need. In fact, there have been seven major studies in PPG methodology and all of them cite standardization as a huge concern.

Q. What studies are those?

A. These are studies in 1991 by Simon and Schouten, '95 by Howes, 1994 by Whitney, 1992 by Barker and Howell, 1992 by Earls, 1992 by Donahue and Letourneau, and 1996 by Marshall. Two of those indicated that the PPG should not be used at all, and a third one said it could be used with some limitations, and the other ones indicated that it was useful; However, there were significant problems.

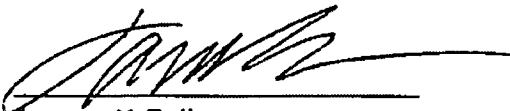
Hearing Transcript p 46 l. 11 through p. 47 l. 8.

SouthEastern Assessments, Inc used the Burke Real Child Voices stimulus set and the Limestone Prefest Penile Plethysmograph for and Respondent's PPG test. Counsel

is informed and believes that there are no peer reviewed studies that validate the specific stimulus set used in Respondent's PPG test. Moreover there are no studies that standardize PPG test results obtained with the Real Child Voices stimulus set and the Limestone equipment with those obtained with other stimulus sets on other PPG machines.

Respondent therefore asks that this Court conduct a hearing to establish the reliability of the anticipated PPG testimony from Dr. Amy Swan.

Respectfully Submitted,



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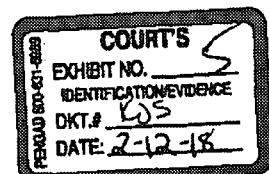
STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	
COUNTY OF FLORENCE	)	FOR THE 4th JUDICIAL CIRCUIT
	)	
In Re Care and Treatment of	)	CASE NO.: 2016-CP-21-00044
	)	
	)	
JIMMY RAY FILYAW	)	
Respondent,	)	
_____	)	

**RESPONDENT'S MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING
PENILE PLETHYSMOGRAPH (PPG) TESTING**

Respondent by and through undersigned counsel moves in limine and pursuant to the 4th, 5th, and 14th Amendments to the United States Constitution, Article 1 Sections 3, 10, and 12 of the South Carolina Constitution and Rules 402 & 403 of the South Carolina Rules of Evidence to exclude all testimony regarding a penile plethysmograph (PPG) test performed upon Respondent. Contemporaneous with this motion, Counsel has also filed a motion asking this Court for a hearing to determine the reliability of the particular PPG test performed on Respondent.

SUMMARY

1. The PPG test constitutes an unwarranted and unreasonable search and seizure of Mr. Filyaw and therefore the results should be suppressed.
2. Assuming arguendo that Respondent consented to the seizure, such consent was either coerced or was not fully informed.
3. The use of PPG testing violates Respondents rights against self-incrimination.
4. Dr Swan played no part in conducting or evaluating Respondent's PPG test, therefore all of her testimony regarding PPG testing would be hearsay.



Respondent is informed and believes that the scope of Dr Swan's testimony regarding the PPG testing exceeds the latitude Rule 703 SCRE provides for hearsay testimony from expert witnesses.

4. The admission of hearsay testimony regarding the PPG testing would violate Respondent's rights under the Confrontation Clauses in the United States and South Carolina Constitutions.
5. The stimulus set used to perform the test was the Burke Real Child Voices Stimulus Set and Respondent is informed and believes that there are either no or insufficient peer reviewed studies validating the use of this stimulus set in conjunction with diagnostic PPG examinations.
6. PPG testing lacks sufficient scientific reliability for use as a diagnostic test in a SVP pre-commitment evaluation.
7. PPG testing is a highly intrusive test and the State's expert could have obtained similar manner of data by use of less invasive means.

FACTUAL BACKGROUND

1. On March 15, 2016 the Florence Circuit Court appointed Dr. Amy Swan was appointed to perform and evaluation and give an opinion whether Respondent met the statutory criteria for classification as a Sexually Violent Predator.
2. On June 18, 2016 Dr. Swan completed her evaluation and prepared a report in which she opined that Respondent suffered from three specified mental diseases and or personality disorders namely, 1) Pedophilic Disorder, Sexually Attracted to Females, Non-Exclusive Type; 2) Other Specified Paraphilic Disorder, Sexually Attracted to Young Prepubescent Females (Hebephilia); Alcohol Use Disorder, in a Controlled Environment. Dr Swan opined further that it was likely he would commit crimes of sexual violence if not confined for long term control, care and treatment.

