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STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Beaufort County

Honorable Thomas A. Russo, Circuit Court Judge

ARTHUR FRANKLIN SMITH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001196

APPENDIX

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS.
COUNTY OF BEAUFORT 2003-GS-07-01756

STATE OF SOUTH CAROLINA	)	
-vs-	)	TRANSCRIPT OF RECORD
ARTHUR SMITH,	)	September 19-21, 2011
Defendant.	)	Beaufort, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge, and Jury.

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

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Attorney for the State

Gail Lovell, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1	I N D E X				
2	WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
3	Andres Florencio	53	59	60	--
4	Cynthia Solak	61	74	77	--
5	Complainant	78	86	88	--
6	Joshua Smith	89	95	96	--
7	Jacquelyn Solak	97	103	--	--
8	Kendra McIlvee	116	123	--	--
9	Tod Lynch-Stanley	125	129	131	142
10		152	167	145	--
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2	NO.	DESCRIPTION	ID.	EV.
3	State's 1	Handwritten note	58	58
4	State's 2	Photograph	70	70
5	State's 3	Photograph	70	70
6	State's 4	Photograph	72	72
7	State's 5	Photograph	72	72
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1 (September 19, 2011.)

2 THE COURT: Welcome, folks. My name is Roger
3 Young. I am a circuit judge from the Charleston area,
4 and I am down here this week to help out on a term of
5 General Sessions court. I was scheduled to be in
6 Charleston this week, but another judge who was in
7 Charleston had a case go over and she was supposed to be
8 here this week, so we swapped and I get to hold court in
9 Beaufort, which it's been a little while since I've been
10 here, but I'm glad to be back.

11 General Sessions Court, as I'm sure they told
12 you, is criminal court, and we are getting ready to draw
13 a jury that we'll begin tomorrow morning. You just sat
14 through a jury strike process, and you understand there
15 is a question we have to ask, not a lot of them, a lot of
16 questions have been asked already and we don't have to
17 reinvent the wheel, but we do have to go through, ask a
18 few questions, namely about whether or not you know the
19 people involved, anything at all about the incident
20 involved and, if so, does it affect your ability to be
21 fair and impartial.

22 Now, if there are any questions that I ask
23 you that you consider to be too private that you don't
24 want to stand up in front of a group of strangers and
25 respond, you're welcome to come down here and talk to me

1 a little bit more privately about this, and by private I
2 mean we still got to be in front of the court reporter
3 and the lawyers will have the opportunity to listen in,
4 but it won't be in front of a whole group of strangers.

5 So let me tell you a little bit about the
6 case that we are getting ready to start. The case is the
7 State of South Carolina versus Arthur Franklin Smith, and
8 Mr. Smith was charged with criminal sexual conduct with a
9 minor under the age of 11 years in the first degree in
10 violation of South Carolina code section 16-03-06-55.

11 He has pled not guilty to this charge, and so
12 the State of South Carolina must now afford him a jury
13 trial and also attempt to prove to 12 of you that he is
14 guilty of this charge beyond a reasonable doubt.

15 Mr. Smith is not required to prove that he is innocent of
16 this charge. The state must prove his guilt. He doesn't
17 have to do anything other than show up for trial, and
18 that he's done, so as far as the procedure that we
19 follow, they have to prove what they have alleged, and
20 they have alleged in this indictment that in Beaufort
21 County between May the 1st, 1999 and May the 31st of
22 2000, he did willfully and unlawfully perform oral and
23 anal sex on his son **Complainant** who is a minor between
24 the ages of seven and nine. He also said he forced his
25 son to perform oral and anal sex on him and that he

1 threatened to break his bones and other physical abuse in
2 order to force him to comply.

3 Again, I tell you this solely for the purpose
4 of telling you what Mr. Smith is on trial for. The fact
5 that he has been indicted on this charge is not evidence
6 at all, is not to be considered by you as evidence in
7 this case. The fact that a person has been arrested and
8 indicted for a crime is to be given no evidentiary value
9 at all.

10 Every citizen of this state and of this
11 country is presumed to be innocent of the crime for which
12 they have been charged. That is a right. That is a
13 substantial constitutional right that he has and every
14 single one of us have, and it accompanies him from the
15 time of his arrest up through the time that you become
16 convinced the state has provided you with sufficient
17 evidence of his guilt beyond a reasonable doubt.

18 Now, I've been talking about an indictment.
19 An indictment is simply a charging instrument. For all
20 practical purposes, it just puts him on notice of what he
21 has been charged with, and it affords this Court or
22 confers upon this Court jurisdiction to hear the matter.
23 An indictment, again, is not to be considered by you as
24 evidence at all in this case. Again, it's simply to let
25 him know what he is charged with and is to stand trial

1 on. It's not to be considered by you as evidence in any
2 way, shape, or form.

3 Now, having said that and told you what this
4 indictment contains, is there any person that knows
5 anything at all about this case, if you heard about it,
6 know anything about it, read anything about it in the
7 news or saw anything about it in any published reports,
8 anything like that? If so, would you please stand?
9 Okay. I found none.

10 Okay. I'm going to introduce you to the
11 lawyers and call out the names of some potential
12 witnesses in this case, and, again, I just want to find
13 out if you know any of these folks or if it would affect
14 your ability to be fair and impartial in this case in any
15 way.

16 In South Carolina, our prosecutors are known
17 as solicitors. We have broken the state up into
18 circuit. This is the 14th judicial circuit, and the
19 solicitor for the 14th judicial circuit is Duffie Stone.
20 Mr. Stone has designated Mr. Jim Bannon out of his office
21 to prosecute this case on his behalf, and so I would like
22 to ask Mr. Bannon to stand, face the jury panel, and I
23 would ask, is there any member of the jury panel who is
24 related by blood or marriage or acquainted in either way
25 with either Solicitor Stone or with Mr. Bannon? If so,

1 would you please stand. Okay. I find none. You may be
2 seated.

3 Now, the defendant in this case, again, is
4 Mr. Arthur Franklin Smith. Mr. Smith, would you stand,
5 face the jury panel, please. He is accompanied by his
6 lawyer, Ms. Gail Lovell, who is also now standing before
7 you. Is there any member of the jury panel who is
8 related by blood or marriage or acquainted or in any way
9 know Mr. Smith, Mr. Arthur Smith? If so, would you
10 please stand, related by blood or marriage or acquainted
11 with him in any way. If so, please stand. All right. I
12 find none.

13 Is there any member of the jury panel who is
14 related by blood or marriage or acquainted in any way
15 with Ms. Lovell, or perhaps you have been represented by
16 her or a member of her law firm before? If so, would you
17 please stand. Okay. I find none. You may be seated.

18 Is there any member -- these are some
19 potential witnesses, not necessarily everybody is going
20 to be called, but they might be called, so if there is
21 any member of the jury panel who is related by blood or
22 marriage or acquainted with any of these folks when I
23 call out the name I ask that you please stand.

24 Andres Florencio, Beaufort County sheriff's
25 office? That is the gentleman standing before you. If

1 so, would you please stand. Okay. I find none. You may
2 be seated.

3 I take it this is officer P. Green? I don't
4 know what the P stands for, so I don't know if it's a man
5 or woman.

6 THE OFFICER: Paul Green.

7 THE COURT: Officer Green with Berkeley --
8 I'm sorry, Beaufort. I'll probably say Berkeley more
9 than one time. All right. I find none. Kendra McIlveen
10 with the Hope Cottage? If so, would you please stand. I
11 find none. **Complainant?** I find none. Joshua Smith? I
12 find John. Jacquelyn Smith? I find none. Todd Lynch
13 Stanley? I find none. Stephanie Cruwys, C-r-u-w-y-s?
14 I'm not sure how to pronounce that name, so I'm going to
15 go with Cruwys? Cruwys. Anyone? All right. I find
16 none. Cindy Solak, S-o-l-a-k? I find none, and Mark
17 Solak? I find none.

18 Is there any member of the jury panel, either
19 you or an immediate family member or a close personal
20 friend, either now or in the past worked for the
21 Beaufort -- or 14th Circuit Solicitor's office? If so,
22 would you please stand. All right. I find none. You or
23 an immediate family member ever worked in law
24 enforcement, either now or in the past? If so, would you
25 stand? Could be any agency. All right. Yes, sir. Your

1 name and number?

2 A PROSPECTIVE JUROR: Steve Sightler, 195. I
3 was a police officer some 30 years ago.

4 THE COURT: Are you retired now?

5 A PROSPECTIVE JUROR: I'm not a retired
6 police officer. I'm a retired Marine.

7 THE COURT: All right. Thank you. Yes, sir?
8 Your name and number?

9 A PROSPECTIVE JUROR: William Spencer, 209.
10 I have a brother who works for the sheriff's office.

11 THE COURT: Do you know anything about this
12 case?

13 A PROSPECTIVE JUROR: No, sir.

14 THE COURT: The fact you have a brother that
15 works for the sheriff's office, would that affect your
16 ability to be fair and impartial in this case?

17 A PROSPECTIVE JUROR: No, sir.

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

20 A PROSPECTIVE JUROR: I've been a health
21 professional in the county, in the jail system.

22 THE COURT: What was your number again?

23 A PROSPECTIVE JUROR: 169.

24 THE COURT: All right. Thank you. Yes,
25 ma'am, your name and number?

1 A PROSPECTIVE JUROR: Grace Jackson, 102. I
2 have a nephew who is a Beaufort County deputy sheriff.

3 THE COURT: Would that affect your ability to
4 be fair and impartial in this case?

5 A PROSPECTIVE JUROR: No.

6 THE COURT: Thank you. Is there any member
7 of the jury panel, either you or an immediate family
8 member, either now or in the past, had membership in the
9 Masonic Lodge or the Eastern Star Lodge, Elks, or similar
10 organization? If so, would you please stand. Okay.

11 Let's start over here to my right, I guess it
12 would be your left, and just give me your name and number
13 and what organization you belong to and we'll work
14 across.

15 A POTENTIAL JUROR: Christian Sherbert, 194,
16 Masonic Lodge.

17 THE COURT: Thank you. Yes, sir?

18 A PROSPECTIVE JUROR: Jeff Giltenboth, 77.
19 My father is a Mason.

20 THE COURT: Thank you. Yes, ma'am?

21 A PROSPECTIVE JUROR: Julie O'Donnell, 160.
22 My father was a Mason.

23 THE COURT: All right.

24 A PROSPECTIVE JUROR: Robert Stevens, 185,
25 Mason.

1 THE COURT: Thank you.

2 A PROSPECTIVE JUROR: My father and brother,
3 my father is deceased, Mason.

4 THE COURT: Just for the record again, I need
5 your name and number.

6 A PROSPECTIVE JUROR: I'm sorry, 169.

7 THE COURT: Okay. Thank you. Yes, ma'am?

8 A PROSPECTIVE JUROR: Suzanne James, 105. My
9 father was a Mason. I was a rainbow girl.

10 THE COURT: Thank you. Anyone else? This is
11 one that, again, I could understand if you were
12 uncomfortable standing up in front of a bunch of people,
13 and you're welcome to come down and talk to me, but has
14 any member of the jury panel, either you or an immediate
15 family member or a close personal friend, ever been the
16 victim of sexual abuse or know anyone who was sexually
17 abused? If so, would you please stand. Okay. Do y'all
18 want to come down and come around.

19 THE BAILIFF: Ms. Moore, 151, Your Honor.

20 THE COURT: Yes, ma'am.

21 A PROSPECTIVE JUROR: I have two friends who
22 were sexually abused by their father.

23 THE COURT: Considering what you know about
24 the allegations of this case, would that affect your
25 ability to be fair and impartial either for or against

1 the state or for or against the defense?

2 A PROSPECTIVE JUROR: It wouldn't affect me.

3 THE COURT: Okay. Thank you.

4 THE BAILIFF: Ms. O'Donnell, 160.

5 A PROSPECTIVE JUROR: In the early '90's, I
6 worked for a shelter for abused women and children and
7 worked with victims of sexual assault.

8 THE COURT: All right. Do you think that
9 would affect your ability to be fair and impartial in
10 this case?

11 A PROSPECTIVE JUROR: Absolutely.

12 THE COURT: You would be inclined to favor
13 the state or the defense?

14 A PROSPECTIVE JUROR: The state.

15 THE COURT: Okay. All right. Well, we'll
16 excuse you from service on this case. Okay? Thank you.

17 THE BAILIFF: Mr. Giltenboth, number 77.

18 THE COURT: Yes, sir.

19 A PROSPECTIVE JUROR: My first wife was a
20 victim of sexual abuse.

21 THE COURT: Would that affect your ability to
22 be fair and impartial either for or against the state or
23 for or against the defense?

24 A PROSPECTIVE JUROR: No.

25 THE COURT: Thank you.

1 THE BAILIFF: And Mr. Sightler, number 195,
2 Your Honor.

3 THE COURT: Yes, sir?

4 A PROSPECTIVE JUROR: My nephew was sexually
5 abused when he was small.

6 THE COURT: Would that affect your ability to
7 be fair and impartial in this case, either for or against
8 the state or for or against the defense?

9 A PROSPECTIVE JUROR: I guess it depends on
10 the evidence, Your Honor. I think I would still be fair.

11 THE COURT: All right. Well, obviously, you
12 would have to make your decision based on what the
13 evidence is, but I need to know if that would incline you
14 to say, well, because, you know --

15 THE PROSPECTIVE JUROR: Not because of that.

16 THE COURT: It wouldn't prejudice you against
17 the defendant?

18 THE PROSPECTIVE JUROR: No, Your Honor.

19 THE COURT: You would be all right with that?

20 A PROSPECTIVE JUROR: Yes, sir.

21 THE COURT: All right. Thank you. What was
22 the name and number?

23 A PROSPECTIVE JUROR: Ms. Riley, number 181.

24 THE COURT: Okay.

25 A PROSPECTIVE JUROR: My mother was sexually

1 abused when she was a young teenager by the next door
2 neighbor.

3 THE COURT: Do you think that would affect
4 your ability to be fair and impartial in this case,
5 either for or against the state or for or against the
6 defense?

7 A PROSPECTIVE JUROR: Do I think I -- sorry.

8 THE COURT: Would it affect your ability to
9 be fair and impartial? Would you say I couldn't possibly
10 find somebody not guilty just because of crime, or I
11 would automatically favor the state or anything like
12 that?

13 A PROSPECTIVE JUROR: No. It would be based
14 on the evidence, for sure.

15 THE COURT: Okay. Fair enough. Thank you.
16 Anything other than 160, striking him for cause?

17 MS. LOVELL: No.

18 THE COURT: All the others said there would
19 be no effect, so if that bothers you, I guess you're
20 going to have to move to strike. I got this as a five
21 state, ten defense. All right?

22 Is there any member of the jury panel who
23 either they know of either yourself or an immediate
24 family member or a close personal friend ever felt like
25 they have been falsely accused of any crime? Not

1 necessarily that of a sexual nature, but of any crime
2 whatsoever. If so, would you please stand. All right.
3 I find none.

4 Is there any member of the jury panel that is
5 a member of any kind of organization that supports things
6 like victim's rights or law enforcement? It could be
7 Mothers Against Drunk Driving, students again drunk
8 driving, law enforcement organizations, stuff like that,
9 you either contributed to things like that or you
10 belonged to groups such as MADD, SADD, various Fraternal
11 Order of Police, those sorts of things. If so, would you
12 please stand.

13 Okay. Let me start over here and we'll walk
14 across the room here. We'll start with you in the blue
15 shirt, sir. Yes, sir, your name and number.

16 A PROSPECTIVE JUROR: John Pittman, 167. I
17 contribute to the state trooper's association.

18 THE COURT: Okay. Thank you.

19 A PROSPECTIVE JUROR: Jeff Williams, 243,
20 contribute to sheriff's association.

21 THE COURT: All right. Thank you.

22 A PROSPECTIVE JUROR: Charline Baker, number
23 10. I contribute to the Yemassee police department.

24 A PROSPECTIVE JUROR: Robert Stevens, 185. I
25 contribute to the state troopers.

1 A PROSPECTIVE JUROR: Jim Gilman, 77. I
2 contribute to the state troopers, and I am quasi in
3 charge of a security force.

4 THE COURT: What was your number again?

5 A PROSPECTIVE JUROR: 77.

6 THE COURT: Any of you folks that just
7 responded, do you think that would affect your ability to
8 be fair and impartial either for or against the state or
9 for or against the defense? If so, would you please
10 stand.

11 Anybody know of any reason why they don't
12 think they could be a fair and impartial juror in this
13 case? This one is just -- it's one of those catch-all
14 things. Some people feel like, well, you know, people
15 that are accused of a crime, they have to be guilty of
16 something. I'm sorry. That's how I feel because they
17 wouldn't have gotten arrested. That's the way people
18 feel. As such, they have inadvertently shifted the
19 burden of proof in the case, because, remember, I said
20 the state has to prove what they've alleged that
21 Mr. Smith did. Mr. Smith doesn't have to prove he's
22 innocent of it, so if you feel like, Well, he wouldn't
23 have been guilty of something or he wouldn't have been
24 arrested, or I automatically favor the state in such --
25 in any kind of case, that sort of thing.

1 If you have those feelings and you don't feel
2 like you could put that aside -- because once we seat
3 you, we give you an oath and you say, I promise, in
4 essence, that I'm going to make my decision based on what
5 I hear in this courtroom, not what I think about things
6 politically, religiously, that sort of thing, but what I
7 hear in this courtroom, plus what the judge tells me the
8 law is, and I'm telling you the law is he doesn't have to
9 prove he's innocent. Nobody has to prove they're
10 innocent.

11 That's a right that we have as citizens of
12 this country, and if you don't think you can go along
13 with that, I respect that, but I need to know about it
14 ahead of time. We also have some folks that say, well,
15 you know, I read some versions in the Bible in which it
16 says I shouldn't judge other people, and, you know, I
17 read those verses. A lot of people have read those
18 verses, and they say, well, because of my religious
19 beliefs I can't sit in judgment of somebody.

