VOLUME II OF III

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
The Honorable Eugene C. Griffith, Jr., Post-Conviction Relief Judge

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Appellate Case No. 2017-001877
Circuit Court Case No. 2014-CP-32-04769

LANCE AUSTIN WILLIAMS, #345477

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

APPENDIX

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*Applicant's Exhibits 3-6 are photographs that are not part of this Appendix, but were separately transported.

time?
A Yes, I did.
Q Can you tell us or tell the jury what technique you had to use when you cleaned her?
A Well, whenever I was cleaning her front side or midsection, I lifted her, both of her legs up like that (indicating) so I could clean her good and then actually held her legs apart so I could actually get everything clean.
Q When you clean, is there a certain way you have to wipe?
A Yes, from front to back.
Q And why is that?
A To keep from infection.
Q Now, did you--- How important is it, that you know it is, to be very careful or thorough when you clean her?
A Very important. My mother has actually taught me how to change my own daughter's diaper and how to be careful with her and how it is a very sensitive area.
Q Now, when you were changing her, did you ever touch her without using a baby wipe?
A No, I did not.
Q Now, was any part of this diaper change, any part of that, sexually stimulating for you?
A No.

Q Anything you were looking forward to?
A No.
Q Now, did you ever touch her private areas without using a baby wipe?
A No, I did not.
Q Now, how were you feeling when you found out you had to change this diaper?
A Aggravated.
Q Why?
A Because I was left with her in my care, and I was just aggravated that I was having to deal with these things in taking care of her.
Q How did that--- How did your feelings or your anger affect the way you changed the diaper?
A It made me not be as--- I guess I was rougher than I should have been.

COURT REPORTER: I'm sorry?

A Rougher.

COURT REPORTER: Rougher.

A Yes.
Q Now, did you intend to be so rough that you left bruises on her?
A No, I did not.
Q And did you knowingly press down or press into her other than to clean her?

A No, I did not.
Q Now, was Victim cooperative during the diaper change? Did she lie still?
A No. She--- I mean, she struggled like any other child when we were changing the diaper.
Q And, after you finished cleaning her, what did you do next?
A I put a fresh diaper on her, and then I put her shorts back on.
Q And did you apply any type of lotion or cream?
A Yes, there is Aveeno lotion that I did apply. It was actually on her thighs, on her legs.
Q And where did you get it?
A Out of the diaper bag.
Q And whose diaper bag was that?
A Victim s diaper bag.
Q Now, on this Thursday, did you take Victim s diaper off any other time other than to change her?
A No, I did not.
Q Now, after you changed this diaper, what did you and Victim go do?
A We went into the living room, and that's where we were. I had the TV on and had a VCR tape in. I believe it was Elmo or something. And then she was playing in the toy box which is located in the living

room.

Q And how were you feeling at that time?

A I mean, I was aggravated that I was having to sit there with nowhere else to go besides in this trailer and watch [redacted]

Q Now, how did--- Did [redacted] do anything at that time that you didn't like?

A She was playing in her toy box, and she was throwing toys. And I had told her to stop, and she didn't. And that's whenever I reached up and popped her in the right side of her head.

Q How hard did you hit her?

A At the time, I didn't think it was hard enough to do any damage. I mean, I just popped her open-handed.

Q Which hand did you use?

A My right hand.

Q Do you have any problems or difficulties with that hand?

A I do. I have limited feeling in it.

Q How long have you had the limited feeling?

A Since my eighth-grade year, and I believe it was '98 when I was in military school.

Q And how did [redacted] react when you hit her in the ear?

A Shocked. She stopped what she was doing. I mean, she

was obviously shocked.

Q And do you believe you hit her too hard?

A Yes.

Q Now, what was the next thing that happened?

A She had thrown her sippy cup, and I told her not to do that. And that's whenever I reached around and I popped the left side of her head.

Q And what made you change ears?

A It's just the position that I was in.

Q And what hand did you use?

A My left hand.

Q And how hard did you pop her?

A Again, at the time, I didn't think it was hard enough to do any damage, but, I mean, hard.

Q Do you acknowledge that was wrong? Do you acknowledge that was wrong to hit her like that?

A It was very wrong.

Q Now, what time did you hear from Brittany again?

A I heard back from her, I believe it was like 5:30 is when she called me back.

Q And what did she call you for?

A She had called to make sure that I was getting ready to leave to go meet [redacted] grandparents on her father's side.

Q And where were you going to have to take [redacted]

A To the gas station in Pelion.
Q How far away from where you were was that?
A From my house or the trailer in Swansea to Pelion is probably a 15-minute ride.
Q Now, when [redacted] --- When you got ready to take [redacted] was she dressed?
A Yes, she was.
Q And what kind of marks or bruises did she have on her at that time?
A The only marks that were noticeable at the time that I dropped her off was the bruise on her forehead.
Q Did you notice--- You couldn't see any marks or bruising on the ears?
A No, I noticed nothing.
Q What about any marks on her arms?
A No.
Q Now, when you took [redacted] who did you meet?
A I met Adam Cooper's parents, which would be [redacted]'s grandparents.
Q And are they in the courtroom?
A Yes, they are.
Q Point them out please.
A They're sitting right over there (indicating).
Q And, when you dropped [redacted] off, where did y'all do this?

A At a gas station in Pelion. I don't recall the name of the gas station. It was in the parking lot.
Q Can you describe the outside of the gas station for us?
A There's lights. It's--- I mean, it is 6:15, 6:00 o'clock, when I dropped her off, so it wasn't dark. The sun was still up. It was clear.
Q Now, what did you tell the Coopers about [redacted] condition when you dropped her off?
A That's whenever we talked about the bruises on her forehead, and that's when I told them that's where she had fallen.
Q Now, was there any kind of concern or discussion raised about her condition at that time?
A Not at all.
Q And how did you think her condition was at that time?
A Fine.
Q Now, did they give you anything to take back to Brittany?
A They did. They gave me child support to give back to Brittany.
Q Now, after you dropped [redacted] off, where did you go?
A I went back to my house, my mother's house.
Q And what did you go back there for?

A Because I needed to start packing so I could go on my trip to Alabama, and I needed to start packing some of my daughter's stuff too and my own.
Q Who was there at the house? Who did you meet at your mother's house?
A My mom, and Mark was also there too.
Q Okay. Now, who was going to go on the trip to Alabama with you?
A Myself, my mother, Mark and my daughter.
Q Now, what kind of relationship did you have with your own daughter at the time?
A I have joint custody, the primary placement being with her mother. But, as an actual relationship with my daughter, she and me get along fine. She's my--- I mean, she's my world.
Q Do you pay child support?
A I did, $600 a month.
Q Now, how were you planning on picking up your daughter?
A I was meeting Heather Rogers, which is over there too, in Enoree, South Carolina, because she lived in Cowpens which is close to Spartanburg.
Q This is Enoree which is in Spartanburg County. Is that correct?
A Correct. It's exit 41 off of 26.

Q And where do y'all--- Is that a regular meeting place?
A Yes, that's where I normally--- I don't normally meet Heather there. I normally pick Aubrey up from Heather's mom in Irmo. But, because I was taking Aubrey on a trip with me and to keep Heather from having to drive all the way to Columbia, I met her in Enoree.
Q And what happened when you got to the gas station?
A While I was sitting at the gas station waiting for Heather and Aubrey to arrive, the detective right there--I can't pronounce his name; Detective Presti is what he told me to call him--he had actually contacted me on my cell phone.
Q And tell us about that call?
A He had called and told me that he needed to talk to me about some things that had happened to [redacted] Victim I told him that I would be more than happy to give my statement but I was waiting for my daughter to come, but that I would be more than happy to come down and give a statement.
Q Okay. And what did he ask you? What did he ask you to do then?
A He asked me what time or how long it would take, and I told him that I was still waiting, that I could be there at 7:00 o'clock but I did have my daughter, or I

was waiting on my daughter and that, after I got her, I would be on my way, that I'd have her with me.

Q And what did he tell you about bringing your daughter?

A He had told me that they would provide somebody to look after my daughter at the office if she was with me.

Q Now, at that time, did you have any concerns or problems going down and talking to the detective about this?

A Not at all.

Q Why not?

A Because I wasn't aware that anything was wrong with Victim .

Q Now, when did Heather arrive?

A I believe she arrived around like 5:30, 5:45, is when she actually arrived at the gas station.

Q And who came with her?

A It was just her and my daughter, Aubrey.

Q Now, did you tell Heather about what was going on?

A I did. I explained what was going on, what I was going to do, what I was doing, that I was going to talk to the detective and give him my statement.

Q Now, why had Heather moved from Lexington to Spartanburg County.

A She was actually married, and she moved with her

husband to Cowpens.

Q Y'all weren't dating at the time?

A No.

Q Now, did you have any problems picking up Aubrey from Heather then?

A Did I have any problems?

Q Yes.

A No, not at all.

Q So, when you left exit 41, where did you go?

A I headed towards Lexington County Sheriff's Department to talk to Detective Presti.

Q And where did you--- Which office did you go to?

A If I'm not mistaken, it's the office that's right over by the jail. It's in front of the jail I think. It's on Gibson Road.

Q And can you tell the jury what happened once you arrived at the Sheriff's Department?

A I had actually contacted my mom on my way to the Sheriff's Department and asked her to meet me there so she could actually watch Aubrey. And, when I arrived there, I probably sat in the room for maybe five minutes until the secretary got Detective Presti to come see me. And, when he did come see me, he came out the door, and he introduced himself and then he took me back to the interrogation room.

Q And can you describe what the first part of that conversation was, how it went?
A When I first got in there, we just pretty much talked about my background. He had told me that he had actually looked at my records in different ways and couldn't find anything on me, that I was clean, never been in trouble.
Q Now, when you got to the room--- First of all, can you describe the interview room for us?
A It's basically just a small room with a desk like they're sitting at, I believe with four chairs. And it's just a small, closed, like, interrogation room.
Q Did--- When you got into the room, did you see any pictures or documents or anything about this case?
A There was nothing in there about the case that I could see, no.
Q And, when you first got there, who was in the room with you?
A Say that again.
Q Who was in the room with you first?
A Detective Presti.
Q And did he have anything with him, like a file or papers or anything?
A Not that I could see, no.
Q Now, what was the first thing he asked you?

A He had asked me what happened to Victim while she was in my care.

MR. SNELL: Beg the Court's indulgence.

THE COURT: Yes, sir, certainly.

(Pause.)

Q Now, when the detective first asked you if you knew anything about Victim being hurt, what did you tell him?

A I told him the only thing I was aware of was the bruise on her forehead from her fall.

Q Why did you tell him that?

A Because that was the only bruise that I was aware of.

Q And what happened then?

A That's when he pulled out the pictures of Victim and started asking me about specific parts or specific bruises that was on her.

Q And what was your reaction when you saw the photographs?

A Shock.

Q Why?

A Because of what my actions did to her.

Q Did you expect it?

A No.

Q Now, what did you tell the detective about her head bump?

A On her forehead?
Q Yes, sir.
A That's where she had fallen outside.
Q Is that the truth?
A Yes.
Q What did you tell him about the bruising on her arms?
A That that's where I had lifted her up from, like her back facing me, from over, lifted her up.
Q Did anybody ever talk to you about picking children up like that before?
A I had picked my own daughter up like that, and my mother had told me that it's not the right way to pick her up. And I did it for the fact to keep from hurting my back.
Q Is that the truth?
A Yes.
Q What did you tell him about the marks above her ears?
A That that is where I slapped her open-handed to discipline her.
Q And was that the truth?
A Yes.
Q And did the detective ask you if you had touched Victim in a sexual manner?
A He did.
Q And what did you tell him?

A No.
Q Is that the truth?
A Yes.
Q Now, Lance, where do you live now?
A Where do I live now?
Q Now.
A Lexington County Detention Center.
Q How long have you been there?
A About a year.
Q Since this happened?
A (Witness nods indicating affirmative response.)
Q Now, let me ask you, after you changed [redacted] s diaper at the house, the trailer, where did you put her dirty diaper?
A In the trashcan in the kitchen.
Q Were there other trashcans in the house?
A There is.
Q Where is the other trashcan?
A There's a trashcan in the bathroom that's on one side of the house, and there's a trashcan I believe in LeeAnn's bathroom, in her bedroom.
Q Are you sure which trashcan you used?
A Yes.
Q Now, did the detective ask you about any injuries to her lip?

A He did.
Q And what did you tell him?
A I told him that it was where a piece of skin was hanging, it's where I'd pulled it off. It was like a piece of skin was hanging there, and it's where I actually peeled it off.
Q Have you ever seen that happen before?
A I have.
Q Who did you see do that?
A I've seen Brittany--I believe it was on the bottom lip--where she had pulled it off before. It was like a piece of dry skin or, like you get on your lip.
Q Were you trying to help [redacted] at that time?
A Yes.
Q And did you mean for that to hurt her?
A No.
Q Now, whatever had made the skin fall, was that something that she already had on her?
A Yes.
Q Now, Lance, are you guilty of criminal sexual conduct?
A No.

MS. MAYES: Objection, Your Honor. Objection to the phrase of that question.

THE COURT: Overruled.

Q Lance, are you guilty of criminal sexual conduct?

A No, I'm not.
Q What are you responsible for?
A I'm responsible for the bruises on [redacted].
MR. SNELL: Beg the Court's indulgence.
THE COURT: Yes, sir.
(Pause.)
MR. SNELL: No other questions.
Q Lance, please answer anything the prosecutor has for you. Okay?
THE COURT: Thank you, Mr. Snell. Solicitor?
MS. MAYES: Yes, sir, Your Honor.
CROSS EXAMINATION BY MS. MAYES:
Q Now, Mr. Williams, when you gave this statement to law enforcement, you had been advised of your rights. Correct?
A Yes, ma'am.
Q I'm going to have you take a look at this, State's Exhibit 22. That statement is in your handwriting, isn't it?
A Yes, ma'am.
Q And it contains your signature, doesn't it?
A Yes, ma'am.
Q All right. So those are your words.
A Yes, ma'am.
Q And, in your words, on April 15th, [redacted] was in

your care. Correct?
A Yes, ma'am, she was.
Q And, throughout this interview with the detective, you were offering explanations for how these injuries occurred. Correct?
A I was explaining how they occurred during my care, yes.
Q All right. So, when you were first confronted with the pictures of her ears, you immediately knew that was because you had struck her in both ears, didn't you?
A Yes, ma'am, I did.
Q There was no doubt in your mind.
A No doubt.
Q And the explanation that you gave to law enforcement in this statement is that you struck her in her ears because that was your form of discipline. Correct?
A Yes, ma'am.
Q Now, you have a daughter of your own who's three now, and she was two at the time. Correct?
A Yes, ma'am, I do.
Q Her name is Aubrey. And Aubrey had been at the residence on multiple occasions herself, hadn't she?
A Not multiple occasions.
Q Had she been to Kevin [redacted] house?

A A couple of times, yes.
Q All right. And, in addition to Kevin [redacted] house, she had been to LeeAnn's house once Brittany moved there. Correct?
A Twice.
Q And you don't strike your own daughter in the ears, do you?
A No, ma'am, I don't.
Q You were 24 years of age, and you had a two-year-old daughter, and you were well aware that you don't strike a 15-month-old child across the head as a form of punishment. Correct?
A Yes, ma'am.
Q But, on this particular day, you chose to strike [redacted] not once but twice across each ear. Correct?
A Yes, ma'am.
Q And, having a daughter of your own, you're familiar with toddler behavior. Correct?
A I believe it all varies between different toddlers.
Q And toddlers are known to throw things. Right?
A Some more than others, yes.
Q Well, a toddler throwing down a cup or a bottle isn't unusual, is it?
A Not particularly, no.
Q Okay. But, on this particular day, a toddler doing a

toddler thing set you off, didn't it?
A Yes, ma'am.
Q And it set you off to the extent that you struck her across the side of the head.
A Yes, ma'am.
Q Now, your testimony was that, earlier in the day, you took [redacted] out to the front yard.
A Yes, ma'am.
Q And you're familiar with the layout of the area. You know there's a swing set and play area on the other side of the house, aren't you?
A I never even took my own daughter in the play set area that you talked, that they talked about. I have had her over in the garage; but she's never been in the back yard, no.
Q All right. How many times has your daughter, Aubrey, been to the home?
A She's been there twice.
Q All right. And what do y'all do when she comes over there?
A Normally, the girls play together. She has spent the night at the home before.
Q Okay.
A And, like I said, they've played in the carport area behind Ms. Hutto's shop.

Q And, when your daughter comes over to stay, she spends the--- She's spent the night there, and she's also spent the night at Kevin [redacted] house. Correct?
A Yes, ma'am.
Q And that's because it was important for you to establish that, or in Brittany's eyes and in your eyes and the eyes of the other members of the [redacted] family, that you cared about both children equally. Correct?
A Yes, ma'am.
Q And I think your previous testimony was that you considered the [redacted] to be like your own family. Correct?
A Yes, ma'am.
Q And there's no doubt that, on this particular day, the reason that Brittany had entrusted you with [redacted] care is because you had always indicated to her that you genuinely cared about [redacted] Correct?
A Yes, ma'am.
Q As if she were your own daughter.
A I wouldn't go so far as to say that she was my own daughter; but, yes, I did have a place for [redacted] in my heart.
Q All right. And that extended to--- I believe your earlier testimony was, when you were at Kevin [redacted] house, you would change her diapers to help Brittany

out. Correct?
A Yes, ma'am.
Q This wasn't the first time you had changed [redacted] diaper.
A No, ma'am, it wasn't.
Q And it certainly wasn't the first time you had changed a diaper because you have a daughter of your own. Correct?
A Correct.
Q And your own daughter has never had to be hospitalized because of being in your care, has she?
A Never.
Q She's never had to be hospitalized because of your form of discipline, has she?
A No, ma'am.
Q She's never had to be hospitalized or medically treated because you caused injuries to her vagina while changing her diaper.
A No, ma'am.
Q Now, when you talk about going outside in the front yard, I believe your earlier testimony was that, according to your testimony, [redacted] fell and you had to dust her off. Correct?
A Yes, ma'am.
Q And you stated that she had a red mark on the head at

the time.
A Yes, ma'am, she did.
Q And you're talking about the forehead. Correct?
A Correct.
Q So that's the only bruise, according to your testimony, that you had knowledge of?
A It was the only bruise that I had knowledge of until Detective Presti showed me the pictures.
Q All right. And you're aware that [redacted] had multiple blows to the head. Correct?
A Yes, ma'am.
Q As well as a hematoma to the back of the head. Correct?
A I was not advised of that whenever I was interrogated, but I am aware of it now.
Q All right. And your testimony is that, as a result of a fall, she had one red mark on her head. So your testimony is you have no idea where the other head injuries came from.
A That's correct.
Q Then you went on to state that, at some point, you had grabbed her by the neck. Correct?
A No, I did not grab her by the neck. I grabbed her by her short collar, and it was to keep her from falling.
Q So all of this occurred while you were outside?

A Yes, ma'am, it did.
Q And your testimony is that you grabbed her by the shirt collar to keep her from falling. Correct?
A Correct.
Q And, when you grabbed her by the shirt collar, what happened?
A She didn't fall.
Q Mr. Williams, you're not testifying that, by grabbing her by the shirt collar, it resulted in these bruises to her neck, are you?
A Yes, I am.
Q Your testimony is that this pattern of bruises---
A Well, I'm not a doctor to be able to tell what it's from, but I'm telling you that's where it's from in my eyes, whenever I grabbed her shirt, yes.
Q Okay. So all of this along her neck, according to your testimony, happened when you grabbed her shirt. Correct?
A Correct.
Q What about the bruises underneath her jaw line?
A I was never aware of any bruises under her jaw line, neither was I told about them in my interrogation.
Q All right. But you are aware now. Correct?
A I am now.
Q And your testimony is you grabbed her shirt collar and

that caused the bruising to her neck?
A Correct.
Q And underneath her jaw line as well?
A I can't say that.
Q And, Mr. Williams, your testimony today is that the injury to [redacted] lip--- Have you seen these photographs before?
A Yes, I have.
Q Where did you see them?
A From Detective Presti.
Q Your testimony is that these injuries to [redacted] lip were the result of you trying to help her?
A It was the results of her having a piece of skin hanging off her lip, like a scab, and I pulled it off.
Q How did you pull it off?
A I pulled it off (indicating).
Q And you pulling off a piece of skin resulted in this pattern of bleeding underneath her lip. Correct?
A Correct.
Q That's your testimony.
A Yes.
Q And the open-handed blows across the head resulted in these ear injuries. You don't dispute that at all. Correct?
A No, ma'am.

Q And explain again about picking her up and causing arm injuries.
A She was--- The back of her was facing me, and I reached over and picked her up by her elbows.
Q All right. And your testimony is that you knew that you were not supposed to pick the child up that way because your own mother had told you not pick your daughter up that way. Correct?
A Yes, ma'am.
Q So your mom says, look, you're not supposed to pick a child up that way. And, on this particular day, according to your testimony, you were angry and you were agitated and you didn't want to be watching [redacted].
A Correct.
Q And you picked her up by her elbows, according to your testimony, because you didn't want to hurt your back.
A Yes. I have sulcatation of the spine. I've dislocated my tailbone twice.
Q And, because of that reason, you picked her up by her elbows and that resulted in the multiple bruises.
A Correct.
Q And you acknowledge that the bruises to her legs occurred in your care as well. Correct?
A Correct.

Q I believe your testimony on direct was that, because you were aggravated about having to watch [redacted] you were rougher than you should have been.
A Rougher than I should be doing what?
Q That was your testimony. I'm asking you.
A Well, I'm asking what you're referring to being rougher. Rougher---
Q Your testimony was that you were rougher than you should have been when you were changing her diaper.
A Okay. Yes, I was.
Q What about the rest of the day?
A No. When I changed the diapers during the other day, during other times of the day, I was not rough with her at all.
Q Well, were you rough with her during any other event during the day?
A Whenever I disciplined her, yes.
Q Now, in addition to being agitated, upset, angry, as you put it, because you didn't want to be watching [redacted] you were also upset because you had had an argument with Brittany about the fence situation.
A I didn't have an argument with her. We had a discussion about it, and I finally just told her that she could go because it wasn't worth arguing about or it wasn't really worth getting into a discussion about

that.
Q You were the one who was originally supposed to help with the fence. Correct?
A Kevin had asked me to help him do the fence, yes.
Q All right. And what happened?
A Brittany wanted to do it so she could spend time with her dad.
Q And, when you became involved with Brittany, I think your testimony was that you have known her for many years. Correct?
A I've known her since '04, yes.
Q And you've known [redacted] since shortly after she was born.
A Yes, ma'am.
Q And you knew, when you got involved with Brittany, that she was a mother and that [redacted] is a part of her life and will always be a part of her life.
A Yes, ma'am.
Q And that, by being involved with her, [redacted] is a part of your life as well. Correct?
A Yes, ma'am.
Q And, on this particular day, you were upset about the fact that she was in your care.
A Yes, ma'am.
Q And, when LeeAnn Harvey arrived at the home, there

weren't any bruises on her at that time, were there?
A No, ma'am.
Q So all of these bruises became apparent at some point in the day after LeeAnn Harvey left. Correct?
A Yes, ma'am.
Q Okay. And, according to your testimony, that dirty diaper that you testified about you put in a kitchen trashcan. Correct?
A Yes, ma'am.
Q The same kitchen trashcan with the other diapers. Correct?
A Yes, ma'am.
Q And, according to your statement to Detective Presti, you changed five diapers that day. Correct?
A I did.
Q And, by changing her diapers throughout the day, you were aware that she was bleeding from the vagina, weren't you?
A No, I was not.
Q You were not?
A No.
Q I'm going to ask you to take a look at these photos, Mr. Williams, State's Exhibit 25 and State's Exhibit 31. All right. Your testimony is you changed five diapers that day. Correct?

A Correct.
Q And now your testimony is you have no idea where the blood stains, what appear to be blood stains, came from?
A That's where I thought they came from, her butt whenever she had the diarrhea because it has occurred before.
Q So now your testimony is that she was bleeding but you thought she was bleeding from the butt.
A It wasn't that she was bleeding. It's that it came from whenever she had diarrhea, and it has happened before because of constipation problems.
Q So that wipe with the blood on it---
MR. SNELL: Objection, Your Honor.
THE COURT: Rephrase your question, Solicitor.
MS. MAYES: Yes, sir, Your Honor.
THE COURT: Thank you.
Q That wipe with the stain on it you acknowledge is part of you changing her diaper. In other words, you're aware of that diaper and that wipe and that stain.
A I am aware of the diaper and the stain, yes.
Q All right. And at no point that day when you spoke with Brittany did you bring any of this to her attention, did you?

A No, ma'am.
Q You didn't tell her that [redacted] was bleeding, did you?
A No, ma'am. And it wasn't a continuous bleeding.
Q Mr. Williams, how many of the five diapers that you changed contained what you believed to be blood?
A I don't recall any diapers actually containing blood.
Q How many times did you observe blood?
A I observed blood one time whenever I changed her diaper, whenever it was a poopy diaper.
Q Your testimony is now that you only saw blood one time and that was with the diaper that you call the poopy diaper.
A Yes, ma'am.
Q All right. So on that particular wipe that you just testified about.
A Correct.
Q Well, that's not the poopy diaper, is it?
A No, it's not. There's not a poopy diaper that's in evidence either.
Q That's what I'm asking you.
A Well, I didn't collect the diapers.
Q So, if you only saw blood one time---
MR. SNELL: Objection, Your Honor. There's been no testimony about blood.

MS. MAYES: Yes, sir, Your Honor.

Q If you only saw blood, what you believed---

THE COURT: Wait just a minute, please, and let me rule. Overruled. Thank you.

Q If you only saw what you believed to be blood one time, didn't you just testify that you were aware of what you believed to be blood on that wipe and on that diaper in that photograph?

A I don't notice any blood on the diaper. I notice blood on this wipe, yes.

Q All right. Didn't you just acknowledge a few moments ago---

A On the wipe, yes.

THE COURT: I can't track it when y'all interrupt each other.

A Sorry. Sorry, Your Honor.

THE COURT: I'm not fussing at you, Mr. Williams, at all. But, Solicitor, please finish your question. And then you answer the question.

A Yes, Your Honor. I'm sorry.

THE COURT: Thank you. I'm not--- Again, I'm not fussing at you at all or at the Solicitor.

SOLICITOR: Yes, sir, Your Honor.

THE COURT: Thank you, Solicitor. You may ask your next question.

Q All right. So there's no doubt in your mind that those wipes in the photographs are the result of your diaper changing that day.
A Yes, ma'am.
Q Now, another question that Detective Presti posed to you was, do you have anger problems.
A Yes, ma'am, I do.
Q What do you mean by that?
A I was placed on Lexapro due to my anger problems.
Q What is that drug?
A Lexapro is a controller for bipolar disorder and for anger problems.
Q All right. So these anger problems had sort of reared its head before this situation with [redacted] Victim. Correct? It was enough where you knew, and people around you knew, that you needed professional help with it.
A Yes, ma'am.
Q Because you would be very short-tempered and would sometimes blow up at people or certain situations. Correct?
A Yes, ma'am.
Q And I believe your testimony was that you had been in military school. Why was that?
A My mother placed me in military school to better me,

to give me a sense of discipline.
Q And your anger problem was part of what led to that decision as well. Correct?
A No, ma'am.
Q When did you first get put on the Lexapro?
A I was put on the Lexapro I believe two years ago, a year prior to being incarcerated.
Q And so this anger problem was certainly present during adulthood. Correct?
A Yes, ma'am.
Q Now, your testimony on direct examination was that you took some Aveeno lotion out of the baby bag and you put it on her legs and thighs. Correct?
A Yes, ma'am.
Q When you were questioned by Detective Presti about that, his specific question to you was, what kind of cream did you put on her vagina.
A I was referring to the area not directly on--- When he showed me the picture of the bruise above, that's where I had applied it, on like her stomach or her belly. When he showed me the picture or told me about pictures of internal, that's whenever I told him it was from a rough diaper change.
Q And, in this particular situation, we're talking about the bruising right here (indicating)---

A Yes, ma'am.
Q ---to the top of the vagina. Correct?
A Yes, ma'am.
Q Your testimony is that that bruising to the top of her vagina was because you were putting lotion on her?
A That's what I had told him in the beginning.
THE COURT: Let me see that picture, Solicitor.
MS. MAYES: Yes, sir, Your Honor.
THE COURT: Rephrase your question, Solicitor, please. I can see it. Just rephrase your question.
Q Your testimony is that that bruising to the top of her vagina is because you were putting lotion on her.
A Originally it was, yes. And then, when he disclosed to me that she had internal bruising, that's whenever I told him that it was due to a rough diaper change.
Q All right. So you acknowledge causing these bruises as well.
A I do.
Q And what you term a rough diaper change resulted in abrasions not only to this child's vagina but to the inner structure of the vagina and to the hymen. Correct?
MR. SNELL: Objection, Your Honor. There's been no testimony as to that.
THE COURT: Step up here for me, please,

Mr. Snell.

(Whereupon, there is a bench conference off the record in the presence of the jury but out of the hearing of the jury.)

THE COURT: All right. Solicitor, you may rephrase your question.

MS. MAYES: Yes, sir, Your Honor.

Q Now, your testimony is that you knew how to change a diaper because your mom had discussed that with you before. Correct?

A Yes, ma'am.

Q And because you have a daughter of your own and you've changed her diaper on many occasions.

A Yes, ma'am, I have.

Q And because you had even changed [redacted] diaper on other occasions. Correct?

A Yes, ma'am, I have.

Q And at no time in the past have you caused injuries to a child by changing her diaper, have you?

A No, ma'am, I haven't.

Q And, on this particular day when you were angry and you had this anger problem, it results in injuries to [redacted] vaginal area. And you acknowledge that whatever abrasions, redness and swelling that she received that day were the result of how you handled

her. Correct?

A Yes, ma'am. How I changed the diaper, yes.

MS. MAYES: Nothing further, Your Honor.

THE COURT: Thank you. Thank you very much, Solicitor. Redirect, Mr. Snell?

MR. SNELL: No other questions, Your Honor.

THE COURT: Thank you. Thank you very much, Mr. Snell. Mr. Williams, you may step down.

A Thank you, Your Honor.

(Witness leaves the witness stand.)

THE COURT: All right. Mr. Foreman and ladies and gentlemen, I believe now we'll take our morning recess. I would remind you, during this recess, do not discuss the case with your fellow jurors. Remember to keep an open mind. Do not begin your deliberations until I instruct you to do so. We'll take a 15-minute recess. If anyone wants to go outside, you may certainly do so. Again, do not discuss the case with anyone. I would like a bailiff to escort those outside at this stage of the proceeding. If y'all stay together, you can go outside with a bailiff. Thank you very much. You may now go to your jury room.

(The jury retires to the jury room.)

THE COURT: Mr. Snell, can you share with me if you have other witnesses? If you can't, that's fine. You can tell me when we come back. I won't hold you to it.

MR. SNELL: We're not planning to call any additional witnesses.

THE COURT: All right. Upon our return then, I'll be glad hear any motions if that's appropriate. Although you haven't formerly rested in front of the jury panel, I would still be glad to hear the motions if you don't have any objections to that. All right. We'll take us a 15-minute recess. Well, Solicitor, and then I'll need to know whether or not you have any reply. Thank you.

(Whereupon, there is a recess.)

THE COURT: All right. Mr. Snell, Mr. Floyd, do you have any motions? And, again, I'm assuming you're going to rest.

MR. SNELL: Your Honor, we are; and, at this time, we would renew our previous motions made for directed verdict on both the charge, on both charges of the unlawful conduct towards a child allegation as well as the criminal sexual conduct with a minor in the first degree.

THE COURT: All right. Thank you. Thank you, Mr. Snell. I will--- Considering the evidence at this stage, both Ms. Moore's testimony and, additionally, Mr. Williams' testimony, I would renew my previous ruling as to the directed verdict. I find there is direct evidence and circumstantial evidence as to violations of section, unlawful conduct towards a child, under Title 63, and also

criminal sexual conduct looking at the case at this point in the light most favorable to the non-moving party, that being the State. Solicitor, is the State going to have any evidence or witnesses in reply.

MS. MAYES: No, sir, Your Honor.

THE COURT: All right. Are there any requests to charge?

MS. MAYES: Not beyond the statutes that are currently before the Court or have currently been discussed by the Court. That would include the definition of sexual battery--of course, I believe that's already a part of Your Honor's charge in the criminal sexual conduct with a minor--and as to unlawful contact towards a child, Your Honor, the subsection which deals with the definition of a person responsible for the child's welfare.

THE COURT: All right. Thank you. Mr. Floyd?

MR. FLOYD: Your Honor, we have several we would like to hand up to you.

THE COURT: All right.

MR. FLOYD: And, of course, we'd also request the lesser-included offense of assault and battery of a high and aggravated nature. Your Honor, we also feel that it's kind of a---

THE COURT: And, Solicitor, do you have copies of these requests?

MS. MAYES: I do not, Your Honor.

MR. FLOYD: I don't think--- I just did them last night. I'll let her look at them, Your Honor.

THE COURT: All right. Well, why don't you ask the clerk if she'll make a set for the Solicitor and we can look at them. Do you mind doing that, Madame Clerk?

CLERK: No, sir.

MR. FLOYD: Your Honor, he's kind of, in some ways, being cheated because, as you know, they changed the assault law in June of I believe 2010 after this incident. But I think he would be entitled to take advantage of the ABHAN, common law ABHAN, which was in effect at the time of this incident. If the new law--- If the new law applies in any way--- I mean, we've looked at it and thought assault in the second degree may well be a lesser-included offense. I don't know if we could take advantage of the old and the new at the same time. So I think that would be the posture we're in.

THE COURT: Well, let me ask the Solicitor. What about the assault and battery of a high and aggravated nature, Solicitor?

MS. MAYES: Yes, sir, Your Honor. The common law of ABHAN was the law in effect at the time of this offense. They had not yet passed any of the new legislation, and certainly that would not apply. There is case law to

support a charge of ABHAN as a lesser-included offense to criminal sexual conduct with a minor under certain circumstances when there are facts on the record to support it. Traditionally, that has been in the context of indecent liberties with a female as the lesser-included offense. And, in this particular case, it's unusual because he does not acknowledge any indecent liberties with a female.

THE COURT: Well, it could be a difference in the gender or the sizes, a difference in the ages. Of course, as you all know, assault and battery of a high and aggravated nature is no more than assault and battery with circumstances of aggravation, and those laundry list of circumstances of aggravation that appear in the common law are not all inclusive. I think the charge says these are just examples of circumstances of aggravation in that regard. His testimony, if you take it from the Solicitor's point of view, is that he was engaged in a lawful act and committed it in an unlawful manner, so to speak, that it was lawful for him to change [redacted] diaper if it needed changing, but it was obviously, whether I couch it in terms of being unlawful, if you take his testimony, it was rough, it was too rough. I'll look at that. That would obviously be unlawful. Did I get a set? My reasoning for making copies was---

CLERK: I made an extra set. I just didn't know who to give it to, Your Honor.

MR. FLOYD: She gave me yours.

THE COURT: So you decided whoever you gave it to I wouldn't be one of them, Madame Clerk? Is that how it works now?

(Hands to Court.)

(Pause.)

THE COURT: All right. Solicitor, as to the requests to charge, are there any that you do not have objections to or any that you object to?

MS. MAYES: Your Honor, as to--- No objections. I think it's what they have labeled number four, traditionally the *King* charge. That's probably part of Your Honor's standard charge in a case where a lesser-included offense is submitted.

THE COURT: All right.

MS. MAYES: I'm not sure about the difference in this terminology versus what the Court might already have as a part of your standard charge.

THE COURT: Okay.

MS. MAYES: But, as to the others, Your Honor, in looking at number three and number five, I believe these are misstatements of the law or with the charging of the jury with something that does not adequately describe or

define the law, and I believe the statute itself clearly sets forth what the elements are. And, in terms of intent, I believe Your Honor already has a standard charge concerning intent.

THE COURT: I do give a standard charge on intent, Mr. Floyd, that's--- Actually, it talks about the State always having to prove intent beyond a reasonable doubt.

MR. FLOYD: As long as we get the intent in there, Judge. And, as far as the *King* charge, yes, Your Honor. We're not married to the language here if you give the standard *King* charge on the lesser-included also. We just want the concepts in the charge.

(Pause.)

THE COURT: I thought--- And I asked my law clerk to check. I thought *King* was reversed, and it was.

MR. FLOYD: I think it's not automatic anymore, Your Honor. But I thought, if we requested, it was appropriate.

THE COURT: Well, if y'all don't have any objections, I'll give it. I'll certainly explain it to the jury. All right. I think what it did is the new case said you're not required to give it if you give the modern reasonable doubt charge. All right. How long do you need to argue? I won't hold you to it. I'd just like to have

it in my mind. Solicitor, Mr. Floyd?

MR. FLOYD: Your Honor, I imagine around 30 minutes.

THE COURT: Solicitor?

MS. MAYES: The State would waive opening, Your Honor, and less than 30 minutes.

THE COURT: All right. Madame Clerk, is the jury ready?

CLERK: Yes, sir, Your Honor.

THE COURT: All right. Thank you. Thank you very much. When the jury comes out, of course, I will turn my attention back to the defense to call your next witness. You can formally rest and renew your objections for the record. I don't know if you have to do that or not in front of the jury, but I always suggest that. Of course, I don't have to tell y'all how to try cases, but I would still suggest it. And then I'll tell them where we're at procedurally, and then we'll go right into closing arguments. Depending on the length of the arguments, we may or may not take a break between the arguments. If they're only 30 minutes or less, we will not take a break between your arguments. Of course, if the Solicitor needs a few minutes to get the evidence straight after Mr. Snell or Mr. Floyd's closing, I'll certainly allow that. I don't allow anyone in or out of the courtroom or any moving about

during the course of the attorneys' closing arguments to the jury. If you want to leave after the defense's closing argument and before the Solicitor starts, you may certainly do so in that narrow window of time. If you want to leave after the Solicitor's closing and prior to the Judge's instruction to the jury, you may certainly do so. But no moving about during the course of the closing arguments. I find it's distracting. I'm sure it may be distracting to the jury. It's the attorneys' last opportunity that they have to speak to the jury on behalf of their clients. All right. Anything further, Solicitor, Mr. Floyd?

MS. MAYES: Your Honor, I just need a moment to get the evidence straight.

THE COURT: All right. Well, Mr. Floyd and Mr. Snell are going to move it all around anyway, Solicitor, so--- Bring us our jury, please, Mr. Corley.

(The jury returns to the courtroom.)

THE COURT: All right. Our jury is back present in the courtroom. As you recall, we are continuing the trial of the case by the presentation of evidence and testimony by the defense. Mr. Snell, you may call your next witness.

MR. SNELL: Your Honor, the defense would now rest.

THE COURT: All right.

MR. SNELL: And we would also, Your Honor, like to reinstate our previous motions made and objections.

THE COURT: All right. Thank you. Thank you very much, Mr. Snell. I would reaffirm all my previous trial rulings, both evidentiary and as to the motions. Solicitor, does the State intend to offer any evidence in reply.

MS. MAYES: No, sir, Your Honor.

THE COURT: All right. Thank you. Thank you very much, Solicitor. Mr. Foreman, ladies and gentlemen, you have now heard that the defense has rested, that the State does not intend to call any evidence or witnesses in reply. The stage we're at now is the stage of the closing arguments by the attorneys. Closing arguments are different from opening statements. They're true arguments. The attorneys may argue the facts, the inferences to be drawn from the facts and how they apply to the law which I will instruct you on after the closing arguments. The procedure we follow in a case such as this is the attorney, I believe Mr. Floyd, will first present the closing argument on behalf of his client, Mr. Williams, thereafter, followed by the Solicitor who will present the closing argument on behalf of the State, the State being the party that bears the burden of proving the case beyond a reasonable doubt. As I have stated on prior occasions, the

Defendant is presumed to be innocent and that presumption of innocence remains with him throughout the trial of this case unless and until the jury finds that the State has met its burden of proving the case beyond a reasonable doubt. After the Solicitor's closing argument to you, I will then charge you or instruct you on the law that applies to the facts of this case. Thereafter, the case will be submitted to you for your deliberations and for your verdicts. I have advised, and will again advise the spectators in your presence, that I do not allow any movement about the courtroom while the attorneys are addressing the jury. It's the final time they have the opportunity to speak with the jury on behalf of their clients. I further have advised the spectators that they may leave between the arguments; in other words, after Mr. Floyd's, they may leave prior to the Solicitor starting or, after the Solicitor's prior to my instructions to you, so that it will not be distracting to you or to me. So please, those in the courtroom, keep that in mind. With that being said, if you will please give the parties your complete and undivided attention as you have done throughout the course of this proceeding. Mr. Floyd?

MR. FLOYD: Thank you, Your Honor. Mr. Foreman and ladies and gentlemen of the jury, this young man is Lance Williams. He's the young man you just met; yet, you

are going to decide today whether, based on what you've heard in this courtroom, whether or not he should be branded a criminal, and not just any criminal, but one of the worse criminals in our society, a child sex molester. Now, if you've never served on a criminal jury before, you almost have to set aside human nature because some of you may have the thought in your minds that, because Lance Williams was arrested which he was, because he was carried to jail which he was, because he has been charged with these crimes which he has been, because he now sits before you to be judged which he does, you may have the thought, well, he must be guilty. Well, if you've got that kind of thought in your mind, you have got to erase it because, you see, Lance Williams has the same rights each and every one of us has; and one of those most important rights is what we call the presumption of innocence. So, when you look at Lance Williams, you must say in your heart and in your mind Lance Williams is innocent and Lance Williams remains innocent unless the State proves to each one of your satisfactions beyond a reasonable doubt of his guilt. Now, what do we mean by that? A lot of people define reasonable doubt as that doubt which would cause a reasonable person to hesitate to act. That doubt which would cause a reasonable person to hesitate to act. So, if you could somehow take all the evidence you have heard and seen in

this courtroom and put it in the shape of this piece of paper and, because of one piece of that evidence or the lack of one piece of evidence you would hesitate before you would vote that he should be branded a sex molester of children, well, then your obligation as a juror is to return a verdict of not guilty. Even if there is evidence that makes you suspicious of the guilt, because, when you vote guilty or not guilty back in that jury room, you're not voting on whether or not you think he did it. What you're voting on is, has the State proven the guilt of Lance Williams to my satisfaction beyond a reasonable doubt. Now, I am not going to stand up here and argue to you that Lance Williams is not at some fault in this matter. I do not argue that to you. I do not argue that to you. And I think you heard him on the stand. He does not say that. This is a very difficult kind of case because there is a child, an innocent being, who has suffered some injuries. Now, fortunately for everybody concerned, the injuries are not permanent and basically the child ended up with bruising that healed. How do we know that? Because we haven't heard anything different. That doesn't make it right, and we don't say it's right. Now, here's what you've got to decide. You see, Lance has been charged with two different crimes. Now, one of those crimes is the unlawful conduct toward a child. And I'm not

going to say that everything he did was lawful, but there's a technicality with that particular crime because they have to prove that he was in some kind of a special relationship with the child for that statute to apply. The Judge will tell you all about that. And you'll notice DSS certainly didn't feel that way. That's for y'all to decide on that. The second thing that he's charged with is the one that he disputes whole heartily, not just on a technicality, and that's that he has been charged with criminal sexual conduct with a minor in the first degree, a serious offense that would affect him for the rest of his---

SOLICITOR: Objection, Your Honor. Sentencing is within the discretion of the Court.

THE COURT: I'm sorry. I couldn't hear you.

SOLICITOR: Sentencing is within the discretion of the Court.

THE COURT: All right.

MR. FLOYD: I didn't say anything about the sentence, Judge.

THE COURT: And, of course, ladies and gentlemen, A, the Solicitor is correct and, B, Mr. Floyd is correct in that regard. And that is not a consideration--- Sentencing is not a consideration for the jury whatsoever. That would not be part of your deliberations in any manner. Mr. Floyd, you may continue.

MR. FLOYD: Thank you, Your Honor. As I say, this is a most serious type of offense. It's the type of offense that would affect him for the rest of his life. Sexual child molester. Now, the Judge will tell you something as an important matter of law. When a person is charged with a crime, also the jury must consider any what are called lesser-included offenses. And, if you listen closely, he will explain it to you and that this crime, criminal sexual conduct with a minor in the first degree, it carries with it the lesser-included offense of assault and battery of a high and aggravated nature. Assault and battery of a high and aggravated nature. And he'll explain to you what that law means and what are elements of that law. But, basically, that means, when there is an assault that occurs, that there is a distinct difference between the assailant and the victim by means of age, size and so forth or the victim is of a particularly tender age; and then the assault becomes assault of a high and aggravated nature. And what the Judge will tell you is that, when you're considering whether the conduct is either of the higher level offense or the lower level offense, either criminal sexual conduct with a minor or assault and battery of a high and aggravated nature which is a lesser-included offense, that, if you have any doubt as to which one of those applies, you must give the doubt to the Defendant and

go with the lesser-included offense. Now, let's talk about some of the evidence in the case. I'm sure the Solicitor is going to parade a bunch of photographs in front of you. And you've seen them all, and they're not pretty at all. No question about that. Now, let's talk about some things that are kind of not in dispute before we start disputing some things. We do know this: That, at the end of the day when Lance turned [redacted] over to the grandparents, there was only one injury that was clearly visible, one new injury--I'm going to talk about something else in a minute--and that was the bruise on her forehead. We know that, once [redacted] was taken to the ball field and some additional time had passed, it was noted that there were other bruises obvious to her, on her face, on her arms, I think on her legs but I don't want to--- If I say something different than your memory of it, you go by your memory of it because you're the judges of the facts. One thing that was interesting to me about that is LeeAnn called the mother and told her about the bruises. And that's what she told her about were the bruises; there was no mention of the lip. Now, I suggest to you what that shows us is that the lip was a pre-existing kind of a situation that they all knew about so they weren't concerned about that because that would obviously be very obvious. And that makes sense. It was scabbed over and the scab was pulled off.

That still does not excuse the other bruises, and I'm not trying to excuse those. We know those bruises happened. Now, Lance Williams was not aware of that bruising yet because they had not appeared. He didn't even know about the bruising until he talked with the investigator, Deputy Prestigiacomo, and he showed him the photographs. And what was his reaction? Surprise. Now--- And we know all this is true because even the doctors tell us there can be a substantial period of time between a blow being struck and the bruise appearing. And we know the bruises weren't apparent when the grandparents picked up the child and when Lance delivered the child, so we know Lance could not be aware of the way the child had been injured. Once he saw the photographs, sure, he could put it together. He had been rough with her. There could be no other explanation in his mind as to why those bruises are there other than his conduct, which he freely accepted. Now, we know that there was a blow to the side of the head, two of them. He's admitted that. We know that he picked the child up. I don't think there's anything malicious there. Daddies pick their children up like that without meaning to do them any harm. It leaves some bruises. Maybe he was too rough when he did it. We don't dispute that. You know, sometimes we adults forget the differences--maybe men do more than women do--we forget our strength and the weakness

of a child. We never should do that, and that is no excuse. And maybe he was too rough when he picked her up. He freely admits that. Now, we go to--- And then the revelation that there is some bruising in her genital area. What he says is there is no way he did anything sexual with this child. He vehemently denies that. He was first asked and shown the photograph where there is a bruise on the-- and forgive my pronunciation--the mons pubis, the front part of the upper area. And his only explanation is, that must've happened when I was putting the lotion on her. He's then asked about some bruising in the lower part of the area, the labia and the hymen and the clitoris. The only way he could explain that is from the poop diaper that he changed. Now, you heard Dr. Luberoff on that point. What did she say? Yes, it is appropriate for an adult to touch a child's private areas, a female child's private areas, the genitalia, when cleaning a diaper. That's not a sexual act; that's an act of hygiene. And that's what he was doing. Now, maybe he was too rough, and he freely admits that because it caused some bruising. It caused some bruising. That doesn't make him a sexual molester. You know why we know it's not a sexual act? You know where there was no bruising on the interior of the vagina? There was no bruising on the interior of the vagina. You heard Dr. Luberoff talking about, you know--taking us back into

the various areas of the vagina itself--no bruising on the vagina, on the interior of the vagina. And, if it was a sexual act, then there would have been penetration of the vagina. There was none. There was none. So what you've got is bruising caused by being too rough wiping the child's diaper, wiping the child off, getting between the folds, too rough with it and it caused bruising. How else do we know it's not a sexual act? There was no forensics whatsoever to reveal any type of sexual act. And what do we know? We know they did a rape kit. That's what they do. They swabbed that entire genital area of that child, the entire anal area of that child. They saw a spot on the foot that could be body fluids. They took it, and they tested it all. And what did they find out? No semen, no sperm, no saliva, no DNA whatsoever of that young man, Lance Williams. Now, let's talk about these diapers for a minute. They've got pictures of them. They're going to try to make some kind of big to do about that, maybe even try to argue about that. Well, where is the poop? These diapers were gathered at 2:00 o'clock on the afternoon of the 16th. Remember them getting those timeframes down for you? The hospital said, go get some diapers. Now, the questioning about the poop in the diaper, well, that didn't come about until 7:00 o'clock that night. So, when these people were told by the hospital to go get diapers, they

were told to go get diapers. They weren't asked to get a poopy diaper because nobody knew that was even an issue. They were told to go get diapers so they could look at them to determine if there was any evidence in those diapers of a sexual assault. And there wasn't. Have you heard anybody say to you there was any evidence of a sexual assault in those diapers they have pictures of? Not a single person. Has anybody come in and said, well, there was blood in those diapers? Not a single person. Now, they've got the State, they've got the hospital, they've got SLED, they've got the Sheriff's Department. Everybody's been involved in this case. Everybody's been investigating Lance Williams. And not a single person has ever said he did anything sexual. There is no evidence of any sexual activity from him. There is no evidence of any sexual activity on the body of the child nor on any of the evidence that they tested and seized. Now, with that in mind, how can you not help but hesitate when you're deciding whether or not Lance Williams should be convicted of criminal sexual conduct with a minor in the first degree? How can you not help but hesitate? You saw him. We put him up there for you to get a feel for him. The man's got a daughter of his own two years old, the main love of his life. He has joint custody with his wife. She's here. The mother of the child, she's here too in

support of him. And what did you hear about that? He spends as much time with that child as he can. He paid his support for that child. He loves that child. He had a good relationship with the family. There's nothing wrong--- Nobody said anything bad about the [redacted] family at all. He had a good relationship with them. He cared for them. He spent a lot of time with them. He had a relationship going with Brittany and was developing a relationship with [redacted] Now, we can't excuse his losing his temper that day, and we're not asking you to excuse him for losing his temper that day. We're not asking you do that at all. All we're asking is that you look at the evidence real close and you consider everything that you've heard here today and just make sure that he gets convicted for what he actually did. You know, everybody wants to jump to the defense of a small child. And I've had children. You love your little children. You want to protect them. But, on the other hand, you've got to apply the law correctly; and all we ask is that you do that in this case. Think about the facts. There's just no evidence whatsoever to suggest this is a sexual act. There's no evidence whatsoever, if you listen to the Lance Williams that I suggest you would have in your mind after listening to him, that he was motivated by some type of sexual motivation. That's just not there. He's got an

anger problem, and that anger problem caused him this problem. We're all fortunate that the child was not hurt bad. We're fortunate that all it was was bruising and some minor lacerations and so forth. We're all fortunate because he did lose his temper. But we know it wasn't devastating because even the bruising and all didn't even come up until several hours later. That doesn't make it right. It doesn't make it right. It was wrong, and we freely admit that. We suggest to you, yes, he's guilty of assault, but not sexual assault, assault and battery of a high and aggravated nature. If you find him guilty of that, we can't complain about that. He's admitted to that. And I'm going to shut up and sit down. I know I've been talking a long time. And I apologize. But, you see, the way this system works is, when I sit down, I don't get to say anything else to you, not a thing. And Ms. Mayes will get up behind me and she'll get to talk to you like I'm talking to you now. And she's a very skilled prosecutor, and so she's going to try her best to convince you to, oh, forget what he said, this man's a sex molester. And she's going to show you these pictures, and she's going to try to jive up your sympathy for this child, you should always have a sympathy for a child, and try to talk about, see all these injuries, all these injuries, see how bad these pictures look, see how close these injuries are to her

vagina, it must be a sexual act. All we can ask is, if she brings up something we've overlooked or talks about it differently than the way we've approached it, is, when you get back in the jury room, if you will just talk and stop and consider how we could've responded to her new argument if we had a chance. You see, she gets to go last just like they get to sit closer to you because the rules allow that because, you see, the State has what's called the burden of proof, so they get to go last and speak with you last which is an advantage because they must prove the guilt of Lance Williams beyond a reasonable doubt. All we ask is that you think hard about it. That's all we can ask. And we appreciate your patience and paying close attention because, you see, this man, this is the most important day in the life of Lance Williams. And the decision you make about him will affect him for a long time. So it's a serious decision, and it merits your serious consideration. We appreciate your consideration because, you know, the police can charge you and arrest you. They've got to get an arrest warrant to arrest you; and, just on that alone, you can go to jail. But you can't be actually convicted of the crime unless 12 members of the community unanimously all agree that the evidence proves that guilt beyond a reasonable doubt. So we thank you for your presence here today. Lance has been sitting in jail, and this is finally

his day for this matter to be addressed in some fashion. We ask for your consideration in these matters, and we ask you to think hard about the lesser-included offense. We think that's the appropriate charge. And we feel comfortable placing Lance in your hands. Thank you very much.

THE COURT: Thank you. Thank you, Mr. Floyd. Solicitor?

MS. MAYES: Yes, sir, Your Honor. May it please the Court.

THE COURT: Yes, ma'am.

MS. MAYES: When I first spoke with you the other day, one of the things that I mentioned was that child abuse is a secret crime. It's a crime of silence, and usually that's because kids are living in a home where they're not able to talk about what's happened or what is happening to them because it's the people around them who are the ones that are hurting them. It might be even someone that they love, most often someone that they trust. And, in this case, it's a secret crime not only because it's child abuse but because the victim is too little to talk; she's too little to tell us what happened to her that day. So, instead, we can only look at the evidence that's left behind. And that's the thing about child abuse. It's not like other crimes where you might have an armed robbery

that's committed in a convenience store and there is a camera up above and it's recording what's happening all along, that we can come into court and we can show you that videotape so you know exactly who committed the crime and what they did. It's not like a burglary case where fingerprints are left behind and we can come in and show you those fingerprints and you know exactly who was in the house and what they did. These crimes, instead, leave behind victims who are too afraid to talk or too little to talk. But what we know for sure is that [redacted] was beaten badly that day, badly enough to put her in the hospital four days, bad enough to cause multiple blows to her head. And what we heard today was the Defendant taking the stand and, once again, trying to explain away what happened to [redacted] Not credible, not believable. [redacted] had multiple blows to the head, not just some red mark on her head that he tried to explain away as her falling outside. And keep in mind how he manufactures these explanations not only to Detective Presti but even here in this courtroom to all of you, trying to manufacture an explanation that, oh, conveniently, I was in the front of trailer where no one else could see me, because he knows full well that Ms. Hutto was right there with the windows open, working at her station in that beauty shop; and, if he had been outside with [redacted] she would've seen him.

There was no fall, ladies and gentlemen. But, even so, he says that fall resulted in a red mark to the head. That's not what happened to Victim Victim had multiple blows across her head, both sides of her head, involving the inside of the ears, the top of the ears, the back of the ears and, most significantly, a hematoma to the back of the head. And that hematoma to the back of the head resulted in bleeding underneath the scalp that was seen on the CT scan. And, when we look at this constellation of injuries, the back of the head, the neck, all over her body, he tries to explain this away by the most ordinary of actions, actions that most parents think about as routine every single day, things like picking up a child, things like leaning over to lift a child, things like the child has something on their lip and you check it. Ladies and gentlemen, this is not someone trying to help Victim She was popped in the mouth. Those are fresh injuries. This is not someone trying to keep her from tripping over. This is someone who has grabbed her by the neck in anger and in rage which, by his own admission, he was that day. Why? Why? She was just being a little girl. He says these blows to her ears are the result of discipline. We know, I submit, that discipline to a 15-month-old, to a baby, does not include boxer blows, as the nurse examiner put it, to the sides of the head because she throws down a

cup or a bottle. And, as he continues to try and explain away these injuries, though she had these multiple pattern bruises to her arms, also to her legs, and he says, oh, I was just picking her up, now, I knew full well I wasn't suppose to pick up a child like that, but I didn't want to hurt my back. That's ridiculous and unacceptable. And then, as he continues trying to explain away these injuries, [redacted] had been bleeding from the vagina. When she got to the hospital, they knew she had been physically abused. There was no question about it because she was covered with all these bruises that could be easily seen. And you heard the testimony. There at the hospital her diaper was removed and, as they removed her diaper, they right away saw what appeared to be blood in the diaper, she had swelling all about the outside of the vaginal area as well bruising here (indicating) along the top, which Dr. Luberoff suggested may be a bite mark. It was certainly a pattern of bruising. And they knew that this assault had also included criminal sexual conduct or suspected criminal sexual conduct which would be an assault on her genitals. And, as the examination progressed, there was no doubt. You heard the testimony from Dr. Luberoff specifically, this injury is a penetrating injury into the vagina. If there's any question at all---

MR. FLOYD: Objection, Your Honor. That's

misstating the testimony.

THE COURT: All right. Ladies and gentlemen of the jury panel, you are the determiners of the facts in the case and the inferences to be drawn from the facts in the case. As I've told you previously, what the attorneys tell you is not evidence. You would apply the facts as you find them to be from your memory and your recollection. Thank you. Solicitor, you may continue.

MS. MAYES: Yes, sir, Your Honor. The testimony of Dr. Luberoff was that her examination was diagnostic of vaginal penetration, diagnostic of vaginal penetration. That was her diagnosis, meaning there was blunt force trauma as she described. I said, how much force. She said enough, enough to cause bruising all along the hymen. Ladies and gentlemen, this is criminal sexual conduct, the intrusion into the genital opening of a child under 11. Now, the State does not have to prove what his intentions are. As I stated before, we have a little girl who can't talk. In a situation like this, what is known is that he chose to act out against her in that manner. He chose to insert his finger or fingers into her vagina. Why? Why harm a child---

MR. FLOYD: Your Honor, I object. There's been no testimony that his finger went into her vagina.