3. In reaching her conclusions Dr. Swan relied upon a May 20, 2016 report and the results from a PPG examination that Southeastern Assessments, Inc. performed on Respondent.

LEGAL ARGUMENT

The Compulsory Administration of PPG testing violates Respondent's rights under the 4th, 5th and 14th Amendments to the United States Constitution as well as Article 1 Sections 3, 10, and 12 of the South Carolina Constitution.

PPG testing is a search of Respondent's mind and body and an invasion of his privacy. The Order appointing Dr Swan to conduct a Sexual Violent Predator Evaluation for Mr. Filyaw is silent regarding the permissible scope of her investigation. Mr. Filyaw's The PPG test was conducted without a warrant or any other judicial intervention. Absent a warrant or other judicial determination that subjecting Mr. Filyaw to PPG testing was necessary. Therefore compelling Respondent to subject himself to this intrusion upon this most intimate aspect of his body, constitutes a violation of his rights against unreasonable searches and seizures protected by the 4th Amendment to the United States Constitution and Article 1 Section 10 of the South Carolina Constitution. Moreover, compulsory PPG testing amounts to an unreasonable intrusion upon Respondent's right of privacy as protected by Article 1 Section 10 of the South Carolina Constitution. See State v Forrester, 343 S.C. 637, 341 S.E.2d 837 (S.C. 2001); State v Counts, 431 S.C. 153, 776 S.E.2d 59 (S.C. 2015).

A PPG test is the most intrusive procedure or test to which respondents in an SVP commitment proceeding could be subjected. Moreover, not all forensic psychologists and or psychologists include PPG testing as part a SVP pre-commitment evaluation. This court will note that the South Carolina Department of Mental Health, does not subject Respondents to PPG testing as part of pre-commitment evaluations. Counsel is informed and believes that

the majority of SVP pre-commitment evaluations are conducted by Dr. Marie Gehle, who is a Chief Psychologist with SC DMH. Dr. Marie Gehle does not use PPG testing as part of her SVP pre-commitment evaluations.¹ Dr. Swan is not an employee of SC DMH, but instead has a contract with SC DMH to perform forensic evaluations as an Independent contractor. Counsel is informed and believes that Dr Swan has conducted SVP pre-commitment evaluations in South Carolina where she did not use any PPG testing.² Therefore since most of the SVP pre-commitment evaluations in South Carolina are performed without using PPG testing; and Dr Swan has performed these evaluations in this state without using PPG testing, this Court should not consider that PPG testing is necessary for the performance of an SVP pre-commitment evaluation. Instead the decision to employ PPG testing in the case was the result of Dr. Swan's unfettered discretion.

PPG testing requires that a strain gauge be strapped to an individual's genitals and they are then shown visual and auditory stimuli to determine their level of sexual arousal. As noted by the Ninth Circuit Court of Appeals,

¹ The following is a non-exclusive list of cases in which Dr. Gehle performed a pre-commitment SVP evaluation without using PPG testing: *In the matter of the Care and Treatment of Ira Singleton*, 1998-CP-10-04182; *In the Matter of the Care and Treatment of William Brinson*, 2012-CP-15-0075; *In the matter of the Care and Treatment of Michael Myers*, 2012-CP-08-33911; *In the Matter of the Care and Treatment of Darryl Snow*, 2013-CP-22-00468; *In the Matter of the Care and Treatment of Darryl Garner*, 2013-CP-33-00650; *In the matter of the Care and Treatment of Michael Hanf*, 2013-CP-10-3350; *In the matter of the Care and Treatment of Michael Fulton*, 2015-CP-21-2226; *In the matter of the Care and Treatment of James Gibson*, 2015-CP-38-1273; *In the Matter of the Care and Treatment of Shawn White*, 2015-CP-10-3212; *In the Matter of the Care and Treatment of Derrick Swinney*, 2015-CP-16-00693; *In the Matter of the Care and Treatment of Mark Anthony Gardner*, 2015-CP-22-0955; *In the Matter of the Care and Treatment of James Gibson*, 2015-CP-38-1273; *In the Matter of the Care and Treatment of Charles Sullivan*, 2015-CP-40-0770; *In the Matter of the Care and Treatment of Jimmy Lee Burgess*, 2016-CP-43-00623; *In the Matter of the Care and Treatment of James Garvin*, 2016-CP-15-00794; *In the Matter of the Care and Treatment of Dionisa McCray*, 2016-CP-26-06673; *In the Matter of the Care and Treatment of John Mills*, 2016-CP-10-04710; *In the Matter of the Care and Treatment of Christopher Busch*, 2016-CP-21-00044; *In the Matter of the Care and Treatment of Robert Isaac*, 2016-CP-43-00622; *In Re the Care and Treatment of Thomas Griffin*, 2016-CP-26-06412; *In Re In the Matter of the Care and Treatment of Robert Powell*, 2016-CP-07-01069; *In the Matter of the Care and Treatment of Michael Robinson*, 2017-CP-22-00421.