20 I respect that, and, again, that's something
21 I need to know about, if you believe that way, because,
22 again, we're going to ask you to sit in judgment of what
23 the facts are that come out in this case, and ultimately
24 you'll be deciding on the guilt or innocence of
25 Mr. Smith.

1 Some people belong to groups or they hold the
2 belief that, well, things have gotten so screwed up in
3 this country that we need to fix it, and one of the ways
4 to fix it is -- I'm kind of paraphrasing what I come
5 across, and some people say, you know, the government is
6 so screwed up that the only way to fix it is to kind of,
7 you know, start all over again, o I need to be, in
8 essence, in charge of things. And the legal system is
9 broke and the way to fix it is to get up, and I will
10 decide what the outcome of the case is going to be, and
11 some people have said -- again, these are organizations
12 that say, you know, if you promise that if you get on a
13 jury, you're going to basically do what you think is
14 right, not necessarily what the judge tells you what the
15 law is or what the facts pan out to be, but you believe
16 that you're going to make the decision based on what you
17 think the decision ought to be, not on what the law and
18 the evidence turns out to be.

19 All of these things are just examples of
20 reasons why you don't feel like you could, in all
21 honesty, satisfy or uphold an oath to say, I promise that
22 I am going to make my decision based on what I hear in
23 this courtroom and what the judge tells me the law is
24 that applies, whether I like it or not, that's what I
25 promise to do.

1 My own personal feelings are this is America.
2 You can believe just about anything you want to, as long
3 as you're not trying to advocate the violent overthrow of
4 the government or trying to hurt somebody. You know,
5 whatever religious beliefs you have or lack of religious
6 beliefs you have or political groups you belong to, I
7 don't want to know how you vote; I don't want to know if
8 you don't like people of a certain skin color. I don't
9 want to know your political beliefs and all that.

10 What I need to know is if, when you look
11 inside, can you say, you know what? I don't think I
12 should be a juror in this case because I don't think I
13 could go along with what the judge is saying, and I
14 respect that. Okay? If you have those beliefs, it's not
15 like it's a crime you have that belief, and I'm not going
16 to make fun of you and arrest you for having it, I'm just
17 going to say I don't think you can be on my jury if you
18 feel that way.

19 And so I need to know about it. The state is
20 entitled to a fair trial. Mr. Smith is entitled to a
21 fair trial, and the system of government is entitled to a
22 fair trial, and so if you have any reason, either
23 something I just mentioned or some other reason that you
24 don't feel like you could be a fair and impartial juror
25 in this case, I would like to ask you to stand and come

1 up and talk to me about it. Okay?

2 I'm not going to make you get up in front of
3 everybody and tell me what the deal is, but I do need to
4 know if you know of any reason whatsoever why you don't
5 think you could be a fair and impartial juror in this
6 case. If so, would you please stand. Okay. Come on up.

7 THE BAILIFF: Ms. Gathers, juror 76, Your
8 Honor.

9 THE COURT: Okay.

10 A PROSPECTIVE JUROR: I'm so glad you brought
11 all that out.

12 THE COURT: All right. What do you want to
13 talk to me about?

14 THE JUROR: My religion, Judge not that you
15 may not be judged.

16 THE COURT: What religion is that?

17 A PROSPECTIVE JUROR: Baptist. Baptist.

18 THE COURT: Okay. And what part of that
19 keeps you from being a juror?

20 A PROSPECTIVE JUROR: Sitting in judgment of
21 others.

22 THE COURT: Yeah?

23 A PROSPECTIVE JUROR: I know that's my duty.
24 I know I should, but my Bible tells me I shouldn't.

25 THE COURT: You know, I've looked these

1 verses up before, because my daddy was a Baptist preacher
2 too, and I'm well aware of it, and here's what it says:
3 It says don't judge other people. In the next verse it
4 says because you're going to be judged by the standard by
5 you judge.

6 Now, what is wrong with that? If you don't
7 think you could be fair and impartial and listen to the
8 evidence, well, I get that, but, you know, there's not a
9 wholesale prescription in the Bible against judging other
10 people other than it says be careful about doing that
11 because you're going to be judged by the same standards
12 you judge people.

13 A PROSPECTIVE JUROR: This is true. You
14 sound like a preacher.

15 THE COURT: You sound like a pretty fair
16 person to me. You think can you do that?

17 A PROSPECTIVE JUROR: Yes.

18 THE COURT: All right. Thank you.

19 THE BAILIFF: Mr. Clavell, number 35, Your
20 Honor.

21 THE COURT: Yes, sir?

22 A PROSPECTIVE JUROR: You pretty much hit the
23 nail on the head with me when you said if you think that
24 because you're arrested you're probably guilty of
25 something? That's something that I have kind of

1 always --

2 THE COURT: You don't think you could set
3 that aside and go, well, I can believe -- I believe they
4 have to prove what they say?

5 A PROSPECTIVE JUROR: I understand due
6 process and all that stuff needs to be done and taken
7 care of, but that is something that go back to thinking
8 whoever -- when I was a juvenile when I was a little kid
9 and I was caught in a ruckus in the neighborhood and the
10 people were coming for me, I was guilty of something, so
11 that's just something that I think I probably could, but
12 you made that comment, and that is exact word for word of
13 how I feel, so I had to come up here and say something
14 about it.

15 THE COURT: All right. Well, thank you.

16 THE BAILIFF: Mr. Gardner, number 75, Your
17 Honor.

18 THE COURT: Yes, sir?

19 A PROSPECTIVE JUROR: I don't know if it's --
20 I don't know if I could be a juror.

21 THE COURT: Why?

22 A PROSPECTIVE JUROR: I really don't know, I
23 just --

24 THE COURT: Is it because -- what reason
25 other than you just don't think you could be fair? You

1 don't think you could be fair to the state or you don't
2 think you could be fair to Mr. Smith?

3 A PROSPECTIVE JUROR: Mr. Smith.

4 THE COURT: Why is that?

5 A PROSPECTIVE JUROR: Because of what he's
6 being charged with.

7 THE COURT: Do you think the charge is so
8 serious --

9 A PROSPECTIVE JUROR: In my mind I do feel
10 like he is guilty of something.

11 THE COURT: Do you feel like you could
12 listen? You don't think you could put that aside and
13 base your decision on the evidence?

14 A PROSPECTIVE JUROR: No, sir. I'm not sure
15 if I could.

16 THE COURT: All right. Thank you. Anyone
17 else?

18 I'll strike those two. We'll leave on 76.
19 So we'll take off -- 35 we struck for cause, 75 we struck
20 for cause, and 160. Okay. All right. Anything from
21 anybody else before we start? Okay.

22 Folks, now, the way we draw a jury in a
23 criminal case, it's going to be the same as you saw down
24 there in Judge Mullins' courtroom. Civil cases are a
25 little bit different. We give a list to the lawyers and

1 let them study it for a few minutes, but criminal I'm
2 sort of we do it a little bit different.

3 We have -- the clerk will call out your name
4 and your number, and then you will come through those
5 little doors right behind Mr. Bannon, come, stand, turn
6 around, face. The state will get first opportunity to
7 say present the juror or strike the juror, and if they
8 say strike, then you go have a seat. If they say
9 present, then the defense will have the opportunity to
10 say strike or present.

11 If both sides say present, then you're on the
12 jury. If either side basically says strike the jurors,
13 then you'll go back and have a seat. All right? So, if
14 y'all are ready, is there anything further from the
15 state?

16 MR. BANNON: No, Your Honor.

17 THE COURT: Anything further from the
18 defense?

19 MS. LOVELL: No, Your Honor.

20 THE COURT: All right. Madame clerk, if
21 you're ready then.

22 THE CLERK: All right. Five strikes for the
23 state, ten for the defense.

24 Juror number 122, Greg Langford.

25 (The juror, a white male, approaches.)

1 What says the state?

2 MR. BANNON: Please present the juror.

3 THE CLERK: What says the defense?

4 MS. LOVELL: Please present the juror.

5 THE CLERK: Juror number 48, Donald Dean.

6 (The juror, a white male, approaches.)

7 What says the state?

8 MR. BANNON: Please present Mr. Dean.

9 THE CLERK: What says the defense?

10 MS. LOVELL: Please present the juror.

11 THE CLERK: Juror number 77, Jeff Giltenboth.

12 (The juror, a white male, approaches.)

13 What says the state?

14 MR. BANNON: Please excuse this juror.

15 THE CLERK: Juror number 31, Miguel Castillo.

16 (The juror, a white male, approaches.)

17 THE CLERK: What says the state?

18 MR. BANNON: Please present this juror.

19 THE CLERK: What says the defense?

20 MS. LOVELL: Please excuse this juror.

21 THE CLERK: Juror number 198, Patricia

22 Singleton.

23 (The juror, a black female, approaches.)

24 What says the state?

25 MR. DANNON: Please present this juror.

1 THE CLERK: What says the defense?
2 MS. LOVELL: Please excuse the juror.
3 THE CLERK: Juror number 47, Steve Deak.
4 (The juror, a white male, approaches.)
5 What says the state?
6 MR. BANNON: Please present this juror.
7 THE CLERK: What says the defense?
8 MS. LOVELL: Please present the juror.
9 THE CLERK: Juror number one 67, John
10 Pittman.
11 (The juror, a white male, approaches.)
12 What says the state?
13 MR. BANNON: Please present this juror.
14 THE CLERK: What says the defense?
15 MS. LOVELL: Please excuse the juror.
16 THE CLERK: Juror number 10, Charline Baker.
17 (The juror, a white female, approaches.)
18 What says the state?
19 MR. BANNON: Please present this juror.
20 THE CLERK: What says the defense?
21 MS. LOVELL: Please present the juror.
22 THE CLERK: Juror number 126, Steven Legge.
23 (The juror, a white male, approaches.)
24 What says the state?
25 MR. BANNON: Please present this juror.

1 THE CLERK: What says the defense?

2 MS. LOVELL: Please present the juror.

3 THE CLERK: Juror 151, Ilse Moore.

4 (The juror, a white female, approaches.)

5 What says the state?

6 MR. BANNON: Please present this juror.

7 THE CLERK: What says the defense?

8 MS. LOVELL: Please excuse this juror.

9 THE CLERK: Juror number 243, Jeffrey
10 Williams.

11 (The juror, a white male, approaches.)

12 What says the state?

13 MR. BANNON: Please present this juror.

14 THE CLERK: What says the defense? 243,
15 Jeffrey Williams.

16 MS. LOVELL: Please present the juror.

17 THE CLERK: Juror number 199, Robert
18 Skresvig.

19 (The juror, a white male, approaches.)

20 What says the state?

21 MR. BANNON: Please present this juror.

22 THE COURT: What says the defense?

23 MS. LOVELL: Please present the juror.

24 THE CLERK: Juror number 203, Anita Smith.

25 (The juror, a white female, approaches.)

1 What says the state?

2 MR. BANNON: Please present this juror.

3 THE CLERK: What says the defense?

4 MS. LOVELL: Please present the juror.

5 THE CLERK: Juror number 108, Amba Johnson.

6 (The juror, a black female, approaches.)

7 What says the state?

8 MR. BANNON: Please present this juror.

9 THE CLERK: What says the defense?

10 MS. LOVELL: Please excuse this juror.

11 THE CLERK: Juror number 101, Antoinette

12 Jackson.

13 (The juror, a black female, approaches.)

14 What says the state?

15 MR. BANNON: Please present this juror.

16 THE CLERK: What says the defense?

17 MS. LOVELL: Please excuse this juror.

18 THE CLERK: Juror number 154, Gail Murray.

19 (The juror, a black female, approaches.)

20 What says the state?

21 MR. BANNON: Please present this juror.

22 THE CLERK: What says the defense?

23 MS. LOVELL: Please present this juror.

24 THE CLERK: Juror number 195; Steven

25 Sightler.

1 (The juror, a white male, approaches.)

2 What says the state?

3 MR. BANNON: Please present this juror.

4 THE CLERK: What says the defense?

5 MS. LOVELL: Please excuse this juror.

6 THE CLERK: Juror number 194, Christian

7 Sherbert.

8 (The juror, a white male, approaches.)

9 What says the state?

10 MR. BANNON: Please present this juror.

11 THE CLERK: What says the defense?

12 MS. LOVELL: Please present the juror.

13 THE CLERK: Juror number 181, Christine

14 Riley.

15 (The juror, a white female, approaches.)

16 What says the state?

17 MR. BANNON: Please present this year.

18 THE CLERK: What says the defense?

19 MS. LOVELL: Please excuse this juror.

20 THE CLERK: Juror number 9, Lisa Bacigalupo.

21 (The juror, a white female, approaches.)

22 What says the state?

23 MR. BANNON: Please present this juror.

24 THE CLERK: What says the defense?

25 MS. LOVELL: Please present the juror.

1 THE CLERK: Juror number 234, Shakia Walker.

2 (The juror, a black female, approaches.)

3 What says the state?

4 MR. BANNON: Please excuse this juror.

5 THE CLERK: Juror number 136, Michael

6 Mastrovito.

7 (The juror, a white male, approaches.)

8 What says the state?

9 MR. BANNON: Please present this year.

10 THE CLERK: What says the defense?

11 MS. LOVELL: Please present this juror.

12 THE CLERK: Juror number 17, Clifton

13 Boatright.

14 (The juror, a white male, approaches.)

15 Striking for an alternate. What says the

16 state?

17 MR. BANNON: Please present this juror.

18 THE CLERK: What says the defense?

19 MS. LOVELL: Please present this juror.

20 THE CLERK: And for our second alternate,

21 juror number 105, Suzanne James.

22 (The juror, a white female, approaches.)

23 What says the state?

24 MR. BANNON: Please present this juror.

25 THE COURT: What says the defense?

1 MS. LOVELL: Please excuse this juror.

2 THE CLERK: Juror number 102, Grace Jackson.

3 (The juror, a black female, approaches.)

4 What says the state?

5 MR. BANNON: Please present this juror.

6 THE CLERK: And what says the defense?

7 MS. LOVELL: Please present this juror.

8 THE COURT: All right. Is there anything
9 from the state?

10 MR. BANNON: Not from the state.

11 THE COURT: Anything from the defense?

12 MS. LOVELL: No, Your Honor. Thank you.

13 THE COURT: All right. Folks, you are our
14 jury now, and so we have some pretrial matters that we're
15 going to need to take up this afternoon, and so we're
16 going to begin this trial tomorrow morning.

17 So I'm going to leave you with the
18 instructions that when you leave now, you're not to begin
19 deliberations or discussions about the case, and,
20 obviously, when you get home, the first person you talk
21 to when you tell them you're on a jury, they're going to
22 say did you get picked and what is the case about?

23 You can say yes, I got picked, and I really
24 can't talk about the case. First of all, we just struck
25 the jury and we haven't had any evidence about it, but

1 the judge told me I can't talk about it, and stop and
2 think about this for a minute and this is why it make a
3 lot of sense.

4 We're going to ask you to make your decision
5 based on what you hear in this courtroom and not what you
6 hear from people outside, what they think about it, what
7 they think about these types of crimes, what they think
8 about courtrooms and judges and lawyers. They're going
9 to talk their heads off, and they're going to give you
10 their opinion. That's just human nature.

11 Now, that's not fair to the state. That's
12 not fair to Mr. Smith, and it will be in violation of
13 that you oath that you take because you promised them,
14 again, that you are making your decision based on what
15 you hear in this courtroom and nothing outside.

16 So tell them, When it's all over with, I can
17 talk to you about it to my heart's content, but I really
18 don't know anything to talk to you about, but the judge
19 told me I cannot talk to you about it. So, hopefully,
20 they'll understand it and respect it, but if they don't,
21 you just have to move away from them.

22 I'm not saying you got to, like, move out of
23 the house if it's your wife or your husband, but you're
24 going to have to say we're going to have to stop talking
25 about this, because when the trial is over, you can talk

1 to your heart's content about it, but it's not fair to
2 have a trial where people are telling you their thoughts
3 about it. It's just human nature it's going to enter
4 into your head. So keep those instructions in mind.

5 Now that you know something about the case,
6 I'm going to tell you another thing people do these days.
7 First thing they do is they get on the Internet. They
8 want to find out whatever they can find out about the
9 case.

10 I don't know if there is anything about this
11 case on the Internet or not. Chances are if you dig deep
12 enough you would find something, because there is all
13 kinds of records and stuff that is on the Internet, but
14 the bottom line is, again, it's not something that you
15 need to know at this point because everything that you
16 need to know in order to make a judgment we're going to
17 tell you in this courtroom.

18 So you get any outside influences like that,
19 start Googling, start doing CSI work and all that other
20 stuff, again, these are things that -- it sounds silly,
21 but, I'm telling you people do it, so that is why I'm
22 instructing you not to do it. Don't go to try to find
23 out anything about the case.

24 Once you know about locations, don't start
25 doing Google maps and figuring out where did this all

1 take place, anything like that. We'll tell you if you
2 need to know. That's the deal I'll make with you. If
3 you need to know about something in order to make a
4 decision, we will let you know about it over the next
5 couple days, but you just go home.

6 Don't call back after 6:00 tonight. You
7 don't have to do anything other than to report back
8 tomorrow morning. If you would, be in the jury room by
9 9:30, and we'll get started, hopefully right at 9:30,
10 shortly thereafter at the latest.

11 Right now, if you go with the bailiff, they
12 will show you where to report and how to report. Don't
13 come right back here in the morning, but they will show
14 you where to report, and you're free to go to lunch. You
15 don't have to come back here today, and we'll see y'all
16 again in the morning. Thank y'all for your patience.

17 The rest of you folks, you are free for the
18 rest of the day. You don't have to come back here today.
19 You probably might not have to come back tomorrow, and
20 possibly you might not come back the rest of the week, I
21 don't know yet, but we don't -- because we have the
22 ability to keep you from having to show up here just to
23 find out you don't need to come in, they gave you a
24 little card with a telephone number on it. Call if you
25 would, and that will tell you whether or not or it will

1 say call back tomorrow after 6:00.