THE COURT: All right. Again, ladies and

gentlemen, the facts of the case are solely within the province of the jury. You determine the facts and the reasonable inferences to be drawn from the facts. You and you alone will make those decisions. Thank you. Thank you, Mr. Floyd. You may continue, Solicitor.

MS. MAYES: Yes, sir, Your Honor. Again, the testimony of Dr. Luberoff, diagnostic of vaginal penetration. If there's any question at all about her testimony and about her testimony in regards to this being a penetrating injury to [redacted] you may come back and hear that portion of her testimony or anyone else's testimony at any point in this case. I submit there's absolutely no question. She made it clear that there was a diagnosis that that occurred. I submit you can easily confirm among yourselves, after looking at the picture, that that is what has occurred. The State is not required to prove that there is intercourse or the degree of penetration--and I will speak on that momentarily--but the law is any intrusion, however slight, into the genital opening. Now, I submit that, when we look at crimes like this against children, it is impossible to presume the motive behind someone who would commit this type of crime. He says he has an anger problem. I submit it goes a lot more beyond that. In cases where there is some type of criminal sexual conduct, I submit it is not always about

sexual gratification. There are certainly offenders out there who commit rape, criminal sexual conduct, as a means of power, control, out of rage, brutality, for example, a prison rape. You hear about rapes of that nature that occur in the prison system not because there is any sexual gratification to be gained but because it's a form of domination and control to take a victim and assault them sexually, sometimes even with an object, as a form of harming them physically, physical torture. For whatever reason that day, he acted out. He chose to act out against Victim in the worse way possible. He chose to put his fingers there, to put his fingers in her. And I submit that he did that knowing full well that he was harming that little girl. His story about the dirty diaper doesn't float. It doesn't float. LeeAnn Harvey's testimony was that she went home and retrieved the diaper. Was there a dirty diaper? Her testimony was there was not. She brought in the diapers.

MR. FLOYD: Your Honor, I object. She did not testify as to whether or not there were not any dirty diapers.

MS. MAYES: Your Honor---

THE COURT: Again, ladies and gentlemen, the facts aren't decided by the Court, by the Solicitor, by Mr. Floyd. They're decided by you. It's your recollection of

the testimony individually and collectively as a jury. You are the determiners of the credibility and the believability of the witnesses in this case. Thank you, Mr. Floyd. Solicitor, you may continue.

SOLICITOR: Yes, sir, Your Honor. Again, if there is any question as to the testimony of any witness, you may hear that testimony again. The testimony was she brought in the diapers, there were six diapers. He says he changed five that day. I ask you to consider his own inconsistencies even as he tries to explain that away. He takes the stand and said, well, I did notice some blood but I thought it was coming from her butt, and I noticed the blood when I was changing her dirty diaper. That's the only time he claimed he saw blood. Then he's confronted with the photographs. Then he admits, well, yeah, I saw that, yeah, I know what that wipe's about, yeah, okay, I'm familiar with that. Once again, there's no dirty diaper here, just, I submit, blood. For whatever reason, he chose to act out against [redacted] in what is, under the law, criminal sexual conduct with a minor. When we look at what the State is required to prove under this particular statute--and the Judge will charge you momentarily on exactly what the law is--it is when there is a sexual battery committed against a child who is under the age of 11. That element has been proven beyond a reasonable

doubt. Secondly, sexual battery is defined as any intrusion, however slight, into the genital opening. That element also has been proven beyond a reasonable doubt. This includes digital penetration or insertion of a finger into the genital opening. Secondly, the offense of unlawful conduct towards a child. In this case, beyond a reasonable doubt, Lance Williams was responsible for [redacted] welfare. Under the law, he does not have to be a parent, he does not have to be the guardian, he does not have to be a licensed daycare provider. In this particular case, the testimony is, and by his own admissions, he considered them a family member. He wasn't just some random babysitter. The reason Brittany entrusted [redacted] in his care that day is because, all along, he had led her, through his actions and through his words, to believe that he genuinely cared for [redacted] that he would treat Aubrey and [redacted] the same. And, in fact, his daily interaction with [redacted] was far more than that with his own daughter. His testimony was that his normal contact with his daughter would be every other weekend and then sometimes she would stay over at Brittany's house along with [redacted]. His interaction with [redacted] included giving her baths, changing her diaper, and then making plans with Brittany for them to move in together and be a family. And that is how he held himself out to be, as a family member to

[redacted] as a stepfather, somebody that he could, somebody who could be trusted to care for [redacted] And, on this day, he committed bodily harm, again, proven beyond a reasonable doubt. We know she was hospitalized and remained hospitalized. And, the final element, he endangered the health of a child; and certainly, in this case, [redacted]s health was endangered to point where she was admitted to the hospital and continued to receive medical treatment until her injuries began to heal. As I stated before, we could never prove, in a case like this, what motivates him to act the way he did, but we can prove what he did. What he did on that particular day was hurt this little girl in a way that a child should never be hurt anywhere, anytime, under any circumstances. You have before you the most noble of opportunities, the chance to strike back against injustice and deliver a verdict that speaks the truth. And, in this case, the truth is that Lance Williams committed these offenses of unlawful conduct towards a child and criminal sexual conduct with a minor. The Judge will charge you on the lesser-included offense of aggravated assault and battery. And I submit to you that assault and battery of a high and aggravated nature does not apply in this case because that's not what he did to [redacted] He chose to commit an intrusion of her genital opening. Thank you.

THE COURT: Thank you. Thank you, Solicitor.

(Whereupon, the Court charged the jury as follows.)

THE COURT: Ladies and gentlemen of the jury, my charge to you, or my instruction to you, will take about 30 minutes. If anyone needs a break now, we'll take it now. If not, I'm going to press on. I will not take a break during the course of my instructions to you. So raise your hand now or forever hold your peace, so to speak.

(There is no response.)

THE COURT: All right. The manner in which I cover these charges is I first give the general law that applies to all criminal cases in South Carolina. After I cover the general law that applies to all criminal cases, I will then cover the specific charges in the indictments, criminal sexual conduct with a minor in the first degree, the lesser-included offense of assault and battery of a high and aggravated nature and the second indictment of unlawful conduct towards a child. I will usually give you the caption of the paragraph I am fixing to cover; and, when I change paragraphs, I will also give you the caption. Charge, arrest, indictment not evidence: The indictments charge the Defendant with criminal sexual conduct with a minor in the first degree and unlawful conduct towards a child. I remind you that the fact that the Defendant was

arrested, charged and indicted in this case is not evidence and cannot be considered by you as evidence of guilt in this case nor does it create any presumption or inference of guilt. These documents, these indictments, are simply the formal written instruments which contain the charges made against the Defendant. It is the formal documents by which the case is brought before the Court. Multiple charges: The indictments in this case allege different offenses. The charges in indictment one, unlawful conduct towards a child, and, in indictment two, criminal sexual conduct with a minor in the first degree. Each indictment is a separate and distinct offense. You must decide each indictment separately on the evidence and the law that applies to it uninfluenced by your decision as to the other indictment. The Defendant may be convicted or acquitted on either or both of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty as to each indictment. Presumption of innocence: The Defendant has pled not guilty to these indictments, and that plea puts the burden on the State to prove the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent. I charge you that it is an important rule of the law that a defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed

to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt. This presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you reach a verdict of guilty based on evidence satisfying you of that guilt beyond a reasonable doubt. The presumption of innocence has been said to be like a robe of righteousness placed about the shoulders of the Defendant which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt. The presumption of innocence is not a mere legal theory; it is not just a legal phrase. It is a substantial right to which every defendant is entitled unless you, the jury, are satisfied from the evidence of the Defendant's guilt beyond a reasonable doubt. Reasonable doubt: What is a reasonable doubt? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving the Defendant guilty beyond a reasonable doubt. Some of you in the past may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or the preponderance of the evidence. In criminal cases, the

State's proof must be more powerful than that; it must be proof beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are very few things in this world that we know with absolute certainty. And, in criminal cases, the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of the crime charged, you must find the Defendant guilty. If, on the other hand, you think there is a real possibility that the Defendant is not guilty, you must give the Defendant the benefit of the doubt and find him not guilty. Duties of jury and trial judge: I remind you that, during this trial, you and I have certain duties to perform. As the trial judge, it's my responsibility to preside over the trial of this case, and I also have the duty to rule on the admissibility of the evidence offered during the trial. You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand and any exhibits which have been made a part of this record. I have the added duty to charge you or instruct you on the law that applies to this case. As the presiding

judge, I am the sole judge of the law of this case; and it is your duty, as jurors, to accept and apply the law as I now state it to you. If you already have any idea as to what the law is or what the law ought to be and it does not agree with what I now tell you the law is, you must abandon your idea because you are sworn to accept the law and apply the law exactly as I state it to you. In every case tried in this Court before a trial jury, the jury becomes the sole and exclusive judge of the facts in the case. A trial judge cannot intimate, state, comment on, or make any statement to a trial jury about the facts in a case. Since you, the jury, are the sole judge of the facts in this case, you are not to infer, from what I have said during the progress of this trial in ruling upon the admissibility of evidence or otherwise or anything that I now say to you during the course of this instruction, that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case. That is a matter solely for you, the jury, to determine. As jurors, it is your duty to determine the effect, the value, the weight, and the truth of the evidence presented during the trial. Direct and circumstantial evidence: There are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence. Direct evidence is the testimony

of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes a collateral fact from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or personal observation. The law, our law, makes absolutely no distinction between the weight or the value to be given to either direct or circumstantial evidence nor is there a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of the evidence in the case. After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty. Credibility of witnesses: Members of the jury, in determining what the facts are in this case, you, of necessity, must pass upon the credibility of the witnesses who have testified. Credibility in the law simply means believability. Can I believe this witness? Is this witness credible? The value and the weight to be given to their testimony is in your sound discretion and good judgment. You alone must decide the force and effect and the truth of the testimony. In making a determination

as to the credibility of a witness, there are many factors that you may and should take into consideration, such as the appearance or manner of the witness as he or she gave testimony from the witness stand known in the law as the demeanor of the witness. Did the witness have an interest in the outcome of the trial? Was the witness forthright or hesitant? Was the witness' testimony consistent or did it contain discrepancies? What was the ability of the witness to know about the facts concerning which he or she gave testimony? Did the witness have cause or reason to be biased or prejudiced in favor of the testimony that he or she gave? Was the testimony of the witness corroborated or made stronger by other testimony or evidence or was it made weaker and impeached by other testimony or evidence? As jurors, you have the right to believe a small portion of a witness' testimony and disregard a larger portion, or you may believe a larger portion of a witness' testimony and disregard the smaller portion. You may disregard a witness' testimony in its entirety if you have sound reason in the record for doing so. You may believe the testimony of a single witness against that of many witnesses or of the many witnesses against one. Most certainly you do not determine the matter of credibility or believability merely by counting the number of witnesses for either side. Throughout this entire process, you have but one single

objective, and that is to seek the truth regardless from what source that truth may come. Expert witnesses: The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education or experience, has become expert in some art, science, profession or calling may state an opinion as to relevant and material matter in which the witness claims to be an expert and may also state the reasons for holding that opinion or those opinions. You should consider any expert opinion received in evidence in this case and, like any other evidence, you give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education or experience or if you conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion in its entirety. An expert witness' testimony is to be given no greater weight than that of any other witness simply because the witness is an expert. Further, you are not required to accept an expert's opinion even though it is not contradicted. Statement of the Defendant: A statement alleged to have been made by the Defendant has been admitted into evidence in this case. While the Court has determined that the statement is admissible, I instruct

you that you make the ultimate decision of whether or not the Defendant made the statement. If the Defendant did make the statement, you must determine whether the statement was made by the Defendant voluntarily and of his own free will. This means that the statement was not caused by pressure, force, fear, threats, coercion, intimidation or hope or promise of leniency or reward of any kind. In determining whether or not a statement was voluntary, you should consider both the characteristics of the Defendant and the details of the questioning. Some of the factors that you must consider are the age of the Defendant, the Defendant's education or lack of education, the Defendant's mental ability or capacity, the Defendant's I.Q. or intelligence, the Defendant's background and environment, the place and length of detention, the nature of the questioning and the advice or lack thereof to the Defendant of his constitutional rights including, but not limited to, the right to remain silent, that any statement could be used against him in a court of law, the right to have a lawyer present, that, if he could not afford a lawyer, a lawyer would be appointed to represent him without any cost and that he could stop making a statement at any time. You must carefully consider all of the surrounding circumstances before you give any weight to any alleged statement. The State has the burden of proving

beyond a reasonable doubt that the alleged statement was voluntary. If you determine it was not, you may give the statement--- Let me start that one over. The State has the burden of proving beyond a reasonable doubt that the alleged statement was voluntary. If you determine that it was voluntary, you may give the statement any further consideration that you deem proper. You must decide what weight, if any, should be given to the alleged statement. If you determine that the alleged statement was not the voluntary and the free statement of the Defendant, you should not consider the statement at all. If you would please continue to give me your complete and undivided attention, ladies and gentlemen. Intent: In order to establish criminal liability, criminal intent is required. For example, the mental state required to be proven by the State for a particular crime might be purpose, intent, knowledge, recklessness or criminal negligence. Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There is no way to prove intent to a mathematical certainty. There is no way medical science can dissect a person's brain and determine what the person had in mind. So the law says that criminal intent may be inferred from the circumstances shown to have existed.

This is how you make a determination of whether or not the element requiring intent is present. It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact, by taking into consideration the acts of the parties and all the facts and circumstances of the case. Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine what the Defendant intended to do based on the circumstances shown to have existed. An act that's done willfully is done voluntarily, intentionally and with a specific intent to do something the law forbids. An act is done intentionally if it is done with a conscious awareness or knowledge of the nature of the act involved and with the purpose of committing the act. It is not done intentionally if by mistake or accident or negligence or recklessness. Criminal intent can arise from an action or a failure to act. It may arise from negligence, recklessness or indifference to duty or to consequences. That is considered by the law to be the equivalent of criminal intent. Ladies and gentlemen, I am now going to cover the charges in the indictments. First, I'm going to cover criminal sexual conduct with a minor in the first degree and the lesser-included offense of aggravated assault and battery. It is unlawful in South Carolina to commit

criminal sexual conduct with a minor in the first degree. The Defendant is charged with first degree criminal sexual conduct with a minor. The State must prove beyond a reasonable doubt that the Defendant engaged in a sexual battery with the victim. The term sexual battery is defined in our Code of Laws. A sexual battery is sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of a another person's body except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes. The State must then prove beyond a reasonable doubt that the victim of the sexual battery was less than 11 years of age at the time. That's the charge on criminal sexual conduct with a minor in the first degree. Mr. Foreman, ladies and gentlemen, if you find that the State has not proven that the Defendant is guilty of criminal sexual conduct with a minor in the first degree, you must then determine whether the State has proved that the Defendant is guilty of assault and battery of a high and aggravated nature. Under our law, the theory, the greater offense, the criminal sexual conduct with a minor in the first degree, includes also the lesser offense of assault and battery of a high and aggravated nature. The elements of assault and battery of a high and

aggravated nature: Assault and battery of a high and aggravated nature is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation. We'll break down those terms. An assault occurs when a person unlawfully attempts or offers to commit a violent injury upon another person and had the present ability to complete the attempted injury. An assault is the intentional creation of a reasonable fear of immediate bodily harm. It is not necessary that the attempted injury or harm actually take place. For example, if I walk up to you and we're within arm's length, I draw back to hit you, that is an assault. A battery: A battery is the unlawful touching of another person by a person who has committed the assault. An unlawful touching can be caused by a part of the accused's body or by any object that the accused puts in motion. A battery is the completion of the assault by using or applying force to another person, however slight, in a rude, angry or resentful manner without legal justification for doing so. In using my earlier example, if I carry through with the assault and I'm within my arm's length of you, by hitting you, that is the battery. You have the assault and the battery. The State must also prove a circumstance of aggravation, thus the charge assault and battery of a high and aggravated nature. Circumstances of aggravation

include, but are not limited to, the following: The use of a deadly weapon, the intent to commit a felony, the infliction of serious bodily injury, a great disparity between the ages and physical conditions or sizes of the parties, a difference in the genders of the parties, the taking of indecent liberties or familiarities with a female through the use of force, the purposeful infliction of shame and disgrace. And, again, these are only examples of circumstances of aggravation. Now, as to the charge of criminal sexual conduct with a minor in the first degree and the lesser-included offense of assault and battery of a high and aggravated nature, if you have any reasonable doubt as to whether the Defendant should be convicted of the greater or the lesser-included charge, you must give the Defendant the benefit of that doubt and only convict him of the lesser-included charge of assault and battery of a high and aggravated nature. That is the charge, ladies and gentlemen, of criminal sexual conduct with a minor in the first degree and assault and battery of a high and aggravated nature. I am now going to cover the other indictment, unlawful conduct towards a child. Thank you again for giving me and continuing to give me your complete and undivided attention. Unlawful conduct towards a child is a Code section in South Carolina. The Defendant is charged with unlawful conduct towards a child. The State

must first prove beyond a reasonable doubt that the Defendant had charge or custody of the child, was the parent or guardian of the child or was a person responsible for the care and support of the child. Under our Code, section 63-7-20, subsection 16, it is defined, quote, a person responsible for a child's welfare includes the child's parent, guardian, foster parent, an operator, employee or caregiver as defined by section 63-13-20 of a public or private residential home, institution, agency or childcare facility or an adult who has assumed the role or responsibility of a parent or a guardian for the child but who does not necessarily have legal custody of the child. A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact, such as a babysitter, has not assumed the role or responsibility of a parent or a guardian. A person whose only role is as a caregiver and whose only contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caregiver, has not assumed the role or responsibility of a parent and guardian and would not be a person responsible for a child's welfare. The State must also prove beyond a reasonable doubt that the Defendant placed the child at unreasonable risk of harm affecting the child's life,

physical or mental health or safety or unlawfully and maliciously did or caused to be done any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered. A child is defined as a person under the age of 18. That is the charge of unlawful conduct towards a child. Finally, ladies and gentlemen, the form of verdict. And I assure you the end of my charge is in sight. Mr. Foreman, ladies and gentlemen of the jury, you cannot allow yourself to be governed by sympathy, by prejudice, by passion, by public opinion or any other arbitrary factor not in evidence in this case. Both the State and the Defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in this case and that you will precisely follow the law as I have explained it to you. You will have, Mr. Foreman, in the jury room a form of verdict which will have the caption of the case and the charges listed thereon. As to the charge of unlawful conduct towards a child, there are two possible verdicts that may be reached, guilty or not guilty. As to the charge of criminal sexual conduct with a minor in the first degree, there're really three possible verdicts, guilty of criminal sexual conduct with a minor in the first degree or guilty of aggravated assault and battery, the lesser-included offense, or not guilty. The order in which I explained those has no significance.

I have to list one first. Your verdicts, ladies and gentlemen, must be unanimous. All twelve of you must agree. The form that you will have, Mr. Foreman, will have the indictment number as to the specific indictment. And this one is the unlawful conduct towards a child; and it has, we, the jury, by unanimous consent, find the Defendant, and there you have the word guilty and the words not guilty. If, after your determination and deliberations of the facts, you find that the State has met its burden of proof beyond a reasonable doubt as to that charge and your unanimous verdict is guilty, I would ask you to check to the left of the word guilty, circle both your checkmark and the word guilty. If you find that the State has failed to meet its burden of proving the case beyond a reasonable doubt as to that charge, I would ask you to check to the left of the words not guilty and circle both your checkmark and the words not guilty. As to criminal sexual conduct with a minor in the first degree, I have it listed out, we, the jury, by unanimous consent, find the Defendant, and it has guilty of criminal sexual conduct with a minor in the first degree, under that, guilty of assault and battery of a high and aggravated nature or not guilty. Again, whatever your verdict may be, your unanimous verdict, check to the left, circle both your checkmark and all the word or wording associated with whatever your verdict may

be. Please keep in mind, as to the criminal sexual conduct with a minor in first degree and the aggravated assault and battery, if you have a reasonable doubt as to whether or not the Defendant is guilty of the greater or the lesser offense, you would give the Defendant the benefit of that doubt and find the Defendant guilty of the lesser offense of assault and battery of a high and aggravated nature. Once you have reached those unanimous verdicts, if you'd sign and date the form, Mr. Foreman, if you'd then knock on the jury room door and inform the bailiff that you have reached those unanimous verdicts, we will receive you back into the courtroom for your verdict. I'm going to ask you to return to your jury room. Do not begin your deliberations until you are directed to do so by the clerk. I may have to bring you back out here for further instructions. If not, if I don't have to bring you back, the form of verdict will be sent in, all of the evidence that has been presented will be sent in; and you will then be directed by the clerk to begin your deliberations. If you have any questions during the course of your deliberations, Mr. Foreman, please write me out a note, knock on the jury room and give it to one of our fine bailiffs. Lunch is supposed to be here at---

CLERK: It's here.

THE COURT: All right. Well, it's here. So

perhaps you may want to eat before you begin your deliberations. But I'll see if I have to bring you back out. If you have any questions, please write me a note. And I assure you we're not going to leave y'all. I realize you're being held captive. Thank you for your complete and undivided attention during my instruction to you. You may now go with your bailiff.

(The jury retires to the jury room.)

THE COURT: Any exceptions from the State, Solicitor?

MS. MAYES: None from the State, Your Honor.

THE COURT: Thank you, Solicitor. Defense?

MR. SNELL: None from the Defendant, Your Honor.

THE COURT: All right. We need to check the evidence. My experience with that is perhaps stay away from my court reporter until such time as she checks it. Is that correct, Madame Court Reporter?

COURT REPORTER: Yes, sir, that's great advice.

THE COURT: And then--- I've learned that experientially over the years. And then, once she's checked it, she'll review it with the attorneys.

COURT REPORTER: Thank you, Judge.

(Pause.)

THE COURT: Solicitor, have y'all checked the evidence?

MS. MAYES: Yes, sir, Your Honor.

THE COURT: All right. And you're satisfied it's proper?

MS. MAYES: Yes, sir, Your Honor.

THE COURT: Mr. Snell?

MR. SNELL: Yes, Your Honor.

THE COURT: All right. And you're satisfied it's proper?

MR. SNELL: Yes, Your Honor.

THE COURT: All right. Then I'm going to send the proposed form of verdict in and the evidence and bring the alternate out. All right?

MS. MAYES: Yes, sir.

THE COURT: Thank you very much. We will be awaiting the jury's verdict.

(The jury commences its deliberation at 12:30 p.m.)

(The following occurred at 2:18 p.m.)

THE COURT: All right. I have a note from the jury. The first question is, can we review the transcript of Dr. Luberoff's testimony. Of course, there is no transcript. So I intend to advise the jury that a transcript is not available. Any objection to that, Solicitor?

MS. MAYES: Your Honor, no objection to that

particular charge, but we would ask that the jury be informed that there are portions that they may request from the court reporter.

THE COURT: Mr. Snell?

MR. FLOYD: Your Honor, we have no problem if the answer is that there is no transcript. If they want to listen to the tape itself, it would be our position that we have to listen to all of it.

THE COURT: The second question is, can we get a copy of the State law words related to criminal sexual misconduct to a minor. We specifically are interested in words related to penetration. There are no--- The word penetration does not appear in my charge. I'll be glad to give them a copy of my charge and a copy of the assault and battery of a high and aggravated nature charge if y'all don't, in writing, if y'all don't object. I'll be glad to reread it. Solicitor?

MS. MAYES: I have no objection to their request, Your Honor.

THE COURT: Any objection---

MR. SNELL: No, sir.

THE COURT: ---as far as giving them a copy of the charge?

MR. SNELL: No objection, Your Honor.

THE COURT: All right. Bring us our jury.

(The jury returns to the courtroom at 2:22 p.m.)

THE COURT: All right. Mr. Foreman, ladies and gentlemen of the jury, I received a note from the jury. The first request is, can we review the transcript of Dr. Luberoff's testimony. Of course, there is no transcript. If you're talking about the written words, it is not transcribed at this time. Obviously, the testimony is preserved. It can be played back. The testimony is about an hour and a half, give or take, probably more give than take, but about an hour and a half. If you want to listen to it, that's fine. I would require that you listen to the entire testimony of Dr. Luberoff in that regard. I have no objections to you listening to it, but I don't want to parse it out so to speak. And I'll allow you to step back to your jury room, and you can decide that amongst yourselves outside the presence of the Court. Your second request is, can we get a copy of the State law words, not my words, related to criminal sexual misconduct to a minor. We specifically are interested in the words related to penetration. I have a copy of my charge as it relates to first degree criminal sexual conduct with a minor and assault and battery of a high and aggravated nature. It's three pages. The attorneys have no objections to me providing that to you. I will give that to you for you to review. Again, keep in mind that is encapsulated within

the entire charge. I'm not sending my entire charge in there to you, the 24 pages, because you haven't requested it. But, again, I don't want you just to parse something out and consider it not in the light of the total and complete charge in that regard if I make myself somewhat clear.

MR. FOREMAN: I understand.

THE COURT: All right. Mr. Corley, would you hand this to our Foreperson for me, please. And I'm going to ask you to step back to your jury room. If you'd just let me know if you want to hear that transcript or that testimony, we'll get it keyed up. All right. Thank you. Thank you very much. It may take us a few minutes, but thank you very much.

(The jury returns to the jury room at 2:27 p.m.)

THE COURT: Any objections from the State, Solicitor?

MS. MAYES: No, sir, Your Honor.

THE COURT: Defense?

MR. SNELL: No objection, Your Honor. And we have a question. Did the charge of CSC with a minor and the lesser, the ABHAN, did that also include, in the body of your charge, the language regarding, if you can't make up your mind, how to resolve that?

THE COURT: It did not.

MR. SNELL: If possible, we would ask to have that included and submitted to the jury in addition.

THE COURT: Let me see what they say about the transcript. Let me think on that. Of course, I covered that as the theory; and then I, of course, covered that as part of the form of the verdict. It's a concept that applies in any case in which there is a lesser-included offense. And, of course, that's--- That raises the issue of, when they do request just part of a charge, to make sure they encapsulate the entire charge. That's why I tried to explain that to them. But I'll see if the Solicitor would like to respond.

MS. MAYES: Yes, sir, Your Honor. The State would oppose that. I believe that would be a charge on a legal issue that goes beyond the request. The request was actually for a specific definition of criminal sexual misconduct, as they termed it, specific to sexual battery or the definition of intrusion or penetration.

THE COURT: I'm going to deny that now at this time, Mr. Snell. You're certainly protected on the record in that regard.

MR. SNELL: Thank you, Your Honor.

THE COURT: All right. Let's not get too far away in case they you want to hear testimony. Let's see what their requests are in that regard.

(Court's Exhibit 2 is marked for purposes of the record.)

(The following occurred at 2:43 p.m.)

THE COURT: I received a note from the jury. It indicates, no additional information needed, signed by the foreperson. We will be awaiting our jury's verdict or verdicts. Thank you.

(Court's Exhibit Number 3 is marked for purposes of the record.)

(The following occurred at 3:00 p.m.)

THE COURT: In many cases, the taking of the verdict can be very emotional for either or both sides. The Court will not tolerate any show of emotion. If you feel like you cannot contain your emotions, I would ask you to please step out of the courtroom at this time. All right. And, sheriffs, if y'all would remain posted. Thank you very much. Bring us our jury, please.

(The jury returns to open court to report its verdict.)

THE COURT: All right. Our jury has returned to the courtroom. Madame Clerk?

CLERK: Mr. Foreman, have you reached your verdicts?

MR. FOREMAN: Yes, ma'am, we have.

CLERK: Please pass them up by the bailiff.

(Hands to Clerk.)

THE COURT: All right. Madame Clerk, if you would please publish the verdicts.

CLERK: Indictment 2010-GS-32-1860 and 2010-GS-32-1861, the State of South Carolina v. Lance Austin Williams. As to indictment 2010-GS-32-1860 as to unlawful conduct toward a child, we, the jury, by unanimous consent, find the Defendant guilty. Indictment number 2010-GS-32-1861, as to criminal sexual conduct with a minor in the first degree, to wit, digital penetration, we, the jury, by unanimous consent, find the Defendant guilty of criminal sexual conduct with a minor in the first degree. And it is so signed by the foreperson. Mr. Foreman, and ladies and gentlemen of the jury, if these are your verdicts, please indicate, each of you, by raising your right hand. All hands raised, Your Honor.

THE COURT: Thank you. Thank you very much, Madame Clerk. Anything further for the jury from the State?

MS. MAYES: Nothing from the State, Your Honor.

THE COURT: From the defense?

MR. SNELL: Your Honor, we make a motion to poll the jury.

THE COURT: All right. Madame Clerk, would you poll the jury and would you poll them separately as to each

charge?

CLERK: Yes, sir.

THE COURT: Thank you. And explain the procedure to them.

CLERK: As I call your name, please hold your hand up so I can recognize you. I will ask you the question really basically in four parts. The first one will be: As to the verdict of unlawful neglect of a child, was this your verdict? I need a response. And is it still your verdict? I'll need a response.

THE COURT: And use the term unlawful conduct.

CLERK: Unlawful conduct, yes, sir. I'm sorry.

THE COURT: That's all right.

CLERK: And, as to the charge of criminal sexual conduct in the first degree, it would be a same thing. Kelly Wilson, as to the charge of unlawful conduct toward a child, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes.

CLERK: As to the charge of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes.

CLERK: Jonathon Mitchell, as to the verdict as to unlawful conduct toward a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to charge of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Jo Ann Veronee, as to the verdict as to unlawful conduct toward a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to charge of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Chatmond Byas, as to the verdict of unlawful conduct toward a child, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes.

CLERK: As to verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes.

CLERK: Angela Swann, as to the verdict of unlawful conduct toward a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Jeffrey Archie, as to the verdict of unlawful conduct towards a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, it is.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes, it is.

CLERK: Michelle Godfrey, as to the verdict of unlawful conduct towards a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Tiffany Baldwin, as to the verdict of unlawful conduct towards a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Terri Highsmith, as to the verdict of unlawful conduct towards a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Charles Greer, as to the verdict of unlawful conduct toward a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: Jennifer Moore, as to the verdict of unlawful conduct towards a child, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes.

CLERK: As to the charge of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes.

CLERK: Is it still your verdict?

JUROR: Yes.

CLERK: Walter Kennerly, as to the verdict of unlawful conduct towards a child, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: As to the verdict of criminal sexual conduct with a minor in the first degree, to wit, digital penetration, was this your verdict?

JUROR: Yes, ma'am.

CLERK: Is it still your verdict?

JUROR: Yes, ma'am.

CLERK: All jurors polled, Your Honor.

THE COURT: Thank you. Thank you very much, Madame Clerk. Anything further for the jury from the

defense, Mr. Snell, Mr. Floyd?

MR. SNELL: Not at this time, Your Honor.

THE COURT: Thank you. Thank you very much. All right. Mr. Foreman, ladies and gentlemen of the jury panel, this will conclude your jury service for the remainder of the term, which is about an hour and 50 minutes away if we went the full time on Friday. Thank you very much for your participation in this process this week. We would not be able to be about the very important function of administering your civil and criminal justice system without the participation of citizens just like yourselves week in and week out, not only in Lexington County, but in all 46 counties in South Carolina. And, as I had said Monday when I qualified the jury and I repeat it--and it's not just idle words--it's been my pleasure and privilege to be with y'all, to serve with y'all this week. I hope to see you in the future. I'm not sure you hope the same, but I hope to see you in the future again. I don't know that I've seen a jury that is more hard working, more focused, more attentive and more patient as you have been to the Court and to all of the parties throughout the trial in this case. And, with that being said, you're now released from your jury service. If you would leave your buttons on the stand as you leave. You do not have any further requirements for jury service for the remainder of

2011 as far as State circuit court of record is concerned. Thank you. Thank you again very much for your participation. And, Mr. Archie, the Clerk will need to see you momentarily in the hallway out back. Thank you very much. You're now excused.

(The jury is excused.)

THE COURT: Any motions from the State?

MS. MAYES: None from the State, Your Honor.

THE COURT: I take it, Mr. Snell, Mr. Floyd, y'all would have some post-trial motions?

MR. FLOYD: That's correct, Your Honor.

THE COURT: Would you object if I heard them next week?

MR. FLOYD: No, Your Honor. It might be good to give us a chance to put them in writing to you or whatever.

THE COURT: All right. Solicitor and Mr. Floyd, since I'm requesting that I can hear them next week and sentence Mr. Williams next week, would you have a preference of what day, Solicitor?

MS. MAYES: No, sir, Your Honor.

THE COURT: As far as you know, members of the victim's family would be available at whatever time the Court set?

MS. MAYES: That's correct, Your Honor.

THE COURT: All right. And, Mr. Floyd, I believe

you told me previously you may have a sentencing in Federal Court Monday?

MR. FLOYD: That got continued today, so I don't have anything that would take priority.

THE COURT: All right. Mr. Snell?

MR. SNELL: Your Honor, if at all possible, if we could have--- If I could have protection for Monday.

THE COURT: All right. Well, then why don't we say Tuesday morning then. That would be the 5th, Tuesday morning at 9:30. I don't know what courtroom I'll be assigned to next week. Thank you. Thank you very much. Post-trial motions are continued until Tuesday morning at 9:30. Thank you, Solicitor. Thank you, Mr. Floyd, Mr. Snell.

(Whereupon, the proceedings were concluded for April 1st, 2011.)

(Whereupon, the following proceedings were reported on April 5th, 2011.)

CLERK: State v. Lance Williams.

THE COURT: All right. Why don't you have the victims remain seated until I hear the motions, Solicitor, Sheriff. All right. Mr. Snell, Mr. Floyd, I'll be glad to hear your motions.

MR. SNELL: Thank you so much, Your Honor. I would like to begin the motions, if I may, by handing up a

case which is *State v. Middleton*, 295 S.C. 218, Your Honor. May I?

THE COURT: Yes, sir.

(Hands to Court.)

MR. SNELL: And, Your Honor, in this case, the South Carolina Supreme Court has noted that the terms rape and criminal sexual conduct are interchangeable. And rape is defined by Black's Law Dictionary as unlawful sexual activity without consent and usually by force or threat of injury. Your Honor, we believe that, taking all the evidence presented certainly in the light most favorable---

THE COURT: What page were you reading from?

MR. SNELL: Oh, I'm sorry, Your Honor.

THE COURT: That's all right. I see it. The third page?

MR. SNELL: Yes, Your Honor.

THE COURT: Three of 6. All right. Thank you.

MR. SNELL: Your Honor, we believe, taking the appropriate standard, taking everything the State has submitted in the light most favorable to the State and even assuming it to be true, there has been no evidence put forth of a sexual touching or sexual contact with Mr. Williams, by Mr. Williams with the minor child. And it's been our position that he's been charged with conducting a lawful activity in an unlawful manner. Your Honor, we

would make the following motions post-trial. The first motion would be for a motion in arrest of judgment. And, in this motion, we are asking the Court to withhold judgment on the verdict because of those errors appearing on the face of the record; and the principle is based on the fact that, even if everything alleged is true and has been proved, the Defendant cannot be convicted of the offense. We'd also make a motion for a judgment notwithstanding the verdict, or JNOV, which still exists in General Sessions cases.

THE COURT: You think that still exists in criminal court?

MR. SNELL: Your Honor, the last cases came up in the '70's, but there was no case saying you can't.

THE COURT: Well, as I read Judge Anderson's *State v. Taylor*, 558 S.E.2d 917, 2002, he states, as an initial matter, we note that a motion for JNOV in a criminal case is not recognized in this case. Who I am to question Judge Ralph King Anderson, of course?

MR. SNELL: Your Honor, the last cases I read--and I can cite one--which were in the '60's, began treating them as almost like ancillary motions for directed verdict and a lot of the same standards were applied.

THE COURT: All right.

MR. SNELL: And, in addition, we'd also make a

motion on the same grounds pursuant to the 13th Juror Doctrine as would apply in General Sessions. Your Honor, our belief is, if the Court granted one of those motions, that would be as to the offense of criminal sexual conduct only and it would revert back, the conviction would revert back to the lesser-included offense of assault and battery of a high and aggravated nature as well as the, as well as his previous or simultaneous conviction for unlawful neglect of a child. So, Your Honor, we make those motions. And then, with regard to all charges, we'd make a motion for a new trial on the basis of all the issues previously presented to the Court as well as the evidence submitted and previous objections made by the Defendant that were overruled and previous motions denied.

THE COURT: Thank you. Thank you very much, Mr. Snell. Mr. Floyd, anything you would like to add, sir?

MR. FLOYD: No, Your Honor. I think Mr. Snell has said it succinctly. It's our position that, from the evidence--and much of it was perhaps revolting because of the injuries to the child--there was actually no penetration of the vagina and no evidence whatsoever of a forensic nature to suggest that there was any sexual activity involved. And, of course, that's where the bulk of our motion is coming from. There is no evidence of any sexual activity involved in this attack.

THE COURT: All right. Thank you, Mr. Floyd. Solicitor?

MS. MAYES: Yes, sir, Your Honor. The State's position is that this particular statute, criminal sexual conduct--in this case, criminal sexual conduct with a minor in the first degree pursuant to 16-3-655--is intended to include victims who are helpless, incompetent or otherwise unable to speak, such as a deceased murder victim; and, often, we are left only with circumstantial evidence to prove a case. And, in this particular situation, his intent, whatever that may be, can be inferred by the circumstances. The statute does not require proof of sexual gratification, only intrusion, however slight, of the genital openings.

THE COURT: All right. Thank you. Thank you, Solicitor. I reviewed my notes of the entire trial. I think one of the motions made was a motion for arrest of judgment. A motion for arrest of judgment is a post-verdict motion made to prevent the entry of a judgment where the charging document is insufficient or the Court lacked jurisdiction to try the matter. It has been held that a motion in arrest of judgment is distinguishable from a motion to quash an indictment in that reasons sufficient to sustain the quashing of an indictment may be insufficient to sustain a motion in arrest of judgment.

However, it has also been held that a motion in arrest of judgment is a post-trial motion to quash an indictment. When ruling on a motion in arrest of judgment, the trial court is limited to rectifying trial errors and cannot make a redetermination of the credibility and weight of the evidence. Based on my review of both indictments and the case, I would deny the motion for arrest of verdict both as to the unlawful conduct towards a child and the criminal sexual conduct with a minor in the first degree. As to the other motion, as to the motion for judgment notwithstanding the verdict, I do not believe that motion exists in South Carolina in criminal court based on *State v. Taylor* and *State v. Follin*, F-O-L-L-I-N, 35--no, excuse me--352 S.C. 235. JNOV is a civil motion and not proper in a criminal trial. As to the motion for a new trial, that being, according to the case law, the only post-verdict fact-based remedy available for a defendant is a motion for a new trial, citing *State v. Miller*, 337 S.E.2d 883. Where there is no evidence to support a conviction, an order granting a new trial should be upheld. However, where there is competent evidence to sustain the jury's verdict, the judge may not substitute his judgment for that of the jury, *State v. Prince*, 447 S.E.2d 177. As I stated earlier, I reviewed my notes, scoured my notes as a matter of fact, and reviewed all the documentary evidence that was introduced.

I reviewed the timeline, as best I could determine it from the evidence, that the mother of Victim left the residence at 8:00 that morning leaving, of course, the Defendant, Ms. Harvey and Ms. Harvey's three children. Ms. Harvey left at 11:30 or so, returned 1:00ish, sees Mr. Williams coming down the hall with Victim in a diaper only, doesn't note anything askew, doesn't take any steps, doesn't put up a human cry. Upon her return, of course, she finds that the door was locked and had to walk over to her mother's beauty shop to retrieve the key. She comes back at 2:30, as I understand it, Ms. Harvey does, and kisses Victim goodbye because she's going to her father's for the weekend, does not notice anything, any injuries and such. Then around 6:20 to 6:30, Victim is delivered to Pelion to her aunt. The aunt notes unusual demeanor, unusual appearance, behavior very different than usual, sees bruises and such. Although the child stays at the ballpark for a period of time, the aunt and the paternal grandmother and grandfather call mother. They meet at the BP station in Swansea. The mother's demeanor deteriorates. She's very upset, crying. They go to Palmetto Richland Hospital. Victim is examined by doctors at the hospital and then by the SANE nurse, Ms. Clary, a forensic nurse examiner. Her testimony is that the injuries that she observed are no, time wise, are no greater than 24 hours

previous. She notes the heightened vigilance of the child, not wanting to be touched. Of course, it's a very traumatic experience for a 15-month-old child to be in that setting. Her general assessment is that it is suggestive of sexual activity, that her labia is swollen, there are blood streaks in her diaper, and the appearance of genital abnormalities. Dr. Luberoff testifies to the following: Hematoma at the back of the child's head, bruises on the forehead, which previously Mr. Williams had called the mother or there was a conversation between Mr. Williams and the mother. I believe the mother called him checking on Victim. And he indicated, by his testimony, that he had told the mother of the injuries to the child's forehead, that she fell out in front of the trailer, in the front yard, in rough terrain. There are bruises bilaterally to both ears. There's a neck abrasion, what appears to be a fingernail mark perhaps. There is--- Her upper lip inside is bleeding or has the appearance of some blood; it hasn't scabbed over. Her elbows have what appear to be finger marks. The doctor described those as grip marks. There is an injury to her right nipple suggestive of fingernails and bruises to her knee, her knees. The doctor testified that the bruises are diagnostic of child physical abuse. They are outside the normal range of bruises for children that age that may be falling and tumbling and playing and such.

As to the child's vagina, she indicates there are, there is a bruised hymen, there is bruising outside, that, from her observations, that is diagnostic of vaginal penetration. I looked at the photographs, specifically State's Exhibit Number 14 I believe it is, which is a picture of the child's vagina with traction, in other words, with the nurse opening it up. It appears to be very reddened; it's beyond the outer area of the genital opening of the child, beyond the labia majora and labia minora, and then the hymen is bruised internally. Again, the doctor further testified that it's an extraordinary injury, very deep, and it is an internal injury with some type of penetration to the genital opening. Relying on *State v. Middleton*, the defense says criminal sexual conduct, as the case says, that intended the term rape and criminal sexual conduct to be interchangeable. *Middleton*, which is actually reversed, I think, because of some live testimony where Mr. Middleton committed two homicides several days apart in Charleston County--- Well, that was the first Middleton trial. This is the second. He was retried and convicted and again sentenced to death. The issue, in that case, was in the sentencing phase of the death penalty trial since the Legislature had not amended the statute to include criminal sexual conduct as a statutorily aggravating circumstance for which the imposition of the death penalty would have

been appropriate as opposed to rape. I think that's very different than here. Of course, I base my ruling on *State v. Morgan*, which is a South Carolina case, 574 S.E.2d 203, *State v., State of New Hampshire v. Flynn*, 855 Atlantic 2d 1254, and *State v., The People v. Quintana*, Q-U-I-N-T-A-N-A, 89 California Appellate 4th 1362. Of course, the statute does not define vaginal, but only genital opening. I do not think I can impose my will over the will of the jury when there is competent evidence from which the jury could have returned a verdict of guilty. And I cannot substitute my verdict based on *State v. Taylor*, 558 S.E.2d 917, and *State v. Garrett*, G-A-R-R-E-T-T, Opinion Number 3515, Court of Appeals, 2002. With that, the Defendant's motions for a new trial are denied. I did not address specifically the issues as to unlawful conduct with a child. In this case, I think there was sufficient evidence for which, competent evidence for which a jury could return the verdict that it did; and I would not substitute my opinion for that of the jury. So the post-trial motions are denied. Anything further before imposition of the sentence, Mr. Snell, Mr. Floyd?

MR. SNELL: Your Honor, we'd just like to have you hear from the family, and then we have---

THE COURT: Certainly.

MR. SNELL: ---a psychologist.

THE COURT: All right. Sure. I mean, I haven't heard yet the Solicitor as far as any post-trial as far as sentencing. I'll be glad to hear from them. Just give me a moment. Solicitor, anything you would like to add?

MS. MAYES: Yes, sir, Your Honor. I would like to begin by making part of the record the report of Dr. Susan Luberoff who was the consulting physician at Palmetto Health Richland. As the Court has noted, during her testimony, she did describe evidence of vaginal penetration; and, on page 3 of her report, she noted not only the multiple bruises on many areas of the body which were consistent with non-accidental physical trauma, but she also noted clear evidence of the sexual abuse including injury to the genital area which may include bites and also includes deep penetrating injury to the vaginal area as evidenced by contusion to the hymen and bruising and abrasions of the labia minora. I will submit that to the Court at this time.

THE COURT: All right. Do you have a copy of this, Mr. Snell?

MR. SNELL: We do, Your Honor.

THE COURT: All right.

(Hands to Court.)

MS. MAYES: Your Honor, as for victim impact testimony, the grandfather of [redacted] Victim Kevin [redacted] B is

present; and I believe he does wish to address the Court. The father, Adam Cooper, and his family have been present throughout the proceedings. They were present for the trial last week and are present today as well. And, at this time, I would ask Mr. [redacted] to come forward.

THE COURT: And this is the maternal grandfather. Is that correct?

SOLICITOR: Yes, sir, Your Honor.

THE COURT: All right. Would you tell me your full name, please?

KEVIN [redacted] Kevin Lynn [redacted]

THE COURT: All right. Madame Clerk, would you place Mr. [redacted] under oath?

WHEREUPON, KEVIN [redacted] being first duly sworn, testifies as follows:

THE COURT: Mr. [redacted] I'll be glad to hear from you.

KEVIN [redacted] Yes, sir. I'm a resident of Lexington County for 45 years, a business owner in the community. I speak for the whole entire family. We have been going through a whole bunch of issues for the past year after this thing took place. I have four grandchildren. They're all girls, [redacted] being in the middle. Lance was in the family and helped me in my business and done things around us for a long time; and we

trusted him, and everybody knew him as a good person and knew him as a friend of the family's. And, you know, we just are totally still in shock that all this stuff took place the way it did. The whole family is still struggling. Hopefully, today, we can possibly get past this a little easier and a little better. [redacted] a beautiful child, great demeanor, great personality. I can only imagine, you know, what she went through at that time. The family appreciates everything the County and the State has done for us and appreciates the jury and everything that you have done for us here. And, hopefully, everything from here on out can be carried out in the way you see fit.

THE COURT: Thank you. Thank you, Mr. [redacted].

KEVIN [redacted] Thank you.

MS. MAYES: Beg the Court's indulgence.

THE COURT: Yes, ma'am.

(Pause.)

MS. MAYES: Nothing further, Your Honor. Mr. Williams does not have a prior record.

THE COURT: Thank you. Thank you, Solicitor. Mr. Snell?

MR. SNELL: Your Honor, may it please the Court. I would ask Your Honor to hear from the Defendant's mother and a friend, Mr. Rosenberg.

THE COURT: Certainly. I'll be happy to hear

from anybody you want, Mr. Snell, Mr. Floyd.

MR. SNELL: Mr. Rosenberg, if you will, start off by telling the Court your full name.

MARK ROSENBERG: Sure. Mark Wayne Rosenberg.

THE COURT: Say it again?

MARK ROSENBERG: Mark Wayne Rosenberg.

THE COURT: Madame Clerk, would you place Mr. Rosenberg under oath for me, please?

WHEREUPON, MARK ROSENBERG, being first duly sworn, testifies as follows:

THE COURT: Yes, sir. I'll be glad to hear from you, Mr. Rosenberg.

MARK ROSENBERG: Good morning. I consider myself a pretty normal guy, and I'm not real intelligent and not real dumb. Actually, I like to think of myself as having a nice dose of common sense and the ability to think logically. I've sat here for two and a half days of facts and evidence and some testimony in this case. And, to be perfectly honest, I'm having a hard time with it. In fact, this case has been so serious and emotional that it's tested my personal principles and my compassion and those of everybody involved. After all the testimony of the family members, the testimony of the experts and the law enforcement professionals, this case left me, and I'm sure a few others, very unsure and worried about the future of

the two principal people involved in this case, Victim and Lance. We can surmise all day long about exactly what Victim endured during that week of last year; but, ultimately, there's only two people who really know for sure, Lance and Victim Victim can't tell us what happened, but Lance can and has. In fact, it seems to me that he's been trying to from the start. He drove 75 miles voluntarily in his own car, on his own time, straight to the Lexington County Sheriff's Department with the intention to give a statement voluntarily. He submitted his explanation to the investigator when he could have easily made them come to him. But they had their minds made up before ever meeting him. He tried volunteering his accounts of that day to Brittany B the mother; but she refused to listen. He then wanted to explain things to the man who he looked up to and admired the most, Kevin B but he rejected Lance before ever listening to his side of the story. I'm not trying to paint Lance as a victim here, just to point out he did everything he was asked, everything, and without being forced. It seems to me that, over the past days, every expert testifying here has stressed how important history is to their job. Each doctor and nurse has to detail the history of what has allegedly taken place so they can effectively assess the patients. The detectives have to dig through mountains of

leads and suspects to uncover the history of the events leading up to a successful conclusion. In fact, history is paramount to finding the truth. And sometimes a lack of history shows even more. Lance has no history, no previous history, of criminal behavior. He has no previous history of altercations with the law or its enforcers. He has no previous history of mistreating children, his own or anyone else's, none. And he had relationships before Brittany with women who've had young toddlers whom he's watched and cared for with no issues whatsoever. Actually, up to this point, Lance has very little negative history, but he does have history known to those close to him, some issues of repressed anger and a very short temper. And he needs our help in dealing with them. Anyone who has children knows just how amazingly resilient they are, and [redacted] is no different. In many ways, she's an ordinary 2 and a half-year-old child playing tag with friends and family, participating in beauty pageants and just trying to grow up in a world that is dangerous. I believe she's going to be fine. She has another 15 and a half years before she legally becomes an adult. And I don't doubt for one minute that, without Lance being in her life, she's moved on and already forgotten about what all the fuss is about. Lance, on the other hand, is different. He will never forget. He's 25 years old and facing an imposing term of

imprisonment, whether it's 25 or 50 years. I believe we have an opportunity, an opportunity to possibly save Lance from imploding. I really don't believe that it would be in anyone's best interest to put him away forever. I believe he can prove to be a productive member of society if we just give him a chance by offering help instead of imprisonment. If he learned to control his anger and his temper and his negative emotions, I am positive he would show the world just how compassionate and helping and impressive he could be if he's given the chance. I ask your help, Your Honor, by showing mercy and leniency. Everyone could benefit from a judicious example of clemency, the victims and family, the Defendant and family. A lifetime of incarceration won't put Lance on the right track or the right train; it will only show him that no one seems to care. Thank you.

THE COURT: Thank you, Mr. Rosenberg.

THE COURT: Tell in your full name, please.

DEFENSE ATTORNEY: Deborah Lynn Williams.

THE COURT: All right. Madame Clerk, would you place Ms. Williams under oath?

WHEREUPON, DEBORAH WILLIAMS, being first duly sworn, testifies as follows:

THE COURT: All right, Ms. Williams.

DEBORAH WILLIAMS: I'll do my best to read this,

Your Honor. When I started writing this--- When I started writing this letter of mercy to the Court, I truly didn't know where to begin. What words can I say that would impact you enough so you would show mercy to my son, Lance? How can a mother's love be explained? I feel my son's every pain; I feel his sorrow, his disappointment, his frustration, his excitement, his joy, his compassion, his tears and his laughter. I hurt when he hurts. I laugh when he laughs. I cry when he cries, and I smile when he smiles. Not a thing about my son's life has been easy. His father became a quadriplegic before he was born. Then he was separated from me from the age of two to five years of age. By the time he was six years old--I'm sorry--he was diagnosed with the ADHD. The medications didn't seem to help. He struggled through school. I was in a relationship for 15 years with someone that was abusive to both, to someone that was both abusive verbally and physically to both of us. I have always made excuses during that time, in our relationship, that maybe he and I deserved it. I didn't know how to help myself or my son at that time. But, thanks to God, I am no longer in that relationship. However, it has scarred my son greatly. He has had anger and temper issues for most of his adolescent and adult life. He has severe mood swings. He sometimes would just not want to get out of bed. He has severe

depression, anxiety, and sometimes talks of not wanting to live. I'm not saying these things to make you feel sorry for him. Since my son has been in jail, I have been doing a lot of searching trying to figure out why. I feel that my son has some sort of a disorder that has gone untreated for far too long. He has had all the warning signs for many years, but I've always just took it as being immature and he would grow up one day. I feel his outburst with [redacted] was done due to this condition and, with proper medical care and counseling, he would benefit from that more than being sent to prison for a number of years. He has a 3-year-old daughter that he has joint custody of, whom he takes care of. His mother--- Her mother, Heather, has primary placement. He has been paying child support and taking care of her since she was 9 months old. He would get her for 3 and a half days every other week. And, at that time, he had never had any outbursts or any ill will toward her. He's lived with me in Swansea from 2004 until 2010. He has lived on and off with the [redacted] during that time. During the time of the visits with Aubrey, they would come and stay with me and live with me during those visits. My son has never been in trouble before. He is a good man; he is a good son; he has been a good father; and he was a good boyfriend. I pray, Your Honor, that you have mercy on my son and help him get the proper treatment he

needs to better himself so he can continue to be a good father to his daughter and protect her in society. She truly misses him. She asks every day where is her daddy. She doesn't understand why we get to come home from work and her daddy doesn't. The only way she gets to talk to him is on the phone, and he gets to raise her by phone. He shouldn't have to be punished for something for the rest of his life for one instant of mistake. Lance has been in jail now for over 350 days. That's a long time. I hired Dr. Watson for a medical evaluation, and I hope that today maybe he'll be able to confirm some of the things that I have said and will let you know that imprisonment is not the best thing that needs to happen in this case. I thank you for your time.

THE COURT: Thank you, Ms. Williams.

MR. SNELL: Your Honor, this is Lance's maternal grandmother, and then this is the mother of his own daughter.

THE COURT: Yes, ma'am, your name, please?

MINNIE LUMPKIN: Minnie Evelyn Lumpkin.

COURT REPORTER: I'm sorry. I did not---

MINNIE LUMPKIN: Minnie, M-I-N-N-I-E, Evelyn, E-V-E-L-Y-N, Lumpkin, L-U-M-P-K-I-N.

THE COURT: All right. Madame Clerk, would you place Ms. Lumpkin under oath?

WHEREUPON, MINNIE EVELYN LUMPKIN, being first duly sworn, testifies as follows:

THE COURT: I'll be glad you to hear from you, Ms. Lumpkin.

EVELYN LUMPKIN: I wrote a short note Friday and gave it to Mr. Floyd. I would like for him to read it, please.

THE COURT: All right. Certainly.

MR. FLOYD: Your Honor, in her note, what she says is that she, of course, has known Lance all his life. She helped raise him. He's very special and close to her. She's never known him to be physically abusive or violent to any person, adult, child or anything. That he's a good father to his own daughter who is, as you've heard, about 3 years of age. He's a loving father, and he tries to do what's right. She, likewise, doesn't condone what he did in any way. She understands that he was under a lot of pressure at the time. It started out at work, you know, with what had gone on at work. I think you heard a little bit about that. And his frustration of the day doesn't excuse what happened. Please don't think I am saying it for that. And that he just lost his temper. She doesn't--- And she hopes you'll understand that he's not a bad person, he's a good person. He's never been in trouble before. He does have an anger issue, and he lost it on

this particular day. She asks you for whatever mercy you can give him because he is a good man who loves his family, loves his child, has good family support. And whatever mercy you can give him she would appreciate.

THE COURT: Thank you. Thank you, Mr. Floyd. Anything you would like to say personally, Ms. Lumpkin?

MINNIE LUMPKIN: Well, that particular day--I know I may not be allowed to say this--but I think Brittany [redacted] took advantage of Lance and Lance should have been going to help her father work on the fence and her take responsibility of her own daughter or take her to one set of her grandparents instead of leaving her there with Lance. He's not a monster. He made a mistake, but he's not a monster.

THE COURT: Thank you. Thank you very much, Ms. Lumpkin. Yes, ma'am, your name, please?

HEATHER ROGERS: Heather Rogers.

THE COURT: Last name?

HEATHER ROGERS: Rogers.

THE COURT: All right. Madame Clerk, would you place Ms. Rogers under oath?

WHEREUPON, HEATHER ROGERS, being first duly sworn, testifies as follows:

HEATHER ROGERS: My name is Heather Rogers. I am the mother of Lance's 3-year-old daughter. I have known

Lance for many years, and I really know him heart and soul. Although this last year of Mr. Williams' incarceration has been heart wrenching for all family and friends involved on both sides, this past week has been just as tough. Since April 16, 2010, the day that I was notified of the situation, I have been behind Lance 100 percent. On that day, Lance called me as I was leaving work to go pick up our daughter and meet him for his weekend visitation. I was shocked. I was shocked because I would never imagine that Lance would ever do anything to hurt another human being, let alone a child. I proceeded to my home to pick up my child and to exit 41 where Lance was waiting on me. We talked when I arrived, and he informed me that he was going to meet Detective Ed to give his statement. I gave him my daughter and gave him and my daughter a hug, and I told him that I believed in him and to call me when he was finished with his statement. I never received a phone call. I tell you this because this shows how confident I am, that I feel that Lance is a good person and that this entire incident is just that, a one-time incident. Last week we all heard over and over again beyond a reasonable doubt. There was no doubt in my mind when I handed my daughter, my only child, over to him. Had any part of me for one second thought that he was capable of intentionally or maliciously hurting a child, especially in any sexual

manner, my child would have never left with him, especially with the plans to go out of State the next day because, if I thought that for one second I would never see my child again, I would've never taken her to meet him. There has not been any doubt in anyone's mind that there has been wrongdoing. The jury decided that. However, it's a learned lesson. And Lance knows that he needs help for his anger and it will be hard for him to get the proper help that he needs behind bars. My main concern through all this is like any mother of her child. Every day, I see my child hurt. She asks about her daddy, when he's coming home, if he can pick her up from school, why she can't call or see him. How do you tell a 3-year-old that? I know that it's no one else's fault but Lance's for putting himself in that situation. Victim [redacted] is not the only child affected in this; she has healed, and she will not remember this unless it's brought to her attention growing up. I will be answering these questions to my daughter for many days and possibly even years and trying to find an explanation to fill that void. Aubrey loves her father, and Lance has been devoted to her since day one. They had an amazing relationship and bond that has unfortunately been interrupted. Your Honor, the only thing that I ask of you is to please consider the other child that has fallen victim in this case. The thought of Aubrey not seeing her

father for another year or years to come kills me. No child should grow up without their father. I hope and pray that she will have the chance to have her father in her life and to grow up with him and not be as old as I am whenever she sees him again. I thank you for listening to my concerns and taking into consideration these thoughts in making your decision when sentencing Lance Williams.