² The following is a non-exclusive list of SVP pre-commitment evaluations in which Dr Swan did not conduct PPG testing. *In the matter of the Care and Treatment of Jovan Brown*, 2014-CP-10-7452; *In the matter of the Care and Treatment of Michael Kaminski*, 2014-CP-08-2649; *In the matter of the Care and Treatment of John Henry Dorsey*, 2015-CP-22-00539; *In the matter of the Care and Treatment of James Felder*, 2015-CP-26-00847; *In the matter of the Care and Treatment of Robbie Collins*, 2015-CP-26-1841; *In the matter of the Care and Treatment of Joshua Flowers*, 2016-CP-17-00192.

[PPG testing] is not a run-of-the-mill medical procedure. Plethysmograph testing not only encompasses a physical intrusion but a mental one, involving not only a measure of the subject's genitalia but a probing of his innermost thoughts as well. U.S. v Weber, 451 F.3d 552, 569 (9th Cir 2006). PPG testing requires the physical involvement of arguably the most private part of the inmate's body, for the purpose of recording and monitoring the physiological disclosure of sensitive and revealing information about the subject's sexual response. Lile v. McKune, 24 F. Supp. 2d 1152, 1162 (D.C. Kan 1998) rev'd 536 U.S. 24 (2002).

Substantive due process prohibits the government from invading personal immunities that are "implicit in the concept of ordered liberty" and "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Rochin v. California, 342 U.S. 165, 169, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952) Courts have addressed whether the non-consensual administration of PPG testing involves a substantive due process violation. See Harrington v. Almy, 977 F.2d 37 (1st Cir 1992) (finding that in a civil rights action a genuine issue of material fact exists whether an employer violates an employees' substantive due process rights by requiring him to submit to PPG testing as a condition of reemployment). U.S. v McLaurin, 731 F.3d 258 (2nd Cir 2013) (requiring a committed sex offender to submit to PPG testing as a condition of community supervision violates offender's due process guarantee); In re Marriage of Parker, 957 P.2d 256 (Wash App Div. 1 2004) (holding that court-ordered PPG testing violated husbands substantive due process rights and outweighed the tests value in protecting the child).

Respondent's status as a convicted sex offender does not strip him of his substantive due process rights. A person, even if convicted of a crime, retains his humanity. He also retains his right to substantive due process, even if it is sharply diminished in many respects. McLaurin 731 F.3d at 261.

Although the right against government intrusion upon ones liberty interest is not absolute, any intrusion should be narrowly tailored so that it involves no greater deprivation of liberty than is reasonably necessary to serve the governments goals. See U.S. v Weber 451 F.3d 552, 569 (9th Cir 2006). (Finding that before inmate defendant could be subjected to PPG testing as a condition of supervised release, there must be a showing specific to that particular defendant that PPG testing was reasonably necessary to promote the government's goals).

Subjecting Respondent to PPG testing would implicated his liberty interests. See Bailey v Pataki, 708 F.3d 391, 402 (2nd Cir 2013) (stating that there can be no serious doubt that the liberty interests implicated by mental health treatment involving PPG testing are of a high order). Weber 451 F.3d at 563 (holding that PPG testing implicates a significant liberty interest); Harrington 977 F.2d at 44 (stating that a reasonable fact finder could conclude that requiring PPG testing involves a substantive due process violation). Therefore this Court must consider whether the use of the PPG test is necessary in order to serve the State's interest in evaluating whether Respondent is a sexually violent predator.