2 Don't call back after 6:00 because a lot of
3 times they just don't have the ability to know what the
4 deal is until like, 5:59, so call back after 6:00, and if
5 you get a busy signal, keep trying because there will be
6 other people calling as well, and it will tell you
7 whether to call back or just show up tomorrow. Keep
8 doing that rest of the week until it tells you don't have
9 to call back anymore.

10 (Recess taken.)

11 (September 20, 2011.)

12 (In open court, jury not present.)

13 THE COURT: Let's bring in juror 194,
14 Mr. Sherbert.

15 THE COURT: Yes, Mr. Sherbert.

16 A PROSPECTIVE JUROR: Yes, sir.

17 THE COURT: Let me ask you a question. It's
18 come to our attention that you're friends with the spouse
19 of somebody who works in the victim's witness office with
20 the solicitor?

21 A PROSPECTIVE JUROR: Oh, yeah.

22 THE COURT: Did I get that right? We didn't
23 ask you about that yesterday, so you're not in trouble or
24 anything, I just need to know if you're close enough with
25 this lady that works for the solicitor's office, if you

1 think that would affect your ability to be fair and
2 impartial juror in this case, either for or against the
3 state or for or against the defendant.

4 A PROSPECTIVE JUROR: Not a problem
5 whatsoever. I'm really friends with her husband.

6 THE COURT: Okay. So I've told them just out
7 of an abundance of caution, I would just have her sit not
8 in the courtroom today, but I want to make sure you're
9 okay today and it wouldn't prejudice the defendant that
10 you work or that you're friends with somebody whose
11 spouse works there.

12 A PROSPECTIVE JUROR: I understand
13 completely.

14 THE COURT: So you can put that aside?

15 A PROSPECTIVE JUROR: Absolutely.

16 THE COURT: Anybody want to ask him
17 questions?

18 MS. LOVELL: One quick question? Have you
19 spoken or heard anything at all about this case prior to
20 today?

21 A PROSPECTIVE JUROR: No, ma'am.

22 MS. LOVELL: Have you discussed this with her
23 at all? Has she mentioned this in social events, what
24 she's doing at work, nothing like that?

25 THE WITNESS: No, ma'am, not at all.

1 THE COURT: All right. Thank you.

2 A PROSPECTIVE JUROR: You're welcome.

3 THE COURT: Anything else we need to bring up
4 before we bring the jury in?

5 MR. BANNON: Nothing from the state.

6 MS. LOVELL: No, Your Honor.

7 THE COURT: So we'll go into opening
8 statements, and you'll have your first witness ready?

9 MS. BANNON: Yes, Your Honor.

10 MS. LOVELL: You had mentioned earlier at the
11 time you read the indictment it would be an opportunity
12 for my client to plead not guilty to the jury. Would
13 that be now?

14 THE COURT: That was really something I had
15 done before --

16 MS. LOVELL: I thought you had already.
17 Thank you.

18 THE COURT: Okay. Let's bring the jury in
19 then.

20 (In open court, jury present.)

21 THE COURT: Welcome back, folks. We're going
22 to get started here in a minute, but before we do, I need
23 to have the clerk administer the oath to you, so if you
24 would, stand and raise your right hand while the clerk
25 administers your oath.

1 (Jury duly sworn.)

2 THE CLERK: You may be seated. Thank you.

3 All right. Sir, what is your name?

4 A PROSPECTIVE JUROR: Cliff, Boatwright.

5 THE COURT: And you're on the alternate list.
6 What is your name?

7 A PROSPECTIVE JUROR: Gail Murray.

8 THE COURT: Number 154?

9 A PROSPECTIVE JUROR: Yes.

10 THE COURT: Congratulations. You're the
11 foreman of the jury. You don't get any extra pay. You
12 just have to make sure you have the verdict written down
13 at the end, okay?

14 Let me go over a few things with you. In a
15 minute we're getting ready to start this trial, and I
16 want to tell you procedurally how we do some things and a
17 few things I want you to keep in mind as you're listening
18 to the evidence in the trial. We have roles. Everybody
19 in this courtroom has a role. You're the judges of the
20 facts. I'm the judge of the law, so I preside over the
21 trial, make sure both sides get a fair trial, instruct
22 you on the law at the end of the trial, but your job is
23 to sit and listen to the facts.

24 There is a dispute about them. You'll
25 listen. After all the evidence is in and I tell you what

1 the law is, you go back and render a decision on the
2 facts as you find them and the law that I tell you
3 applies.

4 Now, as part of the role of a fact finder,
5 you listen to evidence, determine credibility of the
6 witnesses, and, most importantly, keep an open mind until
7 you have heard all of the evidence. Trials are like
8 life, all right? You probably figured this out already,
9 but as life goes on, there is usually two sides to every
10 story. That's why we say don't make up your mind until
11 you have heard all of it because procedurally, as I
12 mentioned yesterday, the state has the burden of proof.
13 They have to prove Mr. Smith is guilty of this charge.
14 He doesn't have to prove his innocence, so because they
15 have the burden of proof, they're going to tell you their
16 evidence first, and then, Mr. Smith, if he wants, will
17 put up a defense, but you're going to hear one side, and
18 even as you hear evidence, one side calls a witness, they
19 ask questions first.

20 That's called direct examination. Then the
21 other side gets to question that witness, and that's
22 called cross-examination and that goes back and forth
23 through every witness. So you heard one side and then
24 you hear the other side. You go to the next witness.
25 You hear one side and you hear the other side, and this

1 goes on until you've heard all the evidence, so it's
2 important that as you sit here listening that you don't
3 make up your mind until the end of the trial.

4 That sounds kind of simplistic, but I'm
5 telling you, I have set through I don't know how many
6 trials over 15 years, and I always have to remind myself,
7 I just heard one side, I just heard one side, and those
8 things go back and forth sometimes.

9 So keep an open mind until you hear both
10 sides of the story, and at the end of the trial, you'll
11 have plenty of time to discuss it amongst yourselves and
12 make a decision at that point, so keep that in mind.

13 Now, I talked to you about the fact that
14 Mr. Smith got indicted, and I told you about the
15 indictment yesterday, and I want to remind you again, the
16 fact that he got indicted or charged with a crime doesn't
17 mean anything, as far as evidence goes, and weight of the
18 case that the state has to prove.

19 All right? He doesn't have to prove he's
20 innocent. This document simply lets him know what he's
21 charged with and gives this Court jurisdiction. It's not
22 to be considered as evidence. The fact that he got
23 arrested for the charge isn't to be considered by you in
24 any way, shape, or form.

25 When we were talking about it yesterday, a

1 couple people said, look, I think if somebody gets
2 arrested that means they're guilty. Well, that's not the
3 law, and they are not sitting on the jury. You folks
4 have all indicated you put that kind of thing aside, and
5 you believed that he basically is an innocent man at this
6 point. The state has to prove to you beyond a reasonable
7 doubt that he is guilty of this charge. He doesn't have
8 to do anything other than show up for trial, and he's
9 sitting over there and he's done that, so he doesn't have
10 to prove he's innocent. The state has to prove he's
11 guilty.

12 Now, you've heard me talk about this phrase
13 beyond a reasonable doubt. You probably even heard it
14 before. If you stop and think about it, that sounds
15 familiar, you probably read about it in a book or saw it
16 on a movie or TV show, beyond a reasonable doubt. That
17 is a standard of proof, a burden of proof, if you will,
18 and that's kind of like the amount of evidence that the
19 state has to show you to convince you of guilt. It's
20 different in a civil case than it is in a criminal case.

21 If you ever served on a jury in a civil case,
22 the burden of proof is called the preponderance of the
23 evidence, and that means the greater weight of the
24 evidence, or, as sometimes said, is whatever the party
25 trying to prove more likely true than not true.

1 Now, there are probably several of you that
2 are like me, and I don't quite grasp that. I'm a visual
3 learner. I've got to see things, and so it's helpful to
4 me to imagine a set of scales, so you got a set of
5 scales, the state is on one side be the defense is on the
6 other side.

7 If this were a civil case at the beginning of
8 trial, like now, the scales are even. One side doesn't
9 get an advantage when the case starts off, all right?
10 But if this were a civil case and you were trying to
11 prove the greater weight of the evidence, the party
12 bringing the lawsuit in a civil case just has to tip
13 those scales, even if it's just a little bit, and they've
14 met the burden of proof. They're entitled to a verdict.
15 But in a criminal case like this, beyond a reasonable
16 doubt, if they're using this same set of scales, the
17 state has to really tip those scales in their favor, a
18 pretty fair amount, in order to show that -- prove that
19 somebody is convicted of a crime, or is guilty of a
20 crime.

21 The law says if after you have heard all of
22 the evidence you're firmly convinced of the defendant's
23 guilt, then the state has met its burden of proof beyond
24 a reasonable doubt. So those scales, the state has to
25 tip them in their favor a pretty fair amount in order to

1 meet that burden because they have to leave you firmly
2 convinced, and at the end of the trial, if you're not
3 firmly convinced of Mr. Smith's guilt, he's entitled to a
4 verdict, all right?

5 And, again, he doesn't have to prove
6 anything. He wants to put up witnesses, that's fine, but
7 he doesn't have to. He doesn't have to testify if he
8 doesn't want to, and if he doesn't testify, you're not to
9 hold that against him in any way, shape, or form, and the
10 rules are such that he doesn't even have to tell me at
11 this point in the trial if he intends to take the stand
12 or call any witnesses. That is just the way it is, so,
13 again -- and it goes back to the fact that the state has
14 to prove he's guilty.

15 He doesn't have to prove he's innocent, so if
16 he doesn't testify, that's his business. He can sit
17 there and you're not to even discuss that back in the
18 jury room. All right?

19 Now, because the state has the burden of
20 proof, they're going to put their evidence up first, and
21 they'll call their witnesses first, and, again, when they
22 call a witness, first the side that calls him asks the
23 questions. That's called direct evidence, or direct
24 examination. The other side gets to ask questions.
25 That's called cross-examination, and I usually allow one

1 follow-up set, so we have redirect, recross, and follow
2 up things that got brought up on the previous set of
3 questions, and then we move on to the next witness. All
4 right?

5 So the state will put up their case, and
6 we'll see if they have enough to go forward at that
7 point. Again, the burden of proof is on the state, so
8 you're going to hear their evidence first. All right?
9 When we have in a couple minutes these opening
10 statements, the lawyers are going to get up and talk to
11 you about the evidence that you're likely to hear in this
12 trial. What is important for you to remember is the
13 lawyers are not witnesses in the case, so they're not
14 testifying when they get up and talk.

15 If they knew enough about the case to be
16 witnesses, they wouldn't be able to act as a lawyer, they
17 would be brought in, sworn, and they will tell you what
18 they heard, touched, felt, smelt, that sort of thing.
19 That's what witnesses do. The lawyers are just going to
20 be kind of giving you a preview of the case to help you
21 understand the flow of things as they come along, but
22 it's important to remember that the lawyers are not given
23 evidence and what they say is not to be considered as
24 evidence.

25 So, for example, when a lawyer asks a witness

1 a question, that question is not evidence. The answer to
2 the question, though, that's evidence, because it's
3 coming from the witness, all right? So keep that in
4 mind. They're not testifying. They're just telling you
5 about the case, so we'll have the opening statements.

6 The state will go first, again, because they
7 have the burden of proof, and then the defense, if they
8 want to even put up an opening statement, you'll hear
9 from Ms. Lovell, and then we'll go into the presentation
10 of evidence.

11 Now, sometimes throughout the trial, you
12 might have one of the lawyers stand up and say,
13 objection. When somebody asks a question or the witness
14 says something, they say objection. Why are they doing
15 that? They're doing that because the idea is that you
16 get to make your decision based on what we call legally
17 competent evidence. In other words, it's evidence that
18 you're supposed to hear, and that's part of my job, is to
19 help determine whether that is.

20 Remember I gave you an example yesterday when
21 I told you about going home? You shouldn't base your
22 decision on what your bartender thinks about the case or
23 what your husband thinks about the case or that sort of
24 thing. That's not evidence. It's not legally competent.
25 You're not supposed to hear it. It's not supposed to

1 enter into your deliberations.

2 Same thing with a trial. There is evidence
3 that you can hear and there is evidence that you can't
4 hear, and it's my evidence to weed through that, and so
5 when a lawyer says objection, that's just kind of the
6 code word to say, Judge, pay attention here. You got to
7 rule as to whether or not that is legally competent
8 evidence.

9 We're not trying to hide anything from you,
10 we're just trying to make sure that we do this, do it one
11 time, and do it right because the last thing anybody
12 wants to do is come back and do it again, all right? So
13 that is just me doing my job.

14 Sometimes I can make a ruling based on the
15 context, and they don't have to say anything more than
16 objection. After you've been doing it a little while,
17 you go, Okay, well, I get what you're talking about.
18 Sometimes you might have to say, Give me the grounds for
19 that objection, and they'll just give me a real brief
20 synopsis and sometimes I can make a ruling on that.
21 Sometimes I have to bring them over to the side and say
22 talk to me just a second, because, really, if they made
23 the argument for the objection in front of y'all, that
24 kind of defeats the purpose about whether or not you can
25 hear it or not hear it.

1 So I just bring them over here and we talk
2 about it out of earshot. Sometimes I have to send you
3 out to so I can hear what this witness is going to say so
4 I can make a proper determination as to whether it's
5 proper for you to hear it, so I may need to listen to the
6 witness first or I may have to have them flesh out their
7 arguments a little more. Again, that's just part of my
8 doing my job because my job, again, is to make sure both
9 sides get a fair trial.

10 The state is entitled to a fair trial,
11 Mr. Smith is entitled to a fair trial, so that is really
12 all we're trying to do is our job.

13 I believe I've covered enough. I could talk
14 all day long, but that doesn't get us in closer to the
15 end of trial, so I will at this point turn it over to the
16 lawyers. Again, the solicitor's office gets to go first
17 and make their opening statement, and after the
18 solicitor, the defense, if they want to, will and then
19 we'll move into the evidence.

20 We will probably take a break sometime in the
21 hour, hour and a half range, so if you need to use the
22 rest room, that sort of thing, kind of anticipate that;
23 go to lunch somewhere between noon and 1:00 depending on
24 where the evidence kind of breaks for a -- a good break
25 spot for lunch, and I think I got a note. Somebody

1 needed to leave by 5:00. That's no problem. We'll break
2 no later than 5:00 today.

3 If we need to finish up tomorrow -- in fact,
4 under our best case scenario, we might get all of the
5 evidence in today, and we'll probably come back for
6 closings in the morning anyway, so that's not a problem.
7 We'll finish up by 5:00 today, so whoever needed to go
8 can go.

9 If, however, you need to take a break a
10 little bit before I do, you know, just kind of send word
11 down to the bailiff, and they'll get my attention and
12 we'll take a break, but don't hesitate if nature calls.

13 Having said all that, I'll now turn it over
14 to the solicitor, so, Mr. Bannon, if you're ready, you
15 may begin your opening.

16 MR. BANNON: Thank you, Your Honor. May it
17 please the Court, counsel: Silence. Silence is the
18 sound of molestation and sexual abuse. Silence is the
19 sound of a crime that takes place behind closed doors.
20 Silence is the sound of a crime that occurs where no one
21 can hear, no one can see, and no one can help.

22 Silence is for a crime where a father forces
23 his son to perform sex acts on him and to have his son
24 perform sex acts back. That's what we're here to talk
25 about today.

1 Today the victim in this case, **Complainant**, a
2 very brave young man, is going to break that silence.
3 He's going to come in here today and talk to you about
4 how back in 1999, 2000, this man, his father, Arthur
5 Smith, molested him. Today is when the silence ends.

6 Now, back in 1999 and 2000, Mr. Smith was
7 preying on ^{Complainant}s silence, a silence which he guaranteed
8 through threats and shame and fear. At the time this was
9 occurring, **Complainant** was just a little boy. He wasn't
10 even ten. He certainly wasn't 11. Now, some ten years
11 later, that scared little boy is a man, and he's going to
12 be here and he's going to be able to tell you about what
13 this man did to him.

14 Arthur Smith forced his own flesh and blood
15 to perform sex acts for him on demand. Now, just as the
16 defendant was banking on ^{Complainant}s silence, he continued to
17 bank on our discomfort, our unwillingness to talk about
18 these horrible things that occurred, because they are
19 horrible and they are unsettling, and they are difficult
20 to talk about. But we, just like ^{Complainant}, need to find the
21 strength to shine a light into what was done to him.

22 Now, the judge at some point is going to tell
23 you that Mr. Smith sits here an innocent man. He's been
24 accused of a crime, and what some say is the defendant
25 sits cloaked in a robe of righteousness, and that is how

1 the defendant currently sits before you.

2 But what we are going to do here through the
3 course of this trial is show you that that cloak of
4 righteousness is nothing more than a cloak of shadows,
5 fear, and shame, because just like ^{Complainant} we cannot shy
6 away from what happened.

7 ^{Complainant} will get up here and he will take the
8 stand, and he will tell you about what happened to him,
9 and together, all of us, will have to take a journey into
10 that world of what happened to him, and at the end of
11 this trial, you will be firmly convinced that it is not a
12 robe of righteousness, but rather a cloak of shadow.

13 At the end of this trial, you will be firmly
14 convinced that Arthur Smith is guilty of molesting his
15 son. Thank you.

16 THE COURT: Ms. Lovell, would you like to
17 make an opening?

18 MS. LOVELL: Yes, I would, assistant
19 solicitor, ladies and gentlemen of the jury: My name is
20 Gail Lovell and I represent Mr. Arthur Smith, and as you
21 have heard, the state has accused him of sexually
22 assaulting his son over 11 years ago.

23 This is a distasteful and dark crime for so
24 many reasons, the sort of crime that most people want to
25 shy away from because they are uncomfortable and the

1 state accuses Mr. Smith of committing this crime, but he
2 is innocent of this crime until the state has proven it
3 to you beyond a reasonable doubt. Under the
4 constitution, he is innocent until proven guilty.