THE COURT: Thank you. Thank you, Ms. Rogers.

MR. SNELL: Your Honor---

THE COURT: Yes, sir.

MR. SNELL: I have letters the family has provided from Wayne Black, Michael Myers and Diane Black and if I may approach. And Ms. Mayes has reviewed those.

(Hands to Court.)

(Pause.)

THE COURT: All right. Mr. Snell?

MR. SNELL: Thank you so much, Your Honor. We have Dr. Selman Watson who has evaluated Lance, and we would like to have the Court listen to some of his findings.

THE COURT: All right. Madame Clerk would you place Dr. Watson under oath, please?

WHEREUPON, DR. SELMAN WATSON, being first duly sworn, testifies as follows:

THE COURT: Yes, sir. I'll be glad to hear from

you, Dr. Watson.

COURT REPORTER: I didn't get your first name.

DR. SELMAN WATSON: It's Selman, S-E-L-M-A-N, Watson, W-A-T-S-O-N.

COURT REPORTER: Thank you.

DR. SELMAN WATSON: I spent about eight hours examining Mr. Williams last year. He took a battery of tests, and I probably interviewed him for the better part of three or four hours. He does not have an Axis I impairment; in other words, he is not mentally ill. I don't see any elements of schizophrenia or bipolar disorder in his functioning. And he seems to have a lot of borderline features. These are basically people that feel very empty inside. They have trouble controlling their anger. A lot of their anger tends to be very chronic in its origin. And I think, given what's happened between [redacted] and Mr. Williams, this is pretty much borne out. One of the deficits Mr. Williams has is that he was so attached to Ms. [redacted] that he didn't have the strength to tell her no when she asked him to stay at the house as opposed to him going to erect the fence. So he's got some psychological deficits, but he knew what he was doing and he does not have a mental illness in my opinion. One thing Mr. Williams did tell me was, when I was examining him, he said he saw some spots in his visual field when he got real

angry. Whether he's got some neuro-psychological deficits that make it difficult for him to control his anger is probably another issue. I did not examine him in terms of any kind of neuro-psychological instruments, but he talked about spots in his visual field when he got real angry. That might relate to some of his control problems.

THE COURT: What--- Doctor, I've never had you in court before that I know of. You've never appeared in my court before. What is your background?

DR. SELMAN WATSON: I'm a clinical psychologist, but I practice forensic psychology. So I do a lot of referrals from the courts and the attorneys.

THE COURT: All right. Thank you. Thank you, Doctor. Anything further?

DR. SELMAN WATSON: No.

THE COURT: Thank you. Thank you very much.

MR. SNELL: Dr. Watson--- If I may, Your Honor?

THE COURT: Certainly.

MR. SNELL: Can you comment at all on his sexual offender tendencies, Doctor?

DR. SELMAN WATSON: Just hearing about this case and talking to Mr. Williams, the overriding impression in my mind was this was a physical assault as opposed to a sexual assault. I know some of [redacted] anatomy was targeted, but that's not the way pedophiles generally

operate. You know, pedophiles try to get close to children so they can sexually molest them, and they get a lot of gratification from that. From just my conceptualization of the case, it just seems like he lost control of his anger and the physical assault took place on this child.

THE COURT: Thank you. Thank you, Dr. Watson. Anything you would like to say, Mr. Williams?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Madame Clerk, would you place Mr. Williams under oath, please?

WHEREUPON, LANCE AUSTIN WILLIAMS, being first duly sworn, testifies as follows:

THE DEFENDANT: Your Honor, I stand before you today and ask you to have mercy on me. I know this has been an extremely serious case, and I am very sorry for what pain I have caused Victim and her family. I never intentionally brought any harm to Victim Victim and her family and I have shared many good times too. The B are like a family to me. We, too, shared in many ups and downs. Again, I am both remorseful and regretful for what pain I did cause Victim and her family. I now face the possibility of never being able to continue raising my own daughter. I also may never know what it means to have a family with my daughter. I was raised by my mother and my grandmother with no father. I do not want

Aubrey to grow up with no father. Aubrey is my world and everything. If I am sent to prison for a long time, it will affect many lives besides my own. I am a good person with a big heart. I have never been in any kind of trouble before. I have held a job since I was 14 years old. I am a big part of my daughter's life, both mentally, physically and financially. I ask that you please take everything into consideration and show mercy on me. Again, I am sorry for all the pain that has stemmed from this situation. Thank you for your time, your fairness and your consideration.

THE COURT: Thank you, Mr. Williams. Mr. Snell?

MR. SNELL: Your Honor, just in closing, I just would say we recognize, and Mr. Williams certainly recognizes, the seriousness of this and we recognize the serious nature of the statute. But we'd just ask for all the consideration the Court can provide and as much mercy and leniency as you can offer.

THE COURT: Thank you. Thank you, Mr. Snell. Mr. Floyd?

MR. FLOYD: Just briefly, Your Honor. I think you've heard everything, and I think Lance expressed himself well on the point. This is a sad case. These people were close, and he loved this family, and I think they loved him too. And it's just a very unfortunate

situation that he lost his temper on this particular day. We're all thankful and hopeful that [redacted] will suffer nothing permanent, and it doesn't appear so at this point. And we hope that's true and she's over it because he does feel very bad about it. We just ask for whatever mercy you can give him. We know there are some constraints with the statute, but we'd ask you to do whatever you could to be fair and merciful to Mr. Williams.

THE COURT: Thank you. Thank you, Mr. Floyd. Anything further Mr. Floyd, Mr. Snell?

MR. SNELL: No, Your Honor.

THE COURT: Solicitor, anything further?

MS. MAYES: Yes, Your Honor, briefly just in response to I think Mr. Watson's statement that, in his opinion, Mr. Williams is not a pedophile. I just wanted to clear up for the record that the State is not alleging that he would fit within the criteria of that unique category of sex offenders known as a pedophile. There are certainly many other types of sex offenders; and, as Mr. Watson stated, the child's genitals were targeted.

THE COURT: Thank you, Solicitor.

(Pause.)

THE COURT: As to the charges for which the Defendant was convicted, unlawful conduct toward a child and criminal sexual conduct with a minor in the first

degree, I have considered all of the evidence and testimony presented during the trial. Further, I have considered all of the statements that have been presented by the State during the sentencing proceeding, both the address to the Court by Mr. Kevin [redacted] and Dr. Luberoff's report that was handed up. Further, I have considered the statements given before the Court by Mr. Rosenberg, by Ms. Williams, Ms. Lumpkin, Ms. Rogers and Dr. Watson, and I've considered the statement of Mr. Williams, the Defendant. Further, I have listened very carefully to the arguments of Mr. Snell and Mr. Floyd. Numerous things strike me from what I pluck out of the various statements that were presented to the Court today. It is apparent that [redacted] has a very loving and caring and supportive family. Many families may not have responded as timely as [redacted]s family did and may not have been as supportive as they have been throughout this ordeal and throughout the course of the trial. It's further apparent that Mr. Williams has a very loving and supportive family, some of whom look back and wonder what they may have done wrong or perhaps could have done different. Of course, that Monday morning quarterbacking never resolves any issues. As I've always said, hindsight's 50/50. Some people say it's 20/20; I say it's still 50/50. You can't change the past. I have detected a genuine remorse in Mr. Williams, and I don't think it's

only remorse because he's going to prison. I think it's remorse--- Obviously, he doesn't relish that thought, and I don't blame him. If he did, I would be more concerned about him and his mental stability. I think he does have remorse for his actions and the harm that it caused to [redacted] And, further in his statement, he says he realizes there are many, many other victims; and there are. First and foremost is [redacted] who is innocent of all misconduct. You know, it's amazing to me--- Of course, the courtroom's full with family members for both sides. I'm certainly not comparing [redacted] or any human to a dog; but, if a dog had been mistreated like this, there would probably be people out there picketing the courthouse. There would probably be groups up here wanting him to get the maximum. As I say, I'm a dog lover too. It just amazes me, with our children, our most precious assets, our future, there is not more of that. But all of the victims that have been victimized in both the [redacted] and Cooper families and the Williams family, that has been caused by the misconduct of the Defendant. And the jury has spoken on the matter. The jury, as the lawyers did, both the State and the defense, did an excellent job. The jurors had an opportunity to return a verdict of guilty of aggravated assault and battery of a high and aggravated nature; they chose not to do so based on their

understanding of the facts as they determined them to be and the law as charged by the Court. Under 16-3-655-A, a person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with a victim who is less than 11 years of age. Under C-1 of that same section, a person convicted of a violation of Subsection A-1 is guilty of a felony and, upon conviction, must be imprisoned for a mandatory minimum of 25 years, no part of which may be suspended or probation granted, or must be imprisoned for life. 2010-GS-32-1861, Lance Austin Williams, criminal sexual conduct with a minor under the age of 11, first degree, under 655-A-1, the Defendant is committed to the State Department of Corrections for a determinate term of 25 years. 2010-GS-32-1860, Lance Austin Williams, unlawful conduct towards a child, the Defendant is committed to the State Department of Corrections for a determinate term of 10 years. Those are concurrent. He's given credit for all time served. And he's placed on the Central Registry of Child Abuse and Neglect. He shall be subject mandatorily to the Sex Offender Registry. Good luck to you, Mr. Williams.

MR. WILLIAMS: Thank you, Your Honor.

MS. MAYES: Thank you, Your Honor.

THE COURT: Thank you, Solicitor.

(WHEREUPON, TRIAL CONCLUDED.)

CERTIFICATE

I, the undersigned CAROLE R. SHEALY, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Lexington County, South Carolina, as recorded by L. Coconut Pantsari, Court Reporter, on the 30th and 31st days March, 2011, and on the 1st and 5th days of April, 2011.

I do further certify that I am neither of kin, counsel or interest to any party.

July 8, 2011.

Carole R. Shealy

CAROLE R. SHEALY

WITNESSES

Lexington County Sheriffs Department

Edward D. Prestigiacomo

Law Enforcement Case #: 1003444

DBM

ARREST WARRANT NUMBER

M300591

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 7/12/10

VERDICT

Guilty

Foreperson of Petit Jury
Date: 7/1/11

DOCKET NO. 2010GS3201861

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JULY TERM 2010

THE STATE
vs.

Lance Austin Williams

CDR #: 0385

Indictment for

Criminal Sexual Conduct With a Minor

S.16-03-0655(A)(1)

DONALD V. MYERS, SOLICITOR

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

INDICTMENT FOR
Criminal Sexual Conduct With a Minor

§ 16-03-0655(A)(1)

At a Court of General Sessions, convened on July 2010, the Grand Jurors of Lexington County present upon their oath:

That **Lance Austin Williams** , did in Lexington County, South Carolina on or about April 15, 2010, did commit a sexual battery upon a minor, [redacted] VICTIM dob: 12-22-08, who was less than eleven years of age, to wit: the defendant did digitally penetrate the victim's vagina, in violation of Section 16-3-655(A)(1), Code of Laws of South Carolina, 1976, as amended.

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

Donna B. Morel
ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

Edward D. Prestigiacomo

Law Enforcement Case #: 1003444

DBM

ARREST WARRANT NUMBER

M300590

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: 7/12/10

VERDICT

GUILTY

Foreperson of Petit Jury
Date: 7/12/10

DOCKET NO. 2010GS3201860

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

JULY TERM 2010

THE STATE
vs.

Lance Austin Williams

CDR #: 2481

Indictment for

Unlawful Neglect of a Child
§ 20-07-0050

DONALD V. MYERS, SOLICITOR

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	Unlawful Neglect of a Child
COUNTY OF LEXINGTON	)	§ 20-07-0050
	)	

At a Court of General Sessions, convened on July 2010, the Grand Jurors of Lexington County present upon their oath:

That **Lance Austin Williams** in Lexington County, South Carolina, on or about April 15, 2010, while having been responsible for the welfare of the minor child, [redacted] dob: 12-22-08, did or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered to wit: did strike the victim causing bruises to several areas of her body, defined in Section 63-07-20 and in violation of Section 63-05-70 South Carolina Code of Laws (1976, as amended).

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

Dana B Moore

ASSISTANT SOLICITOR

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case Nos. 2010-GS-32-1860; 2010-GS-32-1861

State of South Carolina, Respondent,

v.

Lance Austin Williams, Appellant.

BRIEF OF APPELLANT

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Graham L. Newman
M. David Scott
RICHARD A. HARPOOTLIAN, P.A.
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ATTORNEYS FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in admitting Appellant's out of court statements where the statements were obtained in violation of Miranda?

II. Did the trial court err in failing to grant a directed verdict of not guilty on the charge of unlawful conduct towards a child where Appellant was not a person responsible for the Victim's welfare, as defined by S.C. Code Ann. §63-7-20 (2010)?

III. Did the trial court err in admitting enlarged anatomical diagrams and photographs of the Victim's genitalia where the diagrams and photographs were unduly prejudicial and had an undue tendency to suggest a verdict on an improper basis?

STATEMENT OF THE CASE

This is an appeal from a trial verdict entered on April 1, 2011, in which a jury found Appellant guilty of criminal sexual conduct (CSC) with a minor, first degree, and unlawful conduct towards a minor.

Appellant was arrested in Lexington County on April 16, 2010, and charged with one count of unlawful conduct towards a child, in violation of South Carolina Code of Laws Section 63-5-70, and one count of CSC with a minor, first degree, in violation of S.C. Code Ann. §16-3-155(a)(1). The Lexington County Grand Jury returned true bill indictments on each charge on July 12, 2010. Appellant's case was called for trial before a jury on March 30, 2011. At the conclusion of the State's case, Appellant moved for a directed verdict of not guilty on both charges. Appellant renewed his directed verdict motions at the conclusion of the defense's case, which consisted solely of Appellant's testimony. The trial judge denied the motions in both instances.

Both charges were submitted to the jury on April 1, 2011, and the jury returned guilty verdicts on both charges later that day. Appellant made post-trial motions for arrest of judgment (R. p. 612, line 2), judgment notwithstanding the verdict (R. p. 612, line 9), and new trial based on the thirteenth juror doctrine (R. p. 612, lines 1-2), arguing the conviction for CSC with a minor should be vacated and judgment of guilty be entered on the lesser-included offense of assault and battery of a high and aggravated nature. In addition, Appellant made a motion for new trial on all charges. (R. p. 613, lines 10-14). The trial judge denied all post-trial motions. (R. p. 619, lines 19-20).

On April 5, 2011, the trial judge sentenced Appellant to twenty-five (25) years' imprisonment on the charge of first degree CSC with a minor, and to a concurrent term of ten

(10) years' imprisonment on the charge of unlawful conduct towards a child. (R. p. 642, lines 10-18). Appellant timely filed and served a notice of appeal on April 5, 2011.

STATEMENT OF FACTS

On the evening of April 15, 2010, family members of the fifteen month-old Victim transported her to the emergency room at Palmetto Richland hospital after noticing several bruises on the child's face, arms and genital area. (R. p. 139, lines 6-13; p. 142, lines 3-9; p. 143, lines 1-24). The next day, police detective Ed Prestigiacomo was dispatched to the hospital to investigate the Victim's injuries. (R. p. 60, lines 14-p. 61, line 16). At the hospital, Prestigiacomo interviewed the Victim's mother and other family members. Based on these interviews, Prestigiacomo determined Lance Austin Williams (Appellant) had cared for the Victim the majority of the previous day. Prestigiacomo developed Appellant as the primary suspect in causing the Victim's injuries. (R. p. 78, line 16; p. 79, lines 18-22).

Prestigiacomo contacted Appellant by phone around 4:25 p.m. and asked him if he would come to the Lexington County Sheriff's Department to speak with the detective. Appellant complied and arrived at the sheriff's department at approximately 7:00 p.m. on April 16, 2010. He was accompanied by his mother and young daughter. (R. p. 65, lines 3-14; p. 77, lines 13-18).

When Appellant arrived at the sheriff's office, Detective Prestigiacomo escorted him to an interview room. The interview room was situated behind a locked door and could only be accessed by entering a code. Appellant was not provided the code to the interview room and he could leave only if officers entered the correct code. Appellant's mother and daughter remained in the lobby. (R. p. 66, line 2; p. 80, lines 7-19; p. 81, lines 9-15). Prior to the beginning of Prestigiacomo's questioning, Appellant was "on the top of the list" of potential suspects. According to Prestigiacomo's testimony in the Jackson v. Denno[1] hearing, he had gathered

[1] 378 U.S. 368, 84 S.Ct. 1774 (1964).

enough information prior to questioning to pinpoint Appellant as the sole perpetrator of the Victim's injuries. (R. p. 69, lines 18-21; p. 78, lines 8-16; p. 79, lines 18-25).

After Appellant entered the interview room, Detective Prestigiacomo was joined by Detective Palkowski, who assisted in the questioning. (R. p. 66, lines 2-7). Neither detective informed Appellant at the outset of questioning of his Fifth Amendment right to remain silent, nor did they recite to Appellant the warnings prescribed by Miranda.[2]

When Prestigiacomo began questioning Appellant about the Victim's injuries, Appellant said the girl had fallen. Prestigiacomo explained to Appellant that the Victim had bruises all over her body and that he needed an explanation – he "needed an answer." Prestigiacomo showed Appellant photographs of the Victim. (R. p. 67, lines 4-11). First, the detective produced photos of the bruises on the Victim's arms. Prestigiacomo knew from prior experience that the bruises were "finger marks, circular bruises on each arm." (R. p. 67, lines 19-22). Appellant responded that he had picked the Victim up by her arms. Next, Prestigiacomo showed Appellant pictures of the Victim's ear. The photos depicted visible bruising on the rim of the ear and behind it. The detective testified this type of bruising is "common when somebody is slapped or punched in the ear." (R. p. 68, lines 14-18). After seeing the photos, Appellant told the officers he punched the Victim twice on each side of her head. (R. p. 68, lines 22-25). Finally, Prestigiacomo showed Appellant pictures of bruises on the Victim's forehead and vagina. After Appellant told the detectives that the Victim injured her forehead when she fell, and that the bruises to her vagina were caused when he applied cream to treat eczema, Prestigiacomo advised Appellant of his Miranda rights. (R. p. 69, lines 7-17).

[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.1602 (1966).

After receiving notice of his Miranda rights, Appellant provided a written statement. (R. p. 70, lines 5-12; p. 73, line 6-p. 74, line 3). After Appellant gave the written statement, Prestigiacomo asked him several additional questions to which Appellant provided written responses. (R. p. 74, lines 22-23).

Following the Jackson v. Denno hearing, Appellant moved to suppress his statements. He argued they were obtained in violation of Miranda because he was in custody from the time Prestigiacomo took him into the locked interview room. He further argued the later recitation of Miranda warnings did not cure the prior, unwarned interrogation. (R. p. 89, line 2-p. 90, line 16). The trial judge determined Appellant was not in custody at the time of the initial interview, and therefore, Prestigiacomo was not required to Mirandize Appellant. (R. p. 95, line 8-p.96, line 6). Appellant's verbal and written statements and his answers to Prestigiacomo's questions were later introduced at trial, over Appellant's renewed objection. (R. p. 397, lines 8-17).

During the trial, the State introduced several diagrams purporting to depict the Victim's injuries. Appellant objected to three enlarged diagrams, arguing they were unduly prejudicial under Rule 403, SCRE, because the enlargements exaggerated the Victim's injuries. (R. p. 245, lines 15-23; p. 252, lines 2-5; p. 257, lines 1-3). The trial judge overruled the objections and the diagrams were admitted. Later, the State introduced several photographs of the child, including six photographs of the child's vagina. Appellant did not contemporaneously object because, based on the trial judge's previous ruling on the diagrams, continued objections would have been futile. All of the diagrams and photographs offered by the State were introduced into evidence.

The State called the Victim's mother ("Mother") to testify to the relationship between Appellant and the Victim. Mother explained that she began dating Appellant approximately four months before the alleged incident. (R. p. 154, line 22-p. 155, line 2). She further described the

level of care Appellant provided the child prior to April 15, 2010. According to Mother, Appellant had never been left alone with the Victim prior to April 15; he had never changed the child's diapers; and he had only bathed the child with Mother's oversight. Mother had on occasion asked Appellant to verbally discipline the Victim when Victim would not behave. The discipline provided was in accordance with Mother's instructions. (R. pp. 160-64). Nothing in the record indicates Appellant provided financial support for the child, or otherwise assumed a parental or custodial role to the Victim.

At the close of the State's case, Appellant made motions for a directed verdict of not guilty on both charges. The trial judge denied the motions. After Appellant rested his case, he renewed his directed verdict motions, and the judge again denied them. Both charges were submitted to the jury. After asking the judge to provide them a copy of the law on first degree CSC with a minor, the jury found Appellant guilty as charged.

ARGUMENTS

I. BECAUSE APPELLANT'S OUT OF COURT STATEMENTS WERE OBTAINED IN A CUSTODIAL INTERROGATION BEFORE APPELLANT WAS ADVISED OF HIS MIRANDA RIGHTS, THE TRIAL COURT ERRED IN ADMITTING THE INITIAL STATEMENT AND THE SUBSEQUENT WRITTEN STATEMENT AT TRIAL.

When the State sought to introduce at trial Appellant's out of court statements to Detective Prestigiacomo, the trial judge held a Jackson v. Denno hearing outside the jury's presence to determine whether the statements were admissible. Detective Prestigiacomo was the only witness called during the Denno hearing, and he testified consistent with the facts set forth above. After the detective testified, counsel for the Appellant moved that the statements not be admitted because the statements were obtained in violation of Miranda. Counsel pointed out that at the time the questioning began, Appellant was the primary suspect, the interview was conducted by two experienced police detectives, behind closed, locked doors, at a time when the Appellant's freedom was restrained. Counsel argued under these circumstances Miranda warnings were mandatory before beginning the questioning, rather than later, after eliciting incriminating statements. (R. p. 89, lines 3-17). Counsel further argued that this initial failure to properly advise Appellant could not be cured by a subsequent recitation of the Miranda warnings, and that all the statements should therefore be suppressed. (R. p. 90, lines 9-16).

The trial judge determined Appellant was not in custody at the time he made his initial incriminating statements, and thus the detectives were not required to give Miranda warnings prior to questioning. The judge found that once he made the decision to arrest Appellant, the officer properly advised Appellant of his Miranda rights, and Appellant waived his right to silence prior to providing the written statement. The judge concluded Appellant's statements

were therefore admissible in their entirety. (R. p. 95, line 10 - p. 96, line 5). Appellant submits this was error.

The purpose of Miranda warnings is to apprise the defendant of his constitutional privilege to not incriminate himself while in the custody of law enforcement. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Law enforcement must state the Miranda warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Id. To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). The custodial determination is an objective analysis based on whether a reasonable person would have concluded that he was in police custody. Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493–494 (1994); State v. Sprouse, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996). See also, State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003).

The Supreme Court in Miranda concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467, 86 S.Ct. at 1602. "Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." Missouri v. Seibert, 542 U.S. 600, 608, 124 S. Ct. 2601, 2608, 159 L. Ed. 2d 643 (2004).

The Court in Seibert addressed the police technique of interrogating in successive, unwarned and warned phases. The technique employs two stages of interrogation. During the

initial interrogation, the accused is not advised of his Miranda rights. After he has made an incriminating statement, the defendant is then advised of his Miranda rights and during a second stage of questioning, repeats the incriminating statement. See generally, Seibert, supra.

The Court in Seibert criticized the practice of question first, advise later, and recognized the purpose of the practice was to circumvent Miranda. The Court identified several factors relevant to determining the admissibility of the second, post-Miranda statement: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." Seibert, at 615, 124 S.Ct. 2612.

A. Custody Requirement

The trial judge determined Appellant was not in custody at the time of the initial questioning and when he first made incriminating statements, and therefore, the officers were not required to provide Miranda warnings. This was error.

As set forth in Detective Prestigiacomo's testimony in the Jackson v. Denno hearing, he and another detective questioned Appellant at the Lexington County Sheriff's Department, behind a closed and locked door. The door could only be opened by entering a code or combination. Appellant had neither a key nor the combination to open the door to the interview room. (R. p. 87, lines 3-9). Appellant's mother and daughter accompanied him to the sheriff's department, but they were not present with Appellant during questioning. (R. p. 81, lines 13-15). Although Detective Prestigiacomo testified Appellant was initially free to leave, he admitted Appellant was "absolutely not" free to leave after he made incriminating statements. (R. p. 86, lines 4-10). Arguably, Appellant first made an incriminating statement when he admitted he

pulled the Victim by her arm using excessive force. (R. p. 67, line 19-p. 68, line 3). Without question he incriminated himself when he told Prestigiacomo he had hit the child twice when she misbehaved. (R. p. 68, lines 14-25). Yet the detective continued with the uncounseled custodial interrogation. According to Prestigiacomo, the interview began at 7:00 p.m. and concluded at approximately 8:25 p.m.

Analyzing the factors set forth in Berkemer v. McCarty and State v. Evans, supra, a reasonable person would have concluded he was in police custody from the time the questioning commenced. The stated purpose of the interview was to investigate the cause of and person responsible for the Victim's injuries. Appellant was the primary suspect long before he arrived at the sheriff's office. Prestigiacomo all but admitted that his purpose was to obtain a confession from Appellant. This is clear from Prestigiacomo's direct testimony: "[H]e initially said that she had fallen. And I went on to explain to him that she had bruises on various parts of her body that needed to be explained or I needed an answer. And then I started to show him some pictures . . . ." (R. p. 67, lines 6-10). The setting was inside the locked interview room at the sheriff's office. The only people present were the two experienced police detectives and the Appellant. That the questioning was of relatively short duration does not negate the custodial nature of the questioning, and the trial judge erred in ruling to the contrary.

In State v. Evans, supra, the South Carolina Supreme Court reviewed substantially similar circumstances and found the defendant was in custody during police questioning. First, the trial judge found, and the Supreme Court agreed, that the defendant was not free to leave. Second, the place where the agents interviewed the defendant was in a back office in the police station. Third, the interview was lengthy, as it lasted three hours. Finally, the Supreme Court gave great weight to the officer's purpose. Quoting the trial judge, the Court noted:

> What really turns it for me was that when ... That **her story was challenged and once that was challenged, that changes from just a routine inquiry** to name, rank and serial number. They (Alexander and Ross), in fact, **put it to her that they did not believe her**. As soon as that occurred, then the switch over to the female officer (Edwards) occurred.

Id. at 584, 582 S.E.2d at 410 (emphasis added). Based on the above factors, the Supreme Court found Evans was in custody and police were required to advise her of the Miranda safeguards prior to questioning her.

In State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), a majority of the South Carolina Supreme Court found the nature of police questioning impacts a witness's custodial status. There, police officers questioned Navy at his home following the suspicious death of his two year old son. Navy was cooperative, but visibly upset. Navy voluntarily accompanied the officers to the police station where he provided a statement that was largely exculpatory. After Navy's initial statement, the officers informed him, for the first time, that the child had been suffocated and there was evidence the child had broken ribs. After Navy asked if he were under arrest, the officers responded that they were "just trying to get some answers." Id. at 298, 688 S.E.2d at 840. The officers then asked Navy specific questions calling into doubt his earlier responses. The Court declared that "[a]t this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." Id. In response to the officers' follow-up questions, Navy admitted he hit the child. Following this admission, an officer finally read Navy his Miranda rights. The Court, citing Seibert, supra, concluded that all but Navy's initial statement should be suppressed because they were obtained in violation of Miranda. Navy, at 303, 688 S.E.2d at 842.

Prestigiacomo's questioning of Appellant virtually mirrors the technique employed by the officers and condemned by the Court in Navy. Prestigiacomo knew he was investigating a horrendous case of child abuse. He knew Appellant was the primary, and indeed the lone, suspect. Prestigiacomo indicated in the Denno hearing that he had sufficient cause to arrest Appellant before questioning began. (R. p. 69, lines 18-21). When Appellant initially denied any wrongdoing and explained that the Victim injured herself when she fell down, Prestigiacomo insisted that he needed answers and that the child's injuries had to be explained. At this juncture, the detective produced photographs that he obtained earlier in the day and showed them to Appellant. Prestigiacomo admitted that he used the photos to bring the injuries to Appellant's attention. Prior to this time, Appellant denied knowledge of the child's injuries. (R. p. 79, lines 23-25). Even after he had elicited the initial incriminating statement, Prestigiacomo continued by showing Appellant additional photos of the child, still without advising Appellant of his constitutional rights as required by Miranda.

Appellant submits that the facts of this case are more egregious than those condemned and rejected by a majority of the Court in Navy, and the trial court erred in not suppressing Appellant's statements.

B. Question first, advise later technique

In Seibert, supra, the United States Supreme Court carefully scrutinized the questioning technique employed here by Prestigiacomo, the so-called "question first, advise later" technique. The Court in Seibert identified four factors for determining the constitutional propriety of this interrogation practice. Those factors are:

(1) the completeness and detail of the question and answers in the first round of interrogation;

(2) the timing and setting of the first questioning and the second;

(3) the continuity of police personnel; and

(4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615, 124 S.Ct. at 2612; see also, Navy, supra.

Here, Prestigiacomo began his questioning of Appellant with the knowledge that the Victim had multiple unexplained bruises all over her body. He knew Appellant had been alone with the child for almost the entire day the bruises were first observed and reported by family members. Appellant was at the top of Prestigiacomo's list of suspects. It is safe to conclude Prestigiacomo began his questioning with the intention of eliciting a confession from Appellant that he had inflicted some or all of the child's injuries. After Appellant initially denied knowledge of or responsibility for the child's injuries, Prestigiacomo produced, for the first time, a series of photographs depicting the Victim's bruises. Prestigiacomo then continued the unwarned custodial interrogation designed to elicit incriminating information; he continued his questioning designed to have Appellant admit to inflicting the child's injuries. Once those incriminating answers were given — i.e. after respondent admitted he had hit the child twice on the head, grabbed the child by the arm, picked the child up by her shirt, and been rough with the child in changing her diaper and applying ointment to the child's bottom – Appellant was given Miranda warnings, with interrogation by the same officer resuming immediately.

The four elements of Seibert are met here. Moreover, none of the curative measures suggested by Justice Kennedy in his separate concurrence in Seibert are present. That is, there were no additional warnings that the answers given by Appellant after the first statement but before the administration of Miranda warnings may not be admissible, there was no substantial

break in time, and there was no change of circumstances. Rather, the interrogation continued, practically uninterrupted, in the same interview room, with the same officers present.

The interrogation here violated Seibert and Miranda and Appellant's out of court statements should have been suppressed *in toto*, and the trial court erred in admitting them at trial. Appellant respectfully asks the Court to so find.

II. BECAUSE APPELLANT WAS NOT A PERSON RESPONSIBLE FOR THE VICTIM'S WELFARE, AS DEFINED BY S.C. CODE ANN. §63-7-20 (2010), THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT OF NOT GUILTY ON THE CHARGE OF UNLAWFUL CONDUCT TOWARD A CHILD.

At the close of the State's case and again at the close of the defense's case, Appellant moved that the trial court direct a verdict of not guilty on the charge of unlawful conduct toward a child. (R. pp. 452-455; p. 544, lines 14-18). Appellant argued he was not a "person responsible for a child's welfare," as that term is defined in S.C. Code Ann. §63-7-20 (2010). Because he did not fall within the statutory definition, Appellant essentially argued he was acting as a babysitter for the child during the relevant time frame, and therefore, he could not be found guilty of violating S.C. Code Ann. §63-5-70 (2010), as a matter of law. (R. pp. 453-54). The trial judge denied the motion at both stages of the trial.

Appellant was charged in Indictment 2010-GS-32-1860 with unlawful conduct toward a child. The statute defining this offense provides:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
> (3) wilfully abandon the child.

S.C. Code Ann. § 63-5-70 (2010).

Section 63-7-20 defines a "person responsible for a child's welfare" to include:

> [T]he child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by Section 63-13-20, of a public or private residential home, institution, agency, or childcare facility or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child. **A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.**

S.C. Code Ann. § 63-7-20 (2010) (emphasis added).

The evidence adduced at trial was that Appellant had never been left alone to care for the Victim prior to April 15, 2010, the presumed date of the incident. (R. p. 162, lines 9-16). Appellant had never changed the child's diapers. (R. p. 162, lines 6-8). He had only bathed her with the oversight of the child's mother. (R. p. 162, lines 3-5). While Appellant had provided verbal discipline to the child, he had done so at the direction of the child's mother, and pursuant to the mother's instruction. (R. p. 160, lines 15-18). Nothing in the record suggests he ever provided financial support for the child or otherwise assumed any of the typical responsibilities of a parent or guardian.

Construing the evidence in the light most favorable to the State, Appellant was babysitting the Victim on April 15, 2010. His only contact with the child, both at that time and previously, was incidental to his romantic relationship with the child's mother. It follows that he could not have been guilty of unlawful conduct toward a child as that offense is defined in Section 63-5-70.[3] Appellant, therefore, asks the Court to reverse the trial court's denial of his motion for a directed verdict of not guilty on the charge of unlawful conduct toward a child.

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[3] Appellant would point out that Section 63-5-70 is a criminal statute which must be strictly construed in favor of the accused and against the State. See, e.g., Berry v. State, 381 S.C. 630,

III. THE TRIAL COURT ERRED IN ADMITTING ENLARGED ANATOMICAL DIAGRAMS AND PHOTOGRAPHS OF THE VICTIM BECAUSE THE DIAGRAMS AND PHOTOGRAPHS WERE UNDULY PREJUDICIAL AND HAD AN UNDUE TENDENCY TO SUGGEST A VERDICT ON AN IMPROPER BASIS.

When the State sought to introduce enlarged anatomical diagrams, including enlargements of a child's genital area, Appellant's trial counsel objected. (R. p. 245, line 5-p. 246, line 8; p. 252, lines 2-17; p. 257, lines 1-5). Appellant based his objection on Rule 403 of the South Carolina Rules of Evidence. Counsel argued the enlarged diagrams exaggerated the Victim's injuries and admission of the diagrams was unduly prejudicial. The trial judge admitted the diagrams, finding they were not unduly prejudicial. (R. p. 267, line 24-p. 269, line 8). Later, when the prosecutor sought to introduce photographs of the Victim's genitalia, counsel did not object because further objection would have been futile. Appellant submits admission of the diagrams and photographs was error and this evidence should have been suppressed.

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. Id. at 429-30, 632 S.E.2d at 848. Prejudice exists when there is "a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Martucci, 380 S.C. 232, 248, 669 S.E.2d 598, 606 (Ct. App. 2008). "The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." Id. at 249, 669 S.E.2d at 607. "Photographs calculated to

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675 S.E.2d 425 (2009) (in construing a criminal statute, courts are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the accused.).

arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Jackson, 364 S.C. 329, 334, 613 S.E.2d 374, 376 (2005) (internal citation omitted).

In State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003), the defendant was convicted and sentenced to death for the murder of his two year-old son. On appeal, the South Carolina Supreme Court affirmed Haselden's conviction, but reversed the sentence of death and remanded for a new sentencing proceeding. In addition to finding Haselden was entitled to a jury charge explaining his ineligibility for parole, the Court found his death sentence was influenced by an inadmissible photograph introduced during the sentencing phase of trial. The offending photograph was an enlarged depiction of the victim's dilated anus.

The Court began its analysis by noting that the scope of the probative value of such photos is much broader during the sentencing phase of a capital case than during the guilt or innocence phase. Id. at 199, 577 S.E.2d at 450. Nonetheless, the Court found there was no legitimate purpose for admitting the enlarged photograph. Moreover, the photo's admission served only to inflame the jury, and the prejudicial nature of the photograph clearly outweighed any probative value. Id. at 202, 577 S.E.2d at 450. The Court held the photograph was not to be admitted at Haselden's resentencing trial.

Similarly, the photographs of the Victim's private parts were not relevant to any matter in dispute at Appellant's trial. The only matters in dispute were whether a criminal sexual assault or other unlawful conduct toward a child had taken place and, if so, who committed the

assault. The photographs were of no probative value in determining these issues. The only purpose for their admission was to inflame and arouse the passion of the jurors. The obvious prejudicial impact of the photographs is exacerbated by the excessive number of photographs of the child's genitalia.

Appellant submits the trial judge erred in admitting the enlarged diagrams and inflammatory and irrelevant photographs, and that their admission suggested a verdict on an improper and emotional basis. Further, this evidence impacted the jury's verdict and prejudiced Appellant's right to a fair and impartial trial. He asks that his conviction be reversed based on the admission of this patently inflammatory evidence.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the Court should reverse the denial of the directed verdict motion on the charge of unlawful conduct toward a child. Further, he submits the Court should reverse his conviction for CSC with a minor, first degree, because the trial court erred in admitting Appellant's out of court statement which was obtained in violation of Miranda, and because the trial court erred in admitting unduly prejudicial diagrams and photographs at trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

May 21, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case Nos. 2010-GS-32-1860; 2010-GS-32-1861

State of South Carolina, Respondent,

v.

Lance Austin Williams, Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant, Lance Williams, certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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Case No.: 2010-GS-32-1860; 2010-GS-32-1861

The State, Respondent,

v.

Lance Austin Williams, Appellant.

CERTIFICATE OF SERVICE

I, Holli Langenburg, employee to the attorney for the Appellant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on May 23, 2012, served by U.S. Mail, the following document to the below mentioned person(s):

Document: Brief of Appellant .

Served: Harold M. Coombs, Jr., Senior Assistant Attorney General
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Holli Langenburg

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Honorable R. Knox McMahon, Judge

THE STATE,

Respondent,

vs.

LANCE AUSTIN WILLIAMS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The defendant says that statements were obtained in violation of Miranda and asks whether admitting them was error. (Appellant's Statement of Issues on Appeal I).

2. The defendant says he was not a person responsible for the victim's welfare, § 63-7-20 (2010), and asks whether the denial of a directed verdict for unlawful conduct towards a child was error. (Appellant's Statement of Issues on Appeal II).

3. The defendant says the court admitted enlarged anatomical diagrams and photographs of the victim's genitalia which were unduly prejudicial and suggested a verdict on an improper basis. Did the court err? (Appellant's Statement of Issues on Appeal III).

STATEMENT OF THE CASE

The Lexington County Grand Jury charged the defendant with unlawful neglect of a child (2010-GS-32-1860) and criminal sexual conduct with a minor in the first degree (2010-GS-32-1861). The defendant and his counsel came to trial on March 30, 2011 before the Honorable R. Knox McMahon, Judge, and a jury. The jury found the defendant guilty. On April 5, 2011 the court imposed concurrent sentences of ten years imprisonment for unlawful neglect of a child (2010-GS-32-1860) and 25 years imprisonment for criminal sexual conduct with a minor in the first degree (2010-GS-32-1861). The defendant served a timely notice of appeal to opposing counsel.

ARGUMENT

I.

The statements by the defendant were not made in violation of Miranda, and the trial judge exercised sound discretion admitting them into evidence.

The defendant says that statements were obtained in violation of Miranda and asks whether admitting them was error. (Appellant's Statement of Issues on Appeal I). The defendant challenges the trial court's finding that the defendant was initially questioned when he was not in custody, and the officer properly advised him of his Miranda rights when he decided to arrest him. (IBOA pp. 8-9, citing ROA. p. 95, line 10 - p. 96, line 5). The defendant cites Missouri v. Seibert, 542 U.S. 600, 615, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) where the police tried to circumvent Miranda by deliberately questioning first, obtaining an incriminating admission, and then advising of rights. (IBOA). The defendant then says: [1.] The court was not correct in finding that the defendant was not in custody at the time of the initial questioning when he first made incriminating statements citing State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003) and claims Officer Prestigiacomo's questioning virtually mirrors what is condemned in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). [2.] The four elements of Seibert are met, and there are none of the curative measures suggested by Justice Kennedy in his concurrence.

Application of controlling precedent and the facts within the record support the trial judge's findings, and his rulings should be affirmed.

In camera Detective Prestigiacomo testified that on April 16 at 12:30 PM he went to the hospital, talked with medical personnel, a victim assistant and an investigator after the fifteen month old female victim had been hospitalized with fresh bruises on her neck, arms, privates, vagina, forehead, and ears. He learned from her family that the defendant watched the child during the

previous day, the 15th. About 4:25 PM when the detective telephoned the defendant, the defendant said that he was going to get his daughter. However, the defendant wanted to talk to the detective that night and to clear up the matter since he had a wedding to attend in Alabama. He agreed to meet the detective at the department and arrived around 7:00 PM, April 16, 2010 in a private vehicle with his mother and his two year old daughter. (ROA. p. 59, line 17 - p. 65; p. 75 lines 18-25; p. 77, lines 13-22). The defendant went with the detective to an interview room through a secure door; the door was not locked to a person leaving. (ROA. pp. 392; 406). The detective ensured that the defendant understood the purpose of his being at the department and obtained personal background information, and another officer (Palkowski) joined them and assisted with the interview. The defendant appeared sober and coherent and participated voluntarily in the interview. First, the defendant said that the child had fallen. The detective said that he wanted an explanation for the bruises over the child's body and showed pictures of [1] the three or four circular bruises on her arms that appeared to be finger marks. The defendant said that he had nerve damage in a hand which caused heavy handedness, he sometimes picked up his own daughter that way, and his own mother had criticized that practice. In other pictures of [2] bruises on the ears, the defendant said, not knowing his own strength, they had resulted from slapping the child twice on one side for one incident requiring discipline and twice on the other side for another incident requiring discipline. The defendant explained [3] circular bruises on the child's forehead were from a fall, and [4] a bruise on the outside of her vagina was from rubbing eczema cream on her too hard as a result of his numb hand. At that point, the officer stopped and got a statement form since he was going to arrest the defendant. (ROA. p. 66 - p. 69, line 17). The detective thought that the defendant made incriminating statements and gave the defendant the Miranda rights. The defendant appeared to understand his rights and asked was he getting arrested, and the detective said "yes." The defendant voluntarily waived his rights and

freely and voluntarily wrote a statement. (ROA. p. 69, line 18 - p. 73, line 9; p. 76, line 9 - p. 77, line 1). In his written statement the defendant acknowledged caring for the victim on April 15, 2010. Disciplinary slaps for separate incidents of throwing her toys and her cup resulted in her bruised ears. A fall while playing on rough ground caused bruises on her head. Lifting the child by her elbows left the bruises on her arm. Catching the child by her shirt collar while playing outside may have resulted in the bruise on her neck. Applying cream to her dry skin with too much force - due to the lack of feeling in his hand - left bruising around her privates. (ROA. p. 73, line 13 - p. 74, line 18). The defendant voluntarily continued the same statement by responding to written questions: he changed five diapers; he rubbed "Aveeno" lotion on her vagina; the blood came from her "butt"; he acknowledged both spanking the victim and having an anger problem; bruises on the child's vagina were from his using excessive force cleaning "poop" when he had become angry and used excessive force. (ROA. p. 74, line 19 - p. 75). The questioning began around 7:00, with Miranda rights after 15-20 minutes, and the statement concluded at 8:25. (ROA. pp. 81-83).

The court found under the totality of the circumstances the oral statement was non-custodial, voluntary, and admissible. The officer asked the defendant to come to the department. The defendant wanted to straighten out the matter since he had an out-of-state wedding to attend and came voluntarily in a private vehicle about two hours and thirty-five minutes later. He gave explanations of accidental injury. The defendant was the prime suspect but not the only suspect. He had completed high school. The entire interview was from 7:00 to 8:25 PM. The first twenty-five to thirty minutes were before the rights advisement, and the officer testified the defendant had been free to leave. Further, a reasonable person in the defendant's position - wanting to clear up a matter, coming to the department voluntarily in a private vehicle, and never requesting any help - would believe himself free to leave. The defendant was not in custody, and no rights were required. (ROA.

p. 94, line 4 - p. 95, line 23). When the officer decided to place the defendant under arrest, he advised the defendant of his rights. The defendant received his rights, waived his rights, and knowingly made a free and voluntary confession. The court found that the defendant's written statement was also admissible. (ROA. p. 95, line 23 - p. 96, line 5).

At trial the detective's testimony was substantially similar to the in camera testimony. When the defendant objected to statements before his Miranda advisement, the court reaffirmed previous rulings. (ROA. p. 393). The defendant renewed objections to his two page written statement (State's Exhibit No. 22), and the court reaffirmed previous rulings. (ROA. p. 397).

The defendant's assertion of being initially confined within an interview room (IBOA p. 4) is wide of the mark. The door was secured, apparently to avoid unauthorized entry, but it was not locked to a person coming out. (ROA. p. 406, lines 10-23). Custody is determined by an examination of the totality of the circumstances. The defendant wanted to talk to the detective, and he wanted to talk to him that night to facilitate his personal plans. The defendant went to the department, knew why he was meeting with the officers and freely gave his explanation of the child's injuries. A reasonable person in the defendant's position would have believed himself not to have been in custody when the verbal statement was given. The trial judge's ruling is supported by the record, and it should be affirmed. State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003).

The defendant relies on the brittle plurality opinion of Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004)(after 12 year old son died, defendant was concerned about his bed sores and her facing neglect charges; she wanted to burn her home and to include Donald, a mentally ill teenager living with the family; officer deliberately questioned the defendant without Miranda warnings for up to forty minutes while suggesting to her that the fire was to include Donald; when the defendant acknowledged that fact, she got a twenty minute respite and Miranda warnings,

and she made a written waiver; questioning resumed and defendant affirmed that Donald was supposed to die in the fire). In the present case the police questioned a willing and cooperative suspect about a child's injuries. The police asked about injuries, and the defendant told them what happened. There is no reasonable analogy to Seibert. Seibert addresses the horror of the police deliberately making the Miranda advisement ineffective. In observing that the present case does not have any of the curative measures suggested by Justice Kennedy in his concurring opinion, the defendant ignores the factual basis for Seibert: the police used a pre-warning statement as a false implicit suggestion that merely repeating the earlier statement would not be independently incriminating. Since the present case includes both a non-custodial interview and an effective rights advisement, the Seibert concurring opinion's suggested substantial break before the Miranda warnings or an additional warning to explain the likely inadmissibility of the pre-warning statement has no possible application.

The defendant's suggestion that the present case mirrors State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010) is unsupported by the record. In Navy a majority of the Court found that after an innocuous statement, springing the fruit of an autopsy report on the bereaved defendant, obtaining incriminating statements, and then giving Miranda rights and obtaining incriminating written statements were the equivalent of Seibert's midstream Miranda advisement. Apparently, under the circumstances of Navy, surprising the defendant with the fruit of an autopsy changed the nature of the interview to custodial interrogation. In the present case the defendant wanted to clear up the matter and voluntarily and understandingly came into the department and answered questions about his caring for the child. The police gave Miranda rights during the interview as a courtesy when the officer thought the defendant's statements had given him probable cause for arrest. Neither what the police considered to be incriminating statements nor the advisement of rights changed the otherwise

non-custodial interview into a custodial interrogation. Questioning continued after the advisement and after the defendant was apprised of his pending arrest. The present case wants Seibert's use of a key, deliberately elicited, un-warned statement to obtain a full written confession and wants Navy's surprise fruit to intimidate an unwitting suspect. The trial court's ruling is supported by the applicable law and the record and should be affirmed.

II.

The motion for directed verdict for unlawful conduct toward a child was soundly denied.

The defendant says he was acting as a babysitter for the child during the relevant time frame and, as a matter of law, could not be found guilty of violating § 63-7-20 (2010). (Appellant's Statement of Issues on Appeal II). The motions for directed verdict were denied at the close of the state's case and at the close of the defense case. (IBOA p. 15 citing ROA. pp. 452-455; p. 544, lines 14-18). The defendant says he was babysitting the victim on April 15, 2010, and his only contact with the child, both at that time and previously, was incident to his romantic relationship with the child's mother. (IBOA p. 16).

When Brittany and her infant daughter (victim, DOB 12/22/2008) lived with Brittany's father, Brittany started dating the defendant in December 2009. The defendant stayed over three or four days a week at Brittany's father's house, but they (Brittany and the defendant) planned to get their own house and to move in together. About a month before the day in question [April 15], Brittany and the victim had moved in with Lee Ann, and the defendant continued staying overnight with her - some two or three days a week. The defendant played with the victim and wanted to be a stepfather to her. The defendant was supposed to tell the victim to stop if he saw her doing something wrong but not to either raise his voice or spank her. He helped to get the child ready for bed and dressed and bathed her under supervision; he had not changed her diaper. Before April 15, he had not watched the victim by himself, but the child had been in his care while someone else was present. (ROA. pp. 153-162; p. 189, lines 17-23). On April 15 the defendant had stayed overnight and, as usual, helped out with the victim's care - including bathing the victim and two other children. The defendant shared in the responsibilities that a stepfather would have. Brittany left the home [Lee Ann's house] about 8:00 AM to help her (Brittany's) father and expected the defendant to watch the child and to change

diapers. Brittany knew that the defendant could change a diaper since he had a daughter of his own. (ROA. p. 162, line 9 - p. 166; pp. 179-180). Lee Ann's mother lived close enough to see Lee Ann's home, and Brittany and the defendant had been her guests for dinner and Sundays, including Easter. She saw that Brittany and the defendant were dating, and the defendant stayed over. She thought that Brittany and the defendant were a couple, and Brittany, the victim, and the defendant were like a family. (ROA. p. 213; pp. 215-216; pp. 218-219).

The trial judge denied the motion for directed verdict for unlawful conduct toward a child in violation of S.C. Code § 63-5-70 – rejecting the defendant's position he did not fall within its purview since he was not a person "responsible for the welfare of a child as defined in Section 63-7-20." The court found that viewing the evidence in the light most favorable to the state, there was direct and circumstantial evidence for the jury's consideration that the defendant was a person responsible for the welfare of the child as defined in S. C. Code § 63-7-20 (16): "Person responsible for a child's welfare" includes "an adult who had assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child." The court found, concerning § 63-7-20 (16), the defendant was clearly more than a babysitter or a person who had only incidental contact. To wit, there was testimony that the defendant stayed overnight at the victim's home a significant part of the time, bathed the child, and disciplined and cared for the child. That was more than incidental contact and clearly more than a paid babysitter caring for a child during a length of time. (ROA. p. 461, line 25 - p. 463, line 21; p. 544, line 14 - 545, line 3).

> A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted). Non-relatives may have a crucial and important role in the well-being of a child, and that is true when the mother of child has an intimate partner living with her, and he holds himself as a person within her child's life who is acquiring the role or responsibility of a parent or guardian for the child. See Ex parte Morris, 367 S.C. 56, 624 S.E.2d 649 (2006). The defendant on appeal says he had a romantic relationship with the victim's mother and was merely babysitting on April 15, 2010. The defendant was certainly entitled to his own understanding of the facts and to urge it for consideration by the jury. There was also evidence that the victim, the mother of the victim, and the defendant were a family with the intent of enjoying and continuing that unity. There was evidence that the defendant was a parent of his own child and parenting Brittany's child during his relationship with her and while he spent a significant and ongoing number of nights in the home where Brittany and her child lived. Viewing the evidence in the light most favorable to the State, there was evidence that the defendant was a person responsible for the child's welfare since he had assumed the role or responsibility of a parent or guardian and was clearly more than a babysitter or a person with only incidental contact. The trial judge correctly submitted the offense to the jury.

III.

The trial judge exercised sound discretion admitting into evidence diagrams and photographs.

The defendant says the court erred admitting into evidence unspecified, enlarged anatomical diagrams and unspecified photographs of the victim's genitalia which were unduly prejudicial and suggested a verdict on an improper basis. (Appellant's Statement of Issues on Appeal III).

The defendant's argument on appeal about the enlarged anatomical diagrams is to repeat the basis for trial counsel's objection: the diagrams exaggerated the victim's injuries and were unduly prejudicial. (IBOA p. 17, citing ROA. p. 267, line 24 - p. 269, line 8). At trial when the defendant objected to the introduction of a portion of the child's over-all physical examination and the facial assessment showing where any abnormality was observed, the defendant objected on the ground that the enlargement was just a copy and suggested that the state could just introduce the report itself. The court admitted the enlargement and instructed the jury: they were the finders of fact; the enlargement of the document was not to enhance, and its size was not to be considered. Rather, the enlargement was just to enable the jury to see the document as it is presented. (ROA. pp.244 - 246, line 8; p. 251, line 15 - p. 252, line 21). Further, regarding State's Exhibit Nos. 9, 10, and 11, the court noted 32 A C.J.S., Evidence, § 1245 as one example of authority supporting the admission of enlarged documents: an enlarged photograph may be admissible to show the subject or object magnified where it does not have a tendency to mislead. (ROA. p. 267, line 24 - p. 269, line 15). In sum, the enlarged diagrams effectively illustrated the witness' testimony for consideration by the finder of fact and were soundly admitted in the court's discretion.

The defendant also complains about the admission into evidence of unspecified photographs. A number of photographs, State's Exhibit Nos. 12, 13, 14, 15, 16, 17, 18, 19, and 20, were admitted into evidence with the defendant's express want of objection. (ROA. p. 282; pp. 330-331). Those include State Exhibit Nos. 13, 14, 16, 19, and 20 that the defendant included in his Designation of Matter to be Included in the Record on Appeal. The defendant feels on appeal that photographs were not relevant to any matter in dispute and their only purpose was to inflame and to arouse passion. The defendant excuses the absence of a timely trial objection to the photographs on the ground that it would have been futile since he had already objected to diagrams. The excuse is self-serving and asks the appellate court to speculate on the substance of any trial objection and to assume that the trial judge would have ruled the way that the defendant supposes. Speculation and assumption are not tasks for the appellate court. The appellate court should decline to review the admission of the photographs. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005)(an assignment of error on appeal requires making a specific contemporaneous objection at trial and securing the court's ruling on the same issue presented to the appellate court). Moreover, the defendant does not cite to any trial objection supporting his contention on appeal that "photographs of the Victim's private parts were not relevant to any matter in dispute at [his] trial." (IBOA p. 18). Even if the appellate court should consider, for the first time on appeal, the admission into evidence of any photographs of the victim's private parts, they could only reasonably be understood to be relevant to the charged criminal sexual conduct upon the minor and to illustrate testimony about the child's blood streaked diaper, abrasion and swelling in her genital area, petechiae which were consistent with trauma, bruises over the front of the pubic area, torn tissue just under the clitoris, bruising to her hymen, and injuries consistent with vaginal penetration. (ROA. pp. 260-261; pp. 272-276; p. 329; pp. 349-351). State v. Haselden, 353

S.C. 190, 577 S.E.2d 445 (2003)(in sentencing phase of capital case state introduced over objection autopsy photo of victim's dilated anus illustrating pathologist's guilt phase testimony of inserting three fingers, although there was no indication of trauma and rectal dilation after death was not unusual; held: photo implied possibility of sexual abuse when there was absolutely no evidence of such).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 14, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Honorable R. Knox McMahon, Judge

THE STATE,

Respondent,

vs.

LANCE AUSTIN WILLIAMS,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the within Final Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Richard A. Harpootlian, Esquire, Graham L. Newman, Esquire and M. David Scott, Esquire, at P.O. Box 1090, Columbia, South Carolina 29202.

I further certify that all parties required by Rule to be served have been served.

This 14th day of May, 2012.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
Honorable R. Knox McMahon, Judge

THE STATE,

Respondent,

vs.

LANCE AUSTIN WILLIAMS,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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May 14, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case Nos. 2010-GS-32-1860; 2010-GS-32-1861

State of South Carolina, Respondent,

v.

Lance Austin Williams, Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

Appellant is entitled to a new trial because his out of court statements were improperly admitted. Further the trial court should have granted a directed verdict on the charge of Unlawful Conduct Toward a Child because the evidence established Appellant was not a "person responsible for [the] child's welfare" as that term is defined by statute. Finally, the trial court erred in admitting a number of highly prejudicial photographs that were virtually devoid of any probative value.

I. Appellant's Statement was Obtained in Violation of the 5th Amendment

The record establishes that the investigating officer interrogated Appellant in a custodial setting, demanded Appellant provide an explanation for the victim's injuries, challenged Appellant's account of events, and confronted Appellant with photographs of the victim to contradict Appellant's answers – all without advising Appellant of his 5th Amendment rights. Only after Appellant had given a number of incriminating statements did the investigating officer finally advise him of his right to remain silent. By the time the officer Mirandized Appellant, any opportunity to exercise these rights in any meaningful way had been foreclosed. The investigating officer's conduct was a clear violation of the rule pronounced in Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 159 L. Ed. 2d. 643 (2004), and applied in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010).

Contrary to the trial court's ruling, a review of the record shows Appellant was not free to leave from the time he accompanied Detective Prestigiacomo into the interview room. The detective had already identified Appellant as the lone suspect when he asked him to come to the sheriff's office for questioning. And contrary to the recitation of facts set forth in Respondent's brief, the detective did not testify in the Jackson v. Denno hearing that the room in which the

interrogation took place was only locked from the outside and was not locked from the inside. (Respondent's brief, page 4). Rather, during the Denno hearing, Prestigiacomo clearly and unquestionably testified the room was locked, and Appellant had neither a key nor a code to exit the room. (R. p. 80, lines 15-19; p. 86, line 25-p. 87, line 9). Only after the trial judge had admitted Appellant's statement did Prestigiacomo change his earlier testimony and claim that he had "misspoken" when he said earlier that the room was locked from the inside. (R. p. 406, lines 10-21). Further, Prestigiacomo never told Appellant he was free to leave once the questioning commenced.

Regardless of whether the door was locked from only one side or from both sides, it is clear from Prestigiacomo's testimony Appellant was not free to leave from the moment he accompanied the detective to the interview room. Prestigiacomo identified Appellant as the prime suspect, and in essence the only suspect, before the interrogation ever commenced. Moreover, Prestigiacomo had made the decision to arrest Appellant before Appellant made an admission of guilt to the more serious charge of criminal sexual conduct. Prestigiacomo testified Appellant was not free to leave at the moment he made the first incriminating statement. At the latest, this was when appellant admitted he slapped the victim twice on the side of the head, and more likely even earlier when he admitted he had yanked the child up by her arm after she had fallen in the yard. Yet, Prestigiacomo failed to advise Appellant of his 5th Amendment rights, as required by Miranda, but instead continued to question Appellant and pressing him for an explanation of the injuries to the child's genital region. Prestigiacomo confronted Appellant with photographs, the only purpose of which was to challenge Appellant's prior statements.