Respondent is informed and believes that Dr. Swan will disclose to the jury the Respondent's verbal and physiological responses to the evaluation. Although Respondent would have some volitional control over his verbal responses to the evaluation, Respondent would have no control over his physiological responses to the PPG testing. Therefore by subjecting Respondent to PPG testing this court is forcing him to provide testimony against himself. In the event a jury were to find that Respondent was a sexually violent predator, he would be confined to a secure facility for an indeterminate period of time for long term care, treatment and control. Since a direct consequence of the disclosure of Respondent's PPG results could result in Respondent's conviction and involuntary commitment as a sexually

violent predator, a non-voluntary PPG violates Respondent's right to remain silent and as protected by the 5th Amendment to the United States Constitution and Article 1 Section 12 of the South Carolina Constitution.

Respondent therefore moves that the State and its witnesses be prohibited during its opening and closing remarks and case in chief from making any reference to PPG testing.

Respectfully Submitted,



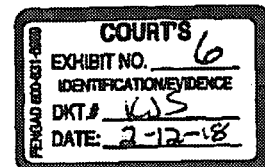
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE #: 2016-CP-21-00044
	)	
IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	PETITIONER'S
JIMMY FILYAW,	)	FIRST MOTION IN LIMINE
	)	
RESPONDENT.	)	

To: James K. Falk, Attorney for Respondent.

You will please take notice that the State moves before the Court to prohibit any reference to the location or residence where Respondent would receive sex offender treatment should he be committed, including but not limited to it being at a "prison;" as well as a prohibition against describing Respondent being "punished" or being civilly committed "for life," or words to that effect. In support of this Motion the following is offered:

1. Petitioner is seeking the civil commitment of Respondent to the South Carolina Department of Mental Health ("Department") as a Sexually Violent Predator. Should a jury find he is a sexually violent predator, he would be confined for long term care, control and treatment at the Sexually Violent Predator Unit, operated by the South Carolina Department of Mental Health, at either of at least two locations, including one on the property of the Broad River Correctional Institution.
2. One of the Sexually Violent Predator Treatment Units is located on Department of Corrections' property at the Edisto Unit, which was the former "Death Row."



3. Treatment at the Sexually Violent Predator Treatment Unit will last until Respondent's mental abnormality or personality disorder has so changed that he is safe to be at large, and no longer likely to engage in acts of sexual violence, S. C. Code Ann. Sections 44-48-110 and 44-48-120. The statute is a civil, non-punitive scheme, for treatment, *In the Matter of the Care and Treatment of Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001).
4. A jury in the instant matter will determine whether Respondent is a sexually violent predator. A sexually violent predator, which is defined by statute, is a person who has been "convicted of a sexually violent offense, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment." See S.C. Code Ann. Section 44-48-30 (1) (a) and (b).
5. Based on the foregoing, the issue before the Court is a factual and medical issue, and not one involving the conditions where Respondent would be confined. Testimony about "Death Row," the Department of Corrections, a prison, being there for life, being punished, other residents of the program, and general conditions of the locations where Respondent would be confined are not relevant to these proceedings, and would distract the jury from its mission. Under Rule 401 of the Rules of Evidence in South Carolina, "relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

less probable than it would be without the evidence." Under Rule 403, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. It is submitted that testimony and comments as outlined above are unfairly prejudicial to the State, and would mislead the jury.

WHEREFORE, it is respectfully requested that this Court order that counsel and witnesses refrain from making description of the actual locations where Respondent would be confined for sex offender treatment, describing it as a "prison," that he will be there for "life," that he is being punished, or words to that effect as requested above, or grant such relief as is just and proper.

Respectfully Submitted,

ALAN WILSON
Attorney General

JAMES G. BOGLE, JR.
Senior Assistant Attorney General

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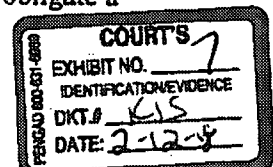
February 7, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	CASE #: 2016-CP-21-00044
IN THE MATTER OF THE	)	
CARE AND TREATMENT OF	)	PETITIONER'S
JIMMY FIFYAW,	)	SECOND MOTION IN LIMINE
	)	
RESPONDENT.	)	

To: James K. Falk, Esquire, Attorney for Respondent:

You will please take notice that the State moves before the Court to prohibit any reference as to the details of any and all future treatment Respondent would receive if committed to the Sexually Violent Predator Program. In support of this Motion the following is offered:

1. A jury in the instant matter will determine whether Respondent is a sexually violent predator. A sexually violent predator, which is defined by statute, is a person who has been "convicted of a sexually violent offense, and suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment." See S.C. Code Ann. Section 44-48-30 (1) (a) and (b). The State is only required to prove the required elements above, and by allowing Respondent to pose arguments and questions as to his future treatment places an additional burden on the State to prove the potential for treatment success. The United States Supreme Court has stated that "...it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a



State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be treated for their afflictions." *Kansas v. Hendricks*, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997). Therefore, based on *Kansas v. Hendricks*, even if the actual future treatment offered to Respondent would be ineffective, it does not indicate that Respondent should not have been initially committed into the SVP Program.

2. Furthermore, relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SC.R.E. 401. As stated above, the actual treatment offered if Respondent was committed to the Sexually Violent Predator Program does not aid a juror in determining the criteria as to whether Respondent satisfies the definition of a Sexually Violent Predator, and is irrelevant.

- a. In the alternative, even if evidence regarding treatment is relevant, such evidence should would cause unnecessary confusion and mislead the jury. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of evidence." SC.R.E. 403. As stated above, the State is only required to prove Respondent has been convicted of a 1) sexually violent

offense, and 2) has a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. See S.C. Code Ann. Section 44-48-30 (1) (a) and (b). Allowing evidence regarding treatment creates an additional element for the State to prove for confinement and indicates that the treatment must be effective, which can potentially confuse and mislead the jury.

3. In addition, any testimony proffered as to treatment from the State's witness, Dr. Amy C. Swan, or any potential expert called by Respondent, would be speculative. In this case, Dr. Swan will be offered as an expert in forensic psychology and will discuss whether Respondent meets the criteria to be admitted into the Sexually Violent Predator Treatment Program. Dr. Swan does not determine a treatment regimen for incoming residents. Dr. Swan only makes determinations for initial commitment proceedings. Since Respondent has not been admitted into the program, it would be speculative for Dr. Swan or any potential expert called by Respondent to determine what the course of treatment Respondent would actually receive. Therefore, neither Dr. Swan, nor any potential expert called by Respondent, should be required to testify as to what course of action and particular treatment Respondent would receive if admitted to the program.

WHEREFORE, it is respectfully requested that this Court prohibit Respondent to prohibit any reference as to the details of any and all future treatment Respondent would

receive if committed to the Sexually Violent Predator Program. Petitioner would also seek any such relief as is just and proper.

Respectfully Submitted,

ALAN WILSON
Attorney General

JAMES G. BOGLE, JR.
Senior Assistant Attorney General

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February 7, 2018
Columbia, South Carolina

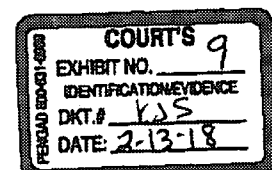
STATE OF SOUTH CAROLINA	)	IN THE COMMON PLEAS COURT
	)	
COUNTY OFFLORENCE	)	FOR THE 12th JUDICIAL CIRCUIT
	)	
In Re Care and Treatment of	)	CASE NO.: 2016-CP-21-00044
	)	
	)	
Jimmy Filyaw	)	
Respondent,	)	
_____	)	

RESPONDENT'S PROPOSED JURY CHARGES

1. BEFORE THE RESPONDENT CAN BE COMMITTED, YOU THE JURY MUST FIND THAT THE RESPONDENT SUFFERS FROM A MENTAL ABNORMALITY OR PERSONALITY DISORDER THAT CAUSES THE RESPONDENT TO HAVE A SPECIAL AND SERIOUS DIFFICULTY IN CONTROLLING HIS BEHAVIOR. THE MENTAL ABNORMALITY OR PERSONALITY DISORDER MUST BE SUFFICIENT TO DISTINGUISH HIM FROM RECIDIVISTS CONVICTED IN ORDINARY CRIMINAL CASES.