5 In other words, the state must prove he's
6 guilty by providing you with credible evidence in the
7 form of testimony that proves to you beyond a reasonable
8 doubt that he committed the crime as charged.

9 The state will call witnesses to shed a light
10 on this charge, but keep a watch on the state to be sure
11 that it proves the charge beyond a reasonable doubt.

12 You may wish to use your common sense and
13 your logic when listening to these witnesses to gauge
14 whether they are truthful or not. Shine that light into
15 the corners to find the truth. You, the jury, can decide
16 to believe some, all, one, or none of the witnesses. You
17 may get to hear from an expert witness. Listen carefully
18 to what they say and ask whether their testimony helped
19 illuminate the corners, the dark corners, for you to see
20 the truth.

21 Please be mindful of the shadows and use your
22 intuition, your impartiality to light your way to the
23 truth. Be alert to the evidence you get and the evidence
24 you don't get. Is something missing that you would
25 expect to see in a case like this? Are there gaps or

1 inconsistencies in the evidence presented? Through
2 questions and cross-examination, you will determine
3 whether or not you have found the truth. We are
4 confident that after state has presented this case to
5 you, you will see the light and find my client not
6 guilty. Thank you.

7 THE COURT: All right. Mr. Solicitor, call
8 your first witness.

9 MR. BANNON: Thank you, Your Honor. The
10 state calls Deputy Florencio.

11 ANDRES FLORENCIO,
12 having been first duly sworn,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BANNON:

16 Q. Could you tell us where you work.

17 A. I'm employed by the Beaufort County sheriff's
18 office.

19 Q. How long have you been working for the sheriff's
20 office?

21 A. It will be 14 years the 6th of October of this
22 year.

23 Q. And what do you do there for the sheriff's office?

24 A. I'm currently assigned as a staff sergeant
25 supervisor of the Beaufort Jasper Multi-Agency Drug Task

1 Force.

2 Q. Have you ever performed any other functions for
3 the sheriff's office?

4 A. Yes. I was assigned to the drug task force in
5 June of 2004. Prior to that from December 1999 to 2004 I
6 served as a criminal investigator.

7 Q. And so what was your job function in 2003?

8 A. I was a criminal investigator assigned to the
9 southern division of Beaufort County, which encompasses
10 Hilton Head and the Bluffton area.

11 Q. And when you say you're a criminal investigator,
12 what exactly does that mean?

13 A. It means I investigated sexual crimes, murders
14 assaults, financial crimes.

15 Q. Is this a situation where you're on the road,
16 patrolling?

17 A. No, I am not.

18 Q. Okay. And could you tell us, what was Hope
19 Cottage?

20 A. Hope Cottage. Like I explained earlier, I was
21 assigned as a criminal investigator, and as a criminal
22 investigator I did receive interview interrogation
23 training, but whenever we had children we needed to
24 interview, whether they be children that had committed
25 crimes or children that were victims, we use Hope

1 Cottage. They were trained to do specific forensic
2 interviews that dealt mostly with children.

3 They had an environment interview room that was
4 set up for children, and the reason for that is because
5 if we had a child that was a victim of a crime instead of
6 us interviewing him with less training or in the police
7 department, which is not really gauged for an atmosphere
8 for children, we did it at Hope Cottage, and they
9 provided the forensic interviewers that had training.
10 And it was pretty much meant to less traumatize or have
11 less trauma on the child so they don't have to be
12 interviewed more than once, or multiple times.

13 Q. In May of 2003, did you have an opportunity to
14 meet with a **Complainant**?

15 A. Yes, I did.

16 Q. And at the time that you met with him, was he by
17 himself or was he with one else?

18 A. He was with a guardian, Cindy Solak.

19 Q. And did you meet with him face to face?

20 A. Yes, I did. I met with him face to face. They
21 actually came to the Hilton Head office where my office
22 is.

23 Q. Okay. When you saw ^{Complainant} do you know how old he
24 was?

25 A. I didn't know initially how old he was. I knew

1 that he was a young child.

2 Q. Okay. How tall was he?

3 A. Well, I don't remember exactly. I know at the
4 time -- I'm about six foot. He was a lot smaller than
5 me. I would say maybe my best guess four foot tall,
6 maybe a little bit taller.

7 Q. And how much did -- you didn't put him on a scale,
8 did you?

9 A. No, I did not.

10 Q. About how much would you say he weighed?

11 A. I would say probably less than 100 pounds.

12 Q. And when you met with Ms. Solak and ^{Complainant} what
13 did -- well, what did they report to you, in very general
14 terms?

15 A. They were there to report that sometime during the
16 time between May, I believe it was 2009 and June of the
17 year 2000, that ^{Complainant} had been sexually assaulted by his
18 father.

19 Q. And what I would like to ask you is, I think that
20 you said 2009, in the year 2000?

21 A. I'm sorry, 1999 and the year 2000.

22 Q. Okay. And so when you get a report like this and
23 you have a child, what do you do -- what is sort of your
24 next step?

25 A. Well, normally, if it wouldn't have been the

1 child, I would have put them in an interview room and got
2 a full statement from them, but because it was a child
3 victim, what I did was I contacted Hope Cottage and made
4 the next appointment possible, which I believe was about
5 a month later, sometime in June, scheduled an appointment
6 to have ^{Complainant} interviewed, and I also questioned the
7 aunt.

8 Q. Okay.

9 A. Mrs. Solak.

10 Q. Is that the guardian?

11 A. Yes, the guardian, yes.

12 Q. And so to your knowledge, was this interview at
13 Hope Cottage ever conducted?

14 A. Yes, it was.

15 Q. Were you present when the interview was conducted?

16 A. Yes, I was.

17 Q. Were you inside the room where the interview was
18 conducted?

19 A. No. The only person in the room was the forensic
20 interviewer. I sat outside the room where I could
21 observe.

22 Q. Okay. So were you able to observe the entire
23 interview?

24 A. Yes, I was.

25 Q. And based on your investigation, were you able to

1 determine where Mr. Smith was residing during, you know,
2 the time period of 1999 and 2000?

3 A. Yes. It was in Shady Glen mobile home park, which
4 is the Bluffton area of Beaufort County, and I believe it
5 was trailer number or lot number 419.

6 Q. And is that located in Beaufort County?

7 A. Yes, it is.

8 MR. BANNON: Permission to approach the
9 witness, Judge?

10 THE COURT: You may.

11 (Handwritten note marked for identification
12 and admitted into evidence as State's Exhibit No. 1.)

13 BY MR. BANNON:

14 Q. And during your interview with ^{Complainant} and his
15 guardian, did they provide you with anything?

16 A. Yes, they did.

17 MS. LOVELL: Objection.

18 THE COURT: What is your objection?

19 MS. LOVELL: The item -- I saw the paper that
20 the state has, but I don't know what it is or where it's
21 from and how he's going to be using it, and my concern is
22 it's inadmissible.

23 MR. BANNON: At this point I haven't asked
24 for it to be admitted. I am just asking him to identify
25 it.

1 THE COURT: All right.

2 BY MR. BANNON:

3 Q. I show you what has been marked State's Exhibit
4 No. 1. Take a look at it and tell me if you recognize
5 this.

6 A. Yes, I do recognize it.

7 Q. How do you recognize it?

8 A. I remember the paper, but also what I wrote on the
9 evidence bag once I collected it and turned it into
10 evidence.

11 Q. Okay. And so is this a piece of paper that was --
12 well, how did you come to see this piece of paper?

13 A. When I first met with Cindy Solak and ^{Complainant} my
14 first initial meeting with them, Ms. Solak provided this
15 piece of paper to me.

16 Q. Okay. Thank you. Did you ever have any contact
17 with Mr. Smith?

18 A. No, I did not.

19 MR. BANNON: Thank you, Your Honor. No
20 further questions for Deputy Florencio.

21 THE COURT: Cross?

22 MS. LOVELL: Yes, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. LOVELL:

25 Q. Did you follow up on any investigation of this

1 incident that was reported to you?

2 A. Yes, I did.

3 Q. What did you do?

4 A. I had ^{Complainant} do a forensic interview.

5 Q. And after that, did you follow up on any other
6 aspects of this investigation, or did -- did it just end
7 right there, didn't it?

8 A. After the forensic interview and the arrest, yes.

9 Q. And did you -- when they came to you, did you
10 refer them to a doctor?

11 A. No, I did not.

12 Q. Did you take any DNA evidence?

13 A. I didn't take any DNA evidence because the
14 incident that was alleged happened about three years
15 prior to when it was reported.

16 MS. LOVELL: No further questions.

17 THE COURT: Redirect?

18 MR. BANNON: Just briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. BANNON:

21 Q. She had asked you about collecting any
22 DNA evidence.

23 A. Yes.

24 Q. Did you collect any physical evidence in this
25 particular investigation?

1 A. Besides the note that was given to me, no.

2 Q. Okay. And why is that?

3 A. Well, in a normal case, in a sexual assault that
4 has just occurred or occurred even within a week, we
5 normally would take the victim to the hospital and have a
6 forensic examination done, but at this point, the
7 incident had occurred over three years ago and there was
8 no evidence, no evidence to be collected.

9 MR. BANNON: Thank you. No further
10 questions.

11 THE COURT: Recross?

12 MS. LOVELL: No, Your Honor.

13 THE COURT: You may step down. Thank you.

14 MR. BANNON: The state calls Cynthia Solak.

15 CYNTHIA SOLAK,

16 having been first duly sworn,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. BANNON:

20 Q. Good morning, Ms. Solak.

21 A. Good morning.

22 Q. Where do you live?

23 A. Currently Lewisburg, West Virginia.

24 Q. What do you do for a living?

25 A. Long-term substitute teacher, teaching eighth

1 grade math right now.

2 Q. Do you have any children?

3 A. I have six.

4 Q. Are all of them your biological children?

5 A. No, sir. Three of them are my biological
6 children.

7 Q. Okay. And are you related to your nonbiological
8 children?

9 A. Yes.

10 Q. How are you related to them?

11 A. They are my niece and two nephews.

12 Q. Okay. And I guess -- is it your brother's child
13 or your sister's children?

14 A. They are my sister's.

15 Q. Okay. So you would be the maternal aunt?

16 A. Yes.

17 Q. Okay. And what are the names of these three
18 children?

19 A. Joshua Smith, Jacquelyn Solak, and **Complainant**.

20 Q. Okay. At any point did ^{Complainant} and Jacquelyn go by a
21 different last name?

22 A. Yes.

23 Q. Okay. And what last name did they go by?

24 A. ^{Complainant}.

25 Q. And who are, to your knowledge, the parents of

1 Complainant, Jacquelyn, and Joshua?

2 A. Kelly Smith and Arthur Smith.

3 Q. Okay. And is Kelly your sister?

4 A. Yes.

5 Q. Okay. And so Arthur Smith would be your
6 brother-in-law?

7 A. Yes.

8 Q. Do you see Arthur Smith in the courtroom here
9 today?

10 A. I do. He's sitting right there.

11 MR. BANNON: Your Honor, let the record
12 reflect that the witness identified the defendant.

13 THE COURT: So ordered.

14 BY MR. BANNON:

15 Q. Where were Complainant, Jacquelyn and Joshua born?

16 A. They were born in New York.

17 Q. Now, I guess -- let's talk about each kid just
18 individually for a moment, if that's all right. When was
19 Complainant born?

20 A. Complainant was born [REDACTED], 1992.

21 Q. Okay. And you said that he was born in New York?

22 A. Yes.

23 Q. When was Joshua born?

24 A. [REDACTED].

25 Q. Okay. And when was Jacquelyn born?

1 A. [REDACTED].

2 Q. Okay. So I guess -- could you tell us sort of
3 then in descending chronological order. Who is the
4 oldest, who is the middle, who is the youngest?

5 A. Joshua is the oldest, ^{Complainant} is next, and Jacquelyn
6 is third.

7 Q. And at any point did the family leave New York?

8 A. Yes.

9 Q. Okay. Do you know where they moved to?

10 A. They moved to Bluffton, South Carolina.

11 Q. Okay. And when was that?

12 A. I believe around the summer of 1997.

13 Q. Okay. And were you living in West Virginia at
14 that point?

15 A. No.

16 Q. Where were you living?

17 A. We were also living in Bluffton, South Carolina.

18 Q. Okay. And were -- well, to your knowledge, are
19 Arthur and Kelly Smith still married?

20 A. They are not.

21 Q. Okay. And to the best of your knowledge, when did
22 sort of their separation begin?

23 A. Fall of 1999.

24 Q. Okay. And during the separation, what was the
25 custodial situation of Joshua, ^{Complainant}, and Jacquelyn?

1 A. Kelly had primary custody. Art had visitation, to
2 best of my knowledge, Wednesday evenings, Friday,
3 Saturday, and Sunday, every week.

4 Q. So Wednesday and the weekends?

5 A. Wednesday and weekends.

6 Q. And were Kelly and Mr. Smith living in the same
7 location or were they separate?

8 A. They were separate.

9 Q. And were they living in different towns or the
10 same town?

11 A. Same town.

12 Q. What town was that?

13 A. Bluffton, South Carolina.

14 Q. Where is Kelly now? Where is the mother of ^{Complainant},
15 Joshua, and Jacquelyn?

16 A. Kelly is living in Buffalo, New York.

17 Q. Okay. And who has custody of the children at this
18 point?

19 A. My husband and I do.

20 Q. Now, when did you first take custody of ^{Complainant}
21 Joshua, and Jacquelyn?

22 A. November 15th, 2001.

23 Q. 2001, did you say?

24 A. Yes.

25 Q. Now, what was ^{Complainant}'s condition when you first

1 got -- when you first took him in?

2 A. He was acting out as a child, behavior in school
3 was poor. Behavior at home was concerning.

4 Q. Okay. When you say that he was acting out, can
5 you tell us some of the things that he was doing.

6 A. He would urinate in the corners of his bedroom, he
7 wiped feces on the wall in school, bathroom wall at
8 school, after our custody, he was physically aggressive,
9 and destruction of property.

10 Q. Was there ever any incidents regarding sort of
11 ^{Complainant}s teeth?

12 A. Yes. Before we received custody, he had pulled
13 out a permanent tooth in school, in September 2001.

14 Q. Okay. And was this a baby tooth to your
15 knowledge?

16 A. No, it was permanent. We had it checked out by
17 the dentist.

18 Q. Okay. And during your custody, did he ever start
19 to have sexual issues?

20 A. Yes.

21 Q. And could you tell us about those, to the best of
22 your knowledge.

23 A. He -- in the beginning, he was on a bus going to
24 Gateway, which was a place where he went for counselling.

25 Q. Let me interrupt you for just a second. When he

1 was going to Gateway, at this point, was he being given
2 any sort of, you know, therapy related to --

3 A. Yes.

4 Q. Okay. Was this for sexual problems or was this
5 for the acting out that you described?

6 A. This was for the behavior, acting out.

7 Q. Okay. And so -- I'm sorry to have interrupted
8 you. Please continue.

9 A. On the bus to Gateway, he fondled a young lady in
10 the back of the bus.

11 Q. Okay. And so based off of -- well, how old was he
12 when this occurred?

13 A. I would say maybe eight or nine.

14 Q. Okay. And how old was he when you took custody of
15 him?

16 A. Eight, turning nine.

17 Q. And based off of the problems on the school bus,
18 did you seek any other counselling for ^{Complainant}?

19 A. We continued with Gateway, and then if I remember
20 correctly, he was put into a program called SOAP, which
21 was also in Savannah.

22 Q. And to your knowledge, did SOAP specialize their
23 counseling in any way?

24 A. They specialized in children who acted out
25 sexually.

1 Q. Okay. And once he was getting the counting at
2 Gateway, he was getting the counselling at SOAP, did you
3 see any improvement in ^{Complainant}s behavior?

4 A. Not initially, no.

5 Q. And when you say not initially, when would that
6 have been?

7 A. We did not see a significant amount of
8 improvement -- probably until his first -- I couldn't
9 tell you.

10 Q. Okay. When you -- I believe you said you first
11 took custody of ^{Complainant} and the other children in 2001.

12 A. Yes.

13 Q. What was your priority with ^{Complainant} when you took
14 custody of him?

15 A. Our priority, at that time, was to take care of
16 his health issues.

17 Q. Okay. At some point, did you take ^{Complainant} to file a
18 police report?

19 A. Yes.

20 Q. Okay. And was that for sexual abuse?

21 A. Yes.

22 Q. Okay. And now when did you take ^{Complainant} to file
23 this report?

24 A. May -- it's hard not having pen and paper and
25 trying to remember things. Hold on. 2003.

1 Q. And so how old was ^{Complainant} when you filed the police
2 report?

3 A. Nine. No. He was born in 1992, 2003 -- 11.

4 Q. Well, before you filed the police report, when did
5 you learn of him having been potentially sexually abused?

6 A. January of 2002.

7 Q. Okay. So why the delay in taking him to file a
8 police report?

9 A. We were still working on taking care of his health
10 issues.

11 MR. BANNON: Permission to approach the
12 witness, Your Honor?

13 THE COURT: Okay.

14 BY MR. BANNON:

15 Q. I would like you to take a look at States Exhibits
16 2 and 3. Could you identify them?

17 A. That's ^{Complainant}.

18 Q. Both pictures?

19 A. Yes.

20 Q. And how old is he in those photographs?

21 A. In No. 3, it was the spring before he moved in, so
22 he moved in 2001, spring of 2001 -- born in '99, I would
23 say he was eight.

24 Q. Okay. And how about the other one?

25 A. The other one was the following year after we had

1 had him for a few months, so he would have been nine.

2 Q. And are they a fair and accurate depiction of
3 **Complainant** at that age?

4 A. Yes.

5 MR. BANNON: At this point, the state would
6 move to admit State's 2 and 3 into evidence.

7 MS. LOVELL: Objection under rule 402 and
8 403.

9 THE COURT: Overruled. They're admitted.

10 (Photographs marked for identification and
11 admitted into evidence as State's Exhibit Nos. 2 and 3.)