Respondent attempts to distinguish the facts surrounding Appellant's interrogation, but the police tactics employed here are virtually indistinguishable from those condemned by a

majority of the Court in State v. Navy, supra. However, the only distinguishing factor respondent offers is its unsupported and factually inaccurate claim that "the defendant wanted to clear up the matter and voluntarily and understandably came into the department and answered questions . . . ." (Respondent's brief, page 7). There is no evidence Appellant "wanted to clear up the matter" until Detective Prestigiacomo phoned Appellant and told him he needed to talk to him. Rather than flee the area, Appellant did what any reasonable person would have done: he agreed to meet with the detective. When Appellant initially denied harming the child, Prestigiacomo challenged Appellant's statement, surprised Appellant by producing photographs of the child's injuries which indicated, at least in Prestigiacomo's view, that the injuries could not have occurred as Appellant had described, and demanded an explanation and an answer. (R. p. 67, lines 4-11). After eliciting an admission from Appellant that he had bruised the child's arm by grabbing it too tightly, Prestigiacomo, in what can only be interpreted as an attempt to circumvent the mandate of Miranda, proceeded to show Appellant additional photographs that purportedly contradicted Appellant's statements. (R. p. 68, lines 14-15; p. 69, lines 7-10). The circumstances attending the questioning here are factually and legally indistinguishable from those condemned in Navy, supra, and warrant a new trial.

II. Appellant Was Entitled to a Directed Verdict of Not Guilty on the Charge of Unlawful Conduct Toward a Child

The offense of Unlawful Conduct Toward a Child is a statutory offense, the terms of which must be strictly construed against the State and in favor of the defendant. See Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009); State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002).

Pursuant to South Carolina Code Section 63-5-70 (2010), the offense of Unlawful Conduct Toward a Child applies only to parents, guardians, custodians, or persons "responsible

for the welfare of a child as defined in Section 63-7-20." Appellant is not the parent, guardian or custodian of the victim, and therefore can only come within the purview of Section 63-5-70 if he meets the definition of a "person responsible for a child's welfare" set forth in Section 63-7-20. Respondent argues Appellant falls within the portion of the definition that includes "an adult who has assumed the role of a parent or guardian for the child, but who does not necessarily have legal custody of the child." Id. Respondent asserts Appellant meets this definition because he was romantically involved with the child's mother and intended to assume a parental role in the future. Appellant submits this position ignores the plain meaning of the definitional statute.

The record is uncontradicted that prior to the time of the alleged offense Appellant had never before been left alone with the child (R. p. 162, lines 9-12; p. 181, line 13); he had never before changed the child's diaper (R. p. 162, lines 6-8); and he had never bathed the child outside the mother's presence (R. p. 162, lines 3-5). Any intentions Appellant had to act in a parental role were all future plans. The child's mother testified, "[Appellant] said eventually he wanted to be a stepfather to [child]." (R. p. 180, lines 11-12). The couple's plans to be a family were all set in the future: "We talked about, after I finished school, like getting a house and everything." (R. p. 158, lines 21-22). Even when the prosecutor attempted to lead the mother into saying Appellant had assumed the role of caregiver to the child, mother provided a temporal qualification: "**That day** he was to watch her while I went and helped my dad." (R. p. 180, lines 4-5) (emphasis added). The only reasonable conclusion, based on the facts presented and construing them in the light most favorable to the State, is that on the date in question Appellant was babysitting the child.

The definitional statute explicitly excepts babysitters and incidental caregivers, and Appellant's future plans to assume the role of a step-parent to the child do not meet the statutory

definition. It follows that Appellant could not be convicted of Unlawful Conduct Toward a Child. Pursuant to the rule of lenity applied in Berry, supra, the trial court should have granted Appellant's motion for a directed verdict of not guilty on this charge.

III. Photographs of the Child's Genitalia Lacked Probative Value and the Trial Court Erred in Admitting Them

The State introduced three diagrams of a child's enlarged anatomy (State's Trial exhibits 9, 10, and 11) and five photographs of the Victim's private parts (State's Trial exhibits 13, 14, 16, 19, and 20). Appellant's trial counsel objected to the diagrams as unduly prejudicial, but admittedly did not object to the photographs because the judge's prior ruling on counsel's objection to the diagrams made further objection a futility. None of these exhibits, and particularly the photographs, should have been admitted because their prejudicial impact greatly outweighed their probative value.

Respondent argues the photographs were "relevant to the charged criminal sexual conduct . . . and to illustrate testimony about the child's blood streaked diaper, abrasion and swelling in her genital area" and other vaginal injuries. (Respondent's Brief, page 13). However, the testimony of the State's forensic nurse examiner describing these injuries was unchallenged. On cross-examination, Appellant's counsel only challenged the time of the injuries and asked the nurse examiner if her examination could accurately determine the time the child received the injuries she described. The nurse admitted she could not. The fact that the child was injured was never disputed, and the photographs depicting the injuries did not assist the jury in determining any issue in dispute, but only served to inflame the juror's passions and invite a verdict based on these passions.

This Court recently addressed an analogous issue in trial State v. Collins, Op. No. 4941, 2012 WL 469719 (S.C. Ct. App. Feb. 15, 2012). The defendant in Collins was charged with

involuntary manslaughter and three counts of owning a dangerous animal after his dogs killed a ten-year-old boy. At trial, the State introduced and the trial court admitted seven autopsy photographs of the child's partially eaten body. The Court of Appeals found the photographs added almost nothing to the jury's understanding of the testimony of the State's witnesses, and thus their probative value was minimal. On the other hand, the photographs were graphic and shocking; they were in color; they depicted a child's partially eaten body. The Court described the photos as "chilling" and "disturbing." Id. at __. The Court concluded that "the photos ha[d] precisely the effect contemplated by the definition of unfair prejudice: 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" Id. at ___ (quoting State v. Holder, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009)).

Similarly, the photographs of the fifteen month-old child's genitalia added little or nothing to the testimony of the State's forensic nurse examiner. Like the photos in Collins, they were graphic and shocking; they depicted a young child's private parts. The photographs clearly fit the definition of undue prejudice set forth in Holder, supra, and they should not have been admitted at trial.

CONCLUSION

From the time the interrogation commenced, Appellant was clearly not free to leave and a reasonable person in the circumstances would reach the same conclusion. The arresting officer extracted an admission without previously advising Appellant of his 5th Amendment right to remain silent. The trial court erred in admitting the statement at trial. Further, Appellant does not meet the statutory definition of a "person responsible for a child's welfare," and the trial court erred in failing to grant a directed verdict of not guilty on the charge of Unlawful Conduct Toward a Child. Finally, the numerous diagrams and photographs of the child's genital area were

of minimal probative value, but were highly prejudicial and tended to invite a verdict based on an improper basis. The trial court erred in admitting them. For these reasons, this Court should vacate his conviction for criminal sexual conduct and reverse his conviction for Unlawful Conduct Toward a Child.

Respectfully submitted,

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May 21, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Case No.: 2010-GS-32-1860; 2010-GS-32-1861

The State, Respondent,

v.

Lance Austin Williams, Appellant.

CERTIFICATE OF SERVICE

I, Holli Langenburg, employee to the attorney for the Appellant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on May 23, 2012, served by U.S. Mail, the following document to the below mentioned person(s):

Document: Reply Brief of Appellant

Served: Harold M. Coombs, Jr., Senior Assistant Attorney General
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Holli Langenburg

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Lance Williams, Appellant.

Appellate Case No. 2011-189886

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 5161
Heard June 6, 2013 – Filed July 24, 2013

AFFIRMED

Richard A. Harpootlian, M. David Scott, and Graham L. Newman, all of Richard A. Harpootlian, PA, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., and Assistant Attorney General John Benjamin Aplin, all of Columbia; Solicitor Donald V. Myers, of Lexington, for Respondent.

KONDUROS, J.: Lance Williams appeals his convictions of criminal sexual conduct (CSC) with a minor, first degree, and unlawful conduct towards a child. He argues the trial court erred in (1) admitting statements given in violation of

Miranda[1]; (2) denying his motion for a directed verdict for the unlawful conduct towards a child charge; and (3) admitting enlarged anatomical diagrams and photographs of the victim. We affirm.

FACTS

On April 15, 2010, Williams cared for his girlfriend's fifteen-month-old daughter (Victim) for about ten hours. That evening, Victim's mother and other family members took her to the emergency room after they noticed bruises on her face, arms, and genital area. Detective Ed Prestigiacomo visited the hospital to investigate Victim's injuries the following day. He learned Williams had cared for Victim on the day her injuries were discovered. He contacted Williams and asked him to come to the Lexington County Sheriff's Department to talk to him. Williams told Detective Prestigiacomo he wanted to clear up the matter that night because he had a wedding to attend in Alabama the following day. Williams arrived at the Department that night around 7 p.m. with his mother and two-year-old daughter.

Detective Prestigiacomo escorted Williams to an interview room while his mother and daughter stayed in the lobby. The door to the interview room was locked to people entering the room but a person could exit the room without a key or code.[2] Detective Palkowski joined them in the interview room after Detective Prestigiacomo had gotten some background information from Williams: Detective Prestigiacomo informed Williams Victim had bruises all over her body, and Williams said she had fallen. Detective Prestigiacomo showed Williams pictures of Victim's arms, which had circular bruises on them that Detective Prestigiacomo believed to be finger marks from someone holding her too tightly. Williams told Detective Prestigiacomo he sometimes picks his daughter up like that and his mother has told him he should not pick up a child like that. He informed the detectives a shard of glass had gone into his hand when he was in school and the injury caused his hand to be numb because of the severed nerves. Williams indicated that as a result of the injury, sometimes he is heavy handed. Williams offered to shake Detective Prestigiacomo's hand to demonstrate his grip, and Detective Prestigiacomo allowed him to do that.

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] Detective Prestigiacomo provided this in his testimony at trial, but during the *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, he had testified the door was locked and Williams did not have a key or the combination to open it.

Detective Prestigiacomo next showed Williams pictures of Victim's ears, revealing bruising on and behind the ears, which Detective Prestigiacomo testified is common when a person is slapped or punched in the ear. Williams stated Victim had misbehaved and the injuries occurred when he disciplined her during those two occurrences. Williams said Victim had a temper tantrum and was throwing her toys and he slapped her twice on one ear. Later, she threw her bottle down and he slapped her on the other ear twice. He said he did it for discipline and demonstrated on himself to show how he could not tell his own strength. Williams also punched the desk at some point during the interview to demonstrate how he could not feel his hand.

Detective Prestigiacomo showed Williams the third picture, which was her forehead that had several circular bruises, and another of the outside of her vagina, which was bruised. Williams stated Victim had injured her head by falling and he had to put eczema cream on her vagina and did not realize how hard he was pressing. He told Detective Prestigiacomo he was angry about having to clean her and demonstrated how much force he had used. Detective Prestigiacomo then stopped the interrogation and advised Williams of his *Miranda* rights.[3] Williams waived those rights and wrote a formal statement repeating the explanations given for Victim's injuries. In response to direct written questions by Detective Prestigiacomo, Williams added he had injured Victim's vagina while cleaning her during a diaper change because he was angry. He also wrote that he had an anger problem. Williams was arrested for physical assault and sexual assault or assault against sexual organs. A grand jury indicted him for CSC with a minor, first degree, and unlawful conduct towards a child.

At the start of the trial, the court held a *Jackson v. Denno* hearing. Detective Prestigiacomo testified about the evening Williams came to the Department. He provided that Williams was the primary suspect but Victim's mother and her roommate were also suspects. He testified Williams was not in custody during his interview before he was advised of his *Miranda* rights. Detective Prestigiacomo testified Williams was free to leave at the beginning of the interview until he gave the incriminating statements and at that point Detective Prestigiacomo administered the *Miranda* warnings.

The trial court first analyzed the oral statement and looked at *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003), and *State v. Navy*, 386 S.C. 294, 688 S.E.2d 838

[3] This occurred approximately fifteen to twenty minutes after they had started speaking about Victim's injuries.

(2010). It noted that it was to look at the totality of the circumstances from an objective standard. The trial court determined that based on "the method of arrival, the voluntary arrival, the agreement to participate, the accidental explanations, [and] the officer's testimony that the Defendant was free to leave," the oral statement was admissible because Williams was not in custody and therefore *Miranda* warnings were not required. The court noted it was making that decision based on an objective standard and not just the officer's subjective testimony that Williams was free to leave. The trial court found that "a reasonable person arriving voluntarily in a private vehicle, never requests any help, not under the influence, cooperating with the officers, wanting to clear it up, that a reasonable person would believe they were free to leave." The trial court further found once Detective Prestigiacomo decided to place Williams under arrest, he was appropriately advised of his *Miranda* rights. Thus, the written statement was admissible.[4]

During the testimony of Marlena Clary, a forensic nurse examiner, the State sought to admit enlarged copies of a report, including anatomical diagrams (State's Exhibits 9, 10 and 11). Williams objected, and the trial court overruled the objection, instructing the jury the fact that it was enlarged should not enhance or disenhance the evidence or testimony. Later, the State sought to introduce photographs into evidence (State's Exhibits 12, 13, 14, and 15). Williams stated he had no objection, and the trial court admitted the photographs into evidence.

Dr. Susan Breeland Luberoff was qualified as an expert in child abuse pediatrics and testified. During her testimony, the State sought to introduce photographs Dr. Luberoff had taken during her examination of Victim (State's Exhibits 16, 17, 18, 19, and 20). Williams stated he had no objection to the photographs.

At the close of the State's case, Williams moved for a directed verdict on the count of unlawful conduct towards a child. He argued he was not a person responsible for Victim's welfare because he was not the parent of Victim. The trial court denied the motion, finding the State presented evidence he was an adult who assumed the role or responsibility of a parent or guardian for a child, in that he stayed at the house overnight with Victim's mother a majority of the time and interacted with Victim. The court found he had more than incidental contact.

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[4] Williams later testified on his own behalf and repeated the explanations he had given during his questioning by the officers.

The jury convicted Williams of both counts. The trial court sentenced him to twenty-five years' imprisonment for CSC and ten years' imprisonment for unlawful conduct towards a child, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

LAW/ANALYSIS

I. *Miranda* Rights

Williams argues the trial court erred in admitting statements he gave before and after he was advised of his *Miranda* rights because he was in custody at the time he gave the statements. We disagree.

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004) ("The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice."). Our review of whether a person is in custody is confined to a determination of whether the ruling by the trial court is supported by the record. *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

The State may not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Custodial interrogation entails questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id.* Interrogation can be either express questioning or its functional equivalent and includes words or actions on the part of police (other than those normally attendant to arrest and custody) the police should know are reasonably likely to elicit an incriminating

response. *State v. Kennedy*, 325 S.C. 295, 303, 479 S.E.2d 838, 842 (Ct. App. 1996), *aff'd as modified*, 333 S.C. 426, 510 S.E.2d 714 (1998).

Whether a suspect was in "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" *State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002) (quoting *State v. Easler*, 327 S.C. 121, 128, 489 S.E.2d 617, 621 (1997)). "To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." *Evans*, 354 S.C. at 583, 582 S.E.2d at 410. A person is "in custody" when a person's freedom has been restricted. *State v. Caulder*, 287 S.C. 507, 515, 339 S.E.2d 876, 881 (Ct. App. 1986).

To determine whether a suspect was in custody for the purposes of *Miranda*, the Supreme Court has asked whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010). "The threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with the strength of an interrogating officer's suspicions." *Stansbury v. California*, 511 U.S. 318, 324-25 (1994) (internal quotation marks omitted). "[A]ny inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of *Miranda*."
Id. at 326.

> In [*Missouri v. Seibert*, 542 U.S. 600 (2004)], the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering *Miranda* warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted. The factors to be considered in determining whether a constitutional violation occurred in this setting, according to the *Seibert* plurality opinion, are:
> 1) the completeness and detail of the question and answers in the first round of interrogation;
> 2) the timing and setting of the first questioning and the second;

> 3) the continuity of police personnel; and
> 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841-42 (2010). In *Seibert*,

> Justice Kennedy wrote separately, stating that while he agreed with much of the plurality opinion, he wished to emphasize that not every *Miranda* violation would require suppression. He explained that an exception should be made where the officer may not have realized that a suspect is in custody and therefore a warning was required, or where the officer did not plan to question the suspect at that juncture. Justice Kennedy noted that in *Seibert*, the two-step technique was used to deliberately avoid *Miranda*, using a strategy based on the assumption that *Miranda* warnings will mean less when given after an incriminating statement has already been made. Under these circumstances, Justice Kennedy agreed the statements must be suppressed unless "curative measures" were taken. As examples of curative actions, Justice Kennedy suggested a substantial break in time and circumstances between the pre-warning statement and the warned, or an additional warning before questioning resumes that the pre-warned statement is not admissible.

Navy, 386 S.C. at 302-03, 688 S.E.2d at 842. Our supreme court held the evidence of a deliberate police practice, the "question first" strategy, was not determinative in *Seibert*. *Navy*, 386 S.C. at 304, 688 S.E.2d at 842.

In *Navy*, the supreme court noted:

> The officers began the questioning of [defendant] with knowledge that the child had been suffocated and with the intention of eliciting a confession. After [defendant]'s first oral statement, the officers "sprang" the suffocation/healing rib fractures information on [defendant], and began an unwarned custodial interrogation designed to elicit incriminating information,

> that is, questioning designed to have [defendant] admit to having hit the child and to having smothered him. Once those incriminating answers were given—i.e. after [defendant] admitted he had popped the child on the back and "patted" his mouth—[defendant] was permitted a supervised cigarette break, then given *Miranda* warnings, with interrogation by the same officer resuming immediately. Thus the four elements outlined in *Seibert* were met here.

Navy, 386 S.C. at 303, 688 S.E.2d at 842.

Simply because an interview takes place at a law enforcement center and at the initiation of police investigators does not render it a "custodial interrogation." *State v. Doby*, 273 S.C. 704, 708, 258 S.E.2d 896, 899 (1979). Rather, the fact a defendant voluntarily agreed to accompany investigators to their office and answer questions without being placed under arrest indicates a non-custodial situation. *Id.* In *Navy*, the supreme court found it was debatable whether a reasonable person would have believed he was in custody at the time the first statement was given, and thus held the trial court's finding the defendant was not in custody should have been upheld as it was supported by the record. 386 S.C. at 301, 688 S.E.2d at 841.

> Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him in custody. It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (internal quotation marks omitted).

> The initial determination of whether an individual is in custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned. Thus, a police officer's subjective view that the person being questioned is a suspect, if undisclosed, does not bear upon the question of whether that person is in custody, and the same is true where the officer's undisclosed assessment is that the person being questioned is not a suspect. However, an officer's knowledge or beliefs may bear upon the issue of whether the person being questioned is in custody if they are conveyed, by word or deed, to the person being questioned; those beliefs are relevant only to the extent they would affect how a reasonable person in the position of the person being questioned would gauge the breadth of his or her freedom of action.

George L. Blum, Annotation, *What Constitutes "Custodial Interrogation" of Adult by Police Officer Within Rule of Miranda v. Arizona Requiring that Suspect Be Informed of Federal Constitutional Rights Before Custodial Interrogation—At Police Station or Sheriff's Office, Where Defendant Voluntarily Appears or Appears at Request of Law Enforcement Personnel, or Where Unspecified as to Circumstances Upon Which Defendant Is Present*, 29 A.L.R.6th 1, § 2 (2007).

In determining whether an interrogation was "custodial" within the meaning of the *Miranda* rule, courts have considered the following factors: (1) whether the contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to interview; (2) whether the express purpose of the interview was to question the person as a witness or suspect; (3) where the interview took place; (4) whether the police informed the person he or she was under arrest or in custody; (5) whether they informed the person he or she could terminate the interview and leave at any time or whether the person's conduct indicated an awareness of such freedom; (6) whether there were restrictions on the person's freedom of movement during the interview; (7) how long the interrogation lasted; (8) how many police officers participated; (9) whether they dominated and controlled the course of the interrogation; (10) whether they manifested a belief that the person was culpable and they had the evidence to prove it; (11) whether the police were aggressive, confrontational, or

accusatory; (12) whether the police used interrogation techniques to pressure the suspect; and (13) whether the person was arrested at the end of the interrogation. *Id.* at § 3.

> Some courts have outlined several factors used to assess how a reasonable person in the defendant's situation would have understood the situation: (1) What was the location where the questioning took place, that is, was the defendant comfortable and in a place a person would normally feel free to leave, for example, at home as opposed to being in the more restrictive environment of a police station; (2) Was the defendant a suspect at the time the interview began, bearing in mind that *Miranda* warnings are not required simply because the investigation has focused; (3) Was the defendant's freedom to leave restricted in any way; (4) Was the defendant handcuffed or told he was under arrest; (5) Were threats . . . made during the interrogation; (6) Was the defendant physically intimidated during the interrogation; (7) Did the police verbally dominate the interrogation; (8) What was the defendant's purpose for being at the place where questioning took place? For example, the defendant might be at a hospital for treatment instead of being brought to the location for questioning; (9) Were neutral parties present at any point during the questioning; (10) Did police take any action to overpower, trick, or coerce the defendant into making a statement?

Id.

The Court of Appeals of Georgia has noted:

> Even if the police have probable cause to arrest at the time of the interview and secretly intend to charge the suspect at some future time, such facts are immaterial to a determination of whether the suspect was in custody at the time of the interview, except when and to what extent the police communicate their future intent to arrest during the course of the interview.

Ray v. State, 615 S.E.2d 812, 815-16 (Ga. Ct. App. 2005).

In *Evans*, the interview lasted three hours and officers challenged the defendant on the answers she gave. 353 S.C. at 581, 584, 582 S.E.2d at 409, 410. There, the trial court found the defendant to be in custody, and thus, the appellate court based its decision on whether any evidence supported that finding. Id. at 584, 582 S.E.2d at 410. In *Navy*, the court noted that the defendant was upset during the interview, which lasted three hours, and the police called into doubt his responses to their questions. 386 S.C. at 297, 303, 688 S.E.2d at 839, 842. Here, the record demonstrates Williams was not upset and the officers were not confrontational towards him.

Evidence supports the trial court's finding Williams was not in custody before he was given his *Miranda* warnings. He came to the Department voluntarily; his mother and young daughter were waiting for him; he wanted to get the matter taken care of before leaving the state for a wedding the following day; he talked with the detectives about Victim's injuries for fifteen to twenty minutes before he was given *Miranda* warnings; he never asked if he could leave or asked for anything; and the conversation leading to his incriminating statements included information about where he was from and his background. Therefore, evidence supports the trial court's finding Williams was not in custody and thus *Miranda* was not violated. Accordingly, we affirm the trial court's admission of Williams's statements.

II. Directed Verdict

Williams argues the trial court erred in denying his motion for a directed verdict on the unlawful conduct towards a child charge because he was not a person responsible for the child's welfare. We disagree.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. *State v. Venters*, 300 S.C. 260, 264,

387 S.E.2d 270, 272 (1990). Additionally, an appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. *Weston*, 367 S.C. at 292-93, 625 S.E.2d at 648.

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in [s]ection 63-7-20 to:
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
> (3) wilfully abandon the child.

S.C. Code Ann. § 63-5-70(A) (2010).

Section 63-7-20(16) of the South Carolina Code (2010) provides:

> "Person responsible for a child's welfare" includes the child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by [s]ection 63-13-20, of a public or private residential home, institution, agency, or childcare facility or *an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child.* A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.

(emphasis added).

The trial court did not err in denying Williams's motion for a directed verdict. Williams and Victim's mother had been dating for four months, and he stayed overnight with them between two and four nights a week. Williams and Victim's mother had discussed moving in together once Victim's mother finished school. She testified he wanted to be a stepfather to Victim. She would ask him to tell

Victim to stop if she was doing something wrong. Williams would instruct Victim verbally but was not allowed to physically discipline her. He had changed Victim's diaper before and would watch her while her mother was cooking. He had also bathed her before with Victim's mother in the house. He had watched her before with other adults or other children present. Williams's involvement in Victim's life was some evidence that he has assumed the role of a parent. Accordingly, the trial court did not err in denying the motion for the directed verdict. Therefore, we affirm the trial court's denial of the directed verdict motion.

III. Admission of Photographs

Williams argues the trial court erred in admitting enlarged anatomical diagrams and photographs of the victim. We disagree.

To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. *State v. Wannamaker*, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). The failure to object to photographs at the time they are offered waives the right to object to them on appeal. *Ramos v. Hawley*, 316 S.C. 534, 536, 451 S.E.2d 27, 28 (Ct. App. 1994). However, once the trial court has ruled on an objection, counsel does not need to object every time the issue arises. *Bennett v. State*, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (stating because the trial court had already ruled on an issue, trial counsel did not need to renew objection); *see also* Rule 17, SCRCrimP ("If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.").

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* "[E]vidence should be excluded when its probative value is outweighed by its prejudicial effect." *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

> Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance. Demonstrative evidence is distinguishable from exhibits that comprise

> "real" or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements.

Clark v. Cantrell, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000). In *Kelley*, the court found the trial court did not abuse its discretion in admitting hand-drawn outlines of a victim's face and body, showing numerous wounds, because they corroborated the pathologist's testimony. 319 S.C. at 177, 460 S.E.2d at 370.

"The relevance, materiality, and admissibility of photographs are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008). The trial court must balance the prejudicial effect of graphic photographs against their probative value, and that decision should be reversed only in exceptional circumstances. *Id.* at 249-50, 669 S.E.2d at 607. "Admitting photographs which serve to corroborate testimony is not an abuse of discretion. However, photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *Id.* at 250, 669 S.E.2d at 607 (citations omitted). "To constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (internal quotation marks omitted). A trial court is not required to exclude relevant evidence simply because it is unpleasant or offensive. *Id.*

Williams only objected to the admission of the anatomical diagram enlargements (State's Exhibits 9, 10, and 11). He did not object to the admission of any of the photographs.[5] He contends that any objection to the photographs was futile in light of the trial court's ruling on the diagrams. We disagree. The photographs and anatomical diagrams are not the same thing. He objected to each of the diagrams. He needed to object to at least the first picture to be able to argue that further objections would be futile. Therefore, the admission of the photographs is not preserved for our review because Williams did not object to their admission.

As to the diagrams, the nurse used them to point out Victim's injuries. Accordingly, they were relevant and corroborated her testimony. They were not graphic at all; they were simply black and white diagrams of a child's head, body,

[5] Williams submitted State's Exhibits 9, 10, 11, 13, 14, 16, 19, and 20 to this court.

and vagina. They did not have any prejudicial effect. Therefore, the trial court did not err in admitting the diagrams.

CONCLUSION

The trial court's admission of Williams's statements, denial of the directed verdict motion, and admission of the photographs and diagrams are

AFFIRMED.

HUFF and WILLIAMS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTONCOUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2011-189886

State of South Carolina, Respondent,

v.

Lance Austin Williams, Appellant.

PETITION FOR REHEARING

Appellant Lance Austin Williams, by and through his undersigned attorneys, hereby petitions the Court for a rehearing, pursuant to Rule 221, SCACR, in State v. Williams, Op. No. 5161, Filed July 24, 2013. Appellant respectfully submits the Court overlooked or misapprehended the following facts and their legal implications in its opinion.

APPELLANT WAS NOT FREE TO LEAVE WHEN HE GAVE HIS FIRST INCRIMINATING RESPONSE

While the Court correctly recites the order of events in its summary of the facts, the Court's opinion overlooks two particularly salient facts: according to Detective Prestigiacomo, the chief investigator and the only witness called by the State at the Jackson v. Denno[1] hearing,

[1] 378 U.S. 368, 84 S.Ct. 1774 (1964).

Appellant was not free to leave the interrogation room once he gave an incriminating response. (R. p. 86, lines 4-10). Further, when he testified at the Jackson v. Denno hearing, Prestigiacomo testified that the interview room where the questioning took place was locked from the inside and Appellant could not get out. (R. p. 87, lines 3-9). These facts are uncontradicted in the record.

Appellant first gave an incriminating response after Detective Prestigiacomo challenged Appellant's claim that the child had fallen while playing in the yard. After being confronted by the detective and the photographs of the child's arm, Appellant admitted he had handled the child roughly while picking her up. Appellant said his mother told him he should not handle a child that way. (R. p. 67, line 24-p. 68, line 3). This answer arguably supported a criminal charge. But Appellant unquestionably incriminated himself after Prestigiacomo showed him more photos, this time of the child's head. This second set of photos depicted bruises on both of the child's ears. Again, as described by Prestigiacomo: "I showed him pictures of [child's] ears that had visible bruising on the rim of the ear and behind it, you know, which is common when somebody is slapped or punched in the ear, it will bruise behind the ear. He told me that she had misbehaved and that these injuries occurred during two occurrences. And the way he described them was that, one, she threw a temperature [sic] tantrum . . . and that he slapped her twice in one ear, on one side from behind, and then, the second time, she threw her bottle down and that caused him to get angry and slap her on the other side twice." (R. p. 68, lines 14-25).

While Prestigiacomo testified Appellant was free to leave at the outset of questioning, his testimony was unequivocal that Appellant was "absolutely not" free to leave once he gave an incriminating statement. An admission to slapping a child four times is clearly incriminating. Moreover, the tone and tenor of the questioning converted what may have started as a non-

custodial setting into a custodial interrogation, just like the Court condemned in State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003). The facts of this case are not legally distinguishable from those in Evans. Like Evans, Appellant denied any criminal conduct when police first confronted him in the interrogation room. Following his denial, the detective indicated he did not believe Appellant, and told Appellant he needed an "explanation", "an answer". The detective then produced photographs which, in the detective's opinion, indicated Appellant was not being truthful. Although he testified Appellant was not free to leave after he gave the first incriminating response, Prestigiacomo continued to question Appellant, and to challenge Appellant's responses, both verbally and by showing Appellant photographs to refute Appellant's answers, without informing Appellant of his Fifth Amendment right to silence.

Citing Evans, a majority of the Court concluded that the nature of questioning, particularly confronting a suspect with evidence that contradicts the suspect's prior statement, is crucial to the determination that the suspect is in custody. State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). The relevant facts described in Navy indicated the following:

> After [the respondent] gave this first [exculpatory] statement, the crying and upset respondent was informed, for the first time, that the child had been suffocated and that there was evidence of broken ribs. According to Investigator Smith, respondent was shocked and surprised by this information. Respondent asked if he were under arrest, and was told "No, we are just trying to get some answers." The officers engaged in follow-up questioning, asking specifically how respondent had comforted the crying child. **At this juncture, the nature of the interrogation and respondent's status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation.**

Id. at 298, 688 S.E.2d at 840 (emphasis added).

These same factors are present here. Appellant admittedly volunteered to meet Prestigiacomo at the sheriff's department to answer questions. However, once Prestigiacomo confronted Appellant and challenged his statement, then sprang photos of the child on the

Appellant with the sole intention of eliciting an incriminating response from him, the nature of the interrogation changed from a voluntary encounter into a custodial interrogation. See Navy.

State v. Evans, supra, State v. Navy, supra, and Missouri v. Seibert, 542 U.S. 600, 124 S.Ct. 2601 (2004), all hold that the practices employed by Prestigiacomo in this case violate the constitution and that statements procured as a result should not be admitted at trial. The Court's opinion fails to draw any meaningful distinction between the facts of this case and the facts of Navy and Evans. Appellant respectfully asks the Court to rehear the matter and to rule in accordance with South Carolina Supreme Court, and the United States Supreme Court precedent.

WHEN APPELLANT INITIALLY DENIED INJURING THE CHILD, PRESTIGIACOMO CHALLENGED APPELLANT'S EXPLANATION AND CONFRONTED HIM WITH PHOTOGRAPHS

Despite Prestigiacomo's clear testimony, the Court found that "the officers were not confrontational with [Appellant]." State v. Williams, Op. No. 5161, at ___. This conclusion is not supported by the record. Prestigiacomo admittedly challenged Appellant's denial of wrongdoing. The Appellant initially denied doing harm to the child. According to Prestigiacomo, "[Appellant] told me he wasn't aware of those bruises either until I brought it to his attention by pictures." (R. p. 79, lines 23-25). Prestigiacomo refuted Appellant's denial and told Appellant he "needed an answer". As described in Prestigiacomo's own words: "We went into what happened to [child] and he . . . initially said that she had fallen. And I went on to explain to him that she had bruises on various parts of her body that needed to be explained or I needed an answer. And then I started to show him some pictures and I started out by showing him pictures of fingerprints on her arms." (R. p. 67, lines 4-11).

The Court acknowledges that "an officer's knowledge or beliefs may bear upon the issue of whether the person being questioned is in custody if they are conveyed by word or deed to the

person being questioned . . . ." Id. at __. However, the Court overlooks the undisputed fact that Prestigiacomo conveyed to Appellant the officer's belief that Appellant was not being truthful. The officer conveyed this both in words ("I needed an answer") and by deeds ("And then I started to show him some pictures . . . ."). Prestigiacomo unquestionably challenged the Appellant's initial statement and set about to disprove the statement with the photographs. Just like in Evans and Navy, both cited extensively in the Court's opinion, here the officer challenged the Appellant on the answers he gave and called into doubt his responses. To hold otherwise is to ignore the officer's own testimony. Appellant respectfully submits that the Court's opinion overlooks or misapprehends the totality of Prestigiacomo's testimony and the clear overlap between the practices employed in this interrogation and forbidden in Seibert, Evans and Navy.

APPELLANT WAS BABYSITTING THE CHILD ON THE DATE IN QUESTION AND A DIRECTED VERDICT WAS REQUIRED

The Court disposes of Appellant's argument that he was not a "person responsible for a child's welfare," as defined in S.C. Code Ann. § 63-7-20(16)[2] in a single paragraph, and essentially finds that because Appellant was romantically involved with the child's mother, he was somehow responsible for the child's welfare. The Court's analysis does not address Appellant's argument that the rule of lenity, recently affirmed in Berry v. State, requires all ambiguities in criminal statutes be construed in favor of the accused and against the State. 381 S.C. 630, 675 S.E.2d 425 (2009).

Respectfully, Appellant submits the record is devoid of any evidence that he had assumed the role of a parent or guardian to the child. In fact, it is uncontradicted that the date in question

[2] This definitional statute provides, in relevant part, that "a person whose role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian."

was the one and only time he had ever babysat the child. Applying the rule of lenity, the Appellant was entitled to a directed verdict of not guilty on the charge of Unlawful Conduct Toward a Child (S.C. Code Ann. § 63-5-70). The Court overlooked the facts and misapprehended or failed to apply the rule of lenity and Appellant's conviction on this count should be vacated.

CONCLUSION

For the reasons set forth above, the Appellant respectfully asks the Court grant this petition for rehearing, pursuant to Rule 221, SCACR.

Respectfully submitted,

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August 8, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Appellate Case No.: 2011-189886

State of South Carolina, Respondent,

v.

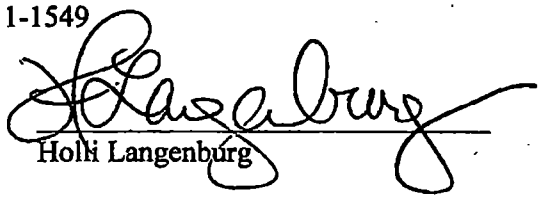
Lance Austin Williams, Appellant.

CERTIFICATE OF SERVICE

I, Holli Langenburg, employee to the attorney for the Appellant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on August 8, 2013, served by U.S. Mail, the following document to the below mentioned person(s):

Document: **Petition for Rehearing**

Served: Harold Coombs, Assistant Deputy
Ben Aplin, Assistant Deputy
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549



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August 8, 2013
VIA HAND DELIVERY

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

In Re: State of South Carolina v. Lance Austin Williams

Dear Mrs. Kitchings:

Enclosed please find for filing the original and eight (8) copies of the Petition for Rehearing. If you would be so kind as to clock-in the original and copies and return the extra copies to my courier, I would be most appreciative.

By copy of this letter, I am providing counsel of record with a copy of the same.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian

/hal
Enclosures
cc: Harold Coombs, Assistant Deputy
Ben Aplin, Assistant Deputy

The South Carolina Court of Appeals

The State, Respondent,

v.

Lance Williams, Appellant.

Appellate Case No. 2011-189886

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Huff J.

H. B. Wo J.

A. Ke J.

Columbia, South Carolina

cc:
Richard A. Harpootlian
Donald V. Myers
Graham L. Newman
M. David Scott
John Benjamin Aplin

FILED
September 19, 2013
721

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Opinion No. 5161 (S.C. Ct. App. filed July 24, 2013)

State of South Carolina, Respondent,

v.

Lance Austin Williams, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 19, 2013.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining Petitioner's out-of-court statements were properly admitted at trial?

2. Did the Court of Appeals err in determining Petitioner was not entitled to a directed verdict on the charge of Unlawful Conduct Toward a Child?

STATEMENT OF THE CASE

Petitioner was arrested in Lexington County on April 16, 2010, and charged with one count of unlawful conduct towards a child, in violation of South Carolina Code of Laws Section 63-5-70, and one count of criminal sexual conduct (CSC) with a minor, first degree, in violation of S.C. Code Ann. §16-3-155(a)(1).

The day before Petitioner's arrest, family members of the fifteen month-old Victim transported her to the emergency room at Palmetto Richland hospital after noticing several bruises on the child's face, arms and genital area. (R. p. 139, lines 6-13; p. 142, lines 3-9; p. 143, lines 1-24). Police detective Ed Prestigiacomo ("Prestigiacomo") went to the hospital to investigate the Victim's injuries. (R. p. 60, lines 14-p. 61, line 16). At the hospital, Prestigiacomo interviewed the Victim's mother and other family members. Based on these interviews, Prestigiacomo determined Petitioner Lance Austin Williams had cared for the Victim the majority of the previous day. Prestigiacomo developed Petitioner as the primary suspect in causing the Victim's injuries. (R. p. 78, line 16; p. 79, lines 18-22).

Prestigiacomo contacted Petitioner by telephone around 4:25 p.m. and asked him if he would come to the Lexington County Sheriff's Department to speak with the detective. Petitioner

arrived at the sheriff's department at approximately 7:00 p.m. on April 16, 2010. He was accompanied by his mother and young daughter. (R. p. 65, lines 3-14; p. 77, lines 13-18).

When Petitioner arrived at the sheriff's office, Prestigiacomo escorted him to an interview room. According to Prestigiacomo's testimony in the Jackson v. Denno[1] hearing, the interview room was situated behind a locked door and could only be accessed by entering a code. Petitioner was not provided the code to the interview room and he could leave only if law enforcement officers entered the correct code. Petitioner's mother and daughter remained in the lobby during the interview. (R. p. 66, line 2; p. 80, lines 7-19; p. 81, lines 9-15). Prior to the beginning of Prestigiacomo's questioning, Petitioner was "on the top of the list" of potential suspects, and Prestigiacomo had gathered enough information prior to questioning to pinpoint Petitioner as the sole perpetrator of the Victim's injuries. (R. p. 69, lines 18-21; p. 78, lines 8-16; p. 79, lines 18-25).

After Petitioner entered the interview room, Detective Prestigiacomo was joined by Detective Palkowski, who assisted in the questioning. (R. p. 66, lines 2-7). Neither detective informed Petitioner at the outset of questioning of his Fifth Amendment right to remain silent, nor did they recite to Petitioner the warnings prescribed by Miranda.[2]

When Prestigiacomo began questioning Petitioner about the Victim's injuries, Petitioner said the girl had fallen. Prestigiacomo explained to Petitioner that the Victim had bruises all over her body and that he needed an explanation – he "needed an answer." Prestigiacomo showed Petitioner photographs of the Victim. (R. p. 67, lines 4-11). First, the detective produced photographs of the bruises on the Victim's arms. Prestigiacomo knew from prior experience that the bruises were "finger marks, circular bruises on each arm." (R. p. 67, lines 19-22). Petitioner

[1] 378 U.S. 368, 84 S.Ct. 1774 (1964).
[2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct.1602 (1966).

responded that he had picked the Victim up by her arms. Next, Prestigiacomo showed Petitioner photographs of the Victim's ear. The photographs depicted visible bruising on the rim of the ear and behind it. The detective testified this type of bruising is "common when somebody is slapped or punched in the ear." (R. p. 68, lines 14-18). After seeing the photographs, Petitioner told the officers he punched the Victim twice on each side of her head. (R. p. 68, lines 22-25). Prestigiacomo testified Petitioner was not free to leave once he gave an incriminating response. Petitioner's statement that he punched the Victim was clearly incriminating, yet Prestigiacomo continued his interrogation without advising Petitioner of his Miranda rights. Instead, Prestigiacomo showed Petitioner photographs of bruises on the Victim's forehead and vagina. After Petitioner told the detectives that the Victim injured her forehead when she fell, and that the bruises to her vagina were caused when he applied cream to treat eczema, Prestigiacomo finally advised Petitioner of his Miranda rights. (R. p. 69, lines 7-17).

After receiving notice of his Miranda rights, Petitioner provided a written statement. (R. p. 70, lines 5-12; p. 73, line 6-p. 74, line 3). Following Petitioner's written statement, Prestigiacomo asked him several additional questions, and Petitioner provided written responses. (R. p. 74, lines 22-23). The officer then formally arrested Petitioner.

Following Petitioner's arrest, the Lexington County Grand Jury returned true bill indictments on each charge on July 12, 2010. Petitioner's case was called for a jury trial on March 30, 2011. At the conclusion of the State's case, Petitioner moved for a directed verdict of not guilty on both charges. Petitioner renewed his directed verdict motions at the conclusion of the defense's case. The trial judge denied the motions in both instances.

Both charges were submitted to the jury on April 1, 2011, and the jury returned guilty verdicts on both charges. Petitioner made post-trial motions, arguing the conviction for CSC with

a minor should be vacated and judgment of guilty be entered on the lesser-included offense of assault and battery of a high and aggravated nature. In addition, Petitioner made a motion for a new trial on all charges. (R. p. 613, lines 10-14). The trial judge denied all post-trial motions. (R. p. 619, lines 19-20).

On April 5, 2011, the trial judge sentenced Petitioner to twenty-five (25) years' imprisonment on the charge of first degree CSC with a minor, and to a concurrent term of ten (10) years' imprisonment on the charge of unlawful conduct towards a child. (R. p. 642, lines 10-18). Petitioner timely filed and served a notice of appeal on April 5, 2011.

The Court of Appeals heard argument on June 6, 2013, and in a published opinion filed on July 24, 2013, affirmed the trial court. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). Petitioner filed a petition for rehearing; by order dated September 19, 2013, the Court of Appeals denied the request for rehearing.

ARGUMENTS

1. The Court of Appeals should have vacated Petitioner's convictions because the trial court erroneously admitted Petitioner's out-of-court statements that were obtained in violation of Miranda.

The Court should grant this petition for a writ of certiorari because the Court of Appeal's opinion is in direct conflict with at least two prior decisions of this Court, the primary issue involves a substantial constitutional question, and the Court of Appeals' opinion decides a federal constitutional issue and conflicts with a decision of the United States Supreme Court. See Rule 242(b)(3), (4), and (5), SCACR. Petitioner's out-of-court statements, admitted at trial against him, were obtained in violation of Miranda and the rule pronounced in Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004). This was reversible error and Petitioner is entitled to a new trial.

The purpose of Miranda warnings is to apprise the defendant of his constitutional privilege to not incriminate himself while in the custody of law enforcement. Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. Law enforcement must state the Miranda warnings "after a person has been taken into custody or otherwise deprived of his freedom of action in any way." Id. To determine whether a suspect is in custody, the trial court is to examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138 (1984). See also, State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003).

The Supreme Court in Miranda concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 U.S. at 467, 86 S.Ct. at 1602. "Miranda conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." Missouri v. Seibert, 542 U.S. 600, 608, 124 S. Ct. 2601, 2608, 159 L. Ed. 2d 643 (2004). Seibert addressed the police technique of interrogating in successive, unwarned and warned phases. During the initial interrogation, the accused is not advised of his Miranda rights. After the defendant has made an incriminating statement, the interrogator provides Miranda rights and during a second stage of questioning has the defendant repeat the incriminating statement.

The Court in Seibert criticized the practice described above. The Court recognized the purpose of the practice was to circumvent Miranda. The Court identified several factors relevant to determining the admissibility of the second, post-Miranda statement: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police

personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." Seibert, at 615, 124 S.Ct. 2612. Prestigiacomo's questioning of Petitioner falls squarely within the pattern of conduct described in Seibert and found unconstitutional by the United States Supreme Court.

A. Custody Requirement

The trial judge determined Petitioner was not in custody at the time of the initial questioning and when he first made incriminating statements, and therefore, the officers were not required to provide Miranda warnings. The Court of Appeals affirmed this conclusion.

As set forth in Detective Prestigiacomo's testimony in the Jackson v. Denno hearing, he and another detective questioned Petitioner at the Lexington County Sheriff's Department, behind a closed and locked door. The door could only be opened by entering a code or combination. Petitioner had neither a key nor the combination to open the door to the interview room. (R. p. 87, lines 3-9). Interestingly, Prestigacomo's testimony at trial directly conflicted with his testimony during the Jackson v. Denno hearing: during the pretrial Denno hearing, Prestigiacomo unequivocally testified the door to the room in which the questioning took place was locked from the inside and Petitioner could not open the door. However at trial, Prestigiacomo changed his testimony and "remembered" that Lexington County had removed the lock from the door such that a person inside the room could exit without a key or passcode. The Court of Appeal's opinion fails to take into account this critical difference in the detective's conflicting versions of the interrogation. When the trial judge made his determination that Petitioner was not in custody, the only evidence before him was that the door was locked from the inside and Petitioner was not at liberty to leave the room at will. The Court of Appeals' opinion glosses over this critical contradiction in the detective's testimony and relegates the detective's testimony during the

Denno hearing, i.e., that the door was locked from the inside, to a single sentence in a footnote. Yet this testimony was all the trial judge considered when he ruled Petitioner was not in custody. Petitioner submits this was clear error.

Although Prestigiacomo testified Petitioner was initially free to leave, he admitted Petitioner was "absolutely not" free to leave after he made incriminating statements. (R. p. 86, lines 4-10). Arguably, Petitioner first made an incriminating statement when he admitted he pulled the Victim by her arm using excessive force. (R. p. 67, line 19-p. 68, line 3). Without question he incriminated himself when he told Prestigiacomo he had hit the child twice when she misbehaved. (R. p. 68, lines 14-25). Yet the detective continued with the uncounseled custodial interrogation. According to Prestigiacomo, the interview began at 7:00 p.m. and concluded at approximately 8:25 p.m.

Analyzing the factors set forth in Berkemer v. McCarty and State v. Evans, supra, a reasonable person would have concluded he was in police custody from the time the questioning commenced. The stated purpose of the interview was to investigate the cause of and person responsible for the Victim's injuries. Petitioner was the primary suspect long before he arrived at the sheriff's office. Prestigiacomo initiated contact with Petitioner by calling him and arranging the meeting. Further, Prestigiacomo all but admitted that his purpose was to obtain a confession from Petitioner. This is clear from Prestigiacomo's direct testimony: "[H]e initially said that she had fallen. And I went on to explain to him that she had bruises on various parts of her body **that needed to be explained or I needed an answer. And then I started to show him some pictures** . . . ." (R. p. 67, lines 6-10) (emphasis added). The setting was inside the interview room at the sheriff's office. Present in the room were the two experienced police detectives and the Petitioner.

That the questioning was of relatively short duration does not negate the custodial nature of the questioning, and the trial judge and Court of Appeals erred in ruling to the contrary.

In State v. Evans, supra, the South Carolina Supreme Court reviewed a factually indistinguishable set of circumstances and found the defendant was in custody during police questioning. In Evans, the trial judge found, and the Supreme Court agreed, that the defendant was not free to leave. Second, the place where the agents interviewed the defendant was in a back office in the police station. Third, the interview was lengthy, as it lasted three hours. Perhaps the most important factor considered by the Supreme Court in Evans was the officer's purpose in questioning the suspect. Quoting the trial judge, the Court noted:

> What really turns it for me was that when ... That **her story was challenged and once that was challenged, that changes from just a routine inquiry** to name, rank and serial number. They (Alexander and Ross), in fact, **put it to her that they did not believe her**. As soon as that occurred, then the switch over to the female officer (Edwards) occurred.

Id. at 584, 582 S.E.2d at 410 (emphasis added). Based on these factors, the Supreme Court found Evans was in custody and police were required to advise her of the Miranda safeguards prior to questioning her.

More recently, in State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010), a majority of the South Carolina Supreme Court found the nature of police questioning impacts a witness's custodial status. There, police officers questioned Navy at his home following the suspicious death of his two year old son. Navy was cooperative, but visibly upset. Navy voluntarily accompanied the officers to the police station where he provided a statement that was largely exculpatory. After Navy's initial statement, the officers informed him, for the first time, that the child had been suffocated and there was evidence the child had broken ribs. After Navy asked if he were under arrest, the officers responded that they were "just trying to get some answers." Id.

at 298, 688 S.E.2d at 840. The officers then asked Navy specific questions calling into doubt his earlier responses. The Court declared that "[a]t this juncture, the nature of the interrogation and [Navy]'s status changed, and what had begun as a voluntary question and answer session matured into custodial interrogation." Id. In response to the officers' follow-up questions, Navy admitted he hit the child. Following this admission, an officer finally read Navy his Miranda rights. The Court, citing Seibert, supra, concluded that all but Navy's initial statement should be suppressed because they were obtained in violation of Miranda. Navy, at 303, 688 S.E.2d at 842.

Here, Prestigiacomo's questioning of Petitioner mirrors the technique employed by the officers and condemned by the Court in Navy. Prestigiacomo knew he was investigating a horrendous case of child abuse. Petitioner was the detective's primary suspect – in actuality, he was the lone suspect. Prestigiacomo indicated in the Denno hearing that he had sufficient cause to arrest Petitioner before questioning began. (R. p. 69, lines 18-21). After Petitioner initially denied any wrongdoing and explained that the Victim injured herself when she fell down, Prestigiacomo verbally insisted that he needed answers and told Petitioner he had to explain the child's injuries. After challenging Petitioner's denial of wrongdoing, the detective then confronted Petitioner with photographs of the child's injuries. Prestigiacomo admitted he used the photographs to bring the injuries to Petitioner's attention. Prior to being confronted with the photographs, Petitioner had denied knowledge of the child's injuries. (R. p. 79, lines 23-25). Even after he had elicited the initial incriminating statement, Prestigiacomo continued his unwarned questioning by showing Petitioner additional photographs of the child, still without advising Petitioner of his constitutional rights as required by Miranda.

The facts of this case are more egregious than those condemned and rejected by a majority of the Court in Navy and Evans, and the trial court erred in not suppressing Petitioner's

statements. The Court of Appeals compared the facts here to those in Evans and distinguished them based on its conclusion that "the record demonstrates [Petitioner] was not upset and the officers were not confrontational towards him." State v. Williams, at 278, 747 S.E.2d at 202. However, nothing in the record supports the conclusion that Petitioner was not upset and Prestigiacomo's own testimony belies the conclusion that he was not confrontational. The detective clearly was confrontational: after Petitioner denied harming the victim, Prestigiacomo demanded an answer and an explanation for the injuries; then he produced one photograph after another and questioned Petitioner about each of the photographs, confronting Petitioner with each new photo. The Court of Appeals' conclusion that the detective was not confrontational is wholly unsupported by the record. The Court should grant the petition for writ of certiorari to review the Court of Appeals' opinion because the opinion conflicts with Navy and Evans.

B. Seibert is directly on point

Moreover, Prestigiacomo intentionally circumvented Miranda by employing the "question first, advise later" technique ruled unconstitutional in Seibert, supra. The Court in Seibert identified four factors for determining the constitutional propriety of this interrogation practice. Those factors are:

> (1) the completeness and detail of the question and answers in the first round of interrogation;
>
> (2) the timing and setting of the first questioning and the second;
>
> (3) the continuity of police personnel; and,
>
> (4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 615, 124 S.Ct. at 2612; see also, Navy, supra.

Here, Prestigiacomo began his questioning of Petitioner with the knowledge that the Victim had multiple unexplained bruises. The detective also knew Petitioner had been alone with the child for almost the entire day the bruises were first observed and reported. Petitioner was at the top of Prestigiacomo's list of suspects; Petitioner was the only suspect. Prestigiacomo began his questioning with the intention of eliciting a confession from Petitioner. It defies logic to conclude otherwise. When Petitioner initially denied knowledge of or responsibility for the child's injuries, Prestigiacomo produced, for the first time, a series of photographs depicting the Victim's bruises. After seeing the first series of photographs, Petitioner admitted he had been rough with the child, and incriminated himself. Prestigiacomo testified Petitioner was not free to leave after he gave his first incriminating response. Despite this testimony, Prestigiacomo did not arrest Petitioner after he gave an incriminating answer. Neither did the detective Mirandize Petitioner. Instead, he continued the questioning designed to have Petitioner admit to inflicting all of the child's injuries. Each new round of questions was accompanied by a new series of photographs depicting different injuries with which the detective confronted the Petitioner. After Petitioner admitted he had hit the child twice on the head, grabbed the child by the arm, picked the child up by her shirt, and been rough with the child while changing her diaper and applying ointment to the child's bottom, Petitioner was given Miranda warnings, with interrogation by the same detectives resuming immediately.

All four elements of Seibert are met here: (1) the first round of questioning was very detailed and complete in that the questions covered all the injuries and required Petitioner to separately explain each injury; (2) the second round of questioning immediately followed the first; (3) the same two police officers attended both rounds; and (4) the only break in continuity between the officer's question was Prestigiacomo's recitation of Miranda warnings. Moreover,

the detective followed none of the curative measures suggested by Justice Kennedy in his separate concurrence in Seibert. That is, there were no additional warnings that the answers given by Petitioner after the first statement but before the administration of Miranda warnings may not be admissible, there was no substantial break in time, and there was no change of circumstances. The interrogation continued, uninterrupted, in the same interview room, with the same detectives present.

The interrogation here violated Seibert and Miranda and Petitioner's statements should have been suppressed; the trial court erred in admitting them at trial. The Court of Appeals erred in affirming the trial court based on its unsupported conclusion that the detective did not confront Petitioner or challenge Petitioner's initial responses to questioning. Petitioner respectfully asks the Court to grant the petition for writ of certiorari and review these rulings.

2. The Court of Appeals should have reversed the trial court's failure to direct a verdict of not guilty on the charge of Unlawful Conduct Toward a Child.

Petitioner was charged in Indictment 2010-GS-32-1860 with unlawful conduct toward a child. The statute defining this offense provides:

> (A) It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
> (3) willfully abandon the child.

S.C. Code Ann. § 63-5-70 (2010).

Section 63-7-20 defines a "person responsible for a child's welfare" to include:

> [T]he child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by Section 63-13-20, of a public or private residential home, institution, agency, or childcare facility or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal

> custody of the child. **A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.**

S.C. Code Ann. § 63-7-20 (2010) (emphasis added).

At the close of the State's case and again at the close of the defense's case, Petitioner moved that the trial court direct a verdict of not guilty on the charge of unlawful conduct toward a child. (R. pp. 452-455; p. 544, lines 14-18). He argued he was not a "person responsible for a child's welfare," as that term is defined in S.C. Code Ann. §63-7-20 (2010). Petitioner argued he was essentially acting as a babysitter and, therefore, he did not fall within the statutory definition and he could not be found guilty of violating S.C. Code Ann. §63-5-70 (2010), as a matter of law. (R. pp. 453-54). The trial judge denied the motion at both stages of the trial. Petitioner was found guilty and the Court of Appeals affirmed his conviction.

The trial court's ruling and the Court of Appeals' affirmance of his conviction on this count should not stand. The trial evidence established that prior to April 15, 2010, the presumed date of the incident, Petitioner had never been left alone to care for the Victim. (R. p. 162, lines 9-16). Petitioner had never changed the child's diapers. (R. p. 162, lines 6-8). He had only bathed her with the oversight of the child's mother. (R. p. 162, lines 3-5). Petitioner had provided verbal discipline to the child only at the direction of the child's mother, and pursuant to the mother's specific instructions. (R. p. 160, lines 15-18). Nothing in the record suggests he ever provided financial support for the child or otherwise assumed any of the responsibilities typical of a parent or guardian.

Construing the evidence in the light most favorable to the State, Petitioner was babysitting the Victim on April 15, 2010. The only contact he had with the child, both at that time and previously, was incidental to his romantic relationship with the child's mother. He could not have

been guilty of unlawful conduct toward a child as that offense is defined in Section 63-5-70. Section 63-5-70 is a criminal statute which must be strictly construed in favor of the accused and against the State. See, e.g., Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009) (in construing a criminal statute, courts are guided by the rule of lenity—the principle that any ambiguity must be resolved in favor of the accused.). Petitioner had never been responsible for the child's welfare. Petitioner asserts that the trial court erred in denying the motion for directed verdict on the charge of unlawful conduct toward a child, and the Court of Appeals erred in affirming the conviction. Petitioner asks the Court to grant this petition for a writ of certiorari to review this conviction.

CONCLUSION

For the reasons set forth above, Petitioner respectfully asks the Court to grant this petition for a writ of certiorari and review the Court of Appeals' published opinion in State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). The opinion addresses a significant constitutional issue and conflicts with this Court's precedent as well as United States Supreme Court Fifth Amendment precedent. Further, the opinion ignores the uncontradicted evidence that Petitioner did not meet the statutory requirement to be convicted of unlawful conduct toward a child and the Court of Appeals erred in affirming Petitioner's conviction on that charge.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

October 21, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Opinion No. 5161 (S.C. Ct. App. filed July 24, 2013)

State of South Carolina, Respondent,

v.

Lance Austin Williams, Petitioner.