Kansas v. Hendricks, 521 U.S. 346 (1997) and Kansas v. Crane, 534 U.S. 407, 122 S.Ct. 867 (2002); In Re Thomas 402 S.C. 373, 741 S.E.2d 27, (SC 2013)

2. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT RESPONDENT HAS A "MENTAL ABNORMALITY" AFFECTING HIS EMOTIONAL OR VOLITIONAL CAPACITY WHICH CAUSES SPECIAL AND SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR THAT IS LIKELY TO CAUSE RESPONDENT TO COMMIT A SEXUALLY VIOLENT



OFFENSE IN THE FUTURE. YOU MUST THEREFORE LIMIT YOUR CONSIDERATION TO RESPONDENT'S LIKELIHOOD OF COMMITTING A SEXUALLY VIOLENT OFFENSE AND NOT CONSIDER THE LIKELIHOOD THAT HE MAY COMMIT AN ORDINARY CRIMINAL OFFENSE.

Kansas v. Hendricks, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002); *In Re Thomas* 402 S.C. 373, 741 S.E.2d 27, (SC 2013)

3. MENTAL DISORDER MEANS A CONDITION AFFECTING THE EMOTIONAL OR VOLITIONAL CAPACITY THAT PREDISPOSES A PERSON TO ENGAGE IN ACTS OF SEXUAL VIOLENCE AND CAUSES SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR. MENTAL DISORDERS DO NOT INCLUDE MERELY DEVIANT BEHAVIORS THAT CONFLICT WITH PREVAILING SOCIETAL STANDARDS. NOT ALL PERSONS WHO COMMIT SEXUALLY VIOLENT OFFENSES CAN BE DIAGNOSED AS SUFFERING FROM A MENTAL DISORDER. NOT ALL PERSONS WITH A MENTAL DISORDER ARE PREDISPOSED TO COMMIT SEXUALLY VIOLENT OFFENSES OR HAVE SERIOUS DIFFICULTY IN CONTROLLING BEHAVIOR.

Kansas v. Hendricks, 521 U.S. 346 (1997) and *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002)

4. THE RESPONDENT HAS ALREADY PLEAD GUILTY TO A SEXUALLY VIOLENT OFFENSE. HE RECEIVED A CRIMINAL SENTENCE FOR THAT CRIME AND HAS ALREADY SATISFIED THAT SENTENCE. SOUTH CAROLINA'S SEXUALLY VIOLENT PREDATOR LAW WAS NOT ENACTED SO TO ADD TO THE CRIMINAL PUNISHMENTS IMPOSED UPON INDIVIDUALS THAT COMMIT SEXUALLY VIOLENT OFFENSES. THEREFORE YOUR DECISION WHETHER TO COMMIT RESPONDENT IN THIS CASE MAY NOT BE INFLUENCED BY YOUR PERSONAL OPINIONS REGARDING WHETHER RESPONDENT RECEIVED AN APPROPRIATE CRIMINAL PUNISHMENT.

In Re Matthews, 345 S.C. 638, 550 S.E.2d 311, (S.C. 2001); *In Re Manigo*, 389 S.C. 96, 697 S.E.2d 629 (S.C. App. 2010); *Kansas v. Crane*, 534 U.S. 407, 122 S.Ct. 867 (2002).

5. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT UNLESS CONFINED TO A SECURE FACILITY, RESPONDENT IS "LIKELY" TO COMMIT ANOTHER SEXUALLY VIOLENT OFFENSE. IN MAKING THIS DETERMINATION OF LIKELIHOOD, YOU MUST BE FIRMLY CONVINCED THAT RESPONDENT WILL COMMIT ANOTHER SEXUALLY VIOLENT OFFENSE. YOU DO NOT HAVE TO BE CONVINCED BEYOND ALL DOUBT THAT RESPONDENT WILL COMMIT

ANOTHER SEXUALLY VIOLENT OFFENSE, BUT IF YOU HAVE A DOUBT THAT CAUSES YOU TO HESITATE TO ACT, THEN SUCH A DOUBT IS REASONABLE AND THE BENEFIT OF THIS DOUBT MUST BE GIVEN TO THE RESPONDENT.

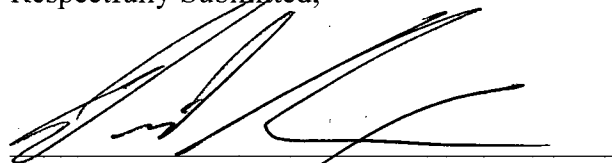
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CERTIFICATE OF COUNSEL FOR APPELLANT

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

Respectfully Submitted,


David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 10th day of December, 2018.

RECEIVED
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SC Court of Appeals