12 BY MR. BANNON:

13 Q. And those pictures of ^{Complainant}, I think you just said
14 he was eight and nine in those photographs? I honestly
15 just don't recall.

16 A. Yeah, I'm -- eight, yeah, eight for the first one
17 and nine for the second one.

18 Q. And do you remember about how big ^{Complainant} was back
19 then?

20 A. He wasn't very big at all.

21 Q. Okay. Would you say he weighed 100 pounds?

22 A. No. I don't even think he weighed 100; 70, 80
23 pounds maybe.

24 Q. Was he five feet tall?

25 A. No.

1 Q. So he was less than five feet tall?

2 A. Less than five foot.

3 Q. I would like to show you what has been marked as
4 State's Exhibit No. 5, and tell me, do you recognize
5 that?

6 A. That one is Joshua.

7 Q. And when was that taken?

8 A. That was taken also the spring after we received
9 custody.

10 Q. So 2002?

11 A. 2002.

12 Q. So how old would Joshua have been in that photo?

13 A. He was 12.

14 Q. And how big was Joshua at that point?

15 A. Joshua was over five foot, and I want to say
16 weighed about 120.

17 Q. Okay. And you say he would have been 12 at that
18 point?

19 A. Yes.

20 MR. BANNON: At this time the state would
21 move to admit State's Exhibit No. 5.

22 MS. LOVELL: Objection, Your Honor, under 402
23 and 403.

24 THE COURT: Okay. Overruled. Admitted.

25 (Photograph marked for identification and

1 admitted into evidence as State's Exhibit No. 5.)

2 BY MR. BANNON:

3 Q. And I would like to show you what has been marked
4 as State's Exhibit No. 4. And do you recognize that?

5 A. That is Jackie.

6 Q. And when was that photograph taken?

7 A. Spring before Jackie moved in with us, so spring
8 of 2001.

9 Q. Okay. And so how old would Jacquelyn have been
10 when that photograph was taken?

11 A. Seven.

12 Q. And is it a fair and accurate depiction of her at
13 that time?

14 A. Yes.

15 MR. BANNON: The state would move State's
16 Exhibit No. 4 into evidence.

17 MS. LOVELL: Objection under 402 and 403.

18 THE COURT: Overruled. Admitted.

19 (Photograph marked for identification and
20 admitted into evidence as State's Exhibit No. 4.)

21 BY MR. BANNON:

22 Q. And same question as the others. How big was
23 Jacquelyn?

24 A. Jacquelyn was smaller. She maybe was 60 pounds,
25 definitely under 5 foot.

1 Q. Okay.

2 MR. BANNON: I beg the Court's indulgence,
3 Your Honor.

4 BY MR. BANNON:

5 Q. I would also like to show you what has been marked
6 as State's Exhibit No. 1. And do you recognize that?

7 A. I do.

8 Q. And without telling me what's written in it, sort
9 of what is it?

10 A. It's a journal entry that ^{Complainant} had made.

11 Q. Okay. And when was the last time that you saw it?
12 Well, let me ask it another way. Did you ever give that
13 item to investigator Florencio?

14 A. I did.

15 Q. And where did you get that letter from?

16 A. I took it out of ^{Complainant}'s journal.

17 Q. Okay. And how do you know that it was ^{Complainant}'s
18 journal?

19 A. He was writing a journal for the counselling that
20 he was in; number two, this is his handwriting.

21 Q. Okay.

22 A. And it's got his name on it.

23 Q. Okay. Thanks. I'll take that back.

24 MR. BANNON: Permission to publish the
25 photographs to the jury, Your Honor?

1 THE COURT: You may.

2 MR. BANNON: No further questions for
3 Ms. Solak.

4 THE COURT: Cross?

5 MS. LOVELL: Yes, Your Honor. Thank you.

6 CROSS-EXAMINATION

7 BY MS. LOVELL:

8 Q. Good morning, Mrs. Solak. You have known the
9 children all their lives; is that true?

10 A. Yes, ma'am.

11 Q. Did you know them when they were in Buffalo?

12 A. Yes, ma'am.

13 Q. And did you observe them having any -- well, we'll
14 speak of ^{Complainant} first. You mentioned that ^{Complainant} had some
15 problems. Had he had problems all his life, behavioral
16 acting out?

17 A. No.

18 Q. Isn't it true he had some learning disabilities
19 when he was in Buffalo?

20 A. I couldn't answer that.

21 Q. When did you get to know these children better?
22 Was it when your sister was going through a divorce?

23 A. It was when they moved to Bluffton, South
24 Carolina.

25 Q. At the time that you had received custody of

1 Complainant, isn't it true that he was living with his mother?

2 A. Yes.

3 Q. And that his mother also was living with her
4 boyfriend?

5 A. No.

6 Q. So the time that you received Complainant was in what
7 year?

8 A. 2001.

9 Q. And where was Complainant living in 2000?

10 A. In 2000? With his mother, and then with his
11 mother and then her boyfriend.

12 Q. So at the time these allegations happened, he was
13 living with his mother and his mother's boyfriend in
14 Bluffton; isn't that correct?

15 A. Allegations --

16 Q. That we're here for today.

17 A. No -- wait. I'm sorry. Yeah, go ahead.

18 Q. Let me get this straight. In 2002, where was
19 Complainant living?

20 A. In 2002, we had custody of Complainant

21 Q. Your testimony now is that in 2000 you had Complainant,
22 not --

23 A. I'm sorry. I thought you said 2002.

24 THE COURT: That's what the record indicates.
25 You asked 2002. It may have been a mistake.

1 BY MS. LOVELL:

2 Q. I apologize. In the year 2000?

3 A. ^{Complainant} was living with his mom, and then his mom
4 moved the children into their boyfriend's home in
5 Beaufort.

6 Q. And at that time, were you close to ^{Complainant}?

7 A. Yes.

8 Q. And was ^{Complainant} -- wasn't it true that ^{Complainant} was
9 having problems at that time as well?

10 A. Yes.

11 Q. And was anyone, to your knowledge, did you ever --
12 were you ever involved in any of the visitation that
13 occurred during the time that the parents were separated?
14 Did you have any involvement with visitation when ^{Complainant}
15 went to visit?

16 A. His dad?

17 Q. Uh-huh.

18 A. Not to my knowledge.

19 Q. So you weren't involved in doing that or
20 relocating them or anything, transporting them, anything
21 like that?

22 A. I don't remember. If I did, I maybe dropped them
23 off.

24 MS. LOVELL: One moment, Your Honor. Thank
25 you. No further questions.

1 THE COURT: Redirect?

2 MR. BANNON: Yes, Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. BANNON:

5 Q. Was Mr. Smith still visiting with his children
6 between May of 1999 and the end of May of the year 2000,
7 to the best of your knowledge?

8 A. Yes.

9 Q. And you didn't get custody of them until late
10 2001?

11 A. June 2001.

12 Q. Okay.

13 A. Yeah.

14 Q. Okay. So that would have been -- okay. No
15 further questions.

16 THE COURT: Recross?

17 MS. LOVELL: No, thank you.

18 THE COURT: All right. You can step down.

19 All right, folks. It's 11:00. Let's go
20 ahead and take a mid-morning break, give you a few
21 minutes to use the rest room. Let's take about ten
22 minutes, about 15 minutes. We'll have you back at 11:15.
23 Don't begin deliberations or discussions about the case,
24 and we'll see you back in about 15 minutes.

25 (Recess taken.)

1 (In open court, jury present.)

2 THE COURT: We'll resume with the state
3 calling the next witness.

4 MR. BANNON: Your Honor, the state calls
5 Complainant.

6 Complainant,

7 having been first duly sworn,
8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BANNON:

11 Q. Good month, ^{Complainant}. And where do you live?

12 A. Lewisburg, West Virginia.

13 Q. Have you ever gone by any other name other than
14 Complainant?

15 A. ^{Complainant}.

16 Q. And how old are you, ^{Complainant?}

17 A. Nineteen.

18 Q. When were you born?

19 A. When or where?

20 Q. When?

21 A. When? [REDACTED].

22 Q. Okay. And where were you born?

23 A. Buffalo, New York.

24 Q. And do you have any brothers and sisters?

25 A. Yes.

1 Q. How many brothers and sisters do you have?

2 A. One biological brother and one biological sister.

3 Q. Okay. And what are their names?

4 A. Joshua Smith and Jackie Solak.

5 Q. And did Jackie Solak used to be Jacquelyn Smith?

6 A. Correct.

7 Q. And who is the oldest?

8 A. Josh.

9 Q. Okay. Who is the youngest?

10 A. Jackie.

11 Q. So you're the middle kid?

12 A. Right.

13 Q. Okay. And do you have someone in your life who
14 you call mom?

15 A. Yes.

16 Q. Who is that?

17 A. My aunt.

18 Q. Okay. And what is her name?

19 A. Cynthia Solak.

20 Q. And is she your biological mother?

21 A. No.

22 Q. Who is your biological mother?

23 A. Kelly Black.

24 Q. Okay. And is she the biological mom of Joshua and
25 Jacquelyn also?

1 A. Yes.

2 Q. Is there someone in your life who you call dad?

3 A. Yes.

4 Q. Who is that?

5 A. Mark Solak.

6 Q. Okay. And is he your biological father?

7 A. No.

8 Q. Who is your biological father?

9 A. Arthur Smith.

10 Q. Do you see Mr. Smith in the courtroom here today?

11 A. Yes.

12 Q. Could you point him out for us?

13 A. (Indicating.)

14 MR. BANNON: Your Honor, let the record
15 reflect that he's identified the defendant.

16 THE COURT: So ordered.

17 BY MR. BANNON:

18 Q. When you were still living in Buffalo, were your
19 biological parents still together?

20 A. Yes.

21 Q. Okay. And how long did you live in New York?

22 A. Since I was born up to five years old.

23 Q. And where did you go after that?

24 A. Beaufort.

25 Q. Okay. Beaufort County?

1 A. Yeah.

2 Q. Do you know exactly where you lived when you were
3 living down here?

4 A. No.

5 Q. At some point did your biological parents
6 separate?

7 A. Yes.

8 Q. Okay. And who were you living with mainly at that
9 time?

10 A. My mom.

11 Q. And did you ever get to see your dad?

12 A. Yes.

13 Q. And do you remember, where was he living at that
14 time?

15 A. Beaufort.

16 Q. Okay. Do you know exactly where?

17 A. No.

18 Q. Do you know the name of the town?

19 A. No.

20 Q. Okay.

21 THE COURT: I need you to speak out loud.

22 THE WITNESS: No, sir.

23 THE COURT: Thank you.

24 BY MR. BANNON:

25 Q. When you went to go visit your dad, did anything

1 happen?

2 A. Yes.

3 Q. What happened?

4 A. He would make me do things to him and do things to
5 me.

6 Q. Okay. How old were you when this started?

7 A. Six years old.

8 Q. Okay. Is that microphone working okay now?

9 A. Yeah.

10 Q. It sounds like it.

11 A. Yeah.

12 Q. So I think that you said that he did things to you
13 and he made you do things to him, right?

14 A. Right.

15 Q. What did he do to you?

16 A. He would suck my penis and stick his penis in my
17 butt.

18 Q. Okay. Where did this occur?

19 A. At his house.

20 Q. And do you remember where inside of his house it
21 took place?

22 A. In his bedroom.

23 Q. And were there -- was there anyone else inside of
24 the room?

25 A. No.

1 Q. So it was just you and him?

2 A. Right.

3 Q. Were you fully clothed?

4 A. No.

5 Q. Was he fully clothed?

6 A. No.

7 Q. How did you get unclothed?

8 A. I undressed.

9 Q. Okay. Did he tell you to undress?

10 A. Yes.

11 Q. And now you said that he would perform oral sex on
12 you?

13 A. Yes.

14 Q. And you said that he would stick his penis in your
15 butt, right?

16 A. Right.

17 Q. How did that make you feel?

18 A. Terrible, angry.

19 Q. Did it hurt?

20 A. Yeah.

21 Q. Did he have you -- well, you said earlier that he
22 had you do things to him as well.

23 A. Yeah.

24 Q. What did he have you do to him?

25 A. He made me suck his penis too and try to put my

1 penis in his butt also.

2 Q. And did this happen more than once?

3 A. Yes.

4 Q. Do you remember how long it went on for?

5 A. Almost two years.

6 Q. And so you said that it started when you were
7 about six?

8 A. Correct.

9 Q. And you said it went on for two years. So how old
10 were you when the abuse stopped?

11 A. Eight.

12 Q. Do you know how many times over that two years
13 that happened?

14 A. More than three times, I know.

15 Q. Did he ever speak to you when it was over?

16 A. No.

17 Q. Did he ever speak to you about whether or not you
18 should tell anyone about what had happened?

19 A. No.

20 Q. Did he ever threaten you?

21 A. He did if I tell anybody.

22 Q. What did he tell you?

23 A. He told me that he would kill me or break my bones
24 if I told anybody.

25 Q. Okay. And did you tell anyone what was

1 happening -- while this was going on, did you tell anyone
2 what was happening?

3 A. No.

4 Q. Why not?

5 A. I was scared.

6 Q. Eventually were you able to tell somebody what was
7 happening?

8 A. Yes.

9 Q. Were you living with your dad when you were able
10 to finally say what had happened?

11 A. Biological father?

12 Q. With Mr. Smith.

13 A. I was not living with him.

14 Q. Were you -- did you still have contact with
15 Mr. Smith?

16 A. No.

17 Q. Okay. Do you see the person in the room who did
18 these things to you?

19 A. Yes.

20 Q. Could you point him out for us.

21 A. Right there.

22 MR. BANNON: Thank you, Your Honor. No
23 further questions.

24 THE COURT: Cross?

25 MS. LOVELL: Yes. Thank you.

CROSS-EXAMINATION

1
2 BY MS. LOVELL:

3 Q. Good morning, Mr. ^{Complainant}. Who did you live with
4 when you -- who did you live with when you were six?

5 A. My mom and her boyfriend at the time.

6 Q. And was there anybody else in that household with
7 you?

8 A. My siblings and his stepson.

9 Q. Were you parents going through a divorce about
10 that time?

11 A. I believe so. I don't recall.

12 Q. They were separated, weren't they?

13 A. They were separated.

14 Q. And you were on visitation, weren't you?

15 A. I was what?

16 Q. You were going on visitation sessions at that
17 time.

18 A. Right.

19 Q. And was -- wasn't your visitation with your
20 brother and sister also to visit your dad?

21 A. Correct.

22 Q. Didn't all three of you go at one time; isn't that
23 correct?

24 A. We all went at one time, yes.

25 Q. Did anyone else live in your father's home at that

1 time?

2 A. My grandfather.

3 Q. Did you go see a doctor at any time for these --
4 for this -- for what happened to you?

5 A. Many counselors afterwards, yeah.

6 Q. And isn't your testimony that you didn't tell
7 anyone about this?

8 A. No, not during that time.

9 Q. How is your memory of the events that happened
10 back in 2000? Is that a pretty good memory?

11 A. Yes, ma'am.

12 Q. But you really don't have a good recall of
13 everything that happened in 2000, do you?

14 A. That's correct.

15 Q. Yesterday's hearing, you didn't remember that you
16 had -- that there was oral sex until you read a
17 transcript from another hearing; isn't that correct?

18 A. Correct.

19 Q. Your memory is better than it was yesterday; isn't
20 that correct?

21 A. Correct.

22 MS. LOVELL: No further questions.

23 THE COURT: Redirect?

24 REDIRECT EXAMINATION

25 BY MR. BANNON:

1 Q. When you took a look at that transcript from
2 yesterday, were those your words that you took a look at?

3 A. Yeah.

4 Q. And so based on -- so what you looked at was what
5 you had said previously.

6 A. Right.

7 Q. And has anyone told you to say that it was
8 Mr. Smith who abused you?

9 A. No.

10 Q. And Ms. Lovell asked you about your brother and
11 sister and your grandfather.

12 A. Correct.

13 Q. When you were -- or when you went to visit
14 Mr. Smith's home, did you go with -- you went with your
15 siblings, right?

16 A. Right.

17 Q. And was your grandfather there also?

18 A. Yeah.

19 Q. Okay. Were any of them inside of the bedroom when
20 these things happened?

21 A. No.

22 Q. Did you ever tell any of them about what happened
23 inside the bedroom at that time?

24 A. No.

25 Q. Thank you.

1 MR. BANNON: No further questions.

2 THE COURT: Recross?

3 MS. LOVELL: No questions.

4 THE COURT: You may step down. Next witness.

5 MR. BANNON: State calls Joshua Smith.

6 JOSHUA SMITH,

7 having been first duly sworn,

8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. BANNON:

11 Q. Good morning. Could you please just state and
12 spell your name for the record.

13 A. Joshua Smith, J-o-s-h-u-a, Smith, S-m-i-t-h.

14 Q. How old are you?

15 A. I'm 22.

16 Q. What do you do for a living?

17 A. I'm in the Marine Corps.

18 Q. How long have you been in the Corps?

19 A. Three-and-a-half years.

20 Q. Do you have any brothers and sisters?

21 A. I do.

22 Q. What are their names?

23 A. Jackie Solak and **Complainant**.

24 Q. And did they ever go by anything else before they
25 were Solak?

1 A. Smith.

2 Q. And do you have a woman in your life who you call
3 mom?

4 A. Yes, Cindy.

5 Q. Okay. And is she your biological mother?

6 A. No.

7 Q. Are you related to her?

8 A. She's my aunt.

9 Q. Okay. Is she your mom's sister?

10 A. Yes.

11 Q. And do you have a person in your life who you call
12 dad?

13 A. Yes, Mark.

14 Q. And is he your biological father?

15 A. No.

16 Q. What is the name of your biological mother?

17 A. Kelly Black.

18 Q. And what is the named of your biological father?

19 A. Arthur Smith.

20 Q. Do you see Mr. Smith in the room here today?

21 A. Yes, he's over there.

22 MR. BANNON: Your Honor, let the record
23 reflect the witness identified the defendant.

24 THE COURT: So ordered.

25 BY MR. BANNON:

1 Q. And is ^{Complainant} and Jacquelyn -- are they the children
2 of Arthur Smith and Kelly Black as well?

3 A. They are.

4 Q. And where were you born?

5 A. I was born in Buffalo, New York.

6 Q. And how long did you live there?

7 A. Till I was about seven.

8 Q. Okay. And when you moved, where did you move to?

9 A. Bluffton, South Carolina.

10 Q. And were you with your brother and sister when you
11 moved to South Carolina?

12 A. Yes.

13 Q. And were you with your biological mother and
14 father at that time too?

15 A. Yes.

16 Q. And are your biological parents still married?

17 A. No.

18 Q. So while you were living in South Carolina, at
19 some point did they start to sort of separate and
20 divorce?

21 A. Yes.

22 Q. Okay. And were they always living together during
23 this whole period?

24 A. What do you mean?

25 Q. Once the separation started, did they live in one

1 house together with all of you or were they in different
2 locations?