CERTIFICATE OF SERVICE

I, Holli Langenburg, employee to the attorney for the Appellants, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 21, 2013, served by U.S. Mail, the following documents to the below mentioned person(s):

Documents:
1. Petition for Writ of Certiorari
2. Appendix

Served:
Harold Coombs, Jr., Assistant Attorney General
Office of the Attorney General
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Columbia, SC 29211-1549

Holli Langenburg

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

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State of South Carolina, ... Respondent,

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Lance Austin Williams, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Missouri v. Seibert, 542 U.S. 600 (2004).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the trial court's decision to admit Petitioner's pre-Miranda and post-Miranda statements to the police where Petitioner's Seibert argument is not preserved for Appellate review and where ample evidence supports the trial court's finding Petitioner was not in custody before he was given Miranda warnings?

2. Whether the Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the unlawful conduct towards a child charge where there was ample evidence Petitioner was a person responsible for the child's welfare?

STATEMENT OF THE CASE

Petitioner was indicted at the July, 2010 term of the grand jury for Lexington County for unlawful neglect of a child (2010-GS-32-1860) and criminal sexual conduct with a minor in the first degree (2010-GS-32-1861). He was represented by James R. Snell, Jr., and H. Wayne Floyd, Esquires, of the Lexington County Bar. On March 30-April 1, 2011, Petitioner proceeded to trial by jury before the Honorable R. Knox McMahon pursuant to which he was found guilty as indicted. He was sentenced to twenty-five years' imprisonment for first-degree CSC with a minor and ten years concurrent imprisonment for unlawful neglect of a child. (App.p.1-p.7). Petitioner timely filed a notice of intent to appeal his convictions and sentences, which were affirmed in a published opinion from the Court of Appeals. State v. Williams, Op. No. 5161 (S.C. Ct. App. filed July 24, 2013) (Shearouse Adv. Sh. No. 33 at 64) (App.p.700-p.714). Petitioner submitted a Petition for Rehearing on August 8, 2013, and by Order filed September 19, 2013, the Petition was denied. (App.p.715-p.722). On October 21, 2013, Petitioner submitted a Petition for a Writ of Certiorari to this Court. This Return to the Petition for a Writ of Certiorari submitted on behalf of Respondent (the State) follows.

STATEMENT OF FACTS

The State hereby adopts the following facts, which are repeated as they appear in the published opinion from the Court of Appeals.

On April 15, 2010, Williams cared for his girlfriend's fifteen-month-old daughter (Victim) for about ten hours. That evening, Victim's mother and other family members took her to the emergency room after they noticed bruises on her face, arms, and genital

area. Detective Ed Prestigiacomo visited the hospital to investigate Victim's injuries the following day. He learned Williams had cared for Victim on the day her injuries were discovered. He contacted Williams and asked him to come to the Lexington County Sheriff's Department to talk to him. Williams told Detective Prestigiacomo he wanted to clear up the matter that night because he had a wedding to attend in Alabama the following day. Williams arrived at the Department that night around 7 p.m. with his mother and two-year-old daughter.

Detective Prestigiacomo escorted Williams to an interview room while his mother and daughter stayed in the lobby. The door to the interview room was locked to people entering the room but a person could exit the room without a key or code.[3] Detective Palkowski joined them in the interview room after Detective Prestigiacomo had gotten some background information from Williams. Detective Prestigiacomo informed Williams Victim had bruises all over her body, and Williams said she had fallen. Detective Prestigiacomo showed Williams pictures of Victim's arms, which had circular bruises on them that Detective Prestigiacomo believed to be finger marks from someone holding her too tightly. Williams told Detective Prestigiacomo he sometimes picks his daughter up like that and his mother has told him he should not pick up a child like that. He informed the detectives a shard of glass had gone into his hand when he was in school and the injury caused his hand to be numb because of the severed nerves. Williams indicated that as a result of the injury, sometimes he is heavy handed. Williams offered to

[3] Detective Prestigiacomo provided this in his testimony at trial, but during the Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), hearing, he had testified the door was locked and Williams did not have a key or the combination to open it.

shake Detective Prestigiacomo's hand to demonstrate his grip, and Detective Prestigiacomo allowed him to do that.

Detective Prestigiacomo next showed Williams pictures of Victim's ears, revealing bruising on and behind the ears, which Detective Prestigiacomo testified is common when a person is slapped or punched in the ear. Williams stated Victim had misbehaved and the injuries occurred when he disciplined her during those two occurrences. Williams said Victim had a temper tantrum and was throwing her toys and he slapped her twice on one ear. Later, she threw her bottle down and he slapped her on the other ear twice. He said he did it for discipline and demonstrated on himself to show how he could not tell his own strength. Williams also punched the desk at some point during the interview to demonstrate how he could not feel his hand.

Detective Prestigiacomo showed Williams the third picture, which was her forehead that had several circular bruises, and another of the outside of her vagina, which was bruised. Williams stated Victim had injured her head by falling and he had to put eczema cream on her vagina and did not realize how hard he was pressing. He told Detective Prestigiacomo he was angry about having to clean her and demonstrated how much force he had used. Detective Prestigiacomo then stopped the interrogation and advised Williams of his Miranda rights.[4] Williams waived those rights and wrote a formal statement repeating the explanations given for Victim's injuries. In response to direct written questions by Detective Prestigiacomo, Williams added he had injured Victim's vagina while cleaning her during a diaper change because he was angry. He also wrote that he had an anger problem. Williams was arrested for physical assault and

[4] This occurred approximately fifteen to twenty minutes after they had started speaking about Victim's injuries.

sexual assault or assault against sexual organs. A grand jury indicted him for CSC with a minor, first degree, and unlawful conduct towards a child.

At the start of the trial, the court held a Jackson v. Denno hearing. Detective Prestigiacomo testified about the evening Williams came to the Department. He provided that Williams was the primary suspect but Victim's mother and her roommate were also suspects. He testified Williams was not in custody during his interview before he was advised of his Miranda rights. Detective Prestigiacomo testified Williams was free to leave at the beginning of the interview until he gave the incriminating statements and at that point Detective Prestigiacomo administered the Miranda warnings.

The trial court first analyzed the oral statement and looked at State v. Evans, 354 S.C. 579, 582 S.E.2d 407 (2003), and State v. Navy, 386 S.C. 294, 688 S.E.2d 838 (2010). It noted that it was to look at the totality of the circumstances from an objective standard. The trial court determined that based on "the method of arrival, the voluntary arrival, the agreement to participate, the accidental explanations, [and] the officer's testimony that the Defendant was free to leave," the oral statement was admissible because Williams was not in custody and therefore Miranda warnings were not required. The court noted it was making that decision based on an objective standard and not just the officer's subjective testimony that Williams was free to leave. The trial court found that "a reasonable person arriving voluntarily in a private vehicle, never requests any help, not under the influence, cooperating with the officers, wanting to clear it up, that a reasonable person would believe they were free to leave." The trial court further found

once Detective Prestigiacomo decided to place Williams under arrest, he was appropriately advised of his Miranda rights. Thus, the written statement was admissible.[5]

During the testimony of Marlena Clary, a forensic nurse examiner, the State sought to admit enlarged copies of a report, including anatomical diagrams (State's Exhibits 9, 10 and 11). Williams objected, and the trial court overruled the objection, instructing the jury the fact that it was enlarged should not enhance or disenhance the evidence or testimony. Later, the State sought to introduce photographs into evidence (State's Exhibits 12, 13, 14, and 15). Williams stated he had no objection, and the trial court admitted the photographs into evidence.

Dr. Susan Breeland Luberoff was qualified as an expert in child abuse pediatrics and testified. During her testimony, the State sought to introduce photographs Dr. Luberoff had taken during her examination of Victim (State's Exhibits 16, 17, 18, 19, and 20). Williams stated he had no objection to the photographs.

At the close of the State's case, Williams moved for a directed verdict on the count of unlawful conduct towards a child. He argued he was not a person responsible for Victim's welfare because he was not the parent of Victim. The trial court denied the motion, finding the State presented evidence he was an adult who assumed the role or responsibility of a parent or guardian for a child, in that he stayed at the house overnight with Victim's mother a majority of the time and interacted with Victim. The court found he had more than incidental contact.

[5] Williams later testified on his own behalf and repeated the explanations he had given during his questioning by the officers.

The jury convicted Williams of both counts. The trial court sentenced him to twenty-five years' imprisonment for CSC and ten years' imprisonment for unlawful conduct towards a child, to run concurrently. This appeal followed.

CERTIORARI

Petitioner argues this Court should grant certiorari because: (1) the Court of Appeals' opinion is in direct conflict with prior decisions of this Court, (2) the primary issue involves a substantial constitutional question, and (3) the Court of Appeals' decision decides a federal constitutional issue and conflicts with a decision of the United States Supreme Court. The State disagrees with Petitioner's characterizations, and submits that pursuant to Rule 242(b), SCACR, there are no "special and important reasons" for this Court to exercise its discretion to grant review of the decision of the Court of Appeals in this matter. Indeed, in regard to Petitioner's Question 1, the Court of Appeals decision was a straightforward matter of applying existing precedent from this Court and the United States Supreme Court to the particular facts and circumstances of Petitioner's case. In applying that precedent, the Court of Appeals was bound by the trial court's factual finding that Petitioner was not in custody before he was given Miranda warnings because that finding had evidentiary support and was not controlled by an error of law. In regard to Petitioner's Question 2, none of the reasons given by Petitioner for granting certiorari apply to the decision to affirm the denial of Petitioner's motion for a directed verdict, leaving no argument in support of a grant of certiorari on Question 2. For these reasons, the State respectfully requests that Petitioner's petition for a writ of certiorari be denied and dismissed.

To the extent this Court finds Petitioner's initial characterizations make a colorable claim for the grant of certiorari, the State submits certiorari should nevertheless be denied because the Court of Appeals properly affirmed the trial court's decisions to: (1) admit Appellant's inculpatory statements to the police, and (2) deny Appellant's motion for a directed verdict on the charge of unlawful conduct towards a child.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The reviewing court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but instead, simply determines whether the trial judge's ruling is supported by any evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Likewise, the admission or exclusion of evidence rests on the sound discretion of the trial judge and will not be reversed absent an abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Moreover, "[a] trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995); see also State v. Navy, 386 S.C. 294, 301, 688 S.E.2d 838, 841 (2010) (finding appellate courts must uphold the trial court's findings regarding whether a defendant was in custody if the trial judge's ruling is supported by evidence in the

record). Thus, appellate court review of whether a person is in custody is confined to a determination of whether the ruling by the trial court is supported by evidence in the record. State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 409 (2003).

ARGUMENT

I. The Court of Appeals properly affirmed the trial court's decision to admit Petitioner's pre-Miranda and post-Miranda statements to the police where Petitioner's Seibert argument is not preserved for Appellate review and where ample evidence supports the trial court's finding Petitioner was not in custody before he was given Miranda warnings.

Petitioner argues the Court of Appeals should have vacated his convictions because the trial court erroneously admitted his out-of-court statements that were obtained in violation of Miranda and the rule pronounced in Missouri v. Seibert, 542 U.S. 600 (2004). The State disagrees, submits Petitioner's Seibert argument is not preserved for appellate review, and submits that even if preserved the trial court's finding that Petitioner was not in custody before he was given Miranda warnings was properly affirmed by the Court of Appeals because there was evidence to support that finding.

Issue Not Preserved for Appeal

Initially, the State submits Petitioner's Seibert argument is not preserved for appellate review because it was not specifically raised to or ruled upon by the trial court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) ("Issues not raised to and ruled upon by the trial court will not be considered on appeal"); see also State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011) ("An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error."); State v. Bailey, 253 S.C. 304, 170 S.E.2d 376 (1969) (holding that specific

grounds are required and that a general objection preserves nothing). "In Seibert, the Court dealt with the police practice of questioning a suspect until incriminating information is elicited, then administering Miranda warnings. Following the warnings, the suspect is again questioned and the incriminating information re-elicited. The post-warning statement is then sought to be admitted." State v. Navy, 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). Petitioner's argument at the pretrial Jackson v. Denno[6] hearing made no mention of Seibert and he never challenged "the police practice of questioning a suspect until incriminating information is elicited, then administering Miranda warnings." Instead, Petitioner claimed the pre-Miranda statement was custodial and inadmissible and that as a consequence everything that followed, including his post-Miranda statement, was fruit of the poisonous tree and should also be inadmissible. (App.p.89-p.90).[7] Then during trial, Petitioner only objected to admission of "any statement of the Defendant prior to the administration of his Miranda rights." (App.p.393) (emphasis added).

The State submits that by failing to argue Seibert at trial, Petitioner never gave the trial court the opportunity to specifically rule on this claim, and the Seibert argument made on appeal is not preserved for appellate review. Additionally, by failing to object to the admission of the post-Miranda statements at the time they were introduced at trial, Petitioner failed to preserve any objection whatsoever to any statements other than those

[6] Jackson v. Denno, 378 U.S. 368 (1964).

[7] This "fruit of the poisonous tree" analysis was specifically rejected by the United States Supreme Court in Oregon v. Elstad, 470 U.S. 298 (1985). See Seibert, 542 U.S. at 612 n4. However, our Supreme Court has recognized that evidence of a deliberate police practice, or the "question first" strategy, was not determinative in Seibert. Navy, 386 S.C. at 304, 688 S.E.2d at 842. Instead, "In a sequential confession case, clarity is served if the latter confession is approached by asking whether in the circumstances the Miranda warnings given could reasonably be found effective." Seibert, 542 U.S. at 612 n4. Petitioner did not articulate this argument at trial either.

given pre-Miranda, for purposes of this appeal. See State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (finding that an objection must be made at the time the evidence is introduced during trial in order to preserve the issue for appellate review). As a result, the only viable argument raised to the Court of Appeals in regard to the Petitioner's statements was his claim that the trial court erred in admitting his pre-Miranda statements because Petitioner was not in custody before he was given Miranda warnings. As a consequence, even if the pre-Miranda statements should have been suppressed, any error in admission was harmless beyond a reasonable doubt in light of Petitioner's post-Miranda statements, which were admitted without objection at trial.

Petitioner Not in Custody

The State submits the Court of Appeals properly affirmed the trial court's factual finding that Petitioner was not in custody before he was given Miranda warnings because there was substantial evidentiary support for this finding. Indeed, an examination of the totality of the circumstances demonstrates Petitioner's pre-Miranda statements were made in a non-custodial setting. Because these statements were non-custodial, the Court of Appeals did not face a sequential confession case like Seibert, and the post-Miranda statements were also admissible.

In Seibert, the plurality found that in a setting where there has been a sequential confession, such that an unconstitutional pre-Miranda confession precedes a post-Miranda confession, the factors to be considered in determining whether a constitutional violation occurred are: (1) the completeness and detail of the question and answers in the first round of interrogation; (2) the timing and setting of the first questioning and the second; (3) the continuity of police personnel; and (4) the degree to which the

interrogator's questions treated the second round as continuous with the first. Navy, 386 S.C. at 302, 688 S.E.2d at 841–42. Justice Kennedy concurred, explaining that while he agreed with much of the plurality opinion, he believed not every Miranda violation would require suppression. He opined that an exception should be made where the officer may not have realized that a suspect is in custody and therefore a warning was required, or where the officer did not plan to question the suspect at that juncture. Justice Kennedy noted that in Seibert, the two-step technique was used to deliberately avoid Miranda, using a strategy based on the assumption that Miranda warnings will mean less when given after an incriminating statement has already been made. Under these circumstances, Justice Kennedy agreed the statements must be suppressed unless "curative measures" were taken. As examples of curative actions, Justice Kennedy suggested a substantial break in time and circumstances between the pre-warning statement and the warned, or an additional warning before questioning resumes that the pre-warned statement is not admissible. Navy, 386 S.C. at 302–03, 688 S.E.2d at 842. However, the Seibert analysis applies where there has been a sequential confession, which only can occur after a pre-warning, custodial statement has been elicited by the police.

"To determine whether a suspect is in custody, the trial court must examine the totality of the circumstances, which include factors such as the place, purpose, and length of interrogation, as well as whether the suspect was free to leave the place of questioning." State v. Evans, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003). The appropriate inquiry involves objectively viewing the circumstances to determine whether a reasonable person in the suspect's position would have understood himself to be in

custody. Easler, 327 S.C. at 128, 489 S.E.2d at 621. Even if it is debatable whether a reasonable person would have believed himself to be in custody at the time he made the first statement, this Court should uphold the trial judge's finding that the defendant was not in custody where it is supported by the record. See Navy, 386 S.C. at 301, 688 S.E.2d at 841 ("In our opinion, it is debatable whether a reasonable person would have believed himself to be in custody at the time the first statement was given, and thus the trial court's finding that respondent was not in custody should have been upheld as it is supported by the record.")

Here, the Court of Appeals identified evidence that Petitioner came to the police station voluntarily two and a half hours after he received the call from the police. He arrived in a private vehicle, accompanied by family members. Petitioner never requested help, never expressed any discomfort or emotional distress, and he had no reason to think he was not free to leave at any time. This evidence supports the trial court's conclusion Petitioner was not in custody.

In his Petition, Petitioner argues: "Prestigiacomo's questioning . . . falls squarely within the pattern of conduct described in Seibert and found unconstitutional by the United States Supreme Court. However, the facts here lend no reasonable analogy to the facts in Seibert. In Seibert, the defendant was arrested at her house at 3 a.m., taken to the police station and interrogated without Miranda warnings for 30-40 minutes while her arm was being repeatedly squeezed by an officer. Seibert, 542 U.S. at 604-05. Here, Petitioner was a willing and cooperative suspect who voluntarily came to the police station to answer questions about Victim's injuries. The Seibert analysis and the curative measures identified by Justice Kennedy aren't germane because the setting itself was not

custodial. In fact, the State submits those curative measures only come into play where the actions by the police involve a custodial first step.

Petitioner alleges he was in custody because he was behind a closed and locked door and references Detective Prestigiacomo's pre-trial testimony the testimony took place "behind locked doors" in support of this allegation. (App.p.86-p.87). He acknowledges the subsequent trial testimony explaining that although Petitioner was behind a door in an interview room, that door was not locked from the inside (App.p.406); however, Petitioner argues this testimony "directly conflicted" with the pretrial testimony. The State disagrees. Detective Prestigiacomo's testimony was not inconsistent. At the pretrial hearing, he only said Petitioner was behind a locked door, but that is because it was locked from the outside, a distinction the trial testimony subsequently made clear.

Petitioner contends the Court of Appeals opinion "glosses over this critical contradiction in the detective's testimony" and notes the pre-trial testimony was all the trial judge considered when he ruled Petitioner was not in custody. But as found by the Court of Appeals and explained above, Detective Prestigiacomo simply clarified his testimony at trial. This trial testimony was properly considered by the Court of Appeals. See State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App. 1996) ("When the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone."). More critically in regard to the door, Petitioner was not told he was behind a locked door at the time he made the pre-Miranda statements. Whether it was in fact locked, either from the outside or the inside,

has little relevance because Petitioner never attempted to go through that door or had a reason to believe it was locked before he was given Miranda warnings.

Next, Petitioner focuses on the Detective Prestigiacomo's testimony that Petitioner was "absolutely not" free to leave after he made incriminating statements, and contends the first incriminating statements were given well before the detective decided to give him Miranda warnings. Yet as properly recognized by the Court of Appeals, subjective beliefs are not relevant to the custody inquiry unless they are relayed or communicated to the person making the statement. Stansbury v. California, 511 U.S. 318, 326 (1994) ("Any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions have remained undisclosed) is not relevant for purposes of Miranda."). Instead, the appropriate inquiry involves objectively viewing the circumstances to determine whether a reasonable person in the suspects position would have understood himself to be in custody. Easler, 327 S.C. at 128, 489 S.E.2d at 621 (emphasis added). Here, there is no evidence that Detective Prestigiacomo told Petitioner or otherwise indicated Petitioner was not free to leave at any point before he was given Miranda warnings. Instead, Detective Prestigiacomo clearly testified Petitioner was not in custody prior to being advised of his Miranda rights. (App.p.85-p.86) (emphasis added).

Finally, Petitioner attempts to analogize his case to Evans and Navy and argues the circumstances are sufficiently similar to warrant reversing the trial court's finding he was not in custody. However, both Evans and Navy are easily distinguished and the State submits they actually support the trial court's decision in Petitioner's case. In Evans, the Supreme Court affirmed the trial court's decision to suppress Evans'

inculpatory statement. The key to the decision, however, was the deference to the trial court's decision about whether the situation was custodial, particularly where the trial court used the correct objective standard in its analysis and considered the totality of the circumstances. Evans, 354 S.C. at 584, 582 S.E.2d at 410. Here, the trial court identified the proper standard for analysis, reviewed Evans and Navy, and then applied the standard to the facts of Appellant's case. The trial court noted that: (1) Although the detective called Petitioner, Petitioner chose to come in that evening, two and a half hours later; (2) Petitioner came in a private vehicle; (3) Petitioner was not the only suspect at the time of the interview so the purpose of the interview was not to get a specific incriminating statement; (4) Petitioner said he wanted to get things straightened out; (5) Petitioner never "requested help" like Evans; (6) Petitioner was educated, relatively intelligent, and did not have an emotional outbreak during the interview; (7) the entire interview lasted only one and a half hours with only thirty minutes of it happening pre-Miranda; and (8) the detective testified Petitioner was free to leave. (App.p.90-p.96). In addition to the considerations listed by the trial court, the State submits Petitioner's case is also not like Evans because: (1) the detective never challenged Petitioner's answers or claimed he didn't believe them, instead he simply showed Petitioner pictures of Victim's injuries and waited for him to offer explanations (App.p.67-p.68); and (2) there was no evidence that Petitioner's mother asked to come in to the interview and was refused entry. (App.p.81). Finally, other independent factors support the finding Petitioner was not in custody. These include: (1) the detective did not proceed thinking Petitioner might be intoxicated or confused; (2) the detective did not threaten or coerce Petitioner; (3) Petitioner never

told the detective he wanted leave or discontinue the interview; and (4) the detective testified Petitioner was not in custody (App.p.65-p.66; p.85).

In Navy, the trial court admitted Navy's pre-Miranda oral statement, a subsequent pre-Miranda written statement, and a post-Miranda written statement. Navy, 386 S.C. at 296, 688 S.E.2d at 838-39. The Court of Appeals reversed finding all three statements should have been suppressed. State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (Ct. App. 2006). This Court reversed the part of the Court of Appeals holding that the oral statement was erroneously admitted, but affirmed in regard to the remainder of the oral statement and the two subsequent written statements. However, a key point of this Court's holding was that if the question of custody is debatable, the trial court's finding should be upheld when it is supported by the record. It was only where no evidence supported a finding Navy was not in custody that reversal of the trial court was appropriate. The circumstances of Petitioner's case are not like Navy. In Navy: (1) police picked Navy up and brought him in for the interview; (2) Navy was upset and crying the entire time; (3) Navy was asked follow up questions that challenged his story, which changed the nature of the interrogation and Navy's status. Here, Petitioner was presented no surprise autopsy photos to change the nature of the interview to something custodial. Petitioner came in voluntarily to answer questions and was free to leave. He was asked follow up questions, but not in the nature of challenging his story, instead, they were more in the nature of seeking clarification or further explanation. Since there was evidence to support the trial court finding Petitioner was not in custody, both Evans and Navy stand for the proposition that the finding must be affirmed.

In conclusion, the State submits the trial judge's finding that Appellant was not in custody is supported by the record; therefore, his statements were properly admitted, and the Court of Appeals properly affirmed the trial court.

ARGUMENT

II. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion for a directed verdict on the unlawful conduct towards a child charge where there was ample evidence Petitioner was a person responsible for the child's welfare.

Petitioner argues the Court of Appeals should have reversed the trial court's failure to direct a verdict of not guilty on the charge of unlawful conduct towards a child because, construing the evidence in the light most favorable to the State, he was merely "babysitting" Victim on the day of the crimes and not acting as a "person responsible for a child's welfare" as defined in the statute. He contends that under the rule of lenity, the statute should have been strictly construed in his favor. The State disagrees and submits Petitioner's argument improperly focuses on the weight of the evidence supporting the trial court's decision rather than the existence of such evidence.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. Id. If there is any direct evidence or any substantial circumstantial evidence reasonably tending

to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. Id.; State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

The South Carolina Code provides:

> It is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to:
>
> (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;
>
> (2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered; or
>
> (3) wilfully abandon the child.

S.C. Code Ann. § 63-5-70(A) (2010). Section 63-7-20(16) of the Code provides:

> "Person responsible for a child's welfare" includes the child's parent, guardian, foster parent, an operator, employee, or caregiver, as defined by [s]ection 63–13–20, of a public or private residential home, institution, agency, or childcare facility or an adult who has assumed the role or responsibility of a parent or guardian for the child, but who does not necessarily have legal custody of the child. A person whose only role is as a caregiver and whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.

S.C. Code Ann. § 63-7-20(16) (2010) (emphasis added).

The State submits Petitioner's significant involvement in Victim's life constituted evidence that he has assumed the role of a parent or guardian. Indeed, non-relatives may have a crucial and important role in the well-being of a child, like when the mother has an intimate partner who holds himself as a person in the child's life who is acquiring the role or responsibility of a parent or guardian. See Ex parte Morris, 367 S.C. 56, 63, 624 S.E.2d 649, 652-53 (2006) (finding that a non-relative such as a custodian who has real,

material, or substantial interest in the long-term custody and potential adoption of a child has standing to participate in a family court proceeding addressing those issues).

At trial, Petitioner's girlfriend and Victim's mother, Brittany Brown, testified: (1) she and Petitioner had dated for 4 months, (2) Petitioner stayed with her three to four nights a week when she lived with her father and then two to three nights a week when she later lived with friend Leeann, (3) she and Petitioner planned for a future where they would get a house and move in together with Victim and her other child Aubrey, (4) Petitioner said he wanted to be a step-father, (5) Petitioner helped discipline Victim with verbal directions, (6) Petitioner sometimes helped get Victim ready for bed while Brown cooked dinner, (7) Petitioner dressed Victim, (8) Petitioner bathed Victim under Brown's supervision, and (9) Petitioner had watched Victim before while Brown ran errands. (App.p.155-p.158). Brown's friend, Leanne Harvey testified: (1) Petitioner and Brown lived with her for a month while dating and she saw Petitioner discipline and give directions to Victim. (App.p.190). Harvey's mother, Tommi Hutto, testified: (1) Petitioner and Brown would often come to her house for dinners and holidays, (2) Petitioner and Brown were together like a family, (3) Petitioner helped take care of Victim and disciplined Victim, and (4) Petitioner would sometimes bathe Victim and was sometimes alone with Victim. (App.p.215-p.218). When the State rested, Petitioner moved for a directed verdict. The trial court applied the proper standard and found sufficient evidence to submit the case to the jury. (App.p.461-p.463).

Petitioner then testified in his own defense, and provided additional evidence that he acted as a person responsible for Victim's welfare. He testified: (1) he was more or less like family with the Browns (App.p.486), (2) (R.p.498) he had changed Victim's

diaper before at Brown's father's house (App.p.498), (3) he held a special place in his heart for Victim and would change her diapers (App.p.520), and (4), by getting involved with Brown he knew Victim would become part of his life (App.p.527). This evidence solidified the trial court's decision in regard to the sufficiency of the evidence that shows Petitioner was a person responsible for the Victim's welfare. See State v. Harry, 321 S.C. 273, 277, 468 S.E.2d 76, 79 (Ct. App. 1996) ("When the defendant presents testimony, he loses the right to have the court review the sufficiency of the evidence based on the state's evidence alone."). To the extent Petitioner continues to rely on the rule of lenity, the State submits it has no application because no genuine ambiguity exists as a result of the proposed application of the statutes. State v. Samuels, 403 S.C. 551, 558, 743 S.E.2d 773, 777 (2013). A disagreement over whether particular facts and circumstances meet a statutory definition does not mean that statute is ambiguous. Indeed, the jury's role typically involves making such determinations.

In conclusion, the State submits that in viewing all of this evidence in the light most favorable to the State, there was sufficient evidence Petitioner was a person responsible for the victim's welfare and not merely a babysitter or a person with incidental contact. The trial court properly denied the motion for a directed verdict and submitted the unlawful conduct towards a child charge to the jury, and the Court of Appeals properly affirmed that decision.

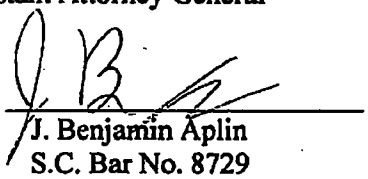
CONCLUSION

For all of the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the lower court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina
November 27, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

R. Knox McMahon, Circuit Court Judge

Opinion No. 5161 (S.C. Ct. App. filed July 24, 2013)
Appellate Case No: 2013-002248

State of South Carolina, ...Respondent,

v.

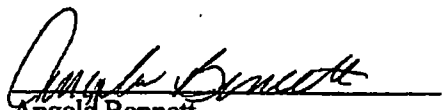
Lance Austin Williams, ...Petitioner.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Return to Petition for a Writ of Certiorari*, dated November 27, 2013, on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

M. David Scott, Esquire
Richard A. Harpootlian, Esquire
Graham L. Newman, Esquire
P.O. Box 1090
Columbia, South Carolina 29202

I further certified that all parties required by Rule to be served have been served. This 27th, day of November, 2013.



Angela Bennett
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The Supreme Court of South Carolina

The State, Respondent,

v.

Lance Williams, Petitioner.

RECEIVED
JUL 25 2014
SC Court of Appeals

Appellate Case No. 2013-002248
Lower Court Nos. 2010-GS-32-01861, 2010-GS-32-01860

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Williams*, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013). The petition is denied.

C.J.
FOR THE COURT

Columbia, South Carolina

July 24, 2014

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Beth Carrigg
Harold M. Coombs, Jr.
John Benjamin Aplin
Richard A. Harpootlian
M. David Scott
Graham L. Newman
Donald V. Myers

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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V. CLAIRE ALLEN
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August 02, 2014

The Honorable Beth Carrigg
205 E Main St Ste 146
Lexington SC 29072-3557

REMITTITUR

Re: The State v. Williams, Lance
Lower Court Case No. 2010GS3201861, 2010GS3201860
Appellate Case No. 2011-189886

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Due to the oversized nature of the exhibits, the South Carolina Attorney General's Office will be required to pick up the exhibits and return them to the Clerk of Court for Lexington County, within ten days from the above mentioned date.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

Enclosure

cc: Richard A. Harpootlian, Esquire
Donald V. Myers, Esquire
Graham L. Newman, Esquire
M. David Scott, Esquire
John Benjamin Aplin, Esquire

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

COPY

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2014 DEC 31 A 9:42
BETH A. CARRIG...
CLERK OF COU...
LEX...

Lance Austin Williams
Plaintiff(s)

vs.

State of South Carolina
Defendant(s)

CIVIL ACTION COVERSHEET

2014-CP-32- 769

JM

2014CP3204769

Submitted By: Richard A. Harpootlian
Address: PO Box 1090, Cola SC 29202

SC Bar #: 2625
Telephone #: 803/252-4848
Fax #: 803/252-4810
Other:
E-mail: rah@harpootlianlaw.com

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

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

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

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☒ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** December 31, 2014

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

JM

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

2014 CP 3204769

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

   a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

   b. Requests for temporary relief;

   c. Appeals

   d. Post Conviction relief matters;

   e. Contempt of Court proceedings;

   f. Forfeiture proceedings brought by governmental entities;

   g. Mortgage foreclosures; and

   h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

JM

COPY

FORM 5

FILED

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) 2014 CP 3204769

Lance Austin Williams, SCDC # 00345477
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Center

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2010-GS-32-01860: Unlawful Neglect of a Child

   (b) 2010-GS-32-01861: Criminal Sexual Conduct First Degree

   (c) ____

5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

(a) April 5, 2011

(b) April 5, 2011

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _x_

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. Petition for Writ of Certiorari denied

iii. _____

(c) the date of each such result:

i. July 24, 2013 (petition for rehearing denied September 19, 2013)

ii. July 24, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)

ii. Denial of Petition for Writ of Certiorari was unpublished

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in

JM COPY

2014CP3204769

custody unlawfully:

(a) See Attachment A

(b) ____

(c) ____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Attachment A

(b) ____

(c) ____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Except as set forth in response to questions 7 and 8 above, no.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. ____

iii. ____

iv. ____

(b) the name and location of the Court in which each was filed:

i. ____

ii. ____

iii. ____

iv. ____

(c) the disposition thereof:

i. ____

FILED
2014 DEC 31 A 9:42
BETH A. CARRIG
CLERK OF COURT

Revised 3/2003

ii. ____
iii. ____
iv. ____

(d) the date of each such disposition:

i. ____
ii. ____
iii. ____
iv. ____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. ____
ii. ____
iii. ____
iv. ____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A
ii. ____
iii. ____

(b) the proceedings in which each ground was raised:

i. ____
ii. ____
iii. ____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Applicant's claims of ineffective assistance of trial counsel could not have been presented on direct appeal.

2014CP3204769

(b) ____

(c) ____

COPY

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. James R. Snell, Jr.

ii. H. Wayne Floyd

iii. Richard A. Harpootlian

(b) the proceedings at which each such attorney represented you:

i. Arraignment and trial

ii. Arraignment and trial

iii. Appeal to South Carolina Court of Appeals and Petition for Writ of Certiorari to the South Carolina Supreme Court

19. State clearly the relief you seek in filing this application:

Vacation of my convictions and a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

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2014 DEC 31 A 9:42
BETH A. CARMACK
CLERK OF COURT

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2014CP3204769

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Richland)

I, Lance Austin Williams, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

L. Williams

COPY
JM

SWORN to and subscribed before me this 16th day of December, 2014.

Dawn Lashley (L.S.)
Notary Public

My Commission Expires: July 11, 2022

FILED
2014 DEC 31 A 10:42
BETH A. CARRIG
CLERK OF COURT

Revised 3/2003

COPY

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

JM

I, Lance Austin Williams, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this 11th day of December, 2014.

Notary Public

2014CP3204769

My Commission Expires: July 19, 2022

FILED
2014 DEC 31 A 8:42
BETH A. CARR
CLERK OF COURT
LEXINGTON

Revised 3/2003

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ATTACHMENT A

10. Applicant is being held in custody unlawfully because he was denied effective assistance of counsel at trial in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

11. Applicant's trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. These photographs were highly prejudicial and served the sole purpose of inflaming the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence. In its opinion affirming Applicant's convictions, the Court of Appeals found any error in admitting the photographs was not preserved for review on direct appeal because trial counsel failed to contemporaneously object to their admission.

Trial counsel failed to call several witnesses to testify at trial. These witnesses would have testified on several issues key to Applicant's defense, including the frequency and prevalence of false confessions in criminal cases, police tactics used to obtain false confessions, like those tactics employed by police in obtaining Applicant's statement, later introduced at trial to help convict Applicant.

Trial counsel failed to raise with specificity the argument that Applicant's out-of-court statement should not have been admitted at trial because the statement was obtained in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Navy*, 386 S.C 294, 688 S.E.2d 838 (2010); and *State v. Evans*, 354 S.C 579, 582 S.E.2d 407 (2003). In addition to not raising the admissibility of Applicant's statement with specificity, trial counsel failed to cross-examine the State's leading witness, Detective Prestigiacomo, after the detective's trial testimony was substantially and materially different from the testimony he provided during the *in camera Jackson v. Denno* hearing that provided the basis for admitting Applicant's out-of-court statement.

All of trial counsel's failures summarized above fell below an objective standard of effective representation and each of the failures was independently prejudicial to the Applicant. Based on each individual failure and the combination failures and their cumulative effect on the outcome of the trial, Applicant is entitled to have his convictions vacated.

2014CP3204769

Respectfully submitted,

JM COPY

Richard A. Harpootlian
rah@harpootlianlaw.com
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810

ATTORNEY FOR PETITIONER
LANCE AUSTIN WILLIAMS

Columbia, South Carolina
December 17, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
Lance Austin Williams, S.C.D.C. No. 345477	)	C.A. No. 2014-CP-32-4769
Applicant,	)	
v.	)	**RETURN** [1]
State of South Carolina,	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief filed December 31, 2014, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. In July 2010, the Lexington County Grand Jury indicted Applicant for unlawful neglect of a child (2010-GS-32-1860) and criminal sexual conduct (CSC) with a minor, first degree (2010-GS-32-1861). James R. Snell, Jr., Esq., and H. Wayne Floyd, Esq., represented Applicant. On March 30-April 1, 2011, Applicant proceeded to a trial before the Honorable R. Knox McMahon and a jury. He was found guilty as indicted. On April 5, 2011, Judge McMahon sentenced Applicant to a term of ten (10) years imprisonment for Unlawful Neglect of a Child and to a term of twenty-five (25) years imprisonment for CSC with a minor, first degree. These sentences were to be served concurrently.

[1] Richard 'Dick' Harpootlian has been retained by Applicant as Counsel.

A timely notice of appeal was filed on April 5, 2011, and perfected on Applicant's behalf by Richard 'Dick' Harpootlian, Esq. The South Carolina Court of Appeals affirmed Applicant's convictions. State v. Williams, 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013) (filed July 24, 2013). Applicant filed a Petition for Rehearing on August 8, 2013. The Court of Appeals denied this Petition on September 19, 2013. Applicant then petitioned for Writ of Certiorari on October 21, 2013. By Order dated July 24, 2014, the Supreme Court denied the petition and the Remittitur was issued on August 2, 2014.

II.

In his current Application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. "Trial Counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute"
   b. "Trial counsel failed to call several witnesses to testify at trial"
   c. "Trial counsel failed to raise with specificity the argument that Applicant's out-of-court statement should not have been admitted at trial because the statement should not have been admitted at trial"

Respondent denies Applicant is entitled to relief on any of these claims, and demands strict proof thereof. Any claims not specifically enumerated in the application or amendments thereto will be opposed by Respondent at the evidentiary hearing. All amendments should be made well in advance of hearing and should be filed in compliance with Rule 11, SCRCP.

Attached to this return and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), Trial Transcript and documents pertaining to Applicant's direct appeal. Any records not attached will be forwarded upon receipt. Respondent reserves the right to amend this return upon receipt of any relevant materials.

III.

Respondent submits Applicant's allegation of ineffective assistance of trial counsel is without merit. In a PCR action, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the plea proceedings "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S.at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. Id. at 117, 386 S.E.2d at 625. First, the Applicant must prove plea counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of trial counsel probably raises questions of fact the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent denies each and every allegation not hereinbefore expressly admitted, qualified, or explained.

[Signature block on following page]

V.

WHEREFORE, having made its return, Respondent requests an evidentiary hearing be held.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-3737

Aug 13th, 2015

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON LANCE AUSTIN WILLIAMS, #345477 Applicant, vs STATE OF SOUTH CAROLINA, Respondent.	IN THE COURT OF COMMON PLEAS 2014-CP-32-4769 AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Richard A. Harpootlian, Esquire
Richard A. Harpootlian, PA
PO Box 1090
Columbia, SC 29202

DATED this 13TH day of August, 2015.

Ashley Haworth

Ashley Haworth, Legal Assistant
For Respondent

FORM 5

ORIGINAL

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

FILED
2016 OCT 25 AM 10:42
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2014-CP-32-04709

Lance Austin Williams,)
SCDC # 00345477)
Full name and prison number (if any) of Applicant.)

AMENDED

v. APPLICATION FOR

State of South Carolina POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Kirkland Corrrectional

2. Name and location of Court which imposed sentence Lexington County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2010-GS-32-01860: Unlawful Neglect of a Child

   (b) 2010-GS-32-01861: Criminal Sexual Conduct First Degree

   (c) ____

5. The date upon which sentence was imposed and the terms of the sentence:

Revised 3/2003

(a) April 5, 2011

(b) April 5, 2011

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _x_

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. South Carolina Supreme Court

iii. _____

(b) the result in each such Court to which you appealed:

i. Convictions and sentences affirmed

ii. Petition for Writ of Certiorari denied

iii. _____

(c) the date of each such result:

i. July 24, 2013 (petition for rehearing denied September 19, 2013)

ii. July 24, 2014

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 405 S.C. 263, 747 S.E.2d 194 (Ct. App. 2013)

ii. Denial of Petition for Writ of Certiorari was unpublished

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

(a) See Attachment A

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See Attachment A

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Except as set forth in response to questions 7 and 8 above, no.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Applicant's claims of ineffective assistance of trial counsel could not have been presented on direct appeal.

(b) ____

(c) ____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. James R. Snell, Jr.

ii. H. Wayne Floyd

iii. Richard A. Harpootlian

(b) the proceedings at which each such attorney represented you:

i. Arraignment and trial

ii. Arraignment and trial

iii. Appeal to South Carolina Court of Appeals and Petition for Writ of Certiorari to the South Carolina Supreme Court

19. State clearly the relief you seek in filing this application:

Vacation of my convictions and a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

Respectfully submitted,

Richard A. Harpootlian
rah@harpootlianlaw.com
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street (29201)
Post Office Box 1090
Columbia, South Carolina 29202
Phone (803) 252-4848
Facsimile (803) 252-4810

ATTORNEY FOR PETITIONER
LANCE AUSTIN WILLIAMS

Columbia, South Carolina
October 24, 2016

ATTACHMENT A

10. Applicant is being held in custody unlawfully because he was denied effective assistance of counsel at trial in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

11. Applicant's trial counsel failed to contemporaneously object at trial to the introduction of prejudicial evidence including, but not limited to, photographs that were not relevant to any matter in dispute. These photographs were highly prejudicial and served the sole purpose of inflaming the passions and prejudices of the jury, and invited a verdict based on factors other than the admissible evidence. In its opinion affirming Applicant's convictions, the Court of Appeals found any error in admitting the photographs was not preserved for review on direct appeal because trial counsel failed to contemporaneously object to their admission.

Trial counsel failed to call several witnesses to testify at trial. These witnesses would have testified on several issues key to Applicant's defense, including the frequency and prevalence of false confessions in criminal cases, police tactics used to obtain false confessions, like those tactics employed by police in obtaining Applicant's statement, later introduced at trial to help convict Applicant. Trial counsel also failed to call a witness that would have testified that the alleged victim's injuries were consistent with Applicant's testimony at trial.

Trial counsel failed to raise with specificity the argument that Applicant's out-of-court statement should not have been admitted at trial because the statement was obtained in violation of *Missouri v. Seibert*, 542 U.S. 600 (2004); *State v. Navy*, 386 S.C 294, 688 S.E.2d 838 (2010); and *State v. Evans*, 354 S.C 579, 582 S.E.2d 407 (2003). In addition to not raising the admissibility of Applicant's statement with specificity, trial counsel failed to cross-examine the State's leading witness, Detective Prestigiacomo, after the detective's trial testimony was substantially and

materially different from the testimony he provided during the *in camera Jackson v. Denno* hearing that provided the basis for admitting Applicant's out-of-court statement.

All of trial counsel's failures summarized above fell below an objective standard of effective representation and each of the failures was independently prejudicial to the Applicant. Based on each individual failure and the combination failures and their cumulative effect on the outcome of the trial, Applicant is entitled to have his convictions vacated.

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

COUNTY OF LEXINGTON

C/A NO.: 2014-CP-32-04769

Lance Austin Williams, SCDC #00345477

Plaintiff,

vs.

State of South Carolina

Defendant.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for the Applicant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on October 25, 2016, served by having the below documents placed in the United States Mail, first class postage affixed, to the following mentioned person:

Document: Amended Application for Post-Conviction Relief

Served: Johanna Valenzuela, Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

Holli Miller

HARPOOTLIAN
ATTORNEYS AT LAW

RICHARD A. HARPOOTLIAN
RAH@HARPOOTLIANLAW.COM
CHRISTOPHER P. KENNEY
CPK@HARPOOTLIANLAW.COM
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29202

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FACSIMILE (803) 252-4810
TOLL FREE (866) 706-3997
ONLINE
HARPOOTLIANLAW.COM

October 25, 2016
VIA HAND DELIVERY

FILED
2016 OCT 25 PM 0:42
BETH A. CARRIG
CLERK OF COURT
LEXINGTON CO. S.C.

Beth Carrig, Clerk of Court
Lexington County
205 E. Main Street
Lexington, SC 29072

In re: Lance Austin Williams, #00345477 v. State of South Carolina
C/A No.: 2014-CP-32-04769

Dear Ms. Carrig:

Enclosed please find the original and two copies the Amended Application for Post-Conviction Relief in connection with the above-referenced matter. Please clock-in the original and copies and return the copies to my courier.

By copy of this letter, I am serving a copy of the same on Assistant Attorney General Johanna Valenzuela.

Thank you for your assistance in this matter.

With warm personal regards, I am

Sincerely,

Richard A. Harpootlian FOR

/hm
Enclosures
cc: Johanna Valenzuela, Assistant Attorney General

ALAN WILSON
ATTORNEY GENERAL

October 24, 2016

The Honorable Beth Carrigg
Clerk of Court, Lexington County
205 E. Main St., Ste 146
Lexington, SC 29072-3557

Re: **Lance Williams, #345477 v. State of South Carolina**
2014-CP-32-1769

Dear Ms. Carrigg:

Enclosed please find a copy of the records from the South Carolina Department of Corrections to be filed with the above-referenced case. Normally, I would have filed this document with the exhibits to the State's Return, but the transcript did not become available until recently. The State's Return was filed on August 23, 2015.

Sincerely,

JCV for JCV

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General

JCV/bea
Enclosure

cc: Richard A. Harpootlian, Esquire

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

11:27:43 Wednesday, January 21, 2015

New

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 01/21/15
OMCOMITA RELEASE DATE SCREEN C023981

SCDC# > 00345477 LOC: KIRKLAND
WILLIAMS, LANCE AUSTIN SCDC CLASSIFICATION..: VIOLENT
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL REGISTRY..: Y
SEXUAL PREDATOR..: PENDING
DNA STATUS.....: COMPLETED
GPS REQUIREMENT..: Y
PREA DECISION....:

CURRENT SENTENCE: 025-00-000 CONSECUTIVE SENTENCE ..: N
025-00-000 CURRENT SENT START DATE: 04/16/2010
PROJECTED COMPLETION DATES
MAXOUT DATE .....: 04/10/2035 CURRENT EWC .: 3 F 5
YOA SIX YEAR DATE: / / CURRENT EEC .: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED .....: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ..: 000408 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS ....: 000000 CURRENT OR PRIOR SEX CONDUCT CONVICT
TOTAL EXTRA EARNED CREDITS .: 000 SUPERVISED REENTRY DATE..: 00/00/00
TOTAL SERVICE TIME EARNED ..: 001715 ISS.....:

PFKEYS: 5:HISTORY OF DATE CHANGES

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 01/21/15 C0239

WILLIAMS,LANCE AUSTIN FBI # 575365HD6 SID# SC01938593 SCDC # 00345477
OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
INSTITUTION ..: KIRKLAND CORR INST
SECURITY/CUST.: 3 MINIMUM IN
CURR INCARC SENT...: 25 YRS 0 MOS 0 DYS
CENTRAL MONITORING.: YES
SOCIAL SECURITY #...: [redacted]

CURRENT PROGRAM..: NO CURRENT PROGRAM
AGE...: 29 DATE OF BIRTH..: [redacted]

DORM.....: B20012A
RACE....:W SEX...:M
PROJ MAXOUT DATE: 04/10/2035
PROJ PAROLE DATE: 00/00/0000
EWC JOB..: CIU PROGRAM
EDUC PGM.: HORTICULTURE
EWC LEVEL: 3F5 EEC LEVEL:
ASSIGNMENT..: CIU PROGRAM

PREVIOUS NUMBERS:
** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS	MOS	DYS	COUNTY	SENTENCE START	V/NV	CATEGORY
CHILD NEGLECT	10	0	0	LEXINGTON	4/16/2010	N	2
CRIM SEX COND.W/MINOR(1S	25	0	0	LEXINGTON	4/16/2010	V	5

PRIOR COMMITMENTS OVER 90 DAYS:
INMATE HAS NO PRIORS
DETAINERS (HOLD,WANTED,NOTIFY):
CODE NOT IN TABLE HOLD IRO CATEG: 4
NO DETAINERS
ESCAPES:
NO ESCAPE HISTORY
CRIMINAL CHARGES:
NO CRIMINAL CHARGES HISTORY
ASSAULTIVE DISCIPLINARIES:
NO ASSAULTIVE DISCIPLINARY HISTORY
NON-ASSAULTIVE DISCIPLINARIES:
NO NON-ASSAULTIVE DISCIPLINARY HISTORY
HISTORY OF MOVEMENTS:

1/15/15	KIRKLAND	INCARCERATED		RETURN FROM COURT
1/15/15	LEXINGTON CO	AUTH ABSENCE	(AWL)	TO COURT
1/15/15	KIRKLAND	INCARCERATED		ADMINISTRATIVE
6/25/14	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
6/25/14	RICHLAND CO	AUTH ABSENCE	(AWL)	MEDICAL
5/20/14	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
5/20/14	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
5/12/14	BROAD RIVER	INCARCERATED		RETURN FROM COURT
5/12/14	LEXINGTON CO	AUTH ABSENCE	(AWL)	TO COURT
1/ 2/14	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
1/ 2/14	KIRKLAND	INCARCERATED		MEDICAL
12/12/13	BROAD RIVER	INCARCERATED		RETURN FROM COURT
12/12/13	LEXINGTON CO	AUTH ABSENCE	(AWL)	TO COURT
12/ 9/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
12/ 9/13	RICHLAND CO	AUTH ABSENCE	(AWL)	MEDICAL
8/ 1/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
8/ 1/13	KIRKLAND	INCARCERATED		MEDICAL
6/14/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
6/14/13	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
6/ 6/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
6/ 6/13	KIRKLAND	INCARCERATED		MEDICAL
5/ 2/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
5/ 2/13	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
3/ 1/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
3/ 1/13	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
1/ 9/13	BROAD RIVER	INCARCERATED		ADMINISTRATIVE

1/ 9/13 RICHLAND CO AUTH ABSENCE (AWL) MEDICAL

WILLIAMS,LANCE AUSTIN FBI # 575365HD6 SID# SC01938593 SCDC # 00345477 (CONTI

12/28/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
12/28/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
12/27/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
12/27/12	KIRKLAND	INCARCERATED		MEDICAL
11/ 2/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
10/31/12	TUOMEY REGIONAL	AUTH ABSENCE	(AWL)	MEDICAL
10/31/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
10/29/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
10/29/12	SUMTER CO	AUTH ABSENCE	(AWL)	MEDICAL
8/31/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
8/31/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
8/10/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
8/ 7/12	KIRKLAND INFRM	INCARCERATED		MEDICAL
8/ 7/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
7/26/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
7/26/12	KIRKLAND	INCARCERATED		MEDICAL
7/21/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
7/20/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
7/19/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
7/19/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
6/12/12	BROAD RIVER	INCARCERATED		ADMINISTRATIVE
6/ 5/12	LIEBER	INCARCERATED		ADMINISTRATIVE
6/ 5/12	RICHLAND CO	AUTH ABSENCE	(AWL)	MEDICAL
4/30/12	LIEBER	INCARCERATED		ADMINISTRATIVE
4/30/12	RICHLAND CO	AUTH ABSENCE	(AWL)	MEDICAL
3/23/12	LIEBER	INCARCERATED		ADMINISTRATIVE
3/23/12	PALMETTO RCHLAN	AUTH ABSENCE	(AWL)	MEDICAL
6/ 7/11	LIEBER	INCARCERATED		ADMINISTRATIVE
4/ 6/11	KIRKLAND	INCARCERATED		NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
CIU PROGRAM	01/16/15	0/ 0/ 0		3F5
TEACHER ASSISTANT	07/22/14	1/15/15	INSTIT TRANSFER	3F5
HORTICULTURE TRAINEE	11/07/12	7/21/14	PROMOTION	3F5
WARDKEEPER ASSISTANT	08/22/12	11/ 5/12	INMATE REQUEST	3F5
FOOD SERVICE AIDE	06/15/12	8/21/12	INMATE REQUEST	3F5
MECHANIC HELPER	08/29/11	6/12/12	INSTIT TRANSFER	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS

********* END OF REPORT *********

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington) IN THE COURT OF GENERAL SESSIONS
STATE VS.)
Lance Austin Williams)
AKA:)
Race: 1 Sex: M Age: 25)
DOB: [redacted] SS# [redacted])
Address: [redacted])
City,State,Zip: Swansea, SC 29160-8942)
DL#: [redacted] SID#:)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

INDICTMENT/CASE#: 2010GS3201860
A/W#: M300590
Date of Offense: 4/15/2010
S.C. Code § : ~~20-07-0850~~ 63-5-70 (Att)
CDR Code #: 2481

SENTENCE SHEET

In disposition of the said Indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Children / Legal custodian, unlawful neglect of child or helpless person
in violation of § ~~20-07-0850~~ 63-5-70 (Att) of the S.C. Code of Laws, bearing CDR Code # 2481
☑ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: S Mayes 64191 _____ _____ _____
Mayes, Suzanne SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☑ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed ____ years
and/or to pay a fine of $ ____; provided that upon the service of ____ days/months/years and/or payment
of $ ____; plus costs and assessments as applicable*; the balance is suspended with probation for ____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2010 GS 32 1861
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Canv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
§ 47.12 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 95.00
§ 14-1-213 (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§ 90.7 (SCCJA Surcharge)	$5	$ 5.00
3% to County (If paid in installments)		$
TOTAL		$ 130

Clerk of Court/ Deputy Clerk Beth A. Carrigan
Court Reporter: C. Rentoasi

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Presiding Judge _____
Judge Code: 62145
Sentence Date: 5 April 11

SCCA/217 (11/2009)

STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Lance Austin Williams)
AKA:)
Race: 1 Sex: M Age: 25)
DOB: [redacted] SS# [redacted])
Address: [redacted])
City,State Zip: Swansea, SC 29160-8942)
DL#: [redacted] SID#:)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2010GS3201861
A/W#: M300591
Date of Offense: 4/15/2010
S.C. Code § : 16-03-0655(1)
CDR Code #: 0385

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree

In violation of § 16-03-0655(1) of the S.C. Code of Laws, bearing CDR Code # 0385
☐ NON-VIOLENT ☑ VIOLENT ☐ SERIOUS ☑ MOST SERIOUS ☑ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☑ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____ 64191 _____ _____ _____
Mayes, Suzanne SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the ☑ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed ___ years
and/or to pay a fine of $ ___; provided that upon the service of ___ days/months/years and/or payment
of $ ___; plus costs and assessments as applicable*; the balance is suspended with probation for ___
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: 2010-65-32-1860
☑ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☑ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107 5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
§ 47.12 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$100	$
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
§ 90.7 (SCCIA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$
TOTAL		$ 130

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk: Beth A. Cartledge
Court Reporter: C. Pantsar
Presiding Judge: _____
Judge Code: 2145
Sentence Date: 5 April 11

SCCA/217 (11/2009)

DEFENDANT SHALL BE SUBJECT TO SC OFFENDER REGISTRY

State of South Carolina)) County of Lexington)) Lance Austin Williams,)) Applicant,) vs.)) State of South Carolina,)) Defendant.)	In the Court Of Common Pleas Case No.: 2014-CP-32-4769 Transcript of Record

January 30 and 31, 2017

Lexington, South Carolina

BEFORE:

The Honorable Eugene C. Griffith, Junior, Judge

APPEARANCES:

Richard A. Harpootlian, Esquire
Attorney for the Applicant

Johanna C. Valenzuela, Assistant Attorney General
Attorney for the Defendant

ALSO PRESENT:

Lance Austin Williams

INDEX

EXHIBITS

COURT'S

NO.	DESCRIPTION	ID	EVDS.
1	Trial Transcript	16	

APPLICANT/PLAINTIFF

NO.	DESCRIPTION	ID	EVDS.
1	E-mail 3/29/2011	26	26
2	Case Notes 62 pages	49	49
3	Photo of Victim	61	148
4	" " "	61	148
5	" " "	61	148
6	" " "	61	148
7	Dr. Friedlander Letter Undated	68	68
8	Fax 9/5/2010	120	120
8A	Defendant's Statement	144	144
9	E-mail 6/17/2010	178	179
10	Jury Questions	201	213

DEFENDANT'S

NO.	DESCRIPTION	ID	EVDS.
1	MUSC 9/30/2010	94	95
2	Polygraph Report (Sealed)	98	

Thereupon, the following proceedings were had,

BAILIFF: All rise.

THE COURT: All right. Y'all be seated. All right. Ready to go?

MS. VALENZUELA: We have one thing before we get started with the hearing, Your Honor. This case involved Mr. Harpootlian filing a motion for discovery in this circuit. Judge Keesley scheduled status conferences for the PCR. We had a status conference to see if we actually needed to set a hearing on that motion for discovery and in that hearing Mr. Harpootlian indicated that his main concern was getting copies of the exhibits that had been entered into the underlying trial so we made sure to have those brought up and we have those in there and it was our understanding that that resolved the pending motion for discovery.

I had been e-mailing Mr. Harpootlian asking him if there were going to be any expert witnesses because it's the State's position that we were going to be prejudiced if we find out today that there are experts and we haven't had their CV or their report and Mr. Harpootlian's position is that because we opposed the motion for discovery we have no right to know about his expert witnesses prior to the hearing starting so I do need to make sure that the Court and the record is clear

that our position as we have notified Mr. Harpootlian for the weeks leading up to this is that we will be prejudiced if there is an expert witness presented today that has not been given notice to us prior to today.

MR. HARPOOTLIAN: Your Honor, I note that the statute explains how discovery happens in a PCR. The State can move forward. We can move forward. They never filed a motion for discovery, therefore, they are not entitled to any expert witness or CV unless they do a formal request. If they had done that, then probably what we would have done if we have an expert is make that person available for deposition and not have to bring them up here and there had been more discovery done. Other than seeing the files of the lawyers in this case we have gotten no other discovery and we subpoenaed that to the courtroom today and both Mr. Snell -- Well, Mr. Snell was kind enough to give it to us in advance rather than giving it to us at the last minute. But other than that there's been no discovery because there is no discovery order.

And let me address another issue that may allow us to deal with their concerns and our concerns. In the last PCR hearing I had here in front of Judge Mark Hayes from Spartanburg we presented our evidence. We then had the transcript typed and then we submitted proposed

orders which cited to the transcript so there is no dispute about what was said and then Judge Hayes could look at the transcript, look at our orders and see. Because your factual findings are binding on the Appellate Court. That's why it's so important that you not have to rely on notes or memory but actually see the transcript.