3 A. They were in different locations.

4 Q. Okay. And where did your dad live -- excuse me,
5 where did Mr. Smith, your biological father, live?

6 A. He lived in a trailer park in Bluffton.

7 Q. And did you still see him?

8 A. Yes.

9 Q. Even while he was living at that other place?

10 A. Yes.

11 Q. And did you go alone or did you go with your
12 brother and sister?

13 A. It was the three of us.

14 Q. And do you recall how often you would go to visit?

15 A. It was usually, like, every weekend and one night
16 during the week.

17 Q. And now, I would like to go back to New York.

18 While you were living in Buffalo, New York, did anything
19 happen with your father?

20 A. Yes. He sexually abused me.

21 Q. And where did this sexual abuse occur?

22 A. It was in Buffalo. It would be either in my room
23 or his room. It was multiple times.

24 Q. And so this was in the house where the family was
25 living together?

1 A. Yes.

2 Q. And you said that he sexually abused you.

3 A. Yes.

4 Q. What did he do to you?

5 A. He sodomized me. There was oral sex. Just --
6 yeah.

7 Q. Was there anal sex as well?

8 A. Yes.

9 Q. And did he ever make you do things to him?

10 A. Yes.

11 Q. Okay. And what were those things?

12 A. Oral sex.

13 Q. Was there anal sex as well?

14 A. No.

15 Q. And were you clothed when this occurred?

16 A. No. He would take off my clothes.

17 Q. Was he clothed when this occurred?

18 A. No.

19 Q. Did you ever say no?

20 A. At first, but I don't think Art knows the
21 definition of no.

22 Q. Did Mr. Smith ever threaten you?

23 A. Yes. He threatened to hurt my mother.

24 Q. When you say no, did he ever hurt you?

25 A. No. He didn't hit me or anything, he just -- I

1 just gave in.

2 Q. Okay. And did this happen just one time or more
3 than once?

4 A. It was multiple times.

5 Q. How old were you when it started?

6 A. I was probably around six.

7 Q. Okay. And how long did the abuse go on for?

8 A. Right up until when we moved to South Carolina, so
9 I would have been just turning eight.

10 Q. Okay. So -- so it happened roughly between the
11 ages of when you were six and when you were eight years
12 old?

13 A. Yes.

14 Q. And how much older than ^{Complainant} are you?

15 A. Right now I'm 22, ^{Complainant} is 19, so three years.

16 MR. BANNON: Beg the Court's indulgence for
17 one moment.

18 BY MR. BANNON:

19 Q. Do you remember testifying at a hearing before
20 this one we have today?

21 A. Yes.

22 Q. And do you remember in that hearing saying that
23 your father put his penis in your butt?

24 A. Yes.

25 Q. Is that what occurred?

1 A. Yes.

2 MR. BANNON: No further questions, Your
3 Honor.

4 THE COURT: Cross?

5 CROSS-EXAMINATION

6 BY MS. LOVELL:

7 Q. Thank you. Good morning, Mr. Smith.

8 A. Good morning.

9 Q. This happened over 18 years ago? It happened when
10 you were six, right?

11 A. Yes. A little while ago.

12 Q. So you're 22, so a while ago, and your memory of
13 that time doesn't seem as good as it could be, does it?

14 A. I don't forget much.

15 Q. But you needed to have a record refresh your
16 recollection from the prior hearing; isn't that correct?

17 A. Yes.

18 Q. And those incidents that occurred that you said
19 happened, they must have hurt, didn't they?

20 A. Yes, ma'am.

21 Q. But did you seek any medical attention?

22 A. No, ma'am.

23 Q. Did you tell anyone that they hurt?

24 A. No, ma'am.

25 Q. And did you -- when you visited with your father,

1 did you also see your grandfather there?

2 A. Yes, ma'am.

3 Q. Now, when you visited, did you -- you lived with
4 your mother at this time because of the separation; is
5 that correct?

6 A. Yes, ma'am.

7 Q. And who else was in that household with you?

8 A. John Roach, I believe his name was.

9 Q. And who was John Roach?

10 A. He was my mother's boyfriend at that time.

11 Q. And was there also any other children living in
12 the household?

13 A. Alex, his son.

14 MS. LOVELL: No further questions.

15 THE COURT: Redirect?

16 MR. BANNON: Yes, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. BANNON:

19 Q. You said that you had a good memory of these
20 things that occurred.

21 A. Yes.

22 Q. Does this sort of thing tend to sort of stick out
23 in your mind?

24 A. I try to put it behind me.

25 Q. I understand. Now, Ms. Lovell asked you if you

1 told anyone at the time this was occurring. Why didn't
2 you tell anyone?

3 A. Because my -- Art threatened to hurt my mother.

4 Q. And you said you were six to eight years old at
5 that point in time, right?

6 A. Yes.

7 Q. Was he bigger than you were?

8 A. Yes.

9 Q. Were you afraid of him too?

10 A. Yes.

11 MR. BANNON: Thank you. No further
12 questions.

13 THE COURT: Recross?

14 MS. LOVELL: No, Your Honor.

15 THE COURT: You may step down. Next witness.

16 MR. BANNON: State calls Jacquelyn Solak.

17 JACQUELYN SOLAK,

18 having been first duly sworn,

19 was examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. BANNON:

22 Q. Good morning, Ms. Solak.

23 A. Good morning.

24 Q. Have you ever gone by any other name other than
25 Solak?

1 A. I have.

2 Q. And what name is that?

3 A. It was Jacquelyn Smith.

4 Q. And do you have any brothers and sisters?

5 A. I do.

6 Q. And who are they?

7 A. Their names are Joshua and **Complainant**.

8 Q. Okay. Do you have someone in your life who you
9 call mom?

10 A. I do.

11 Q. And who is that?

12 A. Her name is Cynthia Solak.

13 Q. And is she your biological mom?

14 A. She is not.

15 Q. Okay. And is there someone in your life who you
16 call dad?

17 A. Yes.

18 Q. And who is that?

19 A. His name is Mark Solak.

20 Q. And is he your biological father?

21 A. No, he is not.

22 Q. I'm sorry, Jacquelyn. Right now what are you
23 doing? Are you working or --

24 A. Currently attending Marshall University.

25 Q. Okay. What are you studying?

1 A. I'm studying nursing. I want to be a nurse
2 practitioner.

3 Q. And do you know who your biological parents are?

4 A. I do.

5 Q. And who are they?

6 A. Kelly Smith and Arthur Smith.

7 Q. And do you see Arthur Smith in the courtroom here
8 today?

9 A. I do.

10 Q. And could you point him out for us?

11 A. He's right there.

12 MR. BANNON: Your Honor, let the record
13 reflect she's identified the defendant.

14 THE COURT: So ordered.

15 BY MR. BANNON:

16 Q. And where were you born?

17 A. I was born in Buffalo, New York.

18 Q. And what is your birthday?

19 A. My birth date is [REDACTED].

20 Q. And how old were you -- well, how long did you
21 live in New York?

22 A. I'm not for sure how long I lived in New York.

23 Q. Okay. Well, where did you go after New York?

24 A. I moved to Bluffton, South Carolina.

25 Q. Okay. And do you know about how old you were when

1 you were living in Bluffton?

2 A. I was about six or seven.

3 Q. And at that time, were your biological parents --
4 well, were you with your biological parents at that
5 point?

6 A. Yes, I was.

7 Q. Okay. And were they still married?

8 A. Not that I can remember. I'm pretty sure they
9 were split up.

10 Q. Okay. And at some point during this, were you --
11 were they living in two different places?

12 A. Yes.

13 Q. And who were you living with mainly?

14 A. I was mainly living with my mom, or Kelly. I was
15 living with Kelly.

16 Q. And did you ever visit Mr. Smith?

17 A. I did.

18 Q. And did you visit him alone or was it with your
19 two brothers?

20 A. It was with my brothers.

21 Q. Okay. And did anything happen with your father
22 while you were in Bluffton, South Carolina?

23 A. Yes.

24 Q. What happened?

25 A. He sexually molested me.

1 Q. Okay. How old were you when this started?

2 A. I believe I was six when it started.

3 Q. And when you say sexually molested, what do you
4 mean?

5 A. He would get me to touch his penis and he would
6 touch me. He would touch my vagina.

7 Q. Would he touch you anywhere else?

8 A. He would touch my butt.

9 Q. Where did these things occur?

10 A. They occurred in his trailer, but mostly it was in
11 his bedroom.

12 Q. Okay. So it was in the bedroom inside of his
13 trailer?

14 A. Uh-huh, yes, sir.

15 Q. And you said that you touched him and that he
16 touched you?

17 A. Uh-huh.

18 Q. Okay. Did you touch him just with your hand?

19 A. No.

20 Q. How else did he have you touch him?

21 A. He had me touch him with my mouth as well.

22 Q. Where did he have you touch him with your mouth?

23 A. His penis.

24 Q. And you said that he touched you on the vagina.
25 Was that with his hand or another part of his body?

1 A. I believe that was with his hand.

2 Q. How did that feel?

3 A. That hurt.

4 Q. And you said he touched you on the butt. Was that
5 with his hand or another --

6 A. It was with his hands.

7 Q. And how did that feel?

8 A. That hurt too.

9 Q. And did this happen only one time?

10 A. No.

11 Q. Do -- can you remember how many times it happened?

12 A. No. It was countless.

13 Q. And do you remember how old you were the last time
14 that it happened?

15 A. I'm pretty sure I was seven. It was March 2000.

16 Q. So when you said it started when you were six, was
17 it between when you were six and seven?

18 A. Yes, uh-huh.

19 Q. And did Mr. Smith ever talk to you about whether
20 or not you should tell anyone about what happened?

21 A. Yes, he did.

22 Q. What did he tell you about that?

23 A. He told me that I shouldn't tell anybody.

24 Q. Okay. And do you see the person in the courtroom
25 today who did these things to you?

1 A. Uh-huh.

2 Q. Can you point him out for us?

3 A. (Indicating.)

4 MR. BANNON: No further questions, Your
5 Honor.

6 THE COURT: Cross?

7 MS. LOVELL: Yes, thank you, Your Honor.

8 CROSS-EXAMINATION

9 BY MS. LOVELL:

10 Q. Good morning, Ms. Solak. Are you close to your
11 brothers?

12 A. I am.

13 Q. Are you, like, a little sister to your big
14 brothers?

15 A. I am.

16 Q. And when this was happening, you didn't tell your
17 brothers, did you?

18 A. No.

19 Q. Why didn't you tell them?

20 A. Because I was scared.

21 Q. And at the time -- did you know that they also
22 accused your father of the same thing?

23 A. At the time, no, I did not.

24 Q. So your brothers didn't tell you anything either?

25 A. Right, correct.

1 Q. Thank you.

2 MS. LOVELL: No further questions.

3 THE COURT: Redirect?

4 MR. BANNON: No redirect, Your Honor.

5 THE COURT: You can step down. Did you have
6 anybody else you wanted to call before we broke?

7 MR. BANNON: No. I think this would be an
8 appropriate time to break for lunch.

9 THE COURT: We've got a couple more
10 witnesses, but they won't be here before 2:00, so we're
11 going to take kind of a little bit of a long lunch break,
12 so you can go to lunch anywhere you want.

13 You can go to lunch with anybody on the jury,
14 if you want, but I want to caution you, do not talk to
15 anybody about the case outside or amongst yourselves.
16 Don't discuss the testimony, don't discuss demeanor,
17 don't discuss anything about the case with or without
18 anybody else, and if anybody approaches you about talking
19 about the case, please report that when we get back.

20 Again, it will be 2:00 before we get started
21 back, so you get a little bit of extra time for lunch
22 today, but please be back in the jury room by 2:00, and
23 we should get started about then. Thank you for your
24 patience.

25 (Jury excused.)

1 THE COURT: I'll be back in here by 1:30 at
2 the latest, so if you've got anybody here earlier and we
3 need to talk about any of these pretrial matters, let's
4 reconvene at 1:30 with the aim of getting back on track
5 at 2:00. All right? And if you have any charges that
6 you want to hand up, be sure to get them to Mary. And
7 other than that, I guess we'll see y'all about 1:30.
8 Okay? Thank you.

9 (Recess taken.)

10 A F T E R N O O N S E S S I O N

11 (In open court, jury not present.)

12 THE COURT: You have your expert?

13 MR. BANNON: Ms. McIlvee is back.

14 Mr. Stanley is not here. She's not here yet.

15 THE COURT: That is Ms. Twitty?

16 MR. BANNON: Yes, sir.

17 THE COURT: So I had told y'all in chambers
18 that I would limit her testimony to 801(d)1(D), the time
19 and place, so --

20 MR. BANNON: And I discussed it with, Your
21 Honor, and what she told me -- what I specifically told
22 her is I said when we talk about the forensic interview
23 of the child, you can say whether or not he was sexual --
24 or whether he told you he was sexually abused. You can
25 say the source of the sexual abuse, and I'm allowed to

1 ask you where the abuse occurred. She told me her answer
2 to the abuse would be in the bedroom of his father's
3 house.

4 THE COURT: All right. Well, you want to
5 respond to that?

6 MS. LOVELL: Your Honor, that kind of goes
7 outside of the boundaries of the accepted -- the
8 non-hearsay rule of having an out of court statement.

9 THE COURT: How so?

10 MS. LOVELL: Well, it will -- well, it
11 bolsters. It then allows her to give credibility to the
12 testimony of ^{Complainant} and Josh and Jacquelyn. We've got
13 another person who is an independent forensic interviewer
14 who says ^{Complainant} told me he did this to my butt, I did that
15 to his penis, exactly the same things, and then he's
16 going to say that it was at the daddy's house.

17 So we have not a child saying it anymore, now
18 we have an expert, if you will, saying it, and I believe
19 that lends credence and bolsters.

20 THE COURT: Well, I think that's just the
21 defendant's bad luck that -- it is entirely designed to
22 bolster the witness -- the testimony of the children.
23 There is no question about that, but that is where it
24 took place, was in the bedroom, at the father's trailer.
25 That is what 801(d)1(D) says that they can do, is bring

1 in a witness who can state that the -- that ^{Complainant} who
2 would be the declarant, testified that he was abused as
3 long as it is limited to the time and the place of the
4 incident, so she can testify as to the time frame that he
5 said the abuse took place and where it took place. It
6 just happened to be that it took place in the father's
7 bedroom. If it had taken place someplace outside of the
8 father's bedroom, then that would be the testimony, but
9 it just so happens that that is where she told him the
10 abuse took place and it happens to coincide with where
11 three other people consider -- or two other people said
12 it took place as well.

13 So I think it's entirely within the
14 parameters of 801(d)1(D), so as long as she limits it to
15 the time frame that he said it took place and where he
16 said it took place, that's the limitation on that
17 testimony.

18 All right?

19 MR. BANNON: And, Your Honor, would you like
20 me to go check and see if Mr. Stanley is here?

21 THE COURT: That's fine, but let me ask you
22 this before you bring him in.

23 MR. BANNON: Sure.

24 THE COURT: In looking through the case law
25 real quick that you just submitted, the cases clearly

1 indicate that rape trauma testimony can come in where it
2 is probative of a fact in issue. As I understand, the
3 defense is they're not disputing that abuse took place
4 but that it was the defendant who did commit the acts of
5 abuse, so testimony that an expert coming in to say,
6 look, this is why children act out at that age and it's
7 consistent with somebody who has alleged child abuse, is
8 it really an issue at this point in the trial? Because
9 they're not contending that it didn't happen.

10 I'm gathering at some point in this trial
11 they're going to point the finger at either the
12 defendant's father or the mother's boyfriend as being the
13 actual perpetrator, but not that any abuse took place.
14 That's what I understood Ms. Lovell's defense argument
15 made earlier in chambers this morning, is that we're not
16 suggesting that it didn't take place, we're going to
17 argue identity.

18 MR. BANNON: Okay.

19 THE COURT: So what is it probative of?

20 MR. BANNON: Well, to be honest with you, I
21 think it's probative as to answer the question, which I
22 think is very relevant in this particular trial, as to
23 why there was a delay in the disclosure of this case
24 as -- you know, and that has been mentioned on a number
25 of occasions.

1 In this particular instance, we are talking
2 about something that happened several years ago, and I
3 think that particularly the delayed disclosure of victims
4 of abuse, and that being a common occurrence, is
5 something that will help the jury understand the nature
6 of sexual abuse and why it wasn't reported the instant
7 that it occurred, in ^{Complainant}s case.

8 THE COURT: Okay.

9 MR. BANNON: I do understand, you know, the
10 Court's position on sort of the, I guess, the probative
11 nature, of sort of the source of the abuse, but I still
12 think that it would help the jury understand that he -- I
13 mean, I understand that they may be almost conceding the
14 fact that he was abused by someone, but I'm also still
15 entitled to prove that he was abused. Does that make
16 sense?