The Attorney General has indicated to me that she is leaving the office on February 8th and won't be available. It's going to take more than a week to type a transcript in this case I suspect. So one proposal we would have here today is to continue this matter. If Your Honor orders me to make the CV available, we have no written report of an expert we intend to call, we will be happy to do that during that continuance period. But this sounds to me like a train wreck getting ready to happen. We have gone to expense, much more expense than the Attorney General to bring people here today. We are more than willing to continue the matter to another term when another Attorney General can be with us through the process. But to have a deadline of February 8th because she is leaving or some other Attorney General could handle the matter after her departure, but I think she's invested in this and some other Attorney General ought to have the ability to get invested in it before we have the

hearing.

So I think those are my solutions, but if she is opposed to continuing the matter, then I would suggest that some other Attorney General is going to have to read the transcript and draft an order if Your Honor allows that. But again, Judge Hayes said this was -- I do it every time I do a PCR, but because his factual findings were so important having a transcript made that inestimably easier. So I'm open to any - including continuing this matter even though I have spent several thousand dollars getting ready to do it today, I would rather have it done in a more deliberate way.

MS. VALENZUELA: Your Honor, we have continued this case twice before at Mr. Harpootlian's request. One time he had a deposition that suddenly got scheduled and he asked that that be allowed to take precedence. On this last one he had a last minute what he termed a discovery dispute because he did not get everything from defense counsel. He said that he had gotten last minute records from him.

So I am prepared to go forward today. I have, with the exception that if he could just answer the question about whether we are going to have experts here today that's the only issue.

THE COURT: I think he answered that.

MR. HARPOOTLIAN: I did.

THE COURT: He said he does.

MS. VALENZUELA: He's definitely going to have experts?

MR. HARPOOTLIAN: Definitely.

THE COURT: He said I will not provide the CV so that tells me he's going to provide the expert though.

MR. HARPOOTLIAN: Yes, sir.

MS. VALENZUELA: If I could see the CV, I could tell the Court if I'm gonna be prejudiced by getting the CV at this moment. I tried to get this resolved before you walked in so that I could see exactly what expert we're dealing with.

The issue about the proposed order, we are constantly drafting proposed orders for other AG's who have left over the years. So although my preference was to have, if the Court had had a ruling, I was going to have a proposed order drafted before I left on the 8th so that it wasn't going onto anybody else's standard practice roster. We are constantly doing proposed orders that another AG handled or, of course, when we handle the RPWC on the appellate stage, we are always taking over cases that somebody else handles.

THE COURT: That's a very generous and optimistic goal for me to have a ruling issued by the 8th which

would be next Thursday?

MR. HARPOOTLIAN: Yes, sir.

THE COURT: And I haven't heard anything about the case yet so I have no idea how difficult it's going to be. It could be very easy.

MR. HARPOOTLIAN: I think it's going to be more complicated than that. And we would prefer to have the transcript. We're going to argue the facts are X. She's going to argue the facts are Y and the transcript made it so much easier so you can't really debate the facts. They're in the transcript. So what she is proposing is we do the hearing and somebody else do the order?

THE COURT: That's what she said, if she is not able to get it done and I haven't rule.

MS. VALENZUELA: Right. Right.

MR. HARPOOTLIAN: Your Honor, we would ask that you not rule until we get the transcript so we can prepare an order. If she is willing to stipulate to that, I'll let her talk to my expert outside right now. He is from Hattiesburg, Mississippi. In the file she already has is his name and qualifications because he was hired to testify in this case but was never called. His name is Ed Friedlander and he doesn't have a CV because his CV's were destroyed by a tornado last week in Hattiesburg, Mississippi. It went right through his office. However,

I'll be happy to put him on the stand to tell you who he is or have her talk to him outside and explain who he is. But he doesn't have a report and my understanding is if he doesn't have a report, she is not entitled to a report.

THE COURT: Okay. All right. Do you understand, Ms. Valenzuela, what he --

MS. VALENZUELA: Yes. If I could have five minutes to talk to Mr. Friedlander and Mr. Snell, I think I would be able to tell the Court no problem. I don't understand the stipulation of the proposed orders. It's my understanding that you will decide if you want proposed orders from both sides or sometimes PCR judges want to just make a ruling and order somebody to do a proposed order and sometimes they want dueling orders and, of course, if that's the Court's position, then I have no position on it.

THE COURT: Mr. Harpootlian didn't say that's how he thought I would rule was I was gonna get proposed orders from each side. I don't know how I'll rule. I've done it both ways.

MR. HARPOOTLIAN: Well, Your Honor, I don't think we would be prepared to argue without the transcript. Maybe that's a better way to put it. If you want us to just come back and argue after we have the transcript so we

can all go to the same page, page 275, Your Honor says X, then I think whether you want proposed orders or just if you need to wait for the transcript rather than arguing today. That's what I'm asking.

MS. VALENZUELA: So I'm just trying to make sure. Are you saying that we need to have a separate hearing just to make argument on the things that you have presented today?

MR. HARPOOTLIAN: That's not what I'm presenting. That's what I'm proposing. That's one option. Another option is the Judge could get the transcript and say give me proposed orders. Or, Mr. Harpootlian, you make a motion. You reply. We respond. We reply. And then, as we do in many cases, then we submit proposed orders. There's a variety of different options. All I'm saying is we want to do whatever that is after we get the transcript. The last one took like 45 days. So I don't know.

THE COURT: If we wait for the transcript, it's going to be virtually impossible for you to prepare the proposed order if you get asked to do that.

MS. VALENZUELA: Right. I mean, that's up to you. If you feel like you can't rule on this case without having a transcript of what you have sat in on all day then, of course, you have the right to make that decision

and we will pass on our notes. Now, it does not make sense to me that that's what would happen. If you were to decide to do that, there would be an AG who would be able to handle that and I think my notes would be able to assist them so that that wouldn't prejudice the State. So really all I'm saying is you're the presiding Judge. You get to decide how that happens and I have no objection to that, but I'm not agreeing to anything and if I could have five minutes with this expert.

MR. HARPOOTLIAN: Who will tell you his vitae and nothing more.

MS. VALENZUELA: Because it was accidentally destroyed last week.

MR. HARPOOTLIAN: It wasn't accidentally. It was an act of God. A tornado hit his office in Hattiesburg, Mississippi. You know, there's skepticism and then there's skepticism. Your Honor, let me make one other point. We would not be in a position to argue today because there are varying and different legal positions we can take based on how the testimony breaks on that stand. We don't know how that's gonna come. So that's why we would ask for the transcript so we then can research it and determine what legal arguments we want to make. And again, how you take those, oral argument, motion, response, reply. Certainly I would agree with

the Attorney General that is in your option. I mean, obviously your discretion. All I'm asking is we not have to take those positions until we get a transcript.

THE COURT: Okay. I understand. Let her talk to the expert very briefly about his --

MR. HARPOOTLIAN: Qualifications.

THE COURT: -- qualifications.

(Short break.)

THE COURT: Back on the record.

MR. HARPOOTLIAN: Your Honor, for the record, I have given the Attorney General ample opportunity to talk to Dr. Friedlander.

MS. VALENZUELA: Yes. Thank you, Your Honor. We are ready.

THE COURT: Okay. Let's proceed today and see how far we get and then the Court will make a determination on how after hearing everything I wish to either rule or seek proposed orders and wait on the transcript. The waiting on a transcript and proposed orders sounds like a very deliberate way to rule. I kind of like that. I'm just anticipating that so I'm leaning to do something along those lines, so you handle the case understanding that's my leaning right now as to the proposed order and the transcript. No prejudice either way. But it is important. My law clerk was asking me. This is his

first time in PCR court and he was asking and I told him PCR's are kind of an animal of their own because the orders have to be so factually specific. All right. Mr. Harpootlian, it's your case.

MR. HARPOOTLIAN: Please the Court, Your Honor. And since we are not going to ask you to rule today, I'm not going to make an opening statement. We'll just go ahead and call witnesses. Mr. Snell, please.

Thereupon,

JAMES R. SNELL, JUNIOR

after having been first duly sworn, testified as follows,

THE CLERK: Have a seat. State your full name for the record please.

THE WITNESS: James R. Snell, Junior.

DIRECT EXAMINATION

BY MR. HARPOOTLIAN:

Q. Good afternoon, Mr. Snell. We've met before. I'm Dick Harpootlian and I represent Lance Williams. You represented Mr. Williams at one point; is that correct?

A. Yes, sir.

Q. Now, Mr. Williams, when he came to see you, was charged with what?

A. Criminal sexual conduct with a minor in the first degree and unlawful conduct toward a child.

Q. Is that what he went to trial on?

A. Yes.
Q. So there is no change in the charges?
A. No.
Q. How long after he retained you was this case called for trial?
A. Over a year.
Q. Okay. Now, during that year long period, did you have occasion to go and meet with him?
A. I did.
Q. So do you remember when he was charged?
A. I would have to look at the notes, but I was contacted and retained within the same day or the next day.
Q. When was that? Go ahead. Is that your notes?
A. I've got all the printouts.
Q. Okay.
A. April 17th, 2010.
Q. Okay. And he went to trial when?
MS. VALENZUELA: We stipulate that trial was March 30th of 2011.
THE COURT: A year later.
BY MR. HARPOOTLIAN:
Q. Almost a year later; is that correct?
A. That's matching my recollection. Yes, sir.
MR. HARPOOTLIAN: Okay. Now, let me do a little housekeeping first.

MS. VALENZUELA: Your Honor, just to make it clear to everyone, we have sent you a Judge's packet and that Judge's packet was on a disk and that's traditionally what we do in PCR cases and on that was our return which also had attached documents to it and one of those should be the trial transcript which you should have by disk along with the clerk records, SCDC records. I feel like I'm forgetting one thing.

MR. HARPOOTLIAN: Whatever it is, it is.

MS. VALENZUELA: So the Court has a digital copy of the transcript as well.

MR. HARPOOTLIAN: Your Honor, this is a printed out copy which I want to ask witnesses about. Any objection to marking this as an exhibit?

MS. VALENZUELA: That's fine, if that's what you want to do.

THE COURT: That's fine. Mark it as a Court's exhibit.

(Whereupon, Court's exhibit #1 marked for identification.)

BY MR. HARPOOTLIAN:

Q. So during that one year period, did you have an opportunity to interview Mr. Williams?

A. I did.

Q. How many occasions -- He was in jail the entire

period, correct?

A. Yes, sir.

Q. On how many occasions did you have an opportunity to see him?

A. My estimation would be probably close to 20.

Q. 20 times. Did you have an occasion to talk to him about whether he said he was guilty or not guilty?

A. We did.

Q. Did he indicate to you that he was guilty or not guilty?

A. Well, the story changed during the representation and at the end of the - once we got closer to trial, his story matched what his testimony was when he testified in the trial.

Q. Well, and what he testified to in the trial was pretty consistent with the statement he gave to the police?

A. It was.

Q. Okay. So you would agree with me that the statement that's contained in this transcript that we just introduced was read and published during the Jackson v. Denno hearing and then to the jury. You put him on the stand and he testified pretty much, and we'll go through the details of that in a minute, were pretty much the same thing?

A. Sure.

Q. Did you attempt to negotiate a guilty plea for

him?

A. I did.

Q. And were you successful?

A. No.

MS. VALENZUELA: Objection, Your Honor. The application, the allegations laid out here do not go into plea negotiations, so I would just ask that - this line of questioning is not relevant based on the allegations laid out by the applicant.

MR. HARPOOTLIAN: Your Honor, it's a predicate. We are not alleging any ineffective assistance based on plea negotiations.

MS. VALENZUELA: Then no problem as long as he made that clear.

THE COURT: Okay. So objection sustained but you're not going there anyway so go ahead.

BY MR. HARPOOTLIAN:

Q. So who did you talk to about negotiating this case?

A. Deborah Moore at the time was the initial assigned Assistant Solicitor.

Q. Right.

A. And then later a week before trial it switched over to Suzanne Mayes.

Q. Okay. So you're talking to - you had been talking

to Deborah Moore?

A. And she is now Deborah Russell.

Q. Okay. But Deborah Moore was an Assistant Solicitor who had the case, you're talking to her and then a week before it's actually called to trial you --

MS. VALENZUELA: Objection to leading.

MR. HARPOOTLIAN: Not my witness, is he? He's a party opponent maybe.

MS. VALENZUELA: No. He's your witness that you just called so objection to leading.

THE COURT: Keep going and then if he gets a, if a request is made to have him declared a hostile witness, we'll entertain that.

MR. HARPOOTLIAN: Okay. Thank you, Your Honor.

BY MR. HARPOOTLIAN:

Q. I think I was just repeating what you just testified to which was Ms. Moore was the Assistant Solicitor until a week before trial and then who took over?

A. Suzanne Mayes.

Q. From?

A. She had just -- My understanding was she had just recently been hired by the Solicitor's Office.

Q. So when you say a week, seven days?

A. Approximately. It wasn't -- If it wasn't a week, it was pretty close. I mean, it was within that approximate time

frame.

Q. You anticipated this being a guilty plea; is that correct?

A. It is - it is -- Not at that point I did not. At that point I was told there would not be any offers. Initially it was certainly - had been my experience that in other similar cases it would be very likely that a charge like this would be substantially reduced by the prosecutor's office to something closer to, you know, matching the facts of ten.

Q. Did you ever talk to Ms. Mayes about a plea?

A. I did.

Q. And her response was?

A. No.

Q. So you went to trial on -- Let me make sure I get this correct -- March 30th; is that correct?

A. Yes.

MR. HARPOOTLIAN: Let me show this to you. We just received Mr. Floyd's file this morning. I apologize, Your Honor. We didn't have time to have this copied. Mr. Floyd brought his file to the courtroom this afternoon. We have just gone through it. Any objection?

MS. VALENZUELA: Yes. You have no foundation.

MR. HARPOOTLIAN: I'm going to ask him to identify it.

BY MR. HARPOOTLIAN:

Q. Let me show you this document (proffering.) Can you tell the Court what that is please?

A. That appears to be a copy of an e-mail.

Q. To the defense lawyer?

A. Well, to lawyers about putting Mr. Williams on the transport list.

Q. For what? What's that about?

MS. VALENZUELA: Objection to publishing because I haven't decided yet if I'm going to object to this.

THE COURT: All right. We're in a non jury forum. The Court is the gatekeeper of the evidence so I have got to hear it in camera or I have got to hear -- I think I'm tasked with the idea if it's not relevant, I'm to discard it.

MR. HARPOOTLIAN: Yes, Your Honor.

THE COURT: So I have got to see it either way.

BY THE WITNESS:

A. It says dress for trial.

BY MR. HARPOOTLIAN:

Q. Okay. And that was on -- But this is about pleas, correct? It says tomorrow's plea list.

A. That -- He was not to the best of my knowledge never on any plea list.

Q. Okay.

A. He was originally -- Potentially he might have

gotten put on a list for a motion but he was never offered a plea.

MS. VALENZUELA: So at this point, Your Honor, just for the record I would make it clear that I would have objected to the relevance of that before that was entered in as the gatekeeper of the facts.

MR. HARPOOTLIAN: We agree it's not relevant.

MS. VALENZUELA: So I would ask that it be stricken.

THE COURT: And it's not admitted.

MR. HARPOOTLIAN: Right.

THE COURT: Okay. So good.

BY MR. HARPOOTLIAN:

Q. So the first time you knew this was going to trial on March 30th was seven days earlier which would have been March 23rd?

A. Approximately. And I can look through my notes and come up with the exact date, but it was approximately a week and approximately that time frame that we were notified. I may have a note, if you would like me to look --

Q. Yeah. Go ahead and look. We have a minute or two.

A. -- for the exact date.

Q. Right.

A. My notes indicate an e-mail from Ms. Mayes dated March 18th indicating there would not be any offers made in the case so we would have been notified for trial on or before

the 18th.

Q. For the March 30th trial?

A. Yes, sir.

Q. Let me show you, you received a list of witnesses from Ms. Mayes, did you not?

A. We did.

Q. When did you get those? Actually I think I can help you.

MS. VALENZUELA: Can I take a look at it?

MR. HARPOOTLIAN: Let me see if he can identify it and then I'll bring it over to you.

BY MR. HARPOOTLIAN:

Q. Can you identify that? Start with this e-mail right there.

A. That's an e-mail from Suzanne Mayes to me dated March 25th.

Q. Is that the list of witnesses she sent you?

A. It is. Yes, sir.

MR. HARPOOTLIAN: Okay. We offer this in evidence, Your Honor.

MS. VALENZUELA: Your Honor, I'm gonna make my objection to relevance. Earlier he said that these were predicate questions about the guilty plea and that's why I withdrew my objection. I'm confused as to why we are still going along this path when the witnesses does not

relate to the three allegations that we are here for today.

MR. HARPOOTLIAN: Your Honor, I appreciate her meticulous objection to everything I do. But first of all, as Your Honor has already pointed out, you're the gatekeeper. You can regard what's relevant or not relevant. There is no jury here that you have to keep evidence from. Two, this is a predicate. We said he was ineffective and he was ineffective for a number of reasons and we're gonna get to that, but I need to begin the process of getting him there in a very meticulous way myself. So all these interruptions are doing is delaying this case until we go another two days. I would object. If she has an objection to relevance, she can make that, Your Honor, to you after we go through the process rather than interrupting me.

THE COURT: Just so I know about the scheduling, there is nothing scheduled tomorrow so this is likely to continue into tomorrow; is that correct?

MS. VALENZUELA: There is nothing scheduled for tomorrow.

THE COURT: Okay. So we have got tomorrow open for this or is there just nothing scheduled for tomorrow?

MS. VALENZUELA: I don't know where a relevancy objection would be decided by time frame versus relevance

to the allegations that are claimed that he has the responsibility for laying out. He has made three allegations and this case is going to be plenty long even with just those three allegations and so I think it is my responsibility both to protect the record and because we should not be wasting time, to focus on the three exact issues that he brought up. But yes. We don't have anything scheduled for tomorrow and if you were to order us to continue tomorrow, I think we could work with the Court to --

THE COURT: Well, I mean, see, I don't -- Here is where I'm kind of flying blind on this. I get a roster that has cases. I have no idea how long or complicated or simple they are. I was just wondering did y'all anticipate it going into tomorrow and that's why tomorrow is open?

MR. HARPOOTLIAN: I didn't but at this rate we'll be going into Wednesday.

MS. VALENZUELA: We had a status conference where Judge Keesley specifically asked us how long this case was set so that we can schedule them out that way and Mr. Harpootlian had indicated that this was going to take an afternoon.

MR. HARPOOTLIAN: Without this it would take an afternoon. But her verbosity and veraciousness is

extending this beyond this afternoon. And again, since it's before Your Honor, these objections merely delay it and if we could proceed without the sniping, we can get this done.

THE COURT: All right. Let's proceed and the objection is noted and the Court will consider as relevant evidence as it can.

MR. HARPOOTLIAN: Your Honor, for purposes of the record anything I introduce I will stipulate she's made an objection as to relevance so she doesn't have to do that anymore.

THE COURT: Okay. Fair enough. It's admitted.

(Whereupon, Plaintiff's Exhibit #1 marked for identification and admitted.)

BY MR. HARPOOTLIAN:

Q. Okay. So this is an e-mail. Tell me what this is. I don't want to lead you.

A. It's an e-mail from the prosecutor to me with the State's potential witness list. That's the first e-mail on the bottom of the first page.

Q. What's the date of that e-mail to you?

A. March 25th, 2011.

Q. That would be five days before the trial started?

A. Yes, sir.

Q. And then it's got a list of witnesses attached?

A. Yes, sir.

Q. Okay. We'll get back to this in a little while. So you - about how many days, we figure ten, seven, ten days prior to trial you knew it was going to be a trial?

A. Apparently it looks like it might have been closer to at least 12.

Q. 12 days. Okay. So 12 days out you knew it was going to be a trial?

A. Yes, sir.

Q. During those 12 days, what did you do to get prepared for trial specifically if your notes indicate it?

A. Let me just say it was everyday work on the file, going through, following up with our experts. We had Dr. Watson. We had a nurse. A consultant that we spoke to. Reviewing the discovery. Meeting with Mr. Williams. Several conversations with his family.

Q. Let me ask you specifically. Look at plaintiff's exhibit number 1. There are 24 witnesses listed.

A. Yes, sir.

Q. Prior to getting the notice for trial, how many of those witnesses did you interview?

A. We had an investigator.

Q. No. How many did you interview? How many did you talk to?

A. I believe six.

Q. Okay. Let me narrow that down just a little bit. This is the transcript and it has a list of witnesses that testified at the trial, right?

A. Yes, sir.

Q. Did you interview Ed Prestigiacomo?

A. Yes, sir.

Q. Who is he?

A. He's a police officer.

Q. When did you interview him?

A. I spoke to him shortly after Mr. Williams was charged and then again I spoke to him probably two weeks or so before trial.

Q. Did you make notes?

A. I did not.

Q. Okay. And that's why when I look at the file, I don't see interviews with witnesses?

A. Yes, sir.

Q. So you don't write down a year out what he told you?

A. Correct.

Q. And then two weeks out did you write it down?

A. I did not. No, sir.

Q. What about Katie Cooper?

A. If I may look at the --

Q. Sure.

A. Because the folks I spoke to were only the law enforcement individuals. As far as the private folks that were the fact witnesses I didn't speak to any of them.

Q. Okay. Let me go over that. Katie Cooper who testified in the trial, did you talk to her?

A. No, sir.

MS. VALENZUELA: Your Honor, I'm gonna renew my objection. And I have one more specific thing to add here. Mr. Harpootlian has told you that he doesn't know what he's going to argue until he sees the PCR transcript. Under the rules you can amend to match the testimony that is presented.

MR. HARPOOTLIAN: Right.

MS. VALENZUELA: If I do not bring to your attention that we should be focusing on these three allegations, he is going to conduct an entire fishing expedition throughout this entire time so that at the end when he reviews the transcript, he can come back to you and he can try to amend all of these things when there is a different person on the other side. That is improper use of this hearing. He has said these are the three things that we are moving forward on today and that's really what it should be. If these were predicate questions relating to that, he should be able to answer to you it's relevant because this leads directly to this point that I

have alleged. He hasn't been able to do that. He's saying that I'm wasting time but I'm trying to point out that we are here for three things and it is not the correct use of this to instead of having a deposition to instead depose these witnesses throughout here, get the PCR transcript and then come back to you and say now I want to amend the pleadings to include all of these different allegations now that I have the information. That's not right and that's exactly what I think he's doing here.

MR. HARPOOTLIAN: Your Honor, right and legal are two different things unfortunately. I have the right to amend these pleadings at the end of this hearing. I'm not going far afield. This is not a fishing expedition. I think arguably what I'm doing right now fits under the original three but I won't know until I hear his answers. I interviewed him for about 15 minutes one afternoon before we had his complete file. Your Honor, if we could move along, I can get this done today and at the end if we make a motion to amend, it will be based on a position we think will be rational. She can then at that point object to our amendment and that's how that will be dealt with by Your Honor. May I proceed?

THE COURT: Yes, sir.

MR. HARPOOTLIAN: Thank you.

THE COURT: Objection is noted. I know what you're concerned about so we will be looking and listening.

BY MR. HARPOOTLIAN:

Q. Okay. So I want to go over the witnesses that testified.

A. Yes, sir.

Q. Katie Cooper testified. You did not interview her?

A. I want to make sure I understand the question. This is not who the investigator talked to? These are the people I personally spoke to?

Q. Right. Well, did the investigator talk to her?

A. I believe all the fact witnesses were reached out by the investigator.

Q. What's his name?

A. Dave Lawrence.

Q. Dave Lawrence who used to work at SLED?

A. Yes.

Q. I know Dave. And Dave would have prepared a written report for you?

A. I don't believe he did. I'll defer to the -- If he provided one, I don't believe he did. I don't think that was budgeted or provided for.

Q. Did you ask for one?

A. I spoke to Mr. Lawrence. He's working hourly and

things like reports, that would have cost additional money. If there was no benefit to getting the report like witnesses that just wouldn't speak to him, he wouldn't. I don't think we got that.

Q. Did you make notes after you spoke to Mr. Lawrence?

A. Not - whatever notes I have have been provided. I would be happy to look through and see. There may be a few references but not detailed transcriptions.

Q. No. Not detailed transcriptions. Is there a note that says tried to talk to Katie Cooper. She wouldn't talk to us. Is there a note?

A. Not in my notes. No, sir.

Q. Okay. So you made no notes of what Mr. Lawrence told you?

A. Correct. Yes, sir.

Q. Okay. Brittany B[redacted], did you speak with her?

A. No, sir.

Q. Did Mr. Lawrence?

A. Not to the best of my knowledge. No, sir.

Q. Lee Ann Harvey, did you talk to her?

A. No, sir.

Q. Did Mr. Lawrence to the best of your knowledge?

A. No, sir.

Q. Tommy Hutto. Did you speak to Tommy Hutto?

A. No, sir.

Q. Did Mr. Lawrence to the best of your knowledge?

A. No, sir.

Q. Marlena Clary. Did you speak to Ms. Clary?

A. No, sir.

Q. Did Mr. Lawrence speak to Ms. Clary to the best of your knowledge?

A. No, sir.

Q. Adrienne Riley-Hefney. Did you talk to speak to Ms. Riley-Hefney? Do you know who that is?

A. I don't know who that is and I don't see the name on the list. I was wanting to refer to make sure it wasn't a law enforcement officer. I don't recall who that individual is. I don't recall the name.

Q. Okay. So to your knowledge you didn't interview her? She wasn't on the list provided by --

A. Yes.

Q. And you had been investigating this case for a year?

A. Correct. And I don't - I don't recall - I don't recall the name.

Q. Okay. Dr. Susan Luberoff. Did you speak with Dr. Luberoff?

A. No, sir.

Q. Did your investigator Mr. Lawrence?

A. No, sir. I believe Dr. -- We had a doctor consulting. That doctor I believe spoke to Dr. Luberoff.

Q. Where was that?

A. I believe her name is Anne Abel affiliated with MUSC.

Q. Okay. And did you get a written report from Anne Abel?

A. We got -- No. No. She did a letter. Maybe an e-mail. And then sort of spoke to me by telephone once or twice.

Q. Do you have that e-mail?

A. I did. It's -- She should -- It was -- I printed out the same materials I provided you.

Q. Uhm, so let me ask you this: I'm looking at some e-mails now. Maybe this will refresh your memory. She never actually talked to Dr. Luberoff. She prepared a cross examination for you?

MS. VALENZUELA: Objection. Is he testifying, Your Honor? I'm not -- This is definitely a leading question here.

BY MR. HARPOOTLIAN:

Q. What, if anything, did Ms. Abel do for you?

A. She reviewed the medical records, reviewed the report of Dr. Luberoff and basically summarizing she agreed and adopted everything Dr. Luberoff said.

Q. But she never talked to Dr. Luberoff, did she?

A. I believe she did at the beginning of the case.

Q. Get your records out and tell me. I mean, these are the e-mails we pulled. Look and see if --

A. And I will defer to - I'll defer to whatever is in writing. My understanding at the beginning of the case she thought she may be conflicted out because she worked in the same department and the same agency with Dr. Luberoff.

Q. Obviously. But did she do an interview for you of Dr. Luberoff in preparation for this trial?

A. Not specifically - not specifically for me. I believe there was -- I'll defer to her statements. My understanding was that she at some point did speak with Dr. Luberoff regarding whether or not there was a conflict or whether she was allowed to provide --

Q. About the conflict, but not about her testimony, her examination?

MS. VALENZUELA: Objection. You're speculating. Unless he was present during this conversation between these two women, he's not going to know that.

MR. HARPOOTLIAN: I'm asking for what Dr. Abel told him --

MS. VALENZUELA: Same objection. Hearsay.

MR. HARPOOTLIAN: -- as the basis for his reliance and what he did, not to prove the matter asserted.

BY MR. HARPOOTLIAN:

Q. Go ahead.

A. I don't have a recollection of her saying she went back and had a discussion regarding the merits of the situation.

Q. Okay. So what about Shelby Derrick?

A. Shelby Derrick was with the Sheriff's Department --

Q. I don't know.

A. -- and I had a very brief - would have talked to her very briefly during the bond proceeding, prior to the bond proceeding outside.

Q. A year before trial?

A. Yes, sir.

Q. And not since, not prior to trial other than that?

A. Correct. Yes, sir.

Q. And you have no notes that I could find.

A. No, sir.

Q. Troy Crump?

A. I don't have a recollection of Mr. Crump.

Q. Mr. Crump was called at trial. Let me show you page 3 of this trial transcript. That's Mr. Crump listed on there, right?

A. Yes, sir.

Q. So you weren't told about Mr. Crump in the witness list?

A. His name does not appear on the witness list and I don't have a recollection of ever speaking with Mr. Crump.

Q. Beth Harmon?

A. Again, no notes. My understanding was we would have had a very brief, extremely brief conversation prior to trial.

Q. What did she talk about? You have no notes. You have to recollect.

A. The law enforcement officers who were on the witness list were individuals who responded, I think, to the original call and they were with Detective Prestigiacomo. But other than that my main source of information from the law enforcement side came from Detective Prestigiacomo.

Q. And you would agree -- And Candy Kyzer. Do you know who that is?

A. I do and --

Q. Did you interview her?

A. I actually don't have a specific recollection. No, sir.

Q. And you don't know whether your investigator did?

A. I do not. No, sir.

Q. Now, I want you to look at page 3 of the trial transcript. The people I have just read off to you are the people that testified for the State in the case, correct?

A. Yes, sir.

Q. And I think what you have indicated to me, and correct me if I'm wrong, is you have no notes of any interviews with any of those folks?

A. Correct. Yes, sir.

Q. By you or any investigator?

A. Correct. Yes, sir.

Q. And you had no notes prior to the trial of any interview with any of these people?

A. Correct. Yes, sir.

Q. So when you interview a witness or talk to a witness, you just chat it up with them? You don't write anything down?

A. Generally speaking I typically try to leave that up to the investigator to do in case testimony or some sort of impeachment is necessary. If a witness, if I ever personally spoke to a witness that provided any type of material information, anything relevant or useful, I certainly would want to make a note, document it and have it available. If I speak to somebody and they don't -- I hope I don't speak to anybody to conflict myself out. Again, I try to leave that up to the investigator. But if I did, I certainly would make a note in the record.

Q. Okay. So 12 days before the trial you get notice it's going to be tried?

A. Yes, sir.

Q. And you don't know, you can't tell me of any of these people you talked to in that 12 day period?

A. Correct. Yes, sir. And as far as my recollection I have no -- I would -- At this point I would rely upon notes and the trial transcript as far as the occurrence. As far as specific memory I don't - my recollection is limited.

Q. And if you want to correct me, be happy to correct me. I have read the transcript probably more recently than you have. In none of these witnesses do you ever say -- Or tell me if you would have said, I don't believe you did, do you remember telling me or my notes indicate that they said something different than what they said to you or even that you talked to them previously? Did you say that to one of these witnesses?

A. I don't - I - I don't recall. I have no recollection.

Q. No recollection. Okay. Now, so you get the notice. When you got that notice from Suzanne Mayes, were you expecting an imminent trial?

A. No.

Q. Okay. As a matter of fact, you had told Mr. Williams you think it was gonna be a while and --

MS. VALENZUELA: Objection to leading.

THE COURT: I'll let it go. Go ahead.

BY MR. HARPOOTLIAN:

Q. When you spoke to Mr. Williams, you indicated to him -up until the time you heard from Suzanne Mayes that you thought y'all could work this out with a plea down the line?

A. At -- What --

Q. Is that a yes?

A. I would say it's a no. Close. If I may elaborate?

Q. Yes. Explain.

A. All right. Mr. Williams -- What sort of was a catalyst for this was Mr. Williams had been held without a bond being set for during this whole length of time. I would sort of over estimate the speed of the government or prosecutors, but I certainly thought this length of time would be enough for the case to be reviewed, the prosecutor to make a final assessment and begin figuring out which way it's going to go. In this circumstance there was very little communication with the prosecutor's office during that time period. We made a second motion for bond. My conversation with Mr. Williams did include however when you make a successive bond motion, the response from the government may very well be just to call the case for trial rather than be left explaining why a year old case doesn't have a bond and hasn't been set. So we had that conversation. At that point with the existing prosecutor my full expectation was that it would more than likely not be tried; that the charges would be substantially reduced.

Q. So you indicated to him you thought that that might be an impetus to get a plea, to get something reduced?

A. Now, I did not think -- Again, of course, if they're hot ready to reduce it for any reason, political, the office, media, family attention, the alleged victim, any of those circumstances, they may not - their response very well may be just to simply call the case for trial.

Q. But you didn't think when you filed a motion for bond it would be up for trial in two weeks, did you?

A. It was possible. That was something I specifically discussed with Mr. Williams.

Q. That there would be a trial by March 30th?

A. I don't know if I discussed a specific time, but before the case could be - before a bond hearing could be set the response from the Solicitor's Office may just be a trial notice.

Q. Well, there's no requirement to have a bond hearing any time soon. They could put that off for months if they want to, right? They have in your experience, have they not?

A. Oh, they certainly - they certainly - they certainly have - at that point they unfettered docket control.

Q. Right. So and you said a moment ago that you were sort of surprised that she set it 12 days out?

A. It was a call for the new prosecutor to introduce

herself and then just say we're gonna be setting it for trial.

Q. So you were a little taken aback?

A. It was a - it was a little quick.

Q. But you were taken aback, shocked?

A. It was certainly - it was certainly surprising. I've never seen a prosecutor or any government employee want to move that quickly.

Q. Okay. Now, uhm, and at that point you had interviewed none of the witnesses, right?

A. Personally that's correct other than - other than the brief conversations with law enforcement affiliated with the bond hearing or something, nothing else. And I would not have made an effort individually to interview the fact witnesses.

Q. Why not?

A. I don't want to put myself in a position where they're gonna say something and I'm gonna be conflicted out.

Q. Why would you be conflicted out?

A. If they tell me one thing -- Well, a couple things. Number 1, they could tell me something and then testify to something differently and, of course, if it's substantial or material enough that could create a situation where I certainly don't want to be called as a witness or expect to be a witness.

Q. Could you have somebody with you? A secretary? A law clerk? Somebody? Wouldn't that obviate that problem?

A. It very well could. In this situation there was a private investigator who was given the names and all the information to try to interview the witnesses who were available so there was no need for me to personally try to go and knock on doors or make phone calls.

Q. But I mean 12 days out you knew there was going to be a trial. Five days out you got this list of witnesses.

A. Yes, sir.

Q. And you made no attempt at any point to go interview, you to go interview a witness?

A. Correct.

Q. Did you at that point ask your investigator to go back and see witnesses?

A. Yes.

Q. But you have no recollection of receiving any report nor is there any written report of those interviews?

A. My recollection is with the investigator is the investigator would have charged a fee for reports and that his retainer -- He wasn't hired by my office. It was something through the family.

Q. Okay. Did you check with the family to see if they were willing to pay for that?

A. I don't recall that specifically. We had

discussions about the fees and money at the time and I don't recall that specific one.

Q. Well, let's fast forward a little bit. The night before trial -- What day was this case tried on? Do you remember the day of the week?

A. I think it might have been a Wednesday.

Q. Okay. I think you're right. On Tuesday -- Now, this young lady out here Ms. Williams who is related how to Lance Williams?

A. Mother.

Q. Okay. And did she express a lack of confidence in you at some point?

MS. VALENZUELA: Objection to hearsay.

MR. HARPOOTLIAN: It's to him.

MS. VALENZUELA: Even if the statement was made to the witness, it is still hearsay if he is trying to elicit what that out of court person who is not on the stand said.

BY MR. HARPOOTLIAN:

Q. Okay. Let me back up. At some point did you obtain $5000.00 from Ms. Williams to hire another lawyer?

A. Yes.

Q. Okay. And that was the night before the trial started, correct?

A. I would - I would have to defer to notes but very

likely. It was either the day or a couple days before, yes.

Q. I think it was the day before if you look at the date on the --

A. Very well could have been.

Q. -- cashier's check. Okay. I want to show you what you furnished to us which is a printout of your case notes just so we can save a little time here. How about read that note from March 29th.

A. This afternoon Lynn Williams came into the office. Dropped in. She told me that she did not want to hurt my feelings but that her and her mother wondered if I would have co-counsel for Lance's trial. This is the first time anything that had been mentioned by them before.

MS. VALENZUELA: Objection to hearsay, Your Honor. And I know that he's reading his own notes, but he's still talking about someone who was out of court telling him these things. This is impressing upon you what the opinion of his client and his client's family was of the applicant which goes directly to ineffective assistance of counsel.

MR. HARPOOTLIAN: Your Honor, I think I can deal with this.

BY MR. HARPOOTLIAN:

Q. Are these your business records?

A. Yes.

Q. Do you keep these in the ordinary course of business?

A. Yes.

MR. HARPOOTLIAN: Your Honor, business records exception to the hearsay rule.

MS. VALENZUELA: Well, then so the entirety of his notes I would argue would need to come in.

THE COURT: Do you want them to come in?

MR. HARPOOTLIAN: No objection.

THE COURT: All right.

MR. HARPOOTLIAN: Can I have these marked please?

THE COURT: Absolutely.

MR. HARPOOTLIAN: Wait one second.

BY MR. HARPOOTLIAN:

Q. You furnished these to me?

A. Yes, sir.

Q. Are these the entirely of your notes?

A. Yes, sir.

Q. Okay.

MS. VALENZUELA: I haven't looked at those.

MR. HARPOOTLIAN: Well, you shouldn't have had us put them into evidence then. Go ahead.

MS. VALENZUELA: No. I get to look at the exhibit before it goes in.

MR. HARPOOTLIAN: I'm sorry. She just told me to

put it into evidence, Your Honor.

MS. VALENZUELA: No. I argued that the entirety --

THE COURT: She just wants to see it so --

MR. HARPOOTLIAN: Okay.

THE COURT: -- do you have a copy of it?

MR. HARPOOTLIAN: We do right here (proffering.)

THE COURT: Okay. Give her a copy of it.

MR. HARPOOTLIAN: (Proffering.)

MS. VALENZUELA: Have you had a chance to look at the entire thing to see if this is all of your notes?

MR. HARPOOTLIAN: Well, I'm willing to just talk about this one page but you want all of them in.

THE COURT: No.

MS. VALENZUELA: No. I just want to make sure that when we're saying that these are all of the notes, that he has had a chance to look at them so that he can confirm that these are the full set of notes.

MR. HARPOOTLIAN: He gave them to me Friday.

THE COURT: Okay.

MS. VALENZUELA: This is what just got handed to me and so it's a lot more than this small subsection and that's why I'm confused.

MR. HARPOOTLIAN: These were furnished to me by Mr. Snell on Friday.

THE WITNESS: Thursday.

MR. HARPOOTLIAN: Thursday. I apologize. I wasn't exactly right.

MS. VALENZUELA: I'm just asking him to be able to look at the first and the last page to see if everything is in here. That's it.

THE COURT: Okay. Okay. All right. Let him look.

MR. HARPOOTLIAN: You want me to wait for her to look?

THE COURT: No. She wants him to look to make sure that those are all his notes because she's got a copy of everything, too.

MR. HARPOOTLIAN: Okay.

BY MR. HARPOOTLIAN:

Q. Are these your notes?

A. Appear to be. Yes, sir.

Q. Would those be you complete notes? You furnished me complete notes, right?

A. Yes, sir. That's - that's -- If you printed out the PDF I sent you or if that's a copy of what was hand delivered, then that's, I believe that's the complete notes.

MR. HARPOOTLIAN: As an officer of the Court, I represent this is what he furnished to us.

THE COURT: All right. They're marked and admitted under the business exception of his complete records.

MR. HARPOOTLIAN: That's correct. Thank you, Your Honor.

(Whereupon, Plaintiff's Exhibit #2 marked for identification and admitted.)

THE COURT: Let's take a short break real quick. I want to step out back.

MR. HARPOOTLIAN: Yes, sir.

THE COURT: Let me talk to the attorneys. I want to talk to the two of you.

(Short break.)

BAILIFF: All rise.

THE COURT: Be seated.

MR. HARPOOTLIAN: Please the Court.

THE COURT: Yes, sir.

BY MR. HARPOOTLIAN:

Q. I believe we were talking about plaintiff's exhibit number 2, Snell subpoena 157. How about publish that please. These are your notes. And tell me, when you prepare notes, you make them contemporaneously? What's the time entry on that?

A. March 29th, 3:22 p.m.

Q. 3:22. So you would have met with Ms. Williams prior to 3:22?

A. Yes, sir.

Q. Okay. So go ahead and publish it to the Court.

A. This afternoon Lynn Williams came into the office. Dropped in. She told me that she did not want to hurt my feelings but that she and her mother wondered if I would want to have co-counsel for Lance's trial. This is the first time anything that having been mentioned to them before probably meaning like that. I explained that while we were prepared to go forward I would certainly never turn down any additional assistance and I would find out if there was someone suitable available. After she left, I called Wayne Floyd. Mr. Floyd agreed to help and then we called Ms. Williams back. She wrote a certified check for five thousand to Wayne Floyd to my office. I carried it and a copy of all discovery and reports we had received to Mr. Floyd and met with him that evening. We also conferred by phone with Cindy Hurley nurse consultant.

Q. Okay. So I want to make sure I understand this. Mr. Floyd was retained the evening before the next day's trial?

A. Yes, sir.

Q. According to go your notes?

A. Yes, sir. According to my notes. Yes.

Q. And I don't believe Mr. Floyd had met Mr. Williams at that point; is that correct?

A. Correct. Yes, sir.

Q. So prior to the day of trial, Mr. Floyd did not have

the opportunity to ever meet and discuss the case with the client; is that correct?

A. He would have met -- I know he met with him before trial at the jail, but as far as -- So he met him before the day before. Excuse me. He met him before the day of.

Q. Well, did you go with him down there that night?

A. We did. Yes, sir.

Q. Okay. So y'all went to the jail that night?

A. Yes, sir.

Q. Okay. I'm sorry. So that would have been about 12 hours before the trial started?

A. It was very quick. Yes, sir.

Q. Okay. So about 12 hours before the trial starts you and Mr. Floyd go down to the jail and meet Mr. Williams for the first time? That's Mr. Floyd is meeting with him for the first time?

A. Yes, sir. And again, I would want to -- I would want to -- Uhm, that's my understanding. Yes, sir.

Q. Would you have made a note about that?

A. Probably not.

Q. Okay. Because I looked and I didn't see a note.

A. If it's not in there, we didn't.

Q. Okay. You didn't make a note?

A. Correct.

Q. But you did go to the jail?

A. We did. I do remember that. Yes, sir. Yes, sir.

Q. Okay. So let me go back to make sure I understand the dates here. March 30. So tell me who Cindy Hurley is?

A. She is a registered nurse that offers consulting service where she will review records and discuss medical things with lawyers.

Q. Okay. And you retained her?

A. Yes, sir.

Q. Who paid for that?

A. The Williams family.

Q. The Williams family?

A. Yes, sir.

Q. Do you remember how much that was?

A. I do not.

Q. 2500 sound about right?

MS. VALENZUELA: Objection to leading.

THE COURT: It doesn't matter. It was paid by the Williams. I'm okay with it.

MR. HARPOOTLIAN: Right.

BY THE WITNESS:

A. I wouldn't have thought it would be more than that. I would not have expected it to be anymore than that.

BY MR. HARPOOTLIAN:

Q. 2500. Okay. And Ms. Hurley consulted with you?

A. Yes, sir.

Q. You did not call her to the stand?

A. We did not. No, sir.

Q. Because her testimony was not helpful?

A. It would have - it would have been -- At that point it did not seem necessary at that time after the State finished their presentation.

Q. Why?

A. Dr. Luberoff who was the State's main witness from a medical perspective, kind of what happened, my recollection is at the end of her - basically during her testimony she said the same things that Ms. Hurley would have said.

Q. Which was?

A. Generally speaking that the type of injury that the child in this case had would not - uhm, I guess I would defer to the testimony, but basically wasn't permanent and also was not necessarily penile or from that sort of sexual abuse.

Q. So she was going to primarily testify about the injuries. There were bruises on the little girl?

A. Yes, sir.

Q. And she was going to say those weren't life threatening?

A. Yes, sir.

Q. And then she was going to testify that the scrape or bruise in the vaginal area was not due to a penile entry?

A. Was not the type that would have been from a penis.

I remember Ms. Hurley and I, a big part of her review was we talked about diaper changes and how diaper changes were conducted and made since the child's injuries came through or from a diaper change.

Q. And that was your defense?

A. The defense - the defense in this was that it was not a intentional sexual act or an intentional assault in the genital area of the child.

Q. Did - is there - I mean, did you have any law that said that's a defense?

A. ABHAN said the lesser included for criminal sexual conduct with a minor in the first degree was ABHAN which is an assault and in this case it's a lesser included offense.

Q. Did the judge charge it?

A. He did.

Q. Okay. And did you argue that?

A. Closing argument was Mr. Floyd, but I do believe - I do believe he argued ABHAN.

Q. Okay. So that was your one expert witness and you didn't call her?

A. Correct.

Q. So the only witnesses you called were Mr. Williams and somebody from DSS?

A. Yes, sir.

Q. To argue that he was not a custodian or --

A. Yes, sir.

Q. Right. So, uhm, let me ask you a couple things. In terms of the notice -- Well, in terms of the trial the State called two expert witnesses, right?

A. I would defer to the transcript.

Q. Well, they called --

A. I remember Dr. Luberoff.

Q. Right. What about a nurse, the SANE nurse?

A. I would defer to the transcript. I apologize. As far as --

Q. Let me make sure I get her name correct.

MS. VALENZUELA: Nurse Clary.

MR. HARPOOTLIAN: I was looking. Okay.

MS. VALENZUELA: Page 223.

BY MR. HARPOOTLIAN:

Q. She's right. Marlena Clary which was a SANE nurse. Do you remember that? She was the one that initially examined the child?

A. I don't have a specific recollection.

Q. Okay. Well, on page 229 the State moves to qualify Nurse Hurley as an expert. Do you remember that?

A. I do not. No, sir.

Q. Okay. Let me show you page 229.

MR. HARPOOTLIAN: This is Court's exhibit, page 229, Your Honor.

THE COURT: Okay.

BY MR. HARPOOTLIAN:

Q. Direct examination. Ms. Mayes says, Your Honor, at this time the State would offer Marlena Clary as an expert in the field of forensic nurse examination. Do you remember that now?

A. I do not. No, sir.

Q. And there were no questions asked by you or Mr. Floyd of her.

A. I would --

Q. Okay. And then Mr. Floyd -- Wait a minute. I lost the page. 229. There it is. Mr. Floyd says on page 229, no, Your Honor. I'm a little surprised because she's not identified as an expert in the State's witness list they provided us, okay?

A. I don't -- Again, I don't have a -- I don't -- I would defer to the transcript, I apologize, but as far as the testimony and colloquy.

Q. So the witness list did not - you had never been notified she was an expert according to what Mr. Floyd says and the witness list we looked at a moment ago furnished by Ms. Mayes did not designate her an expert; is that correct?

A. Ms. Clary is on the witness list.

Q. But not identified as an expert, correct? She lists two experts, right, at the bottom?

A. She does. Yes, sir.
Q. And who are they?
A. Dr. Luberoff and Dr. Garber.
Q. And as I understand it, this is the only time you have gotten notice that these folks were going to be experts, correct?
A. Correct.
Q. Okay. So at this point during the trial, and your co-counsel is Mr. Floyd, you have indicated to him or y'all knew she had not been designated as an expert under Rule 5?
A. Correct.
Q. What's your understanding of the requirement under Rule 5 for the State to designate an expert?
A. Advance notice.
Q. How much?
A. I don't recall. I would have to refer to the rule but I know it's just like we heard today, it's not something that lawyers want sprung on them in the midst of trial.
Q. So and you had been in this case for a year and you were not aware that she was going to be an expert witness until not even that day, until as you're sitting in the courtroom?
A. Correct. Now, I would have - we would have known that she was - we would have had those reports provided. We knew that she was a potential expert. Excuse me. Potential

witness.

Q. Correct.

A. But as far as the specific questions or things that she would be asked by the prosecutor I did not until she was called as a witness.

Q. And you understand that under Rule 5 you would have had a perfectly good objection to ask her testimony not be allowed?

A. As far as expert opinion testimony, yes, sir.

Q. And yet there was no objection heard other than you didn't know about it?

A. I would defer. I believe this was Mr. Floyd's witness. But as far as -- I would defer to whatever is in the transcript and I believe Mr. Floyd was responsible for the comments to the Court regarding that witness.

Q. I'm not talking about responsibility here. I'm talking about, you're sitting as co-counsel. You're the guy that's had the case for a year.

A. Yes, sir.

Q. Mr. Floyd has been in it for 12 hours, right?

A. Again, a lot less time that I had. Yes, sir.

Q. Well, 364 days less than you, correct?

A. Correct. Yes, sir.

Q. Okay. And at that point tell me what strategic decision, if any, you made to go ahead and allow this witness

to testify?

A. I do not recall the specific thought process during that time other than generally speaking to the witness. A report would have been made available, would have been reviewed and...

Q. There were a number of photographs that were entered while this witness, this expert that y'all did not object to, that she took and testified, interpreted them, did she not?

A. Mr. Harpootlian, I apologize. As far as recollection I would defer to the transcript. I do remember a witness testifying and photographs being presented by the witness. As far as which witness presented which photographs I don't recall.

Q. Okay. I think the transcript will show. Let me get these. The transcript will show --

MS. VALENZUELA: Your Honor, I'm going to raise an objection here. The witness who is testifying did not do the direct - the cross examination of this witness. One thing I just want to correct. I pointed out to Mr. Harpootlian that he misspoke earlier when he said that there had been no cross examination in this record. It does start at page 291, that that indicated that that cross examination was done by Mr. Floyd. And the witness has also already indicated that he does not remember this witness that they are talking about Marlena Clary. So I

don't think any further questions after the witness has indicated that he doesn't remember and that he didn't have anything to do with any cross examination or about this-cross examination is proper for him. I will note that Mr. Floyd is in the courtroom, is under subpoena by both parties.

MR. HARPOOTLIAN: Well, let me mark for identification photos 16, 17, 19 and 20.

MS. VALENZUELA: Can I see which ones we are talking about?

MR. HARPOOTLIAN: These are ones that were introduced through her.

MS. VALENZUELA: Yes. I just wanted to make sure.

BY MR. HARPOOTLIAN:

Q. Okay. And you don't remember this photograph?

A. I don't remember that specific photograph. No, sir. I remember - I remember the general photographs of that general type and description. As far as individual photographs I don't recall.

Q. So these photographs were introduced without objection? Do you know?

A. I would defer to the transcript.

MR. HARPOOTLIAN: Okay. Let me mark for identification 20, 19, 17, and 16 and the transcript, Your Honor, I'll represent to the Court these were

introduced without objection.

BY MR. HARPOOTLIAN:

Q. Mr. Floyd was doing the examination, the cross examination of her. But I would note for the record that you were in the courtroom when this happened?

A. I was in the courtroom for the duration of the trial. Yes, sir.

Q. Were you listening to the testimony?

A. Yes, sir.

MR. HARPOOTLIAN: Okay. We're marking those for identification at this point only.

THE COURT: Okay. Marked for identification. They would be remarked for this hearing, correct?

MR. HARPOOTLIAN: Yes, sir.

(Whereupon, Plaintiff's Exhibits #3, #4, #5, #6, marked for identification.)

BY THE WITNESS:

A. If I may, I might want to go back and just thinking back about the timeline associating Mr. Floyd, if I may thinking back about the dates and the timeline, my recollection is that the Williams family contacted us about getting co-counsel on Monday which is the day we did jury qualification and - because I recalled -- That's my recollection. And it's very possible that Mr. Floyd was brought in not on Wednesday but potentially on Monday.

BY MR. HARPOOTLIAN:

Q. But the check didn't come until Tuesday?

A. And the check may have come -- So if the check came on Tuesday---

Q. Well, Mr. Floyd will clarify that.

A. Yes. I'm just saying.

Q. But certainly 48 hours max before the trial?

A. Yes, sir.

Q. And you have no memory of the strategy for not objecting to this witness under Rule 5?

A. I don't have a specific recollection. My understanding at the time we would have been provided with her notes or her report in advance and so whatever the decision was or wasn't, whatever decision at that time was made we would have been contemplating what the report would have been or what her testimony we would expect to be.

Q. But you understand a possible sanction for not disclosing a witness under Rule 5 is to not allow that witness to testify?

A. Yes, sir.

Q. Did you and Mr. Floyd attempt to do that?

A. If the transcript says there was no objection made under that rule, then we did not.

Q. Mr. Floyd did raise the issue that she had not been named previously as an expert, but you have no recollection of

any discussion between you and Mr. Floyd?

A. I do not. Not on that point. No, sir.

Q. Okay. So was Mr. Floyd calling all the shots?

A. No, sir.

Q. You were participating with him?

A. Yes, sir.

Q. Yet you have no recollection of that?

A. As far as the specifics, I'm trying to only say things that I specifically remember and as far as whatever conversation he and I would have had in the courtroom during the middle of the trial on that topic I don't recall.

Q. Now, in addition, I believe we have looked at that witness list and you said she was on the witness list but not designated as an expert?

A. Correct. Yes, sir.

Q. Now, Dr. Luberoff was?

A. Yes, sir.

Q. And what date was this list given to you?

A. March 25th.

Q. March 25th?

A. Yes.

Q. Five days before you actually started the trial?

A. Yes, sir.

Q. Now, your understanding of Rule 5 is that they have to give it to you when?

A. I would have to defer to the rule as far as whatever the rule says but issues like that I pull out the rule and would look at the rule.

Q. So if you want to disagree with me, I think the Rule 5(a) says within 30 days of the request. And you filed that request I'm sure soon after the guy was arrested?

A. Yes, sir.

Q. Okay. Or within further order of the court. So without an order of the court they were late, right? Five days prior to trial?

A. If that's the text of the rule, then it sounds like they would have been, uhm, would have been late.

Q. Now, one way to deal with that when you got that notice is saying you haven't provided me with adequate notice. We would ask for a continuance, right? Could you do that?

A. Yes. Yes, sir.

Q. Which would give you more time for Mr. Floyd to get engaged in the case and perhaps understand the case a little bit better?

A. You know, at that - which could have -- Uhm, of course, Mr. Floyd was, my understanding was, uhm, the family wanted someone older to appear in front of the jury and that was Mr. - that was Mr. Floyd's role. As far as the actual, you know, sort of reviewing the case and -- I mean, I was ready to try the case at that time.

Q. Well, let me ask you this: Of the 13 witnesses called by the State or 12, I'm sorry, 12 witnesses called by the State --

A. Yes, sir.

Q. -- how many of those did Mr. Floyd cross examine and how many did you cross examine?

A. I don't recall the number but Mr. Floyd was certainly actively involved in cross examining the witnesses.

Q. Would you contradict me if I said you examined two and he examined ten?

A. I would not. No, sir.

Q. So if you were prepared for trial having worked on this case for a year --

A. Yes, sir.

Q. -- Mr. Floyd had we think no more than 48 hours, maybe less than that --

A. Yes, sir.

Q. -- he got prepared more than you did on those 11 witnesses?

A. Mr. -- As far as the facts of the case, what the witnesses were going to say, Mr. Floyd, uhm, in my talks with him and my meetings with him and before the trial I was comfortable he got it. In my - my thought Mr. Floyd was a fantastic trial lawyer and I would - if Mr. Floyd says he's

ready for a witness, after seeing Mr. Floyd in other trials and proceedings I would -- If he says he's ready, he's ready. And he - he -- I always -- That's why I went to Mr. Floyd is I knew that he was - would do an excellent job in court.

Q. And let me for the record put in, see if you disagree with me on this. The first witness was Katie Cooper.

A. No disagreement.

Q. Let me show you from the index of trial witnesses. Katie Cooper.

A. Yes, sir.

Q. Mr. Floyd did her examination?

A. Yes, sir.

Q. Brittany Brown. You did her examination?

A. Yes, sir.

Q. Mr. Floyd did Lee Anne Harvey, Tommy Hutto, Marlena Clary, Adrienne Riley-Hefney. I'm sorry. You did Adrienne Riley-Hefney.

A. Yes, sir.

Q. And he did Susan Luberoff, Ed Prestigiacomo, Shelby Derrick, Troy Crump, Beth Harmon and Candy Kyzer?

A. I would agree with the transcript.

Q. Okay.

A. Certainly.

Q. Now, you or the family retained a guy named Ed

Friedlander; is that correct?

A. He was not retained.

MS. VALENZUELA: Before we move onto another topic, I just want to renew my objection. I know you said I didn't have to but I would move to have all of that stricken as not one of the allegations that was brought up in terms of notice. Obviously he's had the transcript. He had the check that showed that Mr. Floyd was only retained two days prior to the trial and that he handled this and it's in the transcript that they didn't have notice of this SANE nurse who would be qualified as an expert at trial. So I don't think that there is anything that they couldn't have found out that prevented them from giving me notice of this allegation prior to the hearing.

THE COURT: Okay. Objection noted.

BY MR. HARPOOTLIAN:

Q. So who is Ed Friedlander?

A. Uh, he -- Well, he was -- He's a medical -- My understanding is, uhm, he, uhm, that he may be, I believe he's a medical doctor. He's located out of the state. He was not retained by anyone for the case. He provided - he reviewed some documents and materials, wrote a letter and I had a phone conversation with him.

MR. HARPOOTLIAN: Okay. How about marking this for

me please. This is a letter from Dr. Friedlander to Mr. Snell.

MS. VALENZUELA: Let me see it.

MR. HARPOOTLIAN: I thought I gave it to you, didn't I?

MS. VALENZUELA: Let me see what you're handing him that you say that you handed to me before.

MR. HARPOOTLIAN: Oh, this is totally different. I have lied and deceived you.

MS. VALENZUELA: It's just a normal practice to hand me the exhibit that you're going to hand him.

(Whereupon, Plaintiff's Exhibit #7 marked for identification.)

MS. VALENZUELA: It's a different Bates number on my copy, Your Honor, but it appears to be the same copy and I appreciate the courtesy.

THE COURT: Okay.