17 THE COURT: And you've put up testimony to
18 that, so there is no question he was abused, and it
19 sounds like there is no question the other children were
20 abused. They are all, of course, pointing the finger at
21 the father, so identity is an issue, but -- so I guess
22 I'm just trying to get clear in my head that if the
23 defense in fact, is, we're not claiming that no abuse
24 took place or they're not going to argue, delay, draw
25 suspicion as to whether or not it actually occurred, but

1 the sole defense is whether or not the defendant did it,
2 then how does that expert answer -- what do they add to
3 that testimony? What do they add to the evidence to
4 clarify it is the father, because they're not going to be
5 able to argue -- or is this expert going to offer that it
6 was the father is -- were you intending to elicit that
7 from your expert?

8 MR. BANNON: No, I was not.

9 THE COURT: So what is the point of the
10 testimony then?

11 MR. BANNON: Well, like I said before, even
12 though they're arguing that it could have occurred from
13 another source, I think I'm still entitled to show that
14 this behavior which ^{Complainant} is engaged in is consistent
15 with his being abused. One of the elements I certainly
16 have to prove is that he was abused, and I certainly
17 think the emotional and physical manifestations he
18 displayed because of that abuse, I think the expert is
19 going to say I think that helps the jury decide abuse was
20 found.

21 I understand the children did testify and
22 ^{Complainant} testified that he was abused, but I think that like
23 it says in the case law, that the trauma, even if it's
24 emotional trauma, which is based on that, is properly
25 admissible, and I think that that is almost sort of

1 regardless of exactly what Mr. Smith's defense is.

2 THE COURT: Well, it's not admissible per se.
3 It's admissible subject to a 403 analysis that the
4 probative value exceeds the prejudicial effect, so that
5 is kind of where I'm at in this analysis. As long as
6 you're not trying to elicit from the expert the identity
7 of the perpetrator, and if they're conceding that abuse
8 took place and you have proven that abuse took place
9 through other witnesses, then what exactly is the point
10 of offering this witness that makes it relevant as to a
11 probative issue and that does not exceed any prejudicial
12 effect to the defendant?

13 MR. BANNON: Well, I understand --

14 THE COURT: Or it does exceed any prejudicial
15 effect?

16 MR. BANNON: Where I think Ms. Lovell is
17 going may be a defense of someone else molesting the
18 child, but mainly what I've heard so far is, well, this
19 happened a long time ago. It's difficult to remember,
20 that sort of thing, so I think that it's -- and that
21 wasn't relative solely to the identity of the person. I
22 thought that was relative to their entire testimony, so I
23 think that essentially it's been put out there already
24 that we're challenging that this happened a long time
25 ago, so it's difficult to remember, and so I think that

1 it's still at issue, whether or not the child was abused.

2 I mean, I haven't heard any concessions yet.

3 I simply have heard just this has happened a long time
4 ago. She might stand up --

5 THE COURT: Well, we're still early in the
6 case, so I guess -- I'm going to give Ms. Lovell a chance
7 to argue in a minute, but --

8 MR. BANNON: And I'm sorry, Your Honor, I
9 didn't mean to cut you off, but relative to your 403
10 argument, I think it's certainly probative to try to
11 establish that the behavioral problems that ^{Complainant} was
12 displaying is consistent with abuse, and I think that
13 that probative nature definitely outweighs any potential
14 prejudice, because if the doctor isn't going to be
15 testifying as to the source of the abuse, I don't see how
16 that particularly prejudices the defendant, particularly
17 if -- and, again, I'll say I haven't heard it quite yet.

18 If the argument is going to be, well, I
19 concede that, you know, he was abused, you know, I think
20 that's something she could say and that would just sort
21 of, I suppose, ultimately neuter that testimony, but we
22 haven't gotten there yet.

23 THE COURT: Okay. Ms. Lovell?

24 MS. LOVELL: And I don't have any intention
25 of probably admitting that anyway, because that would be

1 something that I would want to be able to use if I needed
2 to. I can't restrict my defense, based on whether or not
3 we're getting testimony in. My argument against the
4 testimony is that it's not probative. It's cumulative.
5 It adds nothing. It doesn't help the jury. The abuse
6 did happen a long time ago. You can't hide that.

7 You can't continue to try to show people,
8 well, but for the fact that this trial is happening in
9 2011 and all this happened in '96 and 2000, that's the
10 facts, and I have to take them the way they are with the
11 testimony and so does the state, so I feel that the
12 evidence that --

13 THE COURT: Well, is your argument going to
14 be, one, identity, and, two, that it may not have taken
15 place?

16 MS. LOVELL: Yes.

17 THE COURT: All right. Then it's probative
18 as to whether or not his post-abuse actions are
19 consistent with somebody who has been abused, and it
20 becomes probative.

21 MS. LOVELL: I can't concede that he was
22 abused because that is part of their proof, so I would be
23 not -- I would be doing a disservice if I agreed. That
24 would then be saying that my client is guilty, and I
25 can't --

1 THE COURT: All right. Well, then it becomes
2 a probative issue and then we go to the question of
3 whether or not the probative value outweighs the
4 prejudicial effect to your client, so what is the
5 prejudicial effect to your client?

6 MS. LOVELL: There was testimony that he went
7 to Gateway, that he went to several counselors. Cindy
8 Solak kind of documented his counselling and he went to
9 Hope Haven {sic}. It's a cumulative effect. We had
10 Cindy's testimony that he had a problem and he gave a
11 note. That note is sort of sitting out there. Then we
12 have Hope Haven, who is going to come in and say, yeah,
13 the police referred ^{Complainant} to me, and ^{Complainant} told me X, Y,
14 Z, and it was not in his father's bedroom.

15 And then we're going to have SOAP come in and
16 say, This is what we do. They're going to track it went
17 from here to here to here. Well, of course, there was
18 sexual abuse it. Was something done on a bus that Cindy
19 said she found and felt that he needed more than health
20 counselling, and so he was referred to SOAP, and SOAP
21 comes in, who I believe Todd Lynch-Stanley is with, is
22 then going to testify, yeah, we see his pattern and we,
23 again, say yes, it is sexual abuse.

24 So I feel it's cumulative and it is
25 bolstered.

1 THE COURT: Well, if you're not conceding the
2 issue of whether or not the abuse actually took place,
3 then the testimony would be probative of -- on that
4 issue. I'm inclined to agree that the probative value
5 outweighs any prejudicial effect, but we're going to need
6 to probably put that witness up, hear what he has to say
7 before I make a final decision on that, but let's go
8 ahead and get Ms. Twitty on the stand and then presumably
9 the other witness will be here and ready to go. We can
10 take a break in between witnesses then.

11 How many witnesses are you going to have,
12 just these two more?

13 MR. BANNON: Just these two more.

14 THE COURT: Do you know how many you're going
15 to have?

16 MS. LOVELL: I'm going to need to discuss
17 that, and I need to discuss this recent -- about the
18 testimony. I'll ask my client. Should he instruct me --

19 THE COURT: You don't have to tell me right
20 now. We'll give you an opportunity.

21 MS. LOVELL: And I also need to put something
22 on the record that I wanted to bring out and reinforce
23 that I had made objections in limine, motions in limine,
24 objecting to the testimony of Josh, Jacquelyn, Cindy, and
25 ^{Complainant}, and I wanted to be sure that that was an ongoing

1 objection. While I may not have mentioned at the time
2 they were coming in, I wanted to make sure the record was
3 preserved that I did object. I do want a continuing
4 objection to their testimony.

5 THE COURT: All right.

6 MS. LOVELL: And if that would be part of the
7 record, I would appreciate it.

8 THE COURT: So noted. Okay. So you have
9 Ms. Twitty ready then?

10 (In open court, jury present.)

11 THE COURT: All right. Welcome back, folks.
12 We're going to resume now with the state calling the next
13 witness.

14 MR. BANNON: The state calls Kendra McIlvee
15 Twitty.

16 KENDRA MCILVEE TWITTY

17 having been first duly sworn,
18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. BANNON:

21 Q. Do you prefer McIlvee or Twitty?

22 A. Twitty.

23 Q. Where do you work?

24 A. I am in private practice, part-time, and I also
25 work at a boarding school in Bluffton, called Mindstream

1 Academy.

2 Q. When you say private practice, what sort of
3 practice are you in?

4 A. I'm a licensed professional counselor.

5 Q. Okay. And do you have any education that relates
6 to being a counselor?

7 A. I do. I have a bachelor's of science and then a
8 master's of clinical psychology, and I've worked in the
9 field of child abuse and child trauma, childhood trauma,
10 for the past 15 years.

11 Q. Okay. And what were you doing back in May of
12 2003?

13 A. I was working at a place called Hope Cottage.

14 Q. And what is Hope Cottage?

15 A. Hope Cottage is a children's advocacy center,
16 which is a place for a multi-disciplinary team of law
17 enforcement or Department of Social Services, counselors,
18 victim advocates that help children in need to make sure
19 there -- if is any allegations of any type of abuse or
20 neglect the child is brought there for a forensic
21 interview.

22 Q. Okay. And when you say a forensic interview, what
23 exactly does that entail?

24 A. The forensic interview is an unbiased, objective
25 interview that is designed or -- sorry.

1 Q. That's okay. Take your time.

2 A. I'm nervous. It's an interview that as a
3 professional that interviews these children, you're
4 trained in child development and you understand children
5 and their needs, as opposed to someone that is not
6 trained in either law enforcement or DSS. So you come
7 together as a group, and there is one person that is
8 certified as an interviewer to talk to the child in hopes
9 that you find that that child is healthy and there is no
10 need for an intervention or further treatment.

11 Q. Okay. And were you certified as a forensic
12 interviewer, I guess a child forensic interviewer, at the
13 time in 2003?

14 A. Yes, I was.

15 Q. And how long had you -- or how long were you a
16 child forensic interviewer?

17 A. I worked as an interviewer for, I believe, six
18 years. I had two roles, that I was child advocate at
19 some point and then -- so I'm not exactly sure of how
20 long I was an interviewer, but I have interviewed over
21 700 children.

22 Q. Okay. And besides your experience, did you have
23 any specialized training to help you be a forensic
24 interviewer?

25 A. Absolutely. Before I was put in the room with the

1 child to do these types of interviews, I went to
2 Huntsville, Alabama to the National Children's Alliance
3 training, and that was a week long training I would do
4 every other year, and then the children's law office in
5 Columbia, South Carolina, hosts week long advanced
6 training for interviewers, and I was required to do that
7 twice a year as well to make sure I was up to date on all
8 the research and changing -- changes of interview
9 procedures and things like that.

10 Q. Okay. And could you tell us, what are some of the
11 techniques that you use when you're interviewing a child?

12 A. Okay. Well, it's not a personal technique, but
13 the way you're trained, it's a nationally -- it's a
14 national protocol, so the way I interview a child is the
15 way the children's advocate center in Arizona interviews
16 the child, which evens the playing field for how we as
17 professionals do things.

18 And you start out with building rapport with the
19 child, which is called the RATAAC protocol. It's a
20 CornerHouse national protocol. You start out with the R.
21 You build rapport with the child, make the child feel
22 comfortable, and you're meeting the child developmentally
23 where they're at.

24 Then you go into anatomy identification, so you
25 usually will bring out, depending on the age of the

1 child, a picture of a boy or a girl with age appropriate
2 body parts on it so that you can identify a common
3 language of what they call the private body parts, and so
4 you try not to make a big deal about the private body
5 parts.

6 You start with the eyes, ears, nose, and you go
7 down the body for what they call things. And once you
8 establish what they call the private body parts, then you
9 go into a touch inquiry which means you talk to them
10 about what are appropriate touches, what are good
11 touches, what are maybe not appropriate, what are bad
12 touches and see if the child understands the difference
13 between different kinds of touches.

14 And then you go into the abuse scenario which you
15 ask questions, has anyone ever touched you in that place,
16 and that is usually when the child, if something has
17 happened, they'll usually disclose, sometimes not,
18 sometimes they will. And after they disclose, you make
19 sure that you're asking open ended, free recall questions
20 so they're not leading or suggestive or anything like
21 that, and then you go into your conclusion, which is kind
22 of wrapping up with the child that that is not okay that
23 that happened to you and the next time, you know, you can
24 go tell a grownup, and the interview is ended.

25 Q. Okay.

1 MR. BANNON: Your Honor, at this time I would
2 ask that Ms. Twitty be certified as an expert in the
3 field of the forensic interviewing of children.

4 THE COURT: Any objection or do you want to
5 voir dire?

6 MS. LOVELL: I -- yes, I do want to voir
7 dire. I don't know that there is an expert level of the
8 forensic interviewing that I would have a standard by
9 which to gauge that.

10 THE COURT: Let me ask you this: Are you
11 going to elicit an opinion?

12 MR. BANNON: No, Your Honor.

13 THE COURT: Okay. Then she doesn't really to
14 be qualified as an expert. I'm not saying she isn't,
15 sounds like she probably is, but since we're not
16 eliciting an opinion, it's really not necessary to go
17 through that.

18 MR. BANNON: That would be fine, Your Honor.

19 BY MR. BANNON:

20 Q. Ms. Twitty, back in May of 2003, did you have an
21 opportunity to interview a boy named **Complainant**?

22 A. I did.

23 Q. Okay. And where did you interview him?

24 A. I interviewed him at Hope Cottage.

25 Q. And did you use the sort of RATAAC that you just

1 described when you interviewed him?

2 A. I did.

3 Q. So had you ever met ^{Complainant} before?

4 A. I have not.

5 Q. And during this interview, did he disclose to you
6 any abuse?

7 A. He did.

8 Q. Okay. What abuse did he disclose to you?

9 A. He disclosed that he had to suck his dad's penis
10 and that --

11 MS. LOVELL: Objection.

12 THE COURT: Sustained. The limitation on the
13 equipment -- or of the question was the time and place.
14 I instruct the jury to disregard that last answer.

15 BY MR. BANNON:

16 Q. Okay. Ms. Twitty, so he disclosed that he was
17 abused?

18 A. Yes.

19 Q. Was he able to give you a time frame in which this
20 abuse occurred?

21 A. When I asked about time frame, he had said that it
22 happened since he was, like, six or seven years old,
23 or -- I don't have my report in front of me. I'm not
24 exactly sure of the number, but he said it had been
25 happening for a number of years. He was ten at the time

1 I interviewed him and it happened in South Carolina in a
2 trailer and they would be in his dad's bedroom.

3 MS. LOVELL: Objection.

4 THE COURT: Overruled.

5 BY MR. BANNON:

6 Q. If I would show you a copy of your report, would
7 it refresh your recollection as to the time frame of the
8 abuse?

9 A. Absolutely.

10 MR. BANNON: Permission to approach, Your
11 Honor?

12 THE COURT: You may.

13 THE WITNESS: Okay. I had written ^{Complainant}
14 reported that he was about six or seven years old when
15 his dad started to do these things to him.

16 MS. LOVELL: Objection.

17 THE COURT: Overruled.

18 MR. BANNON: No further questions.

19 THE COURT: Do you have any questions of the
20 witness, Ms. Lovell?

21 CROSS-EXAMINATION

22 BY MS. LOVELL:

23 Q. Ms. Twitty, did you determine that he needed any
24 medical treatment?

25 A. I did not.

1 Q. Did you refer him in any way or allow him to
2 return to his environment?

3 A. I made a recommendation that he not have contact
4 with his biological father and that he be supervised at
5 all times when he's around other children.

6 MS. LOVELL: Nothing further.

7 THE COURT: Any redirect?

8 MR. BANNON: Nothing further.

9 THE COURT: Folks, we need to take up a legal
10 matter, and I'll send you back to the jury room for a few
11 minutes while we discuss this. Don't begin deliberations
12 or discussions, and we'll have you back here in a minute.
13 We need to take up another matter with another witness
14 before he testifies, and I'm not sure he's here yet, all
15 right?

16 (In open court, jury not present.)

17 MR. BANNON: I've been informed that he is
18 here, so --

19 THE COURT: Let's go ahead and bring him in
20 and go through and see what he's got to say.

21 MR. BANNON: All right. Thank you, sir.

22 And, Your Honor, before we get started, I
23 would just like to inquire, would you like me to run
24 through his credentials as part of this or would you
25 just like to hear the meat and potatoes?

1 THE COURT: Are you going to challenge his
2 expertise?

3 MS. LOVELL: Are you going to do an expert?

4 MR. BANNON: Yes.

5 MS. LOVELL: So this is an opinion as an
6 expert so we -- on the generalities.

7 THE COURT: So why don't we run through his
8 qualifications, and if she wants to voir dire him on that
9 we'll take that up.

10 MR. BANNON: That would be fine.

11 TOD LYNCH-STANLEY,
12 having been first duly sworn,
13 was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. BANNON:

16 Q. Could you please state and spell your name for the
17 record.

18 A. My name is Tod Lynch-Stanley, T-o-d, one D, last
19 name is two words, L-y-n-c-h, hyphen, Stanley,
20 S-t-a-n-l-e-y.

21 Q. What do you do for a living?

22 A. I'm director of a private practice called Family
23 Reconstructions and SOAP. Basically, SOAP stands for sex
24 offender and addiction program, so I have a specialty in
25 working with sexual deviancy, many different forms of

1 that, including a sex offender program, an adult sex
2 offender program, that is being sanctioned by the state
3 of Georgia. I'm a certified treatment provider for
4 Georgia Department of Corrections, as well as providing
5 sex offender treatment for adolescents and various
6 juvenile courts throughout southeast Georgia. That's the
7 SOAP program. We go to different communities and run our
8 program.

9 In my private practice, I do some general work
10 with behavior problems with kids, but also probably
11 specialize more in sexual deviancy in terms of sexual
12 acting out, molestation of people who have been
13 victimized and may be acting out in some form, as well as
14 working with affairs, things like that.