BY MR. HARPOOTLIAN:

Q. First of all, have you seen this letter before?

A. I have. Yes, sir.

Q. Okay. This is a letter from Dr. Friedlander to you?

A. Yes, sir.

Q. Let me read it into the record. Dear, Mr. Snell, thank you for the opportunity to examine the case file on

Larry (sic) Williams. I have received your disk and examined the police reports, account of Mr. Williams' statements, the photo of the child including the SANE nurse exam photos. What appears to be happened is classic. A man in a relationship with a woman who is made caregiver to her child by another man who becomes frustrated with the situation. While changing a diaper loses control of himself and takes out his anger physically on the child. The case summary is in error. The vagina was not visualized. The hymen was not seen well enough to photograph. There are a pair of visual abrasions of the vulva which is not the vagina which are quite consistent with the defendant's account of having gripped the child here forcefully while he was out of control when he was trying to clean her. I see no intent to commit an act of sexual gratification nor do I see anything anywhere on the body to damage the child physically in the long run.

And then he goes on to talk about, uhm, he looked forward to receiving the entire set of medical records. Uhm, he even says, there are genetic diseases. Most famously a mutant monoamine oxidase that causes people to suddenly lose control when even slightly stressed. So he said he was licensed in the practice of medicine in Kansas and Missouri.

Now, this seems to have some helpful information in it, does it not?

A. It does.

Q. And you talked to Dr. Friedlander and he was willing to testify in this case, was he not?

A. Arrangements could have been made. Yes, sir.

Q. And tell me the gravamen of the defense in this case?

A. The first thing, and again --

Q. To the criminal sexual conduct?

A. And from the - and again sort of the - of the version or the belief from Mr. Williams when he first met with me was different than the version he provided law enforcement during the statement and different when he testified and his story moved during the representation. At this point Mr. Williams wasn't acknowledging intentionally leaving marks, bruises, doing anything with the vaginal area.

Q. With the vaginal area?

A. Yes, sir.

Q. Okay.

A. Or any -- Uhm, so it would have either been -- With that being said, it either would have been someone else leaving the marks and the bruises or the marks and bruises weren't as bad as the charges indicated. I don't know how else to phrase it.

Q. So Mr. Williams in his statement to the police and in his testimony indicated he became frustrated because the baby had defecated in its diaper and some of that defecation

had gotten between the lips of her vagina; is that correct?

A. Yes, sir.

Q. And Dr. Friedlander was made available because he got the statement, right?

A. At the time we had the statement, Mr. Williams' version with me was different than what his version was that I got angry or upset.

Q. But that's what he told the police?

A. That's what he told the police.

Q. And the only written recorded version was that?

A. Yes, sir.

Q. That he was angry and upset that the child --

A. Yes, sir.

Q. -- had gotten fecal matter in between the lips of its vagina?

A. Yes, sir.

Q. And that he had to clean that out and he may have been too forceful in doing that; is that correct?

A. Yes, sir.

Q. Okay. And Dr. Friedlander felt that explanation was not consistent with criminal sexual conduct?

A. His -- Well, let me say this: Dr. Friedlander, of course, doesn't know what the South Carolina standard was on criminal sexual conduct.

Q. Did you tell him?

A. I don't recall if we had that -- Let me say I would not have - I would not have relied on an out of state doctor to tell me what the legal elements of CSC are.

Q. What are the legal elements?

A. It's a sexual battery upon a child under 11. Sexual battery is any intrusion into a private parts of the genitalia for an unrecognized medical purpose.

Q. An unrecognized medical purpose?

A. Right. So we have a diaper change which certainly can be a medical purpose, a legitimate reason for any adult to touch a child's genitalia. The child had injuries. The State charged him with criminal sexual conduct even though I don't believe there was anything sexual or any evidence that it was sexual.

Q. Didn't have to be, did it?

A. According to the State's version it did not.

Q. Well --

A. Read the statute. There is no requirement of --

Q. But if there was a medical reason to have an intrusion, it would have been a defense?

A. Exactly. Such as a diaper change.

Q. And that's what Dr. Friedlander gave you?

A. Dr. Friedlander would have testified about the -- Dr. Friedlander would have testified -- Again, I never met him. Never got anything beyond a letter but he would have --

Q. But you had discussions with him?

A. I had one conversation with him that was brief and I don't - and I don't -- We had the letter. At that time, of course, he would have had a big retainer.

Q. How big?

A. I don't recall, but I remember it was - it would have included travel. He's a medical doctor. It would have been whatever that -- I would defer to him.

Q. I looked through your notes. I didn't see anything about talking to Dr. Friedlander or a retainer.

A. He wasn't retained. I had one phone conversation with him.

Q. Or a retainer fee that he offered that he said I would do it for X?

A. I don't think he ever gave a specific quote. I think -- I don't recall a specific quote and if he did give me one, I didn't write it down.

Q. But correct me if I'm wrong. You had no other medical expert that would testify that the injuries were consistent with a diaper change as Lance Williams explained it; is that correct? No other witness?

A. No one testified. We had Sandy Hurley we consulted with and considered having testify.

Q. But you didn't call her?

A. We didn't call her. No, sir.

Q. And that was the defense? The defense was a rough diaper change basically?

A. Rough diaper change. Yes, sir.

Q. Okay. Dr. Friedlander's opinion was consistent with that?

A. It was.

Q. Okay. And he was not retained nor called by you?

A. Again, at the time that this was discussed and presented, Mr. Williams would not have been in agreement with retaining a witness like this or presenting this type of defense.

Q. Did you ask him?

A. Yes.

Q. And he said don't hire him?

A. Mr. Williams said -- Mr. Williams version was I didn't cause it. It wasn't - it wasn't angry. It was -- You know, it wasn't done out of anger. It wasn't done by me.

Q. Even though he had a written statement that he had given to the police saying exactly that?

A. Correct.

Q. And when you put him on the stand during the trial, that's exactly what he said?

A. Correct. Yes, sir.

Q. And did you talk to him before you put him on the stand?

A. Yes, sir.

Q. When? How many days, weeks, months before?

A. The day he testified. The day before he testified. The day before that. The day before that.

Q. And his story was consistent with his testimony?

A. His story became - was inconsistent and then later on as we got closer to the trial date his story --

Q. How close?

A. -- became consistent.

Q. How close? Weeks? Months?

A. Probably weeks or months.

Q. Okay. And once he changed back to --

A. Yes, sir.

Q. -- the rough diaper change, did you call Dr. Friedlander?

A. I did not.

Q. Did you attempt to retain him to testify?

A. I did not. At that time we had Ms. Hurley who would have been available for the same type of testimony if required.

Q. And you did not call her?

A. We did not call her.

Q. And she would have testified consistent with a rough diaper change?

A. She would have testified that as far as how -- She

would have testified as far as how babies, how diapers are changed. How girls are changed as far as the position of the body, position of the genital area and where peoples hands go on little girls when they're changing a diaper.

Q. Would she have testified that the injuries to this child, her vaginal area were consistent, and pubic area, were consistent with a rough diaper change, consistent with somebody trying to get fecal matter from between the lips of the vagina? Would she have testified to that?

A. I don't know if she would have testified to that.

Q. Did she give you an opinion that said that?

A. In her opinion the child, the way a girl's body is positioned, a young girl is positioned during a diaper change would certainly lead to physical contact with the genital area.

Q. Why didn't you call her?

A. During the trial after the State presented their witnesses and considering their testimony including the testimony of Dr. Luberoff it didn't appear at that time to be necessary.

Q. But Dr. Luberoff didn't say the injuries were consistent with somebody attempting to remove fecal matter from between the lips of a little girl's vagina, did she?

A. I would defer to the transcript and, of course, there's no -- I would need to defer to the transcript. But I

do recall Dr. Luberoff's testimony at the end of it and --

Q. On cross?

A. -- confirmed with Mr. Floyd was - her testimony was not specifically directly that this injury would have definitely come from some sort of sexual assault.

Q. Okay. Remember now, we both agree the law doesn't require a sexual assault, correct?

A. Correct.

Q. I read the transcript. She said she can't say it was somebody with sexual gratification, sexual need, whatever?

A. Correct.

Q. But that's not what the statute requires, correct?

A. Correct.

Q. You can't enter the genital area unless you're doing it for medically necessary reason?

A. Correct.

Q. And you knew then and now that somebody, a little girl with fecal matter in her vagina it could cause a serious medical condition, right? Do you not know that?

A. I do know that children should be cleaned. Yes.

Q. Yes. Okay.

A. Yes. Yes.

Q. And that would be a medically necessary reason?

A. I think diaper changes are medically necessary.

Q. Well, not diaper changes but removing fecal matter from inside the vaginal or genital area of a small child?

A. Yes.

Q. Okay. So let me make sure I understand this. Y'all decided not to call the expert that you had here or get any other physician or medical expert to testify?

A. Correct. We discussed the potential testimony with Dr. Abel who is a medical doctor in South Carolina and then also discussed it with Ms. Hurley who is a nurse but the ultimate decision was made not to call either.

Q. Okay. Now, one of the exhibits in this trial which I assume -- Never mind. I'm not going to put that in. I want to make sure I understand this. I think I'm done after this question. But I have got two questions. You did not ever consider moving for a continuance or did you?

A. I think -- Let me say this: I think in every, every case I think it's considered what do I need. Do I need more time for anything else. Uhm, I know in this case I didn't see a need for a continuance. I didn't see anything to argue to a judge or explain why we needed more time for anything.

Q. The fact that you didn't get the notice of an expert witness until five days before the trial?

A. We had the reports.

Q. Right.

A. We had the reports. We already had them evaluated

by a nurse consultant so I don't know what benefit an extra week or two or three or four would have been. We already had those materials for several months and looked at them.

Q. Well, Mr. Floyd might have had a little more opportunity to get prepared. He might have gone and interviewed some witnesses because we can see you never interviewed a one.

MS. VALENZUELA: Objection. Is he testifying as to what Mr. Floyd would say as to what he needed? I object to him testifying and leading at this time.

THE COURT: Don't lead.

MR. HARPOOTLIAN: Yes, sir.

BY MR. HARPOOTLIAN:

Q. If you had gotten a two or three week continuance, would that have given Mr. Floyd an opportunity to actually go interview witnesses?

A. I don't know if Mr. Floyd would have come in the case and that's the thing. Mr. Floyd came in as special, kind of special request just to be kind of trial - for trial purposes. I don't know if Mr. Floyd would have agreed to be retained or would have been retained. If the case had been continued, he might not have come in at all.

Q. But you wouldn't have known that until you got to court the next morning. He was already retained. He didn't have an opportunity to move for a continuance until the

morning of the trial, did you?

A. That's correct.

Q. So Mr. Floyd was in the case --

A. That is correct.

Q. -- and at that point you decided not to move for a continuance?

A. That's - that's - that's correct. We would have maintained the right to ask for a continuance up until --

Q. Jury selection?

A. -- until we got a jury sworn.

Q. The jury had not been sworn?

A. Or even up until the immediate second before we started.

Q. Correct. Okay. Now, let me ask you this: You have indicated you didn't interview any witnesses except one law enforcement. You have indicated that you had no expert. You called no expert. You may have had one, but you had no real counter to Dr. Luberoff's position that this was an intrusion in the genital area which is against the law, correct? Did you have an expert that you were going to call to do that?

A. Other -- Potentially we could have called Ms. Hurley about the diaper change but as far as a medical doctor because our - our evaluating doctor adopted all the, basically said Dr. Luberoff, you know, all her - I concur with her report.

Q. Except for Dr. Friedlander who sent you a letter, a

report?

A. Yeah. But Dr. Friedlander was very -- Again, Dr. Friedlander's report says that the child was definitely injured.

Q. Right.

A. Definite results of an intrusion or something that the defendant did. Dr. Friedlander's report, his conclusions would have been that Mr. Williams was overly rough with the child's genital areas which is what the State argued constituted CSC first. I don't think - I don't think that Dr. Friedlander would have been helpful.

Q. Would not have ben helpful on the child abuse allegation which carries ten years?

A. I don't think Dr. - I don't think Dr. Friedlander would have necessarily been helpful on the CSC first.

Q. So you had no defense?

A. The defense - the defense to this is, uhm -- And again, because Dr. Friedlander would have said it's definitely clear that the child's genital areas were - definitely something happened.

Q. Right.

A. And we get into a question of what's the motivation or why.

Q. Right. Whether it's -- It doesn't even have to be sexual. But does he have a medically necessary reason to do

that? I'm not going to that reap all that ground.

A. Right.

Q. But so reviewing all of that --

A. Yes.

Q. -- do you believe you were effective or ineffective in this case?

A. Effective.

Q. Okay.

A. No one is ever perfect and nothing is ever perfect.

Q. Well, let me ask you this: Anne Abel, who does she practice with?

A. I believe she's affiliated with the medical university.

Q. Was she with Dr. Luberoff?

A. They were in the same kind of group. Yes, sir.

Q. Did you instruct her that she should retain, that she should send a retainer to Ms. Williams, a retainer agreement?

A. Yes.

Q. And did you spend, on March 28th, Monday, March 28th, you said I'm preparing a cross examination of Dr. Luberoff and then you asked her ten questions about crossing Dr. Luberoff?

A. Yes, sir.

Q. Okay. Did you get a response to that?

A. We had kind of a brief brisk phone call and she really wasn't - it wasn't productive or helpful.

Q. Okay.

A. Now that being said, as far as getting specific pre-plAnneed cross or something from her, I never received that and she just deferred to Dr. Luberoff's findings.

Q. And that's on March 28th, Monday?

A. Yes, sir.

Q. Before the trial starts on Wednesday?

A. Yes.

Q. So it's still at that point you're flailing around looking for an expert?

A. No, sir. Again - again - again, we were not flailing around looking for an expert. And again, at the point we had gotten before trial if we thought we needed another expert, we would certainly would have moved for a continuance or asked for additional time.

Q. That would have been appropriate?

A. Let me just say this: Any time, of course, a client is sentenced to this amount of time, looking back at it, you know, if you ask me now if he had an opportunity to go through and redo just about anything, I think every lawyer and every time you would.

Q. How much time did Mr. Williams get?

A. 25 years.

MS. VALENZUELA: You haven't allowed him to finish his answer.

BY MR. HARPOOTLIAN:

Q. I apologize. Go ahead.

BY THE WITNESS:

A. 25 years.

Q. And 10?

A. Plus the 10 and that is - that's an awful lot of time for this type of injury and this type of case and I got --

Q. What?

A. I just think it's an awful lot of time for this type of circumstance.

MR. HARPOOTLIAN: Okay. Thank you.

THE COURT: Cross.

MS. VALENZUELA: Yes, Your Honor, but may I have a restroom break?

THE COURT: Sure.

(Short break.)

THE COURT: All right. Ms. Valenzuela, whenever you are ready.

MS. VALENZUELA: Please the Court.

THE COURT: Okay.

CROSS EXAMINATION

BY MS. VALENZUELA:

Q. Mr. Snell, let's give the Court a little bit of the allegations and the evidence that you were dealing with in this case, okay?

A. Yes, ma'am.

Q. This case involves the applicant Lance Williams who is dating the victim's mother; is that right?

A. Yes, ma'am.

Q. Okay. And the victim is 15 months old at the time of the assault?

A. I don't recall the specific age, but that sounds approximately in line with my recollection.

Q. And, of course, the Court has the transcript in front of it. So the applicant had been dating the victim's mom for approximately four months; is that correct?

A. I don't recall the time period, but I know they had been dating. I know it was an established relationship at that point but I would defer to the...

Q. Okay. And the allegations presented during the trial are that the defendant, the applicant is left home with the 15 month old and he is supposed to be taking care of her while the mom builds a fence with her father away from the home?

A. I do recall that being an allegation. Yes.

Q. Okay. And the allegations presented by the State

are that there are no physical injuries on the child previous to them picking the child up at the end of the day from the defendant?

A. Correct.

Q. Okay. And then the allegations are when they get there, that the applicant does notify the mother that the child fell and injured her forehead?

A. Correct.

Q. Okay. But when the child is picked up, they notice that she has bruises on both of her ears, bruises on her forehead and then some bruises on her arms?

A. That's correct. I think it was a little bit later -- I don't know if it was the very second they picked her up. It might have been an hour or some period of time later that they were noticed.

Q. In the same evening?

A. Yes, ma'am.

Q. Okay. And in the same evening they also do a diaper change of the baby and they noticed something about the baby's vagina that indicates to them that they need to take her to the hospital, correct?

A. Yes, ma'am.

Q. Okay. So they meet the mother and then they take the child to the hospital, right?

A. Yes, ma'am.

Q. Okay. And so the child is taken to the hospital on the same evening that the defendant was taking care of the child?

A. Yes, ma'am.

Q. Okay. And so the child is then, a rape kit is performed on the child?

A. Yes, ma'am.

Q. Okay. And there are also photographs taken of the child's vagina and her entire body?

A. I would need to defer to the reports for exactly when the photos were taken, but there were certainly a lot of photographs taken of the child.

Q. Okay. And there was also a rape kit done on the child?

A. I do recall that. Yes, ma'am.

Q. Okay. And what they identified or at least what the State presented at the trial was that the victim had bruises to her ears?

A. Yes, ma'am.

Q. A bruise on her head?

A. Yes, ma'am.

Q. A hematoma on the back of her head?

A. Yes, ma'am.

Q. Bruises on her arms?

A. Yes, ma'am.

Q. And then she had bruises and I believe Dr. Luberoff testified bruises that would be consistent with teeth marks on her vulva, the pelvic bone of her vulva?

A. Yes, ma'am.

Q. And that additionally there was injuries to the actual labia minora?

A. Yes, ma'am.

Q. Okay. And then in addition that the hymen inside of the vagina or leading to the vagina, that the hymen had a bruise in the lower part?

A. Yes, ma'am.

Q. And there was testimony by the State that the hymen is like, in that part of the vagina, is like the mouth so it's wet tissue. Do you remember that? Do you remember testimony about how it is hard to bruise that part of the body?

A. I don't recall that specifically.

MR. HARPOOTLIAN: If it please the Court, Your Honor, the record is what the record is. I mean, if there is some follow up question, he's aware of the injuries. He's aware of the allegations. Perhaps we can cut to the chase.

MS. VALENZUELA: This goes directly to the expert witnesses and the theory of the defense, Your Honor.

THE COURT: Okay. All right.

BY MS. VALENZUELA:

Q. And so in addition there was testimony by Dr. Luberoff that the injury to the hymen indicated that this was an acute injury meaning an injury that had happened within the last two days?

A. I do recall that. Yes, ma'am.

Q. Okay. The testimony presented by the State also included a written statement handwritten and your client's signature where he confessed to police, correct?

A. Correct.

Q. And in that confession, that was part of the evidence presented by the State, it was that your client had admitted in writing that he had caused those injuries to the child? And I'm sorry. You're right. Because I'm conflating those so we'll go through them one at a time. He confirmed that he had slapped the child with an open hand on each ear causing the bruises to the ears?

A. Correct.

Q. Okay. And he still maintained that the injury to her forehead was caused by a fall?

A. I believe that's my recollection. Yes, ma'am.

Q. And then he stated that the injuries to her arms were when he had picked her up by her elbows, although his mother had told him not to do that, that that's how he picked up children in order not to injure his back?

A. That's my recollection. And again, I would defer to

his actual written statement because I don't want to get confused with trial testimony versus the original statement. But that's my understanding of it.

Q. And he also stated in the written statement -- So there's two parts to the written statement. There's his handwritten statement and then there's portions where the police officer wrote out specific questions and he wrote responses to them, right?

A. Yes, ma'am.

Q. Okay. And in the written statement he says that he believes that the injuries to the child's -- And they're using vagina but it's the pelvic bone or vaginal area -- that the injuries to her were caused when he was trying to treat her eczema by putting Aveeno lotion on her?

A. Yes, ma'am.

Q. Okay. And then in the questions by police they say what happened to her vagina. He responds that she had a dirty diaper and he was trying to clean it and he must have been rougher than he intended to be?

A. Yes, ma'am.

Q. Okay. And in that same interview with police officers he explains that his right hand was injured as a child and that he doesn't actually have full sensation in his hand?

A. Yes, ma'am.

Q. And he claims to police officers that he doesn't know the strength - he doesn't know his own strength with his right hand?

A. Yes, ma'am.

Q. There's testimony by police officers that he punches the table, that he shakes their hand to show them, I have no idea what this hand can do?

A. Yes, ma'am.

Q. Okay. And then your client testified at trial?

A. Yes, ma'am.

Q. And at trial he testified to essentially the same thing that he had in his written statement?

A. Yes, ma'am.

Q. He testified that he had slapped the child with an open hand on both ears?

A. Yes, ma'am.

Q. He testified that one was because the child was throwing toys and once was because the child was throwing a bottle?

A. I would defer to the testimony but I do know that --

Q. Did he indicate in his testimony that he did it in response to something that the child had done and that it dealt with his frustration that day?

A. I believe so. Yes, ma'am.

Q. Okay. And then he also testified -- He changed his

testimony a little bit in that he talked about the Aveeno lotion being applied to her legs and not her vagina, correct?

A. I remember there was some testimony about lotion. As far as how it changed the story without looking at the transcript I don't have a specific recollection.

Q. And he testified that the baby did have a dirty diaper?

A. Yes.

Q. That it was a diarrhea diaper so that the poop had gotten -- I'm just gonna use poop because we all know what that means -- the poop had gone up the back of her diaper and also up her vaginal lips?

A. Yes, ma'am.

Q. And that he was cleaning her?

A. Yes, ma'am.

Q. And he confirmed that there was a baby wipe that had what he confirmed to be blood on it and that that had come from wiping the baby?

A. Yes, ma'am.

Q. But he claimed that that blood came from her butt and not from her vagina?

A. I believe that's correct. Yes, ma'am.

Q. Okay. And he claimed that he was wiping her and he was frustrated that day and he thought that maybe he had used

too much force but he certainly was not doing that for sexual gratification?

A. Correct. Yes, ma'am.

Q. Okay. So his - the theory here that y'all are being presented to and what you're left with after your client testifies for sure is he did it all, he caused all the injuries, but he did it by anger, accidentally by anger and not because he was sexually attracted to the child?

A. Correct. And it was all, the genital contact was all in line with the diaper change.

Q. Okay. And so, you know, you talked a little bit about the experts that you had associated with and I don't know if it was the question being asked, but you mentioned, you said at one point that you had only consulted with one other expert but that's not accurate. You had only consulted with one other medical expert?

A. Well, from a medical like a human body doctor expert only one. We did have other people we consulted or used during the preparation of the case.

Q. Let's go through those a little bit. You had your nurse who was serving as your consultant?

A. Yes, ma'am.

Q. Okay. And you were gonna put her up there to say, hey, diaper changes, especially when there's fecal matter in between the vaginal lips, must be cleaned carefully this

way?

A. Yes, ma'am.

Q. But you got that testimony -- I think you testified earlier that you got that out of Dr. Luberoff?

A. That's my recollection at this time. Yes, ma'am.

Q. Okay. And then you also had at least consulted with Anne Abel at one point?

A. Yes, ma'am.

Q. And Anne Abel actually looked up a certain -- I'm going to -- I'll hand this to you.

(Whereupon, Defendant's Exhibit #1 marked for identification.)

BY MS. VALENZUELA:

Q. So I'm handing you what is labeled as defendant's exhibit 1. Can you look it over?

A. (Witness complies.) Yes, ma'am.

Q. Does that look familiar?

A. Yes. It does.

Q. Does it come out of your file?

A. Yes, ma'am.

Q. Is it part of your regularly kept records?

A. Yes, ma'am.

MS. VALENZUELA: Move to admit defendant's exhibit 1.

MR. HARPOOTLIAN: No objection.

THE COURT: Admitted.

BY MS. VALENZUELA:

Q. Okay. So what are we looking at here? Is this a letter from Dr. Abel?

A. It's a letter from Dr. Abel. Yes, ma'am.

Q. You testified earlier that you had talked to her and also had her look at Dr. Luberoff's work as well?

A. Yes, ma'am.

Q. Okay. And then here you went back to Dr. Abel, or I'm not sure of the timeline so please explain it to us, but at some point you talked to Dr. Abel and have her explore the theory that there is perhaps something wrong with this child's genitals that would have required additional medical cream to be applied to her, correct?

A. I can and I recall, and I don't even want to - I'll spell the medical term, it was l-i-c-h-e-n s-c-l-e-r-o-s-u-s and that was, my recollection was that was something that Mr. Williams' grandmother had maybe e-mailed or commented or asked about and asked to have Dr. Abel comment on.

Q. And did Dr. Abel look at that and try to determine if it could be suggested that the child had this skin condition?

A. She did. Yes, ma'am.

Q. And what does the letter indicate? Were you going to be able to use that in any way to help your client?

A. The letter indicates that there was no evidence of that condition in the case.

Q. Okay. In fact, your client testified at trial that he ended up abandoning the cream and he ended up focusing on cleaning up the fecal matter from her lips?

A. Yes, ma'am.

Q. Okay. And then additionally you had other experts that you talked to because you were trying to address the intent of your client in terms of these injuries appearing in the child's vagina, correct?

A. Yes, ma'am.

Q. And you were hoping that you were going to be able to get some evidence from your experts to show the State that he was not, this is not a pedophile. This is not a sexual offender. This is a man with a bad temper?

A. Yes, ma'am.

Q. Okay. And so one of the things that you tried was you tried to get a polygraph?

A. Yes, ma'am.

Q. A polygraph done?

A. Yes, ma'am.

MR. HARPOOTLIAN: Your Honor, we would object to the introduction of any polygraph results in this proceeding that are per se not admissible in the State of South Carolina and we think this would be unduly prejudicial

putting them in the record. They could not have been used at trial and they could not in any way -- I mean, this is a report of an exam by somebody that's not here to testify so we would object to it coming into evidence.

THE COURT: What's your purpose?

MS. VALENZUELA: So, Your Honor, this is not entered for the purpose of hearsay. I'm not really saying what the exam says is true. I'm saying that what the defense attorney believed that exam would do for his client lead him to make other decisions about who he was going to call as an expert witness which goes directly to the allegations in this case and so I trust the Court's judgment in terms of weighing the facts and I don't think that you're gonna be swayed to completely disregard how you need to rule in this case based on what's in this polygraph. It's only being presented for what knowledge the witness would have had at the time when he was making strategic decisions as to who to call in the trial.

THE COURT: I think it's sufficient that you have asked him did he consider a polygraph examination and he did and leave it there.

MS. VALENZUELA: Okay.

MR. HARPOOTLIAN: Thank you, Your Honor.

MS. VALENZUELA: I would offer this then as a

proffer. I disagree with your ruling and so I would offer this as a proffer.

THE COURT: Fair enough.

MS. VALENZUELA: Would I make that a Court's exhibit?

THE COURT: If you want.

MS. VALENZUELA: Okay.

MR. HARPOOTLIAN: Can we put that in an envelope and the exhibit only be opened for some appellate issue?

THE COURT: Okay.

MR. HARPOOTLIAN: Thank you.

THE COURT: So let's mark that for identification as defense exhibit whatever instead, but not admitted.

MS. VALENZUELA: Defense exhibit 2.

THE COURT: Okay.

(Whereupon, Defendant's Exhibit #2 marked for identification.)

MR. HARPOOTLIAN: And the court reporter will place that in an envelope before we retire. Thank you.

MS. VALENZUELA: I have no objection to that.

THE COURT: Fair enough.

BY MS. VALENZUELA:

Q. Okay. And so you looked to - you had a polygraph done on your client. And then moving on. So you had a -- Did you also reach out to a Selman?

A. Dr. Watson. Yes, ma'am.
Q. Dr. Watson?
A. Yes, ma'am.
Q. Why did you look to Dr. Watson? Why did you start talking to him?
A. Dr. Watson --
Q. Is it a him?
A. It's actually him. Dr. Watson is probably the most experienced and capable forensic psychologist certainly in the state if not the southeast dealing with issues involving sexual offenses and he's a tremendous resource.
Q. And did he serve as a resource in your representation of Mr. Williams?
A. He did. Yes, ma'am.
Q. And how did you utilize Dr. Watson?
A. Dr. Watson, certainly I had several conversations with him. He evaluated the discovery and other file materials, other materials made available. He interviewed, I think, on several occasions Mr. Williams who was in jail. I believe he also had collateral interviews with, I believe, Mr. Williams' mother and then he was able to answer questions and talk to me about what psychological issues may or may not be present out of this case.
Q. Okay. And did Dr. Watson conduct the Abel Screening, the test, the Abel Assessment on your client or was

that a different doctor?

A. That was done by Dr. Burke and Dr. Burke runs -- I'm sorry. Dr. Burke.

Q. Okay. And Dr. Burke. So you have got Dr. Watson, right?

A. Yes, ma'am.

Q. You have got your nurse?

A. Yes, ma'am.

Q. You have got Dr. Abel?

A. Yes, ma'am.

Q. So now we are talking about the fourth expert witness that you had involved in this case Dr. Burke?

A. Yes, ma'am.

Q. Okay. And what did you have or what did Dr. Burke do for this case?

A. Dr. Burke did a type of screening that he regularly does to determine if someone does or doesn't have a possible, the term would be some sort of --

Q. Attraction to underaged children?

A. Some sort of alternative sexual attraction.

Q. Okay. And if this test had been conducted and showed that your client did not have any sort of sexual response to younger children, were you hoping to use that in plea negotiations with the Solicitor?

A. I would have - I would have hand delivered it up to

them and said you have to look at this.

Q. But instead what did you get from Dr. Burke?

A. Dr. Burke, and I'll defer to the report, but Dr. Burke's finding was that Mr. Williams had an attraction. I'll defer to exactly how he referred to it.

Q. Would it refresh your recollection to look at the summary of the report?

A. It would. Yes, ma'am.

MS. VALENZUELA: May I approach the witness, Your Honor.

THE COURT: Sure.

BY MS. VALENZUELA:

Q. Take a look at it. Refreshing your recollection and then I'll ask you the next question.

A. (Witness complies.) Yes, ma'am.

Q. So did that refresh your recollection?

A. It did. Yes, ma'am.

Q. Okay. So what is it actually that you got back from Dr. Burke after he performed this assessment on your client?

A. A report that was not helpful and that indicated a primary attraction to adult females and secondary and subsequent attractions to younger females and including young males two to four years old.

Q. So younger females and then younger boys and the age range was two to four years old?

A. Yes. Yes, ma'am.
Q. And the victim here was 15 months old?
A. Approximately. Yes, ma'am.
Q. Okay. So we talked about Dr. Watson. We talked about Dr. Burke. We talked about Dr. Abel. We talked about your nurse consultant. And then you also reached out to or at least had a telephone call and sent materials to Dr. Friedlander?
A. Yes, ma'am.
Q. Okay. Did you have a phone conversation with Dr. Friedlander?
A. I did. Yes, ma'am.
Q. Okay. And after talking to Dr. Friedlander, did you come away from that conversation believing that it was in the best interest of your client and comported with the duties as you as an officer of the court to have Dr. Friedlander hired?
A. No.
Q. Okay.
A. If I may.
Q. Yes.
A. The - the - the report, I think, produced a letter and that was shared, provided to Mr. Williams and probably very likely his family, and after looking at Dr. Friedlander, I mean looking at the report and sort of what his testimony

would have been, it did not - it didn't seem like something that I would have been necessarily recommending or pushing.

Q. Okay. I had asked you a two part question. Bad on my part so I apologize. Was there any part of your conversation with Dr. Friedlander that caused you concerns as an officer of the court in terms of hiring him?

A. Not - not anything - not anything specific. Now, again, and I don't know this particular Dr. Friedlander and I don't know, uhm, never met him. It's my only contact and I don't know anything about him other than I'm always a little concerned because this is someone who was -- My understanding was that he advertises on the Internet and concerned defendants or family in cases reach out. I don't know anything about Dr. Friedlander again specifically, but there are a lot of folks advertising on the Internet that get concerned family to call and they'll say -- You know, it's a sales pitch, not a medical screening, uhm, and I'm always a little -- I don't want to see my clients or anybody encouraged to spend money for the sake of just spending money. But I did speak to Dr. Friedlander once on the phone and he was certainly very courteous in speaking with me.

Q. Okay. And then how did Dr. Friedlander get brought to your attention?

A. I believe he was someone that Mr. Williams' mother had located and had started lining up.

Q. So it was, in fact, the family who bought into this and who brought Dr. Friedlander to you?

A. Yes, ma'am. And then I believe I was contacted or copied on maybe an e-mail where he was telling them to have the lawyer contact him and send the materials to him.

Q. Okay. And so both your personal concerns and then separately your, what you were dealing with in terms of your client's position on the case indicated to you that Dr. Friedlander should not be called?

MR. HARPOOTLIAN: Objection, Your Honor. That's not what he's testified to. I'm just putting that on the record. I understand she believes he testified to that, but that's not what I heard.

MS. VALENZUELA: He can correct me.

THE COURT: Rephrase your question. But the record speaks for itself as to what he testified to so far. He had concerns on several facets. Leave it at that.

MS. VALENZUELA: Okay.

BY MS. VALENZUELA:

Q. Were there any other experts that I did not cover with you other than the five we have just talked about?

A. I believe that's all.

Q. Okay. Earlier one of the questions started going into whether you expected the trial to be called so quickly. Did I understand it to be that you had talked to your client

and he wanted a second bond motion and you explained to him that when you make a successive motion, sometimes the State elects to take you to trial instead of setting that bond motion for a hearing?

A. It is. Yes, ma'am.

Q. And that you explained to him that that could mean that this case would be called to trial?

A. Yes, ma'am.

Q. And that did, in fact, happen?

A. Yes, ma'am.

Q. You moved for a successive bond motion?

A. Yes, ma'am.

Q. And then in response the State called it to trial?

A. Yes, ma'am.

Q. You talked about, you were asked if you were satisfied with your own representation of your client. You indicated that you thought you had provided effective assistance of counsel, correct?

A. Yes, ma'am.

Q. Okay. You were there present throughout the whole trial?

A. Yes, ma'am.

Q. Did you think that Mr. Floyd provided the representation you wanted him to provide to your client?

A. I thought Mr. Floyd did a very good job so...

Q. Now, earlier you were talking about Dr. Luberoff's testimony, correct?

A. Yes, ma'am.

Q. You indicated that you believed that she had given you what you needed and that's why you had not decided to call your nurse consultant?

A. Yes, ma'am. At the conclusion of the State's testimony that there would have been no advantage to Ms. Hurley testifying and that, you know, putting up a defense expert that's going to be subject to cross might have more of its own set of pitfalls.

Q. Okay. Is one of those things that Dr. Luberoff ended up testifying at the end of her cross is that she agreed with Mr. Floyd, that touching genitals to clean for a diaper is appropriate?

A. Yes, ma'am.

Q. And that was key to your defense?

A. Yes, ma'am.

Q. And exactly what you were hoping to get out from presenting the nurse's testimony?

A. Yes, ma'am.

Q. Okay. Did you also remember that when Mr. Floyd was crossing Dr. Luberoff, Dr. Luberoff was asked about the fact that the baby had been taken to the doctor a few months before for the dry skin, the eczema?

A. I remember that being a thing. I don't remember the specifics of the doctor's testimony or cross.

Q. Okay. Earlier you talked about some of the strategies that y'all had considered in terms of defending the defendant. Was one of them that the injuries could have been caused by someone else?

A. Well, certainly. Yes, ma'am.

Q. Certainly it was. And so timeline was an important part of your defense in your case?

A. Yes, ma'am.

Q. And did you believe that timeline was equally important to the State in terms of establishing that your client had been the last one to or close to the last one with the victim and most likely caused these injuries?

A. Yes, ma'am.

Q. And just for the Court's edification there were several people who came in contact with the baby in between your client caring for her for the last time and her being taken to the hospital, correct?

A. Yes, sir.

Q. There was at least the father's grandparents, the father, uhm, the father of the baby's sister?

A. Yes, ma'am.

Q. And then the baby was out at a baseball field with people milling about?

A. Yes, ma'am.

Q. And then the baby was taken back to the home before being taken to the hospital, correct?

A. I don't recall. I remember the baseball field and the hospital. I don't recall the home, but I wouldn't disagree if that's the record.

Q. Do you remember that part of the strategy in terms of establishing what could have happened to the baby being a cleaning injury versus a sexual injury that part of that was to show the jury how a child's vagina is different from a grown vagina in terms of how close together everything is?

A. I believe so and I believe that -- Yes, ma'am.

Q. Because you were dealing with a fact that the baby's hymen was actually bruised in this case?

A. That's correct. Yes, ma'am.

Q. Okay. And one of the technical - the technical, the legal technicalities that y'all were trying to do was that CSC with a minor includes intrusion into, however slight, intrusion into the genitals and so you were trying to establish what the intrusion actually required?

A. What was the purpose of the intrusion. Yes, ma'am.

Q. But also not just the purpose of the intrusion. Didn't you - didn't Mr. Floyd spend a lot of time with Dr. Luberoff getting her to say that the hymen is actually outside of the vagina? You have to get past the hymen to get into the

vagina?

A. That's correct. And I do recall that -- I think basically a lot of folks got an anatomy lesson as far as from the doctor and during the trial.

Q. And so you guys, you or Mr. Floyd used the image of the child's vagina and how everything was close together and where the actual vagina is past the hymen to support the defense of your client?

A. Yes, ma'am. I do remember that. Yes, ma'am.

Q. And, in fact, you used that specific anatomy in your motion for directed verdict with the judge at the conclusion of the State's case?

A. Yes, ma'am.

Q. You argued that this was not, in fact, an intrusion as defined by the statute because the State's own expert witness had testified that this was not actually going into the vagina?

A. Correct.

Q. Now, the court disagreed with you?

A. Yes, ma'am.

Q. But that was something that you were trying to do there. And then, of course, you also argued against the, it was important as the second charge that the applicant was facing that one of the elements had to be that he was a caretaker of the child, correct?

A. Yes, ma'am.

Q. And so one of the things that you guys argued on directed verdict and to the jury was that he was not a caretaker as defined by the statute, that he was a babysitter?

A. Correct.

Q. And that's why you had the DSS witness who testified that they had concluded that he was not a caretaker?

A. Correct.

Q. And have you reviewed the appellate decisions in this case or the appellate decision? Are you aware of what the decision was?

A. I - I - I - I'm aware - I recall somebody may have sent it to me, but I don't recall the specifics of the rulings. I know it was affirmed.

Q. Okay. Now, let's talk a little bit about the Rule 5 with the SANE nurse who was qualified as an expert. Earlier plaintiff handed up the letter from Dr. Friedlander and in Dr. Friedlander's letter does he actually reference the SANE nurse's records?

A. I would want to defer to Dr. Friedlander.

MR. HARPOOTLIAN: We would stipulate it does.

BY MS. VALENZUELA:

Q. Okay. And so at least by the time that you're consulting Dr. Friedlander which is well before the trial you

have the SANE nurse's records?

A. Yes, ma'am.

Q. And the photographs?

A. Yes, ma'am.

Q. Okay. And I know you didn't do the cross on that one so that's where I'll leave that. Your position on the continuance is that at no point did you feel like you needed to ask for a continuance either before or during the trial?

A. No, ma'am.

Q. No, you didn't need to ask for a continuance?

A. Yes. Prior to trial I didn't have a reason to ask the court for a continuance.

Q. And then during the trial was there ever anything that indicated to you that you needed to ask the court for a delay or extra time or anything?

A. No, ma'am.

Q. Can you look at Dr. Friedlander's letter again? Is it up there?

A. I'm looking now at plaintiff's exhibit 7 which is Dr. Friedlander's letter.

Q. Okay. There is a paragraph there that discusses what he looked at in terms of the injuries to the child, correct? I think it's like the second paragraph.

A. Yes, ma'am.

Q. Can you look through that and actually look through

the letter and see if he references the injury to the hymen?

A. He - he - he does reference the hymen.

Q. Read that out loud.

A. It says the vagina was not visualized and the hymen was not seen well enough to photograph.

Q. Okay. And you had - you had two different sets, not you, but the State had two different sets of pictures of the child's vagina, correct?

A. Yes, ma'am.

Q. There were the SANE nurse's pictures that were taken when the child was first brought into the hospital?

A. I know there was some recent pictures originally and there were some successive pictures. The SANE nurse, I assume, would have taken the first set.

Q. And Dr. Luberoff testified that - or the SANE nurse testified that she did not use any sort of scopes or anything to take a picture of the hymen?

A. I believe that is correct. Yes, ma'am.

Q. Do you remember her saying that she even had trouble seeing it because the child was so restless and didn't want anyone touching her?

A. I believe I do remember that.

Q. But Dr. Luberoff was able to use an implement that was able to take pictures inside the vagina and photographed the bruises to the hymen?

A. I don't have a recollection of the equipment she testified she used, but I do know she was able to take other photographs or had other photographs taken.

Q. - And was she able to testify that she had been able to use something that did give her a clear visual of the hymen?

A. I don't have a specific recollection although I would not dispute it if that's in the transcript.

Q. Do you remember that there was a photograph and a reference to the doctor's thumb being shown in terms of establishing the recess of the hymen and the depth of force necessary?

A. I do recall a thumb.

Q. Okay. So I'm looking at page 335 going back to the hymen injury and Dr. Luberoff on page 335, line 15 Dr. Luberoff testified that she had carefully moved to labia aside and that's when the injury, the deeper injury was obvious which included some tearing of tissue on both sides extended down from the clitoris and then bruising to the hymen itself. Does that sound familiar?

A. It sounds familiar. I would ask to defer to the transcript for whatever it says, but that sounds like what it would have been.

Q. Okay. Did you also consult with Dr. Watson? I'm turning to one of the allegations regarding, let me see, yeah,

the last allegation regarding your client's written statement. Did you consult Dr. Watson in terms of the confession?

A. I did.

Q. And what did -- I mean, was that a one time conversation? Was that a large part of your conversation with Dr. Watson?

MR. HARPOOTLIAN: Your Honor, we're withdrawing any allegation about the witness statement. Maybe save you some time.

THE COURT: Okay.

MS. VALENZUELA: Is that both your second and your third?

MR. HARPOOTLIAN: I don't know what my second and third are.

MS. VALENZUELA: You have two. So you have got one is experts on false confessions, police tactics, and then you have another one on violation of Seibert, Navy and Evans. Three. And to the extent it reaches experts on false confessions.

MR. HARPOOTLIAN: As to false confessions absolutely.

MS. VALENZUELA: Okay. And then number 3 as to the Navy, Evans and Siebert.

MR. HARPOOTLIAN: Let me look at number 3.

MS. VALENZUELA: Yeah. This paragraph.

MR. HARPOOTLIAN: It's not number 3.

MS. VALENZUELA: No. It's the third paragraph.

MR. HARPOOTLIAN: Okay. Yes. We do not contest the out of court statement.

MS. VALENZUELA: May I approach to look at the photographs?

THE COURT: Yes.

MR. HARPOOTLIAN: Your Honor, while she's going through that, let me mention our witness can come back in the morning. He's not in a huge hurry. We have all day tomorrow.

MR. FLOYD: I'm just a witness.

THE COURT: We'll see you in the morning.

MR. FLOYD: I have a pre-trial in the morning at 9:30.

MR. HARPOOTLIAN: We won't need you that early.

MR. FLOYD: I'll let them know I have to be over here.

MR. HARPOOTLIAN: What time are you starting in the morning. Your Honor?

THE COURT: No later than 9:30.

MR. HARPOOTLIAN: If you go to that at 9:30, we will have another witness before you you'll be fine.

THE COURT: You're free to go, Mr. Floyd. You're under subpoena tomorrow morning when you get here. Don't

be late.

MS. VALENZUELA: No further questions for this witness.

THE COURT: Okay.

MR. HARPOOTLIAN: I just have a couple questions if I can find my glasses when I need them.

REDIRECT EXAMINATION

BY MR. HARPOOTLIAN:

Q. Did Dr. Friedlander indicate to you that he does work like this around the country pro bono? Didn't he tell you that initially that he advertises he does it for free?

A. I don't recall that. No, sir.

MS. VALENZUELA: What was that? I missed the answer.

MR. HARPOOTLIAN: Pro bono.

THE COURT: He doesn't recall that.

MR. HARPOOTLIAN: He doesn't recall that.

BY MR. HARPOOTLIAN:

Q. Now, did you ever, when they called the case or said they were calling it in a week, did you ever offer to withdraw your bond motion?

A. Yes.

Q. And Ms. Mayes didn't like that much?

A. No. Ms. Mayes was, you know, she was on fire to try something and this file was given to her because they were

taking things from Deborah Moore and this was given to her and said here is something you can put up right away and get to work.

Q. And the Attorney General just said the timeline in this case was very important and you would agree?

A. Yes, sir.

Q. And that would help or hurt Mr. Williams' defense, the timeline?

A. Yes, sir.

Q. And the timeline was made up of basically lay witnesses. These are people that either had the child, didn't have the child, picked the child up, dropped the child off, took her to the ballpark, all that?

A. Yes, sir.

Q. And I want to make sure I understand this. You interviewed none of those witnesses?

A. I personally interviewed none of them. No, sir.

Q. And to your knowledge you have no reports indicating your investigator interviewed any of them?

A. That's correct.

Q. Okay. And you were asked about these experts. Let me make sure I understand. One of them did an assessment of Mr. Williams' sexual proclivities; is that correct?

A. Yes, sir.

Q. And did he indicate that he had any sexual

attraction to a 15 year old female child?

A. 15 month old?

Q. Yes.

A. No.

Q. As a matter of fact, he said 10 year old perhaps?

A. That's correct. There was the reference to the attraction to two to four year old males.

Q. Males. I'm talking about females.

A. And when you get into children that young, gender becomes less significant.

Q. I'm sorry. Your expertise on that comes from?

A. Attending seminars, reading materials.

Q. But that's not what this expert said that you hired?

A. No. But I'm saying my - my thought - my --

THE COURT: You don't need to answer that. It's not your expertise. Ask your question again.

BY MR. HARPOOTLIAN:

Q. Well, your report says, does not appear to have a persistent sexual attraction to children, correct? Page 3 of 3.

A. Does appear to have a persistent sexual attraction to children.

Q. Persistent sexual attraction to children 10 years and older, correct? Females. Let me read this again.

Caucasian females eight to ten years old. Females, right? Adolescent caucasian females eight years old fully formed for children but not to infants, correct?

A. The objective -- Yeah. The objective testing indicated attraction specifically. The doctor's ultimate conclusion from the report, number 1, was does appear to have a persistent sexual attraction to children that was not qualified.

Q. And what's his qualifications?

A. Dr. Burke is, my understanding has a Ph.D. in psychology. He runs the sex offender treatment for the Department of Probation. He runs screens like this for not only state agencies but also other people from around the southeast.

Q. Okay. And who was the psychologist you hired who is the best in the country? What's his name?

A. Dr. Watson. At least in the state.

Q. Okay. Well, I think you said if not the country. Did Dr. Watson opine to you about those results?

A. He did.

Q. What did he say?

A. Dr. Watson did not believe that that finding was credible.

Q. As a matter of fact, this is a copy of a fax you got from Dr. Watson, right?

A. That's exactly right.
Q. And what did he say?
A. Jim, I don't think these results are reliable.
MR. HARPOOTLIAN: We would like to offer this into evidence.
MS. VALENZUELA: Sure.
THE COURT: Okay.
(Whereupon, Plaintiff's Exhibit #8 marked for identification and admitted.)
BY MR. HARPOOTLIAN:
Q. Now, as I understand this, you consulted with an expert on whether or not he was a child predator?
A. Or had an interest in young children.
Q. You hired a psychiatrist - or psychologist who said he --
A. We don't have -- I -- None of us thought that he had an attraction to young children.
Q. Okay. And that's what Selman Watson's --
A. Dr. Watson's - that's Dr. Watson's --
Q. Being the best expert in the state?
A. Dr. Watson. That's exactly right.
Q. And did you get a report from him saying he wasn't attracted to children?
A. I would defer to his -- He did produce a written report which had been provided.

Q. But he said that he was not attracted to children?

A. Dr. Watson did not believe that he was attracted to children.

Q. Why wouldn't you take that report to the Solicitor and try to negotiate a plea of Dr. Watson's?

A. I - we did. I did. I talked to the - I talked to the --

Q. To Mayes or to who?

A. Both. About Dr. Watson's looked at him. He's not a pedophile or anybody who presents a risk or danger to children and this is not sexual. This is simply --

Q. Okay. You also hired an expert or consulted with an expert named Dr. Abel who is in the same practice with Dr. Luberoff, the State's witness, right?

A. Yes, sir.

Q. Was there any concern that she might not be willing to impeach her partner?

A. I had that conversation. She was someone that the Williams family had located and found and had spoken to. She had indicated -- And that's why she did her conflict. She had to make sure that she was allowed to consult and that she was allowed to, you know, uhm -- My conversation with her she indicated she wouldn't have a conflict not disagreeing with her.

Q. She wouldn't have a legal conflict or a professional

conflict?

A. Or personal. Right. She would be comfortable.

Q. Does she have any personal relationship with Dr. Luberoff?

A. I know that they are - I know that they are associated and know each other as far as --

Q. They're business partners, aren't they?

A. I don't know the financial arrangement.

Q. Okay. So you consulted with her and then didn't you even ask her about this strange disease that Williams raised, some genetic disease?

A. Yes, sir.

Q. Okay. And you hired but did not call to the witness stand another expert on how do you change a diaper?

A. And - and -- Yeah. Right. Dr. -- Excuse me. The nurse Hurley.

Q. But the witness that told you that the injuries were consistent with the injuries to the hymen and to the scrape marks on the labia were consistent with him changing a dirty diaper was Dr. Friedlander, correct?

A. Dr. - Dr. Friedlander was not the only - was not the only source of that information.

Q. But he was a source?

A. He was a - he was a possible source to testify according to his letter.

Q. And you did not hire him or bring him to court?
A. He was not retained nor did he provide testimony.
MR. HARPOOTLIAN: Thank you.
MS. VALENZUELA: Your Honor, brief recross.
MR. HARPOOTLIAN: Your Honor, I object. I covered every topic she covered. I didn't go anywhere else.
MS. VALENZUELA: My recross is limited to his redirect.
THE COURT: I think I have heard enough from him.
MR. HARPOOTLIAN: Thank you.
MS. VALENZUELA: I'm - he - he's the plaintiff. I get to do a recross.
THE COURT: I don't have to let you do that. I have heard enough about the diaper change.
MS. VALENZUELA: It's one question. It's one question.
THE COURT: Let it go. All right. Where do we stand on the expert witness?
MR. HARPOOTLIAN: He will be here tomorrow morning.
THE COURT: Does that suit everybody?
MR. HARPOOTLIAN: Yes, sir.
THE COURT: Has he already missed his plane?
MR. HARPOOTLIAN: Yes, sir. That's his pilot back there. That guy doesn't go, the expert doesn't go. He flew him up here from Mississippi. If we can get him up

at 9:30 in the morning.

THE COURT: We'll start at 9:30 sharp.

MR. HARPOOTLIAN: Thank you, Your Honor.

THE WITNESS: Your Honor, am I released?

MR. HARPOOTLIAN: No objection.

MS. VALENZUELA: Subject to recall.

THE COURT: You got - Ms. Valenzuela has you under subpoena also so if she needs you, you're subject to her subpoena. If she calls you, get here.

THE WITNESS: Can I be on telephone stand-by?

MS. VALENZUELA: Yes.

THE COURT: All right.

(Whereupon, Court was adjourned for the evening at 5:00 p.m.)

January 31, 2017

BAILIFF: All rise. Court come to order.

THE COURT: Be seated please. All right. Mr. Harpootlian, call your witness.

MR. HARPOOTLIAN: Please the Court, Your Honor. We call Dr. Ed Friedlander.

Thereupon,

EDWARD ROBERT FRIEDLANDER, M.D.

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name for the record.

THE WITNESS: My name is Edward Robert Friedlander.

DIRECT EXAMINATION

BY MR. HARPOOTLIAN:

Q. Okay. And you are a doctor, a medical doctor?

A. Yes.

Q. Dr. Friedlander, let me talk a little bit about your education and background before we get to the matters in this case, okay?

A. Yes, sir.

Q. So you're originally from Chicago; is that correct?

A. Outside of Chicago, yes.

Q. Where did you go to undergraduate school?

A. I went to Brown, Rhode Island.

Q. Brown University in Providence, Rhode Island?

A. Yes.

Q. What was your degree in Brown from? What did you graduate with?

A. American and English literature.

Q. And then you went to medical school?

A. At Northwestern.

Q. Northwestern Medical School. Did you graduate from Northwestern Medical School?

A. Yes.

Q. Did you do an internship?

A. Yes. In pathology.

Q. In pathology?

A. Yes.

Q. That's the specialty you decided to go into?

A. Yes.

Q. Where did you do your internship in pathology?

A. Northwestern.

Q. After Northwestern, did you do a residency somewhere?

A. Yes. I divided it between Northwestern and Bowman Gray Wake Forest in North Carolina.

Q. Bowman Gray which is a hospital at Wake Forest University in?

A. Winston-Salem.

Q. Winston-Salem, North Carolina. And at that point are you admitted? Are you a practicing physician? Have you been licensed at that point?

A. Yes. I am.

Q. How long did you do your residency at Bowman Gray?

A. I did that for a year.

Q. Then what did you do?

A. I went back to a teaching position at East Tennessee State University Medical School. I was also staff pathologist at the VA.

Q. Staff pathologist at the VA. What city is that in or town?

A. That was in Johnson City, upper east Tennessee.

Q. And you were practicing pathology at that point and teaching pathology at that point?

A. Yes.

Q. You were teaching pathology at a medical school?

A. Yes.

Q. And the name of that medical school?

A. East Tennessee State University.

Q. What did you do after that?

A. Went to Kansas City, the University of Missouri, Kansas City and practiced at Truman Medical Center and taught at the medical school.

Q. Did you perform any pathology services -- You were

teaching. Did you do any pathology services anywhere at that point?

A. Yes. I did. I was still doing autopsies. I was chief of autopsy for a while at the hospital, at the medical school. I was doing surgicals and for a time I was chief of the chemistry lab.

Q. You were doing surgicals, chief of the chemistry lab and doing autopsies?

A. Yes. And teaching the students.

Q. And teaching the students. Okay. How long did you do that?

A. For four years.

Q. What did you do after that?

A. I went full-time as department chair at the Osteopathic Medical School near the M.D. school.

Q. Okay. How long did you do that?

A. I did that from 1992 up until I came down to Mississippi in 2015.

Q. While you were doing that as the chairman of that department were you doing any autopsies?

A. Yes. I was. From time to time I would do autopsies and then for the last several years I think I did 300 with the service.

Q. 300 what?

A. 300 autopsies with the service.

Q. When did you go to Mississippi? 2015? Is that what you said?

A. Right. The spring, early summer of 2015.

Q. And what do you do -- First of all, what is the name of the facility?

A. It's the William Carey School of Osteopathic Medicine.

Q. And what do you do?

A. I'm full-time education. I'm hoping to get some autopsy spot, but right now I'm full-time education.

Q. Now, over the years have you done autopsies for either private individuals or for governments?

A. Yes. I have.

Q. And how many approximately have you done?

A. About 1300.

Q. 1300. Have you ever examined for purposes of pathology -- Tell me what pathology is.

A. Pathology is the bridge discipline between basic medical science and clinical medicine. It's a family of learning studies. It's a skill set that really involves the understanding of disease bringing science to clinical medicine. It's the study of injury. The study of disease. I have read many biopsies. We run the labs in the hospital and when there is a questionable death, we examine the body. Pathology is much more than autopsies.

Q. Right. So you examine the body to help determine what caused an injury?

A. I like to explain that in my autopsies you have not only the cause of death, but you have the history of a person's life, their whole health history.

Q. Now, have you ever examined any live people?

A. Absolutely. Part of your training in residency is the sexual assault exam and we all do that at Bowman Gray. I participated in A&B's. It's part of general education of a pathologist to understand disease in both the living and the dead.

Q. Okay.

A. And disease and injury.

Q. Okay. And so you have had specific training in examining sexual assault?

A. Yes. That's an important part of the education.

Q. Okay. Now, you were consulted by -- We're gonna get to that in just a minute in more detail. But you were consulted by Mr. Snell in this case, were you not?

A. Yes.

Q. Have you ever been qualified to testify in court?

A. Yes.

Q. On pathology issues?

A. Yes. (Whereupon, the witness spilled water on himself and his paperwork.)

Q. Okay. You have testified and been qualified by courts some 50 times I believe you just testified?

MS. VALENZUELA: Objection. He did not have the opportunity to answer that question as Mr. Harpootlian asked it.

THE COURT: I didn't hear his answer either.

MR. HARPOOTLIAN: I'm sorry.

THE COURT: Ask the question and then --

BY MR. HARPOOTLIAN:

Q. Have you been qualified by courts, either federal or state courts in this land to testify about pathology as an expert?

A. Yes.

Q. On how many different occasions?

A. At least 50.

Q. At least 50. Okay. And in those 50 instances were you testifying for the state, for an individual, for a defendant or did they fall into all categories?

A. All categories. Civil and criminal, plaintiff and defense in civil matters and in criminal both for prosecution and defense.

MR. HARPOOTLIAN: Your Honor, at this time I would move to qualify this witness as an expert in pathology and to testify about pathological methods and analysis.

THE COURT: All right. Ms. Valenzuela, do you want

to voir dire his qualifications?

MS. VALENZUELA: Yes, Your Honor.

THE COURT: You may.

MS. VALENZUELA: What did you say? Pathology methods and what?

MR. HARPOOTLIAN: To testify as an expert in the area of pathology and that is as he's defined it and in pathology. It's the study of the body and disease states and injuries and an analysis thereof.

MS. VALENZUELA: I just wanted to make sure that I had it right. So you're just simply saying in pathology? You're moving to have him qualified as an expert in pathology?

MR. HARPOOTLIAN: Yes.

MS. VALENZUELA: Okay. I just wanted to make sure.

VOIR DIRE EXAMINATION

BY MS. VALENZUELA:

Q. Okay. Mr. Friedlander, tell me a little bit about your residency?

MR. HARPOOTLIAN: Objection, Your Honor. He is not Mr. Friedlander. He is Dr. Friedlander.

MS. VALENZUELA: My mistake. I didn't mean to do that.

BY MS. VALENZUELA:

Q. Dr. Friedlander, tell me a little bit about your residency. I think you mentioned two different schools that you completed it in?

A. Yes.

Q. Is that normal to have two different schools as part of your residency?

A. I took time off to start pathology education at East Tennessee State.

Q. At what point in your residency did you have to take time off?

A. I didn't have to take time off. I wanted to because they needed me.

Q. So at what point did you do that?

A. That was after -- I did a year of internship and a year of residency at Northwestern.

Q. When did you take the time off in your residency before going back to complete it?

A. 1979.

Q. At what stage of your residency did you take the time off? At the beginning or in the middle of the residency?

A. It was in the middle.

Q. The middle. And you did, in fact, go back and complete the residency?

A. Yes.

Q. Okay. Now, can you tell me what a clinician is?
A. A clinician is a physician who focuses on treating patients.
Q. Treating patients. And you haven't been a clinician since you got out of medical school, right?
A. No. I have another side aspect. I do ring side medicine.
Q. So no? Or is that a yes?
A. That is actually a yes. I actually examine and treat boxers. It's a small part of what I do but it's a real part.
Q. Okay. So what percentage would you say of your practice is in treating these boxers?
A. Two percent.
Q. Two percent. Okay. And that's since graduating from medical school?
A. Right.
Q. Okay. And then earlier you were explaining to us that you had training on live patients for sexual assault and that you received that training in medical school, correct?
A. No. That was in residency. That's part of the training of every pathologist.
Q. So that was in residency. And when did you complete that residency? What year?
A. Oh, I finished that up in, I think, '83.

Q. So since 1983 you have not treated any live patients for sexual assault?

A. That's correct.

Q. Okay. Now, I asked yesterday for your CV and I was told that you had some sort of natural disaster befall your office and you were not able to provide a copy of your CV; is that correct?

A. I wasn't given -- I probably could have dredged one up if I thought that I was going to need to bring it but I thought that it had already been provided.

Q. You thought it had already been provided?

A. I thought that you had had a version of it in the past.

Q. I would have thought so, too. How about your publications? What publications have you done in the field of sexual assault?

A. None.

Q. You teach now --

A. Yes.

Q. -- correct? And do you do any sort of publications related to your teaching?

A. I have in the past. I haven't done any recently.

Q. Okay. And do you keep a website as part of your, to share your knowledge that you teach your students?

A. Yes. I do.

Q. What is that website?

A. Pathguy. It's actually the oldest one person medical website in existence. Www.pathguy.com.

Q. For purposes of the record that's p-a-t-h-g-u-i?

A. Y like in guy. Like a person.

Q. Y.com. And you're proud of that website, I guess, from the longest --

A. I have helped an awful lot of people. That makes me feel very good. It helps people to understand.

Q. And are you the sole contributor to pathguy.com?

A. Yes. It's all public service. I do it all for free. I have never charged anybody anything.

Q. On your website?

A. On the website, correct.

Q. Now, you were telling us that you have been qualified at least 50 times in the past. How many of those times were you qualified as an expert in pathology?

A. I think all of them.

Q. Okay. Because you mentioned that -- Haven't you served as an expert in the area of engineering before dealing with a car? Is that not you?

A. No. There was some crazy business about - there was a very strange deposition that I had in an airport in Texas. It was very, very confusing to me and I was asked to talk about injuries sustained in an auto accident and the aftermath

was very strange and apparently they said -- I didn't understand what was going on with the lawyers. I was trying to talk at one point about how -- They started asking me questions about how a car moves and I got back into my high school trigonometry and I tried to explain to them and I think that that was -- But nobody tried to qualify me as an expert in engineering.

Q. Okay. Now, have you had at least one instance in which your testimony has been ruled inadmissible by the court?

A. Yes.

Q. Can you explain to the Court what the circumstances of that was?

A. Yes. I thought that this was a -- I was asked to testify about -- This was a bizarre case in which there was an autopsy done on a child and I testified that under the microscope - that under the microscope it was very clearly not sexual abuse but decomposition. Now, the diagnosis was made by a nurse practitioner who had never used a colposcope on a dead person, but her opinion about a dead body was admitted and mine was not. I thought that was bizarre. Frankly I thought that was a bad decision. My testimony about the microscopic appearance was every bit involved in pathology and they said since I had not worked with a colposcope, I could not give an opinion about pictures taken through a

colposcope.

Q. Okay. Were there other things involved with why the court ended up finding you inadmissible?

A. Not that I know.

Q. Did you write on your website that the solicitor pointed out that she had a problem with the fact that you read Playboy; that your website linked to child pornography?

A. Yeah. That is not true. My website does not link to child pornography.

Q. And I am not suggesting that at all.

A. I felt that the prosecutor was corrupt.

Q. But did you put on your website that that had been, in the paragraph that describes that situation did you say that the prosecutor alleged that your website did link to child pornography?

A. Yes. That's what the prosecutor said.

Q. And then for unknown reasons you felt that your testimony had been found disqualified there?

A. That's what I was told. I never really did learn anything more.

Q. And then I just want to make sure that I understand. So you have never had, aside from the two percent of treating, I'm assuming these are adult boxers? Is it adult boxers?

A. Yes.

Q. Other than treating that two percent of your

practice you have never had a clinical practice where you were asked to treat, evaluate, diagnose living patients since 1983?

A. That's correct.

Q. Okay.

A. I have been in clinical situations. I have examined patients with other physicians, but I have not been the primary treating physician.

MS. VALENZUELA: Your Honor, that concludes my voir dire. I do have an objection to put on the record to the qualifications of this expert.

THE COURT: Okay. Let's hear it.

MS. VALENZUELA: I believe that the terminology for pathology is too broad to qualify him as an expert in that area. Pathology essentially means the study of medicine which opens this up and it needs to be more narrow and specific especially because we know the exact issues that we are dealing with in this case. I also think that -- So it's a little hard to know exactly what areas he's going to go into in terms of his testimony, but because we have the transcript we know that this deals with a 15 month old child with trauma that was related to a sexual assault with her sexual organs. She is, of course, alive and based on his own testimony it's been over 20 years, almost 30 years since he has treated

a live patient dealing with sexual assault so I don't think that he meets the qualifications as an expert dealing with the subject matter that we have in this case.

MR. HARPOOTLIAN: Please the Court. Your Honor, we would submit that her objection goes to the weight of his testimony and not to admissibility.

THE COURT: I thought in the qualification offering in pathology it was the study of disease and injuries of the human body.

MR. HARPOOTLIAN: Yes, sir. That's what he testified to.

THE COURT: I'm going to qualify him as expert in the field of pathology in the study of disease and injury. I'm going to request that his testimony be restricted to opinions and what not he offered which is the subject matter of this case.

MR. HARPOOTLIAN: Yes, sir. I mean, that's our focus here.

THE COURT: So her objection is noted for the record but it does go to the weight.

MS. VALENZUELA: Thank you, Your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. HARPOOTLIAN:

Q. Okay. Dr. Friedlander, you have been qualified as

an expert and therefore you will be able to give opinions. You need to give the basis of those opinions and hopefully I will elicit those from you, but if I don't ask you for that, please explain it so the Judge has a basis to find what you determined. Let me first of all ask you, are you familiar with Mr. Snell? You saw him testify yesterday; is that correct? He's not here now.

A. Yes. I am.

Q. Were you contacted by -- First of all, who contacted you originally about this case? Was it Mr. Snell or the mother of the defendant Ms. Williams?

A. I believe it was Ms. Williams.

Q. And you have a website in which you offered to do what?

A. When I first started pathguy, I just offered to the world, if I could help you, let me help you.

Q. Now, were you helping defendants or prosecutors or doctors or who were you looking to help?

A. It's been my wonderful gift that I have received to have been able to help people of all sorts.

Q. Now, was this an effort by you with this website to make money?

A. I have made no money from it.

Q. All right. And let's talk a bit. That's called pro bono in our business. Have you ever received any recognition

for your pro bono work?

A. I was given the Liberty Bell Award by the Missouri Bar Association, the highest award that they give to a non attorney for 20 years of pro bono work.

Q. So this website wasn't an effort on your part to make money. It was an effort to provide assistance.

A. You know, I went to Brown on almost a full scholarship and I could have paid it forward.

Q. So when Ms. Williams contacted you, did she indicate to you that Mr. Snell would be contacting you?

A. I don't remember.

Q. Okay. Did Mr. Snell contact you at some point?

A. Yes.

Q. Did you have a phone conversation with him?

A. Yes. We did.

Q. During that phone conversation, did you ask him --

MS. VALENZUELA: Objection to leading.

BY MR. HARPOOTLIAN:

Q. What, if anything, did you ask him to do? Did you ask him to send anything to you?

A. I asked him whether or not I could get the rest of the pictures.

Q. No. No. I'm talking about initially. How did you get pictures to begin with? Who sent those to you?

A. I think it was Mr. Snell.

Q. Right. He sent you a package of material, correct?

A. Right.

Q. And in that package of material were pictures?

A. Right.

Q. And police reports?

A. That's correct.

Q. And a statement by the defendant in this case, correct?

A. That's correct.

Q. Let me show you this statement and have you confirm this is what he sent to you (proffering.) This is a statement of Lance Williams taken on April 16th, 2010.

A. Yes.

Q. Is this that statement?

A. Yes. It is.

MR. HARPOOTLIAN: We would like to offer this into evidence.

MS. VALENZUELA: No objection. That is one of the underlying court exhibits also.

MR. HARPOOTLIAN: I understand. I just, for my purposes I would like to have one.

THE COURT: Without objection that is marked for this hearing.

(Whereupon, Plaintiff's exhibit #8A marked for

identification and admitted.)

THE COURT: All right.

BY MR. HARPOOTLIAN:

Q. In addition to plaintiff's exhibit number 8A, you were sent the police report and some photographs, correct?

A. That's correct.

Q. And plaintiff's exhibit number 7. After you received these materials, did you write a letter to Mr. Snell?

A. Yes. I did.

Q. Let me show you plaintiff's exhibit number 7. Is that what you sent him?

A. Yes. It is.

Q. And did you have a subsequent phone conversation with Mr. Snell?

A. Yes. We did.

Q. Let me, in referring you to the letter you wrote you indicate that you do not see - you say the case summary is in error. The vagina was not visualized. The hymen was not seen well enough to photograph. You received the photographs from the SANE nurse?

A. Yes. The sex abuse nurse examiner, S-A-N-E.

Q. Not Dr. Luberoff's?

A. That's correct.

Q. Now, you say there are a pair of visual abrasions of

the vulva which is not the vagina. Let me, for the purposes of this record, you and I discussed the difference between the vulva -- The vulva is part of the genitals, correct?

A. Yes.

Q. So if the -- And then there is the hymen?

A. Yes.

Q. And then there is the vagina?

A. Yes.

Q. And so you have got to go through the hymen to get to the vagina?

A. Yes. It's sloppy usage to call the vulva the vagina but sometimes they do. Even Dr. Luberoff at one point makes that - it's common speech but it's not scientific.

Q. It's not scientific. Scientifically Dr. Luberoff is wrong?

A. Right. It's forgivable.

Q. Talking about Dr. Luberoff, she's not a pathologist, is she?

A. She is not.

Q. She is a pediatrician?

A. She had a six week course in this.

Q. Six week course In?

A. Child abuse exam.

Q. Child abuse examination. Did she say when she had that?

A. I don't remember.

Q. But at some point long before her testimony?

A. Yes. She's been doing this for a long time.

Q. Okay. And she's a pediatrician. She's not a trained pathologist?

MS. VALENZUELA: Objection. Asked and answered.

MR. HARPOOTLIAN: Just want to make the point.

THE COURT: Okay. Understood. Sustained.

BY MR. HARPOOTLIAN:

Q. Okay. So you indicate that this was not an act of sexual gratification and that it's quite consistent with the defendant's account of having gripped the child here forcefully while he was out of control trying to clean her, okay? Is that what you said?

A. Yes.

Q. Okay. Now, the last line in the defendant's statement is, Question: What happened to Victim 's vagina, bruises? Answer: Was angry that the poop got in between her and used excessive force to clean, wipe her. Poop got in between her lips. Used excessive force to clean her.

Is that what he said?

A. Yes.

Q. And based on your examination of the photos at that time -- We're gonna talk about in a minute the additional photos you have seen. But at that time did you have an

opinion, a medical opinion to a medical degree of medical certainty more probably than not that his claim is accurate?

A. Yes. The photos weren't very good but looking at everything I thought his claim was truthful.

Q. Okay. Now, if a child of that age has feces in its vagina, is it medically necessary to clean that out?

A. Yes. If you care about the health of the child, you keep that part of the body clean.

Q. Okay. So the child based on, and again, to a degree of medical certainty, more probably than not is it your opinion that it was medically necessary for him to clean the feces out from the lips of her vagina?

A. Yes.

Q. Okay. Now, when you were talking to -- Well, let me go to one other area. Let me have you --

MR. HARPOOTLIAN: For the record, these are exhibits. Now, I think the record will reflect that exhibit, correct me if I'm wrong, the State's exhibit 16 through 20 came in through Dr. Luberoff; am I correct about that?

MS. VALENZUELA: If you give me one quick second.

MR. HARPOOTLIAN: Let me confirm that.

MS. VALENZUELA: Yes. Page 324.

BY MR. HARPOOTLIAN:

Q. Now, let me show you State's exhibit 16 through 20.

When you were talking to Mr. Snell, you had not seen these yet, had you?

A. I had not.

Q. Now, after viewing those photos, does that assist you in confirming your original opinion?

A. Very much. It's clear what's happened.

MR. HARPOOTLIAN: Your Honor, I would like to offer these into evidence.

THE COURT: That will be -- Let's do this. Let's copy them and offer the copies. That way the original record stays complete.

MS. VALENZUELA: That's fine.

MR. HARPOOTLIAN: I have no objection to that.

MS. VALENZUELA: I thought they were entered yesterday.

MR. HARPOOTLIAN: They were marked for identification yesterday.

THE COURT: We'll photocopy them and they will be admitted as the next defendant's exhibits, the next number 5 or whatever identification numbers they are, they are admitted on those numbers.

MR. HARPOOTLIAN: Well, they have both the State's ID number and my number.

THE COURT: Okay.

MR. HARPOOTLIAN: So and let me --

THE COURT: Admitted.

BY MR. HARPOOTLIAN:

Q. So let's start with State's exhibit 19.

A. Right.

Q. What does that depict?

A. This depicts the - this depicts the vulva and the hymen of the girl in question. You have an abrasion here. You have an abrasion here.

Q. Abrasion here being?

MS. VALENZUELA: Your Honor, can I reposition?

BY THE WITNESS:

A. By all means.

BY MR. HARPOOTLIAN:

Q. She's asking him, not you.

A. Can y'all see?

THE COURT: You just go ahead and answer his questions.

BY MR. HARPOOTLIAN:

Q. So point out to the Judge where there are abrasions in the genital area?

A. Right here is a little scratch going up and down and right here is a little scratch going up and down, and this pink donut shaped structure is the hymen and it's bruised right along the posterior interior aspect.

Q. Okay. And looking --

A. It's a very, very good picture.

Q. Looking at State's exhibit number 20 which is plaintiff's exhibit number 6, what does that depict?

A. This depicts three little bruises consistent with finger impressions.

Q. Right on the pubic area?

A. Right over the mons pubis to the center and to the left.

Q. Are those two injuries that you see in those two photos consistent or inconsistent with your position that these injuries occurred while he was attempting to remove feces from the lips of this little girl's vagina?

A. It's a perfect match. He's holding her down too hard and he's opening the lips here so he can with the other hand remove the feces and this is scratching probably by his nails. These are two parts of the nails where the nails would rub up against and then the impression only on the back half, that's where the finger is going to strike. It's a perfect match.

Q. Let me ask you something, doctor. Let me see that for just a moment. So to give some sense of scale, that's somebody's, an adult fingernail?

A. Correct.

Q. So this is a very small area?

A. Correct.

Q. And to get those lips -- The lips are again pretty small, correct?

A. Right.

Q. Okay. So that's all I have of these. Thank you. Now, when you talked to Mr. Snell, you indicated to him in this letter and when you talked to him on the phone after examining this and after sending the letter, did you indicate to him that the injuries were consistent with the defendant's statement?

A. Yes.

Q. Okay. Now, did he hire you?

A. No.

Q. Or ask you to come testify?

A. No.

Q. Now, did you also indicate to him that you had an opinion about the other injuries to this child?

A. Yes.

Q. And what was your opinion about -- And there was bruising on the neck, the arms, elsewhere. I'm not going to go through the whole entire list. What was your opinion about those?

A. My opinion was that this child was manhandled.

Q. Manhandled. Now, do you know the definition of physical child abuse under the law?

A. No.

Q. Okay. And you couldn't give him a legal opinion about any of these injuries, could you?

A. No.

Q. Okay. So what was the tenor of your conversation with Mr. Snell? First of all, how long did it last?

A. About 15 minutes.

Q. What was the tenor of that conversation?

A. I don't know what is meant by the tenor of a conversation.

Q. Happy? Angry? Cooperative?

A. I found it perplexing.

Q. Why?

A. Mr. Snell started off, we talked about the facts and he started off, he wanted to know --

MS. VALENZUELA: Objection to hearsay.

MR. HARPOOTLIAN: Your Honor, we are not introducing it to prove the matter asserted. The allegation here is that Mr. Snell was ineffective. This gentleman would have, I think you have already heard would have testified to something that was corroborative of the defendant's statement and we are attempting to determine why or why not, why Mr. Snell chose not to use him.

THE COURT: You can just ask that question. Do you have any idea why he didn't hire him.

MR. HARPOOTLIAN: Well, then it would be

speculation. The witness has already testified. Mr. Snell has already testified. I don't think it's hearsay. I think she had an opportunity to examine him and cross examine him and he's already given his rendition of that conversation.

MS. VALENZUELA: I do not remember Mr. Harpootlian asking Mr. Snell to give the content of that conversation. The call was that this was perplexing. Why was it perplexing. I have no objection to the witness testifying as to why he took away that it was perplexing without going through minute description of the conversation.

MR. HARPOOTLIAN: Fine.

BY MR. HARPOOTLIAN:

Q. Why was it perplexing?

A. After we got - after I made it clear to him that we could not think of any way to defend the idea that this child was manhandled, then he starts trying to explain the law to me.

Q. Right. And?

A. I don't really understand the law, but he was saying to me that if -- He was trying to get me to say that there was some way that this could not have been done with a, uh -- He was - he was trying to get me to say that it was not done by penetration of the finger. He said that was there any way

that I could say that the finger was in the vulva and I really couldn't.

Q. He was trying to get you to back off the position that there was a penetration of the genitalia?

A. That is what I was trying to say.

Q. Right. And you said clearly there was penetration of the vulva?

A. Yes.

Q. Okay.

A. I couldn't do that and he was trying to explain to me about the law said this and the law said that and I didn't really understand it.

Q. Did he ever say to you - did he ever use the term -- Let me read something to you. I'm gonna read this to you and then I'm gonna ask you about a specific term. Sexual battery means sexual intercourse.

MR. HARPOOTLIAN: And, Your Honor, I'm publishing 16-3-651(h), the definitional section.

BY MR. HARPOOTLIAN:

Q. Sexual battery means sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion however slight of any part of a person's body or an object into the genital or anal openings of another person's body except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes. Okay. Did he

ever read that statute to you?

A. Not that I remember. I think I would have remembered if he had.

Q. Did he ever ask you if the removal of the fecal matter from this child's vaginal area between the lips was a medically recognized treatment?

A. No. I would remember if he had.

Q. Is it a medically recognized treatment?

A. It's part of the basic medical care of a child's health needs.

Q. So the answer is yes?

A. Yes.

Q. Now, did you ask him to send you anything?

A. Yes. I said - I said if there's more pictures, I would sure like to see the pictures.

Q. But initially you told him that the conduct of the defendant was justified, his statement where he said he was trying to clean the fecal matter from the lips of the --

A. Yes. I told him that I believed the statement how he was too rough but I believed him.

Q. But no sexual conduct?

A. That's right.

Q. Now, did you ever talk to a guy named Wayne Floyd?

A. No. No. No.

Q. Does that name mean anything to you?

A. Wasn't he the second counsel?
Q. Right. But did you ever talk to him?
A. No.
Q. That's Mr. Floyd sitting back there. Have you ever seen him before?
A. Didn't I see him yesterday?
Q. Yeah. But I mean before yesterday?
A. No.
Q. Okay. So if Mr. Snell had asked you to come to South Carolina and testify, would you have done that?
A. Certainly.
Q. Did you quote some exorbitant fee to him to do it?
A. No. I told him -- Here's what I told him and maybe -- I'm sorry if --
Q. Give me the exact quote. It may be offensive.
MS. VALENZUELA: Let him finish what he's saying.
MR. HARPOOTLIAN: I want him to use the words --
MS. VALENZUELA: I think you're cutting off things you don't want him to say.
MR. HARPOOTLIAN: He doesn't want to use the words.
MS. VALENZUELA: He was apologizing for the words.
BY MR. HARPOOTLIAN:
Q. Okay. What did you say?
THE COURT: Counsel, stop now. Let him answer the question of what he said.

BY MR. HARPOOTLIAN:

Q. What did you say?

A. I said your client was an asshole for the way he handled the kid and I'm gonna charge a thousand dollars.

Q. Okay.

A. I'm sorry I said that.

Q. You referred to Mr. Williams as an asshole?

A. I'm sorry.

Q. I know you are now, but at the time you weren't sorry?

A. I was saying he was just an asshole for the way he handled the child.

Q. Okay. I'm sorry. That's what I was trying not to - I wanted to play it down, but I wanted to make sure the exact language came out.

A. I'm sorry.

Q. So you made a derogatory comment about Mr. Williams because of the way he handled the child, but you also indicated he wasn't guilty of any sort of sex crime, criminal sexual conduct?

A. Yes.

MS. VALENZUELA: Objection. That calls for a legal conclusion.

BY MR. HARPOOTLIAN:

Q. Well, let me say this.

THE COURT: Yeah. I agree with that. He testified he didn't know any of the legal terms or statutes in South Carolina.

BY MR. HARPOOTLIAN:

Q. Well, you did tell him that his statement of attempting to clean the child's vaginal area which had feces in it was to be believed?

A. Yes.

Q. Did he ever send you anything?

A. No. Never.

Q. Did he ever contact you again?

A. No. I was hoping that he would.

Q. Because you thought what?

A. I thought this man was over charged.

Q. Over charged. Okay.

A. I thought that I could help with the prosecution of the defense, realized what really happened and they would come up with justice.

Q. You have read Dr. Luberoff's testimony in this case, have you not?

A. Yes.

Q. Do you find it to be accurate or inaccurate?

MS. VALENZUELA: Objection. I think that's calling - that's pitting the witnesses, Your Honor.

THE COURT: In trial. Here it's okay. I would

agree with you in trial we wouldn't do that. It's an opinion of an expert. He can offer -- He can answer the question.

MR. HARPOOTLIAN: Thank you.

BY MR. HARPOOTLIAN:

Q. Go ahead.

A. There is -- I want to say this as nicely as I can. There are some things I think we should have looked at. There are ways in which I could have helped get closer to the truth than what she shared. It's good work overall. I really had a problem with anybody suggesting that thing is a bite mark (indicating.) There is some confusion about what the vagina is and what the vulva is and it's really -- I think a truly objective witness would have focused on just what a good fit these injuries are for what the defendant described.

Q. And did you notice in any examination of her anybody asking her if there was any medically necessary reason to do this?

A. I don't remember anything, any such.

Q. Okay. And so there was no -- Okay. That's okay. The record speaks for itself. I don't need to ask him about that. And I have paid you some money to come here today to pay for your expenses and your time; is that correct?

A. Yes.

MR. HARPOOTLIAN: Thank you. Answer any questions

the Attorney General may have.

MS. VALENZUELA: Thank you. May it please the Court, Your Honor.

THE COURT: Yes, ma'am.

CROSS EXAMINATION

BY MS. VALENZUELA:

Q. Okay. Doctor, one of the things I want to clear up is, and this is purely out of my ignorance, is the difference between when you say pathology and you say that Dr. Luberoff is not a pathologist. Do all doctors receive training in pathology in medical school and in their residency?

A. Yes. As a pathologist I might have gone into a track of -- You get no pathology in your residency. You get a course in anatomy. You get a course in biochemistry. You get a course in pathology. It's very elementary. Most schools involve no practice. At my school where I supervise the course and deliver much of it there is actually some practical. It's a little bit higher level. But all physicians learn a little bit about injury. I made the study of injury my focus.

Q. Okay. But so when we're saying that she's not a pathologist, as a part of her medical training she would have at least received a course in pathology similar to how you just received a course in sexual assault testing or assessment in your medical school, right? You had a course in sexual

assault assessment in medical school and that's the last time you have done it?

A. No. No. No. Not so. Not so.

Q. Okay.

A. Not so. Let me explain. It was a residency. We had a course in residency. It was a part of the training of a pathologist. Most physicians don't get it.

Q. Okay. So one course?

A. Yeah. It's part of the - it's part of the ongoing training. Like once a week we'll, we will review the sexual assault cases and we'll actually do some of them.

Q. Okay.

A. So it's a little more than most physicians get.

Q. And as a pediatrician would Dr. Luberoff come in contact with children, and live children and live children's genitals more often than you would in your medical practice considering your entire career?

A. Yes.

Q. Okay.

A. Just as I would come into contact with more bruises and abrasions and injuries that might be serious and come to court.

Q. In dead people?

A. Okay.

Q. Is that correct?

A. Yes.
Q. In dead people?
A. Mm-hmm.
Q. Okay. And the victim in this case was alive?
A. Yes. She is.
Q. Okay. And she was examined at a time where would you agree the injuries appear to be acute meaning that they would have been caused within the last 24 to 48 hours?
A. Yeah. These are fresh. You make the same determinations about injuries of the dead.
Q. Okay.
A. The key is the injury, not whether the heart is beating.
Q. I'm sorry?
A. The key is the injury, not whether the heart is still beating. Tissue injury is something we all understand.
Q. So, and again, just explain it to me because I don't have a medical background. When you say that it doesn't really make a difference if the heart is beating because of the injuries, do injuries bleed when the heart is still beating but not continue to bleed when the heart is not pumping?
A. Yeah.
Q. Okay.

A. Yeah. A dead body will bleed, an injury will bleed even inflicted several hours after death. It will bleed less but you will still see some bleeding. Abrasion, for example, may - and abrasion may not scab if the injury is inflicted after death. Now, I had, have had a case where a child, a brutal murder of a little girl where there was also trauma to the anus by the perpetrator. This is an injury that would have been the same and I would have evaluated it in the same way if the child had been alive. I use my skills again from residency.

Q. Okay. And did I hear you say that once a person is dead they do bleed less even though they continue to bleed from a victim who has a heart that is continuing to beat?

A. Yeah. I'm well familiar with abrasions and bruises in the living and the dead.

Q. Okay. Now, earlier Mr. Harpootlian handed you your letter. I just want to make sure I have the timeline correct. I see that you have it in your hand. When you sent that letter and then he asked you about the opinion in your letter and I believe I heard you say that you had all the information and based on all the information you had that you were reaching this conclusion, but at the time of the letter you did not have all the information, right? You were missing the photos?

A. Yeah. That was a little bit unclear. So let me

clarify that here. I had seen enough just from the sex abuse nursing examiner's report and from -- Well, her photos weren't very helpful. And from this guy's confession and the - from what I had seen I reached this conclusion and I said I sure would like to see the -- I reached the conclusion that his testimony was essentially truthful and I said and I would sure like to see the rest of the photos. The photos come now and it is, I mean, to me it's as clear as - it's as clear as day that's what happened.

Q. So I just want to make sure. So did you get to actually see the victim at any time in this process?

A. No.

Q. No. So you didn't actually inspect or do any sort of assessment on the victim in this case. In terms of visualizing the things that you had seen as to the injuries it is limited to the photographs that we were talking about of the victim?

A. These are great photos. Your expert should be commended.

Q. Okay. And when you say these, what you're doing is you're holding up --

A. Yeah. Correct.

Q. -- the four --

A. I'm holding up --

Q. -- photographs --

A. -- Dr. Luberoff's photos.

Q. -- that came in under Dr. Luberoff?

A. Yes.

Q. And not the SANE nurse's photos, correct? I just want to make sure that the record shows what you're doing here, too. Right? Those are Dr. Luberoff's photos that you're saying are great photos?

A. Yes. These are great photos and I'm holding up Dr. Luberoff's photos now.

Q. Okay. So when you reached that conclusion -- And I think you said earlier that the SANE photos were not great photos.

A. They were not. Her report was adequate.

Q. Okay. And so you were dealing with an adequate report, not good photos and then the defendant's statement and you were able to reach a conclusion prior to seeing Dr. Luberoff's photos that the defendant was telling the truth?

A. Yes. Before I saw these photos it's more likely than not to a reasonable degree of medical certainty. When I got Dr. Luberoff's photos, dang, I was right.

Q. So you had already reached the conclusion before you saw the visual evidence?

THE COURT: That's the third time. I understand your point.

MS. VALENZUELA: Okay. Do you want me to wink? I'm

just kidding.

BY MS. VALENZUELA:

Q. Okay. So let's talk a little bit going back. What is -- Is there a difference between a SANE exam and the type of training that you received in assessing sexual assault victims?

A. Sexual abuse nurse examiner is a standard type exam. Some of them are very good. Some of them are not good. But that did not exist at the time I was in residency. Special nurses were - the idea was just being floated. You assign special nurses that focus - focus on this and try to get it - try to get it down to more of a science.

Q. Okay. So let's go through -- What should I call your sexual assault training? Is that an accurate term?

A. Sexual assault training. Yes.

Q. Okay. So your sexual assault training -- Let's see. I did want to go back. Have you ever spoken to Dr. Luberoff about this case directly?

A. I have not.

Q. Have not. Okay.

A. I would have if I had been asked to.

Q. Okay. So walk me through your sexual assault training. I think you mentioned before that you did have live victims in that training?

A. Yes.

Q. So you would have treated live people. And did you have the opportunity to look at and examine any injuries that would have been caused by intrusion into the vaginal area?

A. Yes. We had six - six young women, two - two little girls.

Q. Okay. And when you say little girls, about what age are we talking about?

A. I don't remember. It's been a long time.

Q. Okay.

A. But one - one - one was - one was a toddler. She was in her second year of life as this child was. I remember.

Q. Okay. And so as part of the sexual assault training that you received, are you trained on the motive of the person who would have caused the injury to the child?

A. Just the most general terms.

Q. Okay.

A. No. We're -- It is not part of - perpetrator assessment is not part of what I did.

Q. Perpetrator assessment. So the motives of the person who intrudes into the vagina is not part of the training that you received?

A. No. We can talk about what was done. I don't care. We are not really taught to think about the mind.

Q. As part of your sexual --

A. And I don't know whether sexual abuse nurse examiners are either.

Q. Okay. As part of your sexual assault training were you aware that sex crimes can be caused by many different reasons one of which is sexual gratification but additionally anger or power?

THE COURT: He already answered that.

MS. VALENZUELA: Sir.

THE COURT: You already asked him. He doesn't know the motives. He's examined the child medically, not motives. He's already answered that. We don't need to recast --

MS. VALENZUELA: His whole - his whole opinion is saying that this was --

THE COURT: No. No. No. You asked him if he knows anything about the motives. He said no. And you're asking that same question again. Did he study the motives of someone who wanted sexual gratification.

MS. VALENZUELA: No. Was he told.

THE COURT: That's the same question.

MS. VALENZUELA: Just his knowledge of it.

THE COURT: He said he didn't know. Move on. This is not a recasting of his testimony. He was not called as a witness. He was going to offer an opinion consistent with the defense. He wasn't called.

MS. VALENZUELA: But that's how we prove prejudice is because the argument here is that he should have been called and so I have to show that if he had been called, he would not have been effective. I have to do that.

THE COURT: I know, but you have asked the motive question twice now. I'm just -- I've had enough of this of the motive. He doesn't know the motives of someone who is a sexual assault person. He doesn't know that.

MS. VALENZUELA: Okay.

THE COURT: I get it. I mean, I'm with you. I understand your point.

MS. VALENZUELA: May I approach the witness?

THE COURT: Sure.

BY MS. VALENZUELA:

Q. Okay. I'm showing you what is plaintiff's exhibit 6. We went over this one a little bit earlier. Do you recognize this?

A. Yes.

MS. VALENZUELA: I think that the Judge can see it from his seat. Mr. Harpootlian, if you want to, if someone wants to come around, they can.

BY MS. VALENZUELA:

Q. So this is the image where what we see is the vulva of the child, right?

A. Yes.

Q. And it's visible, her actual pubic bone area is visible here?

A. Right.

Q. And what we see is some slight bruising on the pubic area which kind of goes in a circular pattern right when the split in her lips begin?

A. I wouldn't call that slight bruising. Those are bruises.

Q. Okay. So not slight bruising but definite bruising. Would you agree that's in a circular pattern?

A. No. It's an arc. It's half. Part of a circle. A circle goes all the way around.

Q. Thank you for clarifying that. So but you would agree that it's in an arc?

A. Yes. An arc.

Q. Okay. Now, prior to seeing these photos, prior to sending the letter that you sent to Mr. Snell, had you had an opportunity to see a photograph of the defendant's fingers?

A. No.

Q. Did you have any idea of the size of his fingers before you sent that letter and reaching your conclusion?

A. All I know is that he's a grown man.

Q. Okay. And so we know from you that you read the testimony. We know from the testimony that Dr. Luberoff testified that the arc matches the pattern of what could be a

bite mark, correct? I'm just asking if that's what was testified to?

A. Yes.

Q. Okay. And teeth go in an arc?

A. Yes. So where is the k-9's? Where are the teeth impressions? You've got like two incisors here and an incisor here and k-9's here (indicating.)

Q. Okay.

A. I'm not seeing that as a bite mark.

Q. Okay. And so had you had an opportunity to look at photographs or look at the mouth of the defendant prior to reaching that conclusion?

A. This bite mark stuff, I only heard about the bite mark idea when I read it from Dr. Luberoff's testimony a few days ago.

Q. So no?

A. I could have dismissed the idea that's a bite mark.

Q. If you had seen the shape of the defendant's mouth?

A. Well, he's got ordinary teeth, doesn't he?

Q. Well, I don't -- That's what -- You're the one reaching the conclusions so I'm asking. Okay. So and then I think on plaintiff's exhibit 5 there is no dispute, and this is the image where we see the child's, to her -- I can't

remember the correct term for the lips.

A. Labia minora.

Q. Thank you. The labia are being spread apart and you see two thumbs holding it open?

A. Correct.

Q. And you see inside into I think what you described as the hymen?

A. Yes. The hymen is this purply pink donut thing.

Q. Okay. Looks kind of like a donut that's recessed inside?

A. Correct. Correct.

Q. Okay. And then at the top it's the clitoris?

A. Right. The clitoris.

Q. The clitoris. Thank you. And then going to the sides that's what you pointed to as what look like --

A. Two little scrape marks, one there, one there. Just like the nurse examiner described them.

Q. Okay. So scrape marks going down from the clitoris. And then do you also see the bruising on the hymen?

A. Yeah. I already showed that to the Court. It's on the back half right where the fingertips struck.

Q. Okay. Now, in your sexual assault training were you trained on the proper way to get fecal matter from outside of the vaginal lips or the labia of a child?

A. No.

Q. Where does your knowledge come from in terms of the appropriate way to get feces out of the labia of a child?

A. It's reading generally about hygiene.

Q. So reading it. Okay. Did you complete any sexual assault assessments on live victims during your training?

A. Yeah. I was part of the team for those eight that I mentioned.

Q. So did that mean that you actually touched and dealt with the genitals of the children?

A. Yeah. We all - we all touched. We all looked. We all touched.

Q. Did that include the toddler victim that you talked about?

A. Yes.

Q. Okay. And how were you trained in using your fingers around a toddler's vagina when doing a medical treatment to that child?

A. With the greatest care.

Q. With the greatest care. Were you trained to avoid scraping down the inside the labia of a victim?

A. Part of the general education is to keep the fingers off on the skin more than on the mucosa insofar as that is possible.

Q. Okay. Insofar as it is possible. And then what is it that your sexual assault training or even your pathology

experience tells us about the sensitivity of the hymen for a child that would be 15 months old as opposed to that of an adult who still has a hymen intact?

A. Yeah. It's far more sensitive. Just around the ring there are all kinds of nerve endings. That's why - that's why touching it is, especially the hymen, there is special nerve endings in the ring of the hymen that are not present in the vulva so you try not to touch the hymen unless you absolutely have to.

Q. Is the injury to the hymen that we see in plaintiff's exhibit 5 consist with a penetrating injury?

A. No. The hymen was not penetrated.

Q. Okay. And so tell me what --

A. Okay. The vulva was penetrated. The hymen is not penetrated.

Q. So thank you. So for clarification, is the injury that we see in the plaintiff's exhibits that I just referenced consistent with a penetrating injury to the vulva?

A. Yes. It is a penetrating injury to the vulva.

Q. Yes. And then you mentioned that you had reviewed the testimony of Dr. Luberoff. Did you see where Dr. Luberoff agreed that changing, getting the fecal matter from outside of the vaginal lips of a toddler is medically necessary?

A. I don't remember that part.

Q. Okay. I just showed opposing counsel. I think he

has the page turned. So looking at page 378, we see the front of the transcript at the top, Dr. Luberoff is testifying, correct?

A. Right.

Q. Okay. And this is on cross - or recross examination by Mr. Floyd?

A. Mm-hmm.

Q. And if you could, could you just read from 9 to 16?

A. You want me to read it out loud?

Q. Yes, please.

A. Okay. In the -- Question: In the cream. Answer: Yes.

Q. Oh, I'm sorry.

A. I think we got it here. One more question. Would touching the genitals of a young female in order to clean the female as a result of a dirty diaper, would that be a medically recognized touching of a child? Answer: You mean is it appropriate to touch that area in cleaning a diaper? Question: Yes. Answer: Yeah.

There you go.

Q. Okay. And so Dr. Luberoff did testify that it was, that touching a young female in order to clean her for a dirty diaper would be a medically recognized touching of a child?

A. I don't think anybody is arguing about that.

Q. Okay. Did you also see that Dr. Luberoff testified

as to some of the cream that could have been used to treat the eczema if there had been eczema in the child?

A. Yes. And I could also - that's a steroid cream. If that really was applied, that would make her more vulnerable to bruising.

Q. Okay. And Dr. Luberoff explained that that was not, that that had not been prescribed for the genital area, correct?

A. Yeah. That's not something you want to go putting there. If she has got eczema on the skin, that's one thing. But not something for on the inside.

Q. Okay. Did I recognize, was I correct earlier that Mr. Snell was trying to see if you could testify that there had not been an intrusion into the vulva and you indicated to him that you would not be able to testify as to that?

A. That was -- I went around and around and around and around with him and that's where I said I got all perplexed and baffled.

Q. Is that a yes though --

A. Yes.

Q. -- that you're answering my question?

A. Yes.

Q. Thank you. Now, a few last questions, doctor. You advertised your services as an expert?

A. I have in the past, I have used referral services.

I'm trying to focus more just on education now.

Q. So you have used a couple of different referral services?

A. Yeah. I use TASA.

Q. TASA. And then also Consolidated Consultants?

A. A long time ago.

Q. And then earlier you said that your website does not generate money for you but does your website generate leads for expert testimony?

A. It did in this case. I have gotten a few. Mostly it's just about helping folks out. This is for me a way of helping.

Q. We appreciate that testimony. Now, I know that Mr. Harpootlian said that you were getting paid for your time and travel. How much are you being paid to be here today?

A. I was given for everything, he sent me more than I even suggested, he sent me 5000.

MS. VALENZUELA: That was generous of him. Okay. Nothing further. Thank you, Your Honor.

THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. HARPOOTLIAN:

Q. Let me deal with something right off the bat. The Attorney General a moment ago used the term intrudes into the vagina. Let me make this clear that --

MS. VALENZUELA: Objection. That's restating. I used vulva or I used hymen.

MR. HARPOOTLIAN: No. You used vagina. I wrote it down. I'll be happy for the reporter to read it back because it was so wrong I wrote it down.

THE COURT: I heard one of her questions specifically hymen versus vulva so if she may have said that, but she went back through it with intrusion to the vulva and he answered that question I'm certain. I don't know whether he answered this question or not, but she did go back through that.

BY MR. HARPOOTLIAN:

Q. Let me just clarify. Is there any evidence of intrusion into the vagina in this case?

A. No.

Q. Okay. Now, she also asked you about what you had received from Mr. Snell including photographs from Ms. Clary; is that correct?

A. Yes. Ms. Clary is the SANE nurse, isn't she?

MR. HARPOOTLIAN: Yes. Okay. I'm going to hand up to you a series of e-mails from Mr. Snell to you. Can I have these marked please.

(Whereupon, Plaintiff's Exhibit #9 marked for identification.)

BY MR. HARPOOTLIAN: Plaintiff's exhibit number 9,

Your Honor.

BY MR. HARPOOTLIAN:

Q. Let me review this with you. I have given a copy to the Attorney General. The first one is an e-mail on June 17th from Mr. Snell to scalpel_blade@yahoo.com. Is that you?

A. That's me.

Q. Let me publish this. Is says, Dear, Dr. --

MS. VALENZUELA: Objection, Your Honor. So there were some several - I know that you said that you have to look at them either way, but there were several exhibits yesterday that he read out loud and published and didn't actually end up moving to admit them and so it's getting a little messy. I feel like if he's going to publish it, it really needs to be admitted because he's --

MR. HARPOOTLIAN: It just was.

MS. VALENZUELA: -- kind of sort of admitting them without --

THE COURT: He didn't admit them yet. He just identified them I think.

MR. HARPOOTLIAN: I'm sorry. I move to admit it.

MS. VALENZUELA: Yes. No objection.

THE COURT: There it is. Admitted.

MR. HARPOOTLIAN: I'm sorry. A little housekeeping there.

BY MR. HARPOOTLIAN:

Q. Okay. Let me publish this. It says, Dr. Friedlander, Lynne Williams, mother of Lance Williams has asked me to forward to you some information about the medical examination in her son's case. I'm sending you a summary I have prepared with the medical report. The police have not turned over any other medical records or photographs from the prosecutor although we expect them shortly. Please let me know if you have any further questions. If you would like to make proposals for a valued aid of services in this case, I'd be happy to forward it to Ms. Williams. Along with my client thank you for your time and any assistance you may offer. James Snell.

Do you remember getting that?

A. Yes.

Q. And you e-mailed him back on Monday, July 19th. Thanks. I did my 60th autopsy of the year today. My street credit really high. And then he e-mails you back on Monday July 19th. I'm mailing you a disk today containing the documents and photographs we've received from the prosecutor's office. Thank you. And then you e-mail back on the 21st. I forgot to give you my address. Sorry. You give him an address in Kansas city?

A. Right.

Q. And you received the materials; is that correct?

A. Right.

Q. Now, let me go to exhibits 13 and 14 from the trial.

MS. VALENZUELA: Your Honor, this exceeds the scope of my cross and his direct.

MR. HARPOOTLIAN: She asked him about the photographs that he looked at that came from Ms. Clary. Those are exhibits 13 and 14, some of them in the trial. I want to ask him specifically about those.

MS. VALENZUELA: He didn't cover this. I never picked up Ms. Clary's photographs. This is limited to what --

THE COURT: The photographs were referred to as not very good or not helpful --

MR. HARPOOTLIAN: Absolutely.

THE COURT: -- something along those lines. Are those the photographs we are talking about?

MR. HARPOOTLIAN: Yes, sir.

MS. VALENZUELA: Yes.

THE COURT: Okay. Well, how would they be helpful now? If they weren't in the original opinion, how --

MR. HARPOOTLIAN: No. No. No. These are the photographs that he looked at for his original opinion that he said were not very good and he wanted more photographs. I want him to look at these photographs and explain why they weren't very good and what he got -- They were good enough for him to give an opinion. She

seemed to challenge that and I just want to at this point have him at least look at one of them.

THE COURT: All right. One of them.

MR. HARPOOTLIAN: All right. Thank you. This is exhibit number 14. I'm not going to put it in evidence. I'm gonna refer to it from the original trial so we don't have to go through the copying and all that.

BY MR. HARPOOTLIAN:

Q. Do you remember this photograph that you received on a disk from Mr. Snell?

A. Yes.

Q. And what is it in this photograph that you saw that was consistent with the opinion you gave?

A. You have the two abrasions but you can't --

Q. Hold it up just a little bit.

A. You have what looks to be the two abrasions just like the sex abuse nurse examiner described and you do not - the hymen is down here being hidden by this fold of skin. The hymen is down here so you can't see the bruise on the hymen.

Q. But you read about the bruise on the hymen?

A. Right. I read about the bruise on the hymen. This matches what I read about. The bruise on the hymen was also in the report so I figured the bruise on the hymen was also out here as described because the sex abuse nurse examiner did a good job.

Q. Okay. Great. Thank you. So based on this photograph that you received and the description is how you came to your opinion that the injuries to the vulva -- Was it the vulva? The injuries, the scrape marks other than the hymen, whatever --

A. Yeah. The labia minora part of the vulva.

Q. The labia minora part of the vulva and the hymen were consistent with his explanation of cleaning, correct?

A. Yes.

Q. Now, she read to you a moment ago testimony by Dr. Luberoff. The last question I think on cross by Mr. Floyd he said, one more question. Would touching the genitalia of a young female in order to clean the female as a result of a dirty diaper, would that be medically recognized touching of a child? She says, you mean is it appropriate to touch that area cleaning a diaper? Yes, the expert said.

But all her previous testimony is that this was not an appropriate touching; is that correct?

A. That's what I remember.

Q. Right. So this is a hypothetical not - and applied to this case, her opinion was this was not an appropriate touching, correct?

A. I've got to confess I really don't understand.

Q. Okay. Her testimony or the question?

A. I don't understand your question.

Q. Okay. I was hoping it was her testimony. But what I'm saying is, this is a hypothetical. He doesn't say was it appropriate for him to touch this child in this area to change this child's diaper. What I have just asked you many times is because there was feces between the lips of the vagina. He didn't ask that, did he?

A. That's not the question he asked.

Q. Right. Right. Doctor, I want to make sure I understand this. It's unclear to us. Maybe it is clear in the record. If you had been asked to come to trial in this case, would you have come?

A. Yes.

Q. And you would have testified to what you have testified to here today?

A. Yes.

MR. HARPOOTLIAN: Thank you.

MS. VALENZUELA: No redirect. Recross I mean.

THE COURT: All right. You may step down.

MR. HARPOOTLIAN: Your Honor, may the doctor be excused?

THE COURT: You may.

MR. HARPOOTLIAN: He has a flight back to Mississippi.

THE COURT: Let's take a couple minutes break so everybody can stretch their legs and use the restroom.

(Short break.)

BAILIFF: All rise. Come to order.

THE COURT: Thank you. Please be seated.

MR. HARPOOTLIAN: We call Wayne Floyd.

Thereupon,

HOWARD WAYNE FLOYD

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name for the record.

THE WITNESS: Howard Wayne Floyd.

DIRECT EXAMINATION

BY MR. HARPOOTLIAN:

Q. Mr. Floyd, you and I have known each other for 30, 40 years; is that correct?

A. That's correct.

Q. When did you get out of law school?

A. '74.

Q. So did I. We were in the same class actually. So 42 years of practicing law, right?

A. That's correct.

Q. Retired?

A. No. I'm still working.

Q. There you go. Now, you have handled -- Is your primary focus on criminal or criminal and personal injury? What do you do?

A. Mainly criminal but I do personal injury also.

Q. Okay. And you have been doing that for all 42 years?

A. 42 years.

Q. Who did you practice with when you got out of law school?

A. When I first got out of law school, I went to Florida and I practiced down there for three years.

Q. Okay.

A. Then I cam back home.

Q. So you are admitted to the Florida Bar also?

A. Yes.

Q. Okay. And you came back home. When you came back home, did you hang out a shingle or did you practice with somebody?

A. I went in with Billy Oswald for about ten years and then I went on my own.

Q. Billy Oswald. Billy still around?

A. Yeah. He's still around.

Q. Okay. And I think even at one point you had a paralegal named Holly, it's now Holly Miller, this young lady right back here who used to worked for you 20 something years ago?

A. Yes. She did a good job for me.

Q. Still doing a good job. So and you have handled

hundreds if not thousands of criminal cases in your life, correct?

A. That's correct.

Q. Tried dozens, hundreds?

A. Yes. Hundreds probably.

Q. Hundreds. Okay. Now, tell me how you became to be involved in this case?

A. Mr. Snell called me and asked me if I could help out in a trial he had coming up. I want to say it was Monday of the week.

Q. Trial started on Wednesday.

A. Yeah. And then I said, I cleared my calendar and said I could do it. I believe I got a check the next day maybe, the 29th.

Q. For $5000.00?

A. Mm-hmm.

Q. Did you just think the trial would be that week? I mean, you didn't think it was going into the next week?

A. No. I thought it was just a couple day trial. Then I got with him. I got copies of whatever he had that he gave me. We went over to see Lance at the jail.

Q. That was Monday night or Tuesday?

A. I thought it was Tuesday but I may be wrong.

Q. Okay. The day before the trial you met with him for how long?

A. Hour maybe. It wasn't a long time.
Q. Wasn't a long time.
A. Mainly just meeting him.
Q. What was your understanding before you began this trial? Were you going to be second seating Mr. Snell or were you going to be trying the case?
A. I was just to help him through the trial.
Q. Help him through the trial?
A. Mm-hmm.
Q. You didn't think you would be the main lawyer, did you?
A. No. I didn't plan on that.
Q. Okay. Well, we'll talk about what happened. But when you took that $5000.00, you thought you were going to be second seating Mr. Snell?
A. That's correct.
Q. And had you talked to any of the witnesses?
A. No. I just - all I had was this file. Whatever he provided me, I reviewed that.
Q. So prior to picking a jury, you hadn't talked to any of the witnesses?
A. No.
Q. Now, when you're doing a case on your own, do you make an effort to talk to witnesses?
A. Yes.

Q. Okay. And you make an effort to go out and interview witnesses --

MS. VALENZUELA: Objection. Leading.

BY MR. HARPOOTLIAN:

Q. Do you make an effort to go out and interview witnesses?

A. Yes.

Q. Have you ever tried a case other than this case where you have never talked to a witness before trying it? I'm not talking about a DUI where there are two cops.

A. Yes. Just DUI's maybe.

Q. Yeah. But I mean where there are lay witnesses out there?

A. You always want to try to make contact with them and see what they've got to say.

Q. And they may talk to you. They may not talk to you. But you make an effort to talk to them, correct?

A. Yes.

Q. Okay. And in this case you were brought in no more than 48 hours before a jury is picked. You spent about an hour with the client and you got the file; is that correct?

A. That's correct. Well, I also talked with Mr. Snell about what he had done.

Q. Sure. Right. And then you went to trial? You picked a jury, correct?

A. That's correct.

Q. And correct me if I'm wrong. I want to make sure I get this right. There were 13 -- We debate this now. Hold on. I made a list of what I believe you did and if you think I'm wrong, correct me and we'll go over the transcript. You did the pretrial motions. The Jackson v. Denno motion?

A. Jackson v. Denno. Yes. That's correct.

Q. You did closing argument.

A. Yeah.

Q. You did the cross of Katie Cooper?

A. I did a lot of the cross.

Q. Let me just walk through these. Katie Cooper, Lee Ann Harvey, Tommi Hutto, Marlena Clary, Susan Luberoff, Dr. Susan Luberoff, Detective Ed Prestigiacomo.

A. Prestigiacomo.

Q. Shelby Derrick, Troy Crump, Beth Harmon, Brittany Brown, Candy Kyzer. You did 11 witnesses. Mr. Snell did, participated with the selection of the jury. Were you there for jury selection?

A. Yes.

Q. Okay. He did opening statement. He did Brittany Brown, Adrienne Riley-Hefney, and then in the defendant's case he put both witnesses up. There was a witness from DSS Mildred Moore and Lance Williams, correct?

A. (Witness nodding head.)

Q. So you did 11 of the 13 witnesses for the prosecution, right?

A. Correct.

Q. And he did both of the defense witnesses. Now, a moment ago you said that you had been hired to support Mr. Snell. When did it turn from supporting Mr. Snell to doing the bulk -- When I say the bulk of the case, virtually all but two of the prosecution witnesses and closing argument and the Jackson v. Denno, how did that happen?

MS. VALENZUELA: Your Honor, at this point I'm just gonna object on relevancy. Most of these questions were laying the foundation and I could see how they were related to some of the allegations made, but I don't see an allegation on the timing of when Mr. Floyd was hired and the discussion on how this was going to be separated between Mr. Floyd and Mr. Snell so under Rule 15 and under relevance I make the same objection that I made yesterday.

THE COURT: Okay. Overrule your objection. I'd like to hear the answer.

BY MR. HARPOOTLIAN:

Q. Go ahead.

A. It happened during the trial. I, of course, have a lot more experience than Mr. Snell in the courtroom and he just asked me to continue with the cross examinations and I

did.

Q. So you basically took over the case?

A. I did cross examinations and the closing.

Q. And closing. Right. So and you did the cross-examination of Dr. Susan Luberoff?

A. That's correct.

Q. Did you have a report of hers that you looked at beforehand?

A. I imagine I did. If I did -- I gave him my file yesterday so I don't know if there was one in there or not.

Q. But you would agree with me that Dr. Luberoff was a very critical witness for the State?

A. That's correct.

Q. I mean, more so than even Ms. Clary, the nurse, right?

A. Oh, yes. She's always present in these trials usually.

Q. Right. Now, you have been here this morning and you heard the testimony of Dr. Ed Friedlander, correct?

A. That's correct.

Q. Were you aware of him prior to today or maybe this week?

A. If I was aware of him, it was only that - because I talked with Mr. Snell about what he had done pretrial and I thought he had done a lot of work pretrial. He may have been

mentioned as somebody he talked to. I don't recall the substance of what he said or what he said about him, but he wasn't one that was called for trial.

Q. But did you ask him if y'all had an expert on this issue of the penetration?

A. No. Not specifically.

Q. Let me maybe -- You understood that if the penetration was made for a medically recognized reason, that that was a defense, correct?

A. Correct.

Q. Because you asked on page 378 would touching the genitalia of a young female in order to clean the female as a result of a dirty diaper, would that be a medically recognized touching of a child? And she said, you mean it is appropriate to touch that area in cleaning a diaper? Question: Yes. Answer: Yes.

So that was the last question you asked her. You felt that was important?

A. Oh, yeah. That's why I saved it for last.

Q. And it was your defense, right?

A. Mm-hmm. It was the main portion of it. Yes.

Q. Okay. Now, you have heard Dr. Friedlander's testimony this morning. Did that testimony corroborate your defense?

A. What I heard this morning?

Q. Yes.

A. Yes.

Q. That is that it would be medically necessary to penetrate the vulva of a 15 month old to clean fecal matter from the lips of the vagina, right?

A. Correct.

Q. And that's what Mr. Williams had said in his statement given to the police the day of his arrest, correct?

A. Correct.

Q. So that explanation was consistent - inconsistent with what Dr. Luberoff said but consistent with what Dr. Friedlander said, correct?

A. Correct.

Q. So if you had been made aware of Dr. Friedlander -- Did you ever see a written report from Dr. Friedlander?

A. No.

Q. That letter that we have introduced into evidence, you ever seen that before?

A. No. I don't think I ever saw it.

Q. Okay. So Mr. Snell never related to you what you heard here this morning?

A. Correct.

Q. If he had related that, would you have gotten Dr. Friedlander into the courtroom to testify?

A. I was going to try to get him. I don't know what went on conversation wise between Mr. Snell and Dr. Friedlander.

Q. Well, you heard what Dr. Friedlander said this morning?

A. I heard what he said. So I don't know what the reasoning was.

Q. But if Dr. Friedlander had related to him, and in his report he said --

MS. VALENZUELA: Objection, Your Honor. I don't understand the line of questioning. He's making the point that Mr. Floyd did not start the representation until the day before the trial. He didn't have anything to do with the selection of witnesses. He walked in and then he started handling the trial as it had been decided. This isn't relevant to this witness. He had nothing to do with the prep leading into the case. If this is going into him serving as some sort of expert witness as an attorney, that's improper.

MR. HARPOOTLIAN: Two points. One, she's reserved all of her objections as to relevancy and I thought we were going to go forward with that. Number 2, I'm going to have questions about -- The question is was Mr. Snell ineffective and this is his co-counsel and I think it's important to know had he been aware of Dr. Friedlander

and he was available, would he have called him.

THE COURT: He's answered that. He would have.

MR. HARPOOTLIAN: He would have but I want to go one step further. I'm not calling him as an expert. I'm calling him as a lawyer who is sitting in the courtroom that had better knowledge of what transpired than any of us here. So his opinion about that I think is relevant and admissible and he's a lawyer. If you want me to qualify him as an expert as a lawyer, I'll be happy to do that. But I want his opinion based on being co-counsel in this case and what he would have done differently.

MS. VALENZUELA: The two allegations in this case, just to remind us again where we are, are failure to contemporaneously object at trial, and then additionally failure to call several witnesses to testify at trial. This has nothing to do -- Mr. Floyd is the portion about contemporaneously objecting at trial, but he has nothing to do with the decisions made pretrial. This is just a work around way to get an attorney with experience to start second guessing quarterbacking decisions that he had no play in prior to leading up to the trial.

MR. HARPOOTLIAN: Failure to call witnesses at trial is one of our objections. I believe this witness may have an opinion about that.

THE COURT: I think he's already offered it.

MR. HARPOOTLIAN: Well, I think he has, too. Let me refine it a little bit.

THE COURT: All right. When refining questions, I think he has already testified that had he known Dr. Friedlander from Mississippi was available to corroborate their defense which was the last question asked that he asked Dr. Luberoff, he would have tried to get him here. I think that's what he testified.

MR. HARPOOTLIAN: Okay. Well, if that's Your Honor's view of that testimony, I'll move on.

THE COURT: Okay. That's what I thought he just said.

MR. HARPOOTLIAN: Okay.

MS. VALENZUELA: Right. With my objection?

THE COURT: Yeah.

MS. VALENZUELA: Right. With my objection and then you saying that you're overruling my objection to that testimony coming in.

THE COURT: Yes.

BY MR HARPOOTLIAN:

Q. You just heard what the Judge said. Do you agree with that?

A. Well, I agree with one reservation.

Q. Right.

A. I don't know what went on between Dr. Friedlander