15 Q. Okay. And do you deal, as part of your practice,
16 with the victims of sexual abuse?

17 A. Yes, in various ways. There's been times that
18 I've just treated victimization directly, but typically
19 I'm really treating victimization more indirectly, in
20 terms of they're been victimized and they're acting out
21 in different forms, which, actually, is quite common for
22 most victims of sexual abuse, that they will act out in
23 different forms, whether it be sexual acting out or, you
24 know, struggling in a relationship or sexual addiction or
25 whatever it may be.

1 Q. And do you have any education which helps you to,
2 you know, participate in this kind of counselling and
3 practice?

4 A. Well, actually, I have education, I have specific
5 training. I think that is what you're meaning.

6 Q. If you could first start with your education and
7 then move to the training.

8 A. My basic education, I have a master's degree from
9 the University of Georgia back in 1986, and I have a
10 clinical license to practice independently for therapy,
11 therapeutic services, which I received an LCSW in 1991.
12 I have received specialized training around sexual abuse,
13 in particular with Jan Hindman, very intensive weeklong
14 training with her, which dealt with both victimization
15 and victimizing others, as well as specific sex offender
16 treatment through Jonathan Ross, working with him on very
17 extensive programmatic stuff, and then, obviously, over
18 the years, continuing educations.

19 I'm required to have 12 hours per year of specific
20 sexual abuse training to keep up my certification and
21 provider, being able to be a provider for the Georgia
22 Department of Corrections, for adult sex offenders.

23 Q. Okay. And have you had any -- have you ever been
24 qualified as an expert witness in a criminal matter
25 regarding sexual abuse, sexual victimization, sexual

1 deviancy -- sexual deviancy?

2 A. Countless times. I probably testify from one to
3 three times a month regarding sex offender cases but also
4 cases where there's different levels of deviancy as well,
5 and I'm helping to explain to the Court how the deviancy
6 came about and usually explaining sexual trauma in some
7 way as it relates to the acting out.

8 Q. And is that -- was that just in Georgia or is it
9 in more states than Georgia?

10 A. I have testified in South Carolina several times.
11 I've testified, I believe, in this court, not for this
12 particular court, but I know in Beaufort, I believe I've
13 testified two or three times over 20 years. I couldn't
14 specifically tell you when, but I know that I have done
15 that. I have testified in Florida several times.

16 Q. Okay.

17 MR. BANNON: Your Honor, at this time the
18 state would ask that he be qualified as an expert witness
19 in the field of sexual trauma, sexual victimization, and
20 sexual deviancy.

21 THE COURT: That sounds kind of almost more
22 like an adjective than a field. What would your field of
23 expertise be?

24 THE WITNESS: I would probably say sexual
25 deviancy is where it comes from. I'm a clinical member

1 of ATSA, which is the association for the treatment of
2 sexual abusers, which is a very extensive clinical
3 membership with over 3,000 hours of certified working and
4 training with offenders, but, again, we always go back to
5 working with the initial victimization on some level.

6 So victimization becomes a part of working
7 with sexual deviancy, and I would say that my most
8 significant expertise would be sexual deviancy.

9 THE COURT: Okay. Do you wish to voir dire
10 the witness?

11 MS. LOVELL: Yes, Your Honor, I do.

12 CROSS-EXAMINATION

13 BY MS. LOVELL:

14 Q. So you then your specialty is treating the
15 offenders, sex offenders?

16 A. That's what I'm most known for and that is
17 probably what I do the most.

18 Q. And that is your most --

19 THE COURT: Let him finish the answer.

20 THE WITNESS: But, in reality, every person
21 who sexually acts out, you're dealing with their
22 victimization. If you don't understand and don't have
23 specific training in sexual victimization, you truly
24 can't treat victims, so that term of that is called
25 victim to victimizers, which I have been in extensive

1 training with Nicholas Groth, and that direct type of --
2 offending type treatment as well.

3 BY MS. LOVELL:

4 Q. Have you published any papers on this?

5 A. No, I'm too busy in my practice. I've considered
6 actually writing a book on juvenile offending; however, I
7 have not done that at this time.

8 Q. So that would also include journals as well?

9 A. No, I haven't.

10 Q. You said you have an education, master's of social
11 work. What is LCSW?

12 A. Licensed clinical social worker. I believe here
13 they're called LASWs, but in Georgia they're called LCSW,
14 so that's the advanced certification one gets as a social
15 worker, to practice independently, where you can practice
16 without being under the supervision of someone and bill
17 insurances on your own without being under a doctor.

18 Q. Is that through a college or university?

19 A. It's through the state, through the state
20 composite board that issues the clinical license.

21 Q. So when it's a license, it's that you attend
22 classes once a year and you have a continuing --

23 A. Right. You have to keep up with the continuing
24 education for the LCSW. We have to have 40 hours of
25 continuing education every two years and that

1 certification is reissued every two years.

2 THE COURT: All right. Do you challenge his
3 expertise in that field?

4 MS. LOVELL: I challenge his expertise in the
5 field of the victimization of what he has -- what he
6 would be able to say with respect to the acting out, not
7 all that the acting out would -- he would fashion the
8 acting out to be a sexual victimization because he goes
9 from the offender to the victim to treat the offender. I
10 believe his expertise is in more offender related than it
11 is in the child or the victim side. That's my --

12 THE COURT: Sounds like he's got a good bit
13 of experience in treating both offenders and people that
14 have been abused, so I think he's certainly qualified as
15 an expert in the field of sexual deviancy. Despite the
16 fact that the degree is from Georgia, we'll let it go.
17 All right. I find that he is qualified as an expert
18 then.

19 So let's go ahead and talk about what he
20 wants to tell the jury.

21 REDIRECT EXAMINATION

22 BY MR. BANNON:

23 Q. Well, sir, can you tell us what some of the things
24 one might find in -- what behaviors one might see in
25 someone who has been sexually abused.

1 A. Okay. I'm a little confused about just in
2 terms -- so are we getting right into my testimony and --

3 THE COURT: We're just kind of getting a
4 preview of what you want to tell the jury so I can see if
5 it's okay.

6 THE WITNESS: That's what I thought. That's
7 not really how I work. That's not really what I do. I
8 don't look for behaviors. I take what behaviors I see.
9 Whatever behaviors are there, I look for those -- and I
10 do this with any part of my practice. So I work with
11 tough behavior problems all the way around with tough
12 kids, so whatever behaviors I see, I try to work to make
13 meaning of those.

14 There may be some behaviors that generally
15 indicate sexual abuse; however, as anyone will tell you,
16 especially a defense attorney, there are a zillion types
17 of behaviors that are sexualized that could mean many
18 things besides being sexually abused, so the reality is
19 that I treat the behaviors that I see and then if they
20 turn out to be that a person has been abused and we work
21 on that level, then that's what comes out, but that's not
22 a game plan. It's not a ball park. It's kind of how it
23 evolves.

24 Q. I understand. Would the early sexualization of a
25 child, would you consider that a sign that the child

1 could have been potentially sexually abused?

2 A. I would, but, again, the way the treatment goes,
3 I'm going to treat the behavior. My first thing is if I
4 have a kid who is sexually acting out, you know, who is
5 rubbing against people, touching people, touching his
6 penis in a public place, making sexual gestures, you
7 know, masturbating in public, those types of things, I'm
8 going to look at that behavior.

9 Now, I may start to look more and more to see
10 where he learned that behavior, and that behavior can be
11 learned in many different aspects, so that is what I
12 would speak to.

13 Q. What about behavior involving sort of like
14 inappropriate peeing or --

15 THE COURT: You're sort of putting the cart
16 before the horse. Did you actually interview^{Complainant}, the
17 victim in this case?

18 THE WITNESS: Are you speaking to me, sir?

19 THE COURT: Yes. What is he here to talk
20 about? Did he interview or review records, or what is
21 his relation to this case?

22 MR. BANNON: It's my understanding that
23 Mr. Stanley's practice treated **Complainant** for some
24 period of time. It wasn't always necessarily Mr. Stanley
25 who was treating him, but it was his -- he also had an

1 opportunity to review the records of that treatment and
2 is familiar with Mr. Smith's case. Is that an accurate
3 depiction?

4 THE WITNESS: Fairly accurate.

5 THE COURT: Why don't you testify as to what
6 he found out about his behavior and then what, in his
7 opinion, that is consistent with.

8 MR. BANNON: Okay. That would be fine, Your
9 Honor.

10 BY MR. BANNON:

11 Q. Mr. Stanley --

12 A. Lynch-Stanley.

13 Q. Mr. Lynch-Stanley, did you in your practice have
14 an opportunity to treat **Complainant**?

15 A. Yes.

16 Q. And when did that occur?

17 A. Looking back on my records, it looks like that
18 treatment began in August of 2002 and lasted somewhere
19 until 2005. He was --

20 Q. Go ahead. How did he come to be referred to you?

21 A. He was referred to us through the community mental
22 health because of me specializing so much in sexual
23 deviancy and sexually acting out, so I actually had a
24 contract with the Gateway mental health, so they sent him
25 over to me because of acting out, sexual behaviors, so I

1 had other therapists primarily treat him.

2 I had met with the family several times to find
3 out more about, you know, behaviors and symptoms. I
4 did -- I looked back under my notes. There were several
5 sessions that I sat in on or participated in in terms of
6 supervising. To be completely honest, I don't recall a
7 lot of those sessions, but I do recall -- actually, I do
8 recall conversations with the mother and also discussion
9 about his behaviors that he was doing.

10 Q. What information was provided to you or that you
11 observed in ^{Complainant} regarding -- or what behaviors did you
12 observe in him or were related to you that you would
13 consider signs of sexual trauma?

14 A. Well, again, I treat the symptoms. So the
15 symptoms that I was aware of were -- I think masturbating
16 in public, touching other children inappropriately.
17 There were some -- I believe there are some fire setting,
18 very aggressive types of behaviors. Those behaviors,
19 again, in investigating origins of those behaviors, I
20 believe it was disclosed somewhere in that process that
21 he had been molested by his biological father.

22 That was my understanding of that, but that's
23 not -- again, I wasn't -- that wasn't my goal to try to
24 find that out. My goal was to treat the symptoms and
25 reduce the symptoms of the sexual acting out.

1 Q. Okay. And --

2 A. The therapists were doing more -- the therapists
3 may have dealt more with the origins of whatever may or
4 may not have happened in terms of being molested, but
5 specifically we're most concerned with the symptoms.

6 Q. Let's talk a little bit about post-traumatic
7 stress disorder and how it regards to the victims of
8 sexual abuse. Could you tell us more about that?

9 A. Well, it's called PTSD. There are many different
10 aspects of PTSD. There will be a lot of disassociation,
11 which is tuning out. Kids will tune out and kind of not
12 be aware of one behavior moving to the next, so they end
13 up -- like, for instance, I've seen many an offender who
14 is tuned out because of their own molestation where they
15 are really not thinking, supposedly, of what they're
16 doing in terms of sexually acting out or touching.
17 There's certainly not an excuse. The tuning out is a
18 defense mechanism that's used, and that has to be
19 confronted and dealt with, and so the more you talk about
20 what the people are doing in their acting out or more
21 about their history of them being traumatized will help
22 them to get more connected to the realities of what has
23 happened to them and then to the realities of what
24 they've done.

25 But the PTSD can come in various forms of tuning

1 out. Other symptoms would be nightmares. There would be
2 explosive behaviors. There would be some variability as
3 to being very depressed and being volatile, those types
4 of things.

5 Q. Through your contact and ^{Complainant} and information
6 that was related to you about ^{Complainant}, are you of the
7 opinion that he was suffering from post-traumatic stress
8 disorder?

9 A. To the best of my recollection, it did seem like
10 he had some PTSD symptoms, and this is also in our code
11 of ethics as social workers. We are far more concerned
12 in treating the symptoms than trying to treat the
13 diagnosis. I look at diagnostic things to help me
14 understand how to deal with symptoms, but I'm really
15 going to focus on the symptoms. So, yeah, there were
16 some PTSD things, but I wasn't concerned whether it was
17 PTSD. I was more concerned with what he was doing.

18 Q. What was he doing that concerned you?

19 A. I would have to look back more specifically, but
20 in general it was the sexual acting out; again, what we
21 call compulsive sexual behaviors. One of the things we
22 recognize when there is a lot of sexually compulsive
23 behavior at a young age, the higher likelihood that
24 they've been molested themselves, or victimized
25 themselves.

1 If they're at a young age, say, six, seven, eight
2 years old, in terms if they're acting out sexually, then
3 more likely they've been taught that, and that is really
4 kind of common sense, but we also know that is something
5 to maybe explore or look for, because you want to learn
6 how did a person first find out about sex, and how they
7 first found out really has a lot to do with their
8 deviancy.

9 So they may have found out through pornography,
10 they may have found out by poor boundaries in the family
11 or they could have found out by being molested or they
12 could have found out by observing or watching
13 molestation. Those are things we put together in terms
14 of understanding the sexually acting out.

15 Q. Okay. What is delayed disclosure in children?

16 A. Exactly what it says. It's when they don't
17 disclose right away.

18 Q. Okay. And is that behavior that is -- well, how
19 typical is delayed disclosures of abuse when you're
20 dealing with child victims?

21 A. Well, I'm not sure -- I don't know what the
22 statistics are on that. I do know that every child
23 discloses in different ways, different forms, different
24 times. Sometimes the more delayed the disclosure it
25 means the more severe the abuse.

1 Typically, if someone can disclose immediately,
2 then they're not feeling as ashamed. They're not feeling
3 as intimidated or scared so they're able to disclose
4 early, so at times a delayed disclosure can mean more
5 traumatic of an event.

6 You could say that is a general rule. I don't
7 think you can say it as an absolute. There are many
8 reasons why people disclose in different times in
9 different way. Also, there is family dynamics involved
10 that could be involved with delayed disclosure, so that
11 is a part of it.

12 Q. Okay. And you mentioned that sometimes increased
13 feeling of shame can contribute to -- or shame or fear
14 can contribute to a delay in disclosure. Now, I want to
15 ask you, you know, when you're dealing with molestation,
16 sort of, you know, how does the shame and fear sort of
17 work? How does that kind of come about and work on the
18 child?

19 A. In many ways, it's probably the most -- in some
20 ways, it's the most crucial aspect of it. One of the
21 things that I really focus on in the treatment of working
22 with victims and victimization, it's not so much the act
23 itself, it's everything around the act. It's the results
24 of the act. So, for instance, the ways -- there is many
25 ways that a molestation is able to occur.

1 One of the most common ways of child molestation
2 is that the offender will level themselves with the
3 victim so they come down on the same level so it seems
4 like they're buddies. They're pals. And in that
5 participation -- and this can be in the sexual act
6 itself, so in that sexual act there is this, like, we're
7 in this together. We're doing this together, and there
8 may be comments such as, Well, do you want me to stop, or
9 does that feel okay?

10 So the kid is feeling a comfort that goes along,
11 but what is really happening is that they're starting to
12 participate, and so the offender uses that participation
13 as a way to have that child feel ashamed that they're
14 participating, so if they tell, they're going to get in
15 trouble too.

16 Now, what often happens at the same time that
17 there is this levelling that goes on in the sexual
18 relationship, there may be very stern types of behaviors
19 by the perpetrator in the parent or the adult
20 relationship, so that they may be harsh. They may
21 intimidate other people, maybe not even the victim
22 themselves. They may hit the wife, for instance, and
23 then that would be very fearful for the victim because
24 they would say, oh, my gosh, if he does this to my mom
25 and she hasn't even been abused, what is he going to do

1 to me if I tell? So there can be intimidation in that
2 regard too.

3 To make a long story short here, and I could go on
4 for days about this, the reality there is it creates a
5 confusion. The confusion that happens with a victim is
6 the worst part -- I keep saying the worst part, there are
7 many worst parts -- one of the worst parts is the
8 confusion. He's mean to me. I'm afraid of him, but at
9 the same time he's nice to me and he gives me these
10 things and he's caring about me.

11 And then the other part that confuses that
12 typically in molestation the act feels good, it feels
13 pleasurable, so there is so much shame that goes on in
14 the pleasure. That is one of the things I learned from
15 Jan Hindman in particular, that you have to treat the
16 pleasure that goes on in victimization. That is the
17 greatest area of shame, and that is where the kids end up
18 getting suicidal, regarding the shame of the pleasure and
19 then -- I could go on and on and on.

20 And there is pleasure that remains in the brain,
21 and they start to act out that pleasure with somebody
22 else. Now they're confused again. They're getting in
23 trouble for something that they participated in on an
24 equal level, so it's massively confusing, massively
25 overwhelming for a child, and at some point they might

1 just kind of blow, you know, in terms of getting angry,
2 freaking out, or getting so depressed. The behaviors can
3 really go all over the place.

4 Q. Okay. And did you see -- or was ^{Complainant} referred to
5 you for some of these behaviors which could be a
6 byproduct of sexual abuse?

7 A. Yes. He was referred for the acting out
8 behaviors.

9 MR. BANNON: I don't have any further
10 questions, Your Honor.

11 THE COURT: Ms. Lovell?

12 MS. LOVELL: Thank you, Your Honor.

13 RECROSS EXAMINATION

14 BY MS. LOVELL:

15 Q. So you really -- your focus is on treating the
16 symptoms.

17 A. Yes, ma'am.

18 Q. You don't care about disclosures, so delayed
19 disclosure to you is really of no consequence because
20 you're looking at the child, right?

21 A. Well, it's meaningful. There is information in
22 disclosure and there is information in how the disclosure
23 is made; in other words, when I get a delayed disclosure,
24 I'm looking to see, why is this a delayed disclosure?
25 What does that mean? So, again, I look at the behavior

1 and say what is the meaning of this behavior.

2 Q. In ^{Complainant}'s case, did you know there was a delayed
3 disclosure?

4 A. I don't recall -- I wouldn't have known that
5 unless that was asked of me right now. I wouldn't have
6 known that.

7 Q. Was ^{Complainant} -- do you do diagnoses of your patients?
8 Do you say they have PTSD or do you say they were abused?
9 Is that --

10 A. I try not to. There's times I'm required to in
11 terms of maybe a treatment plan. I'm required to for
12 insurance purposes. My belief and even our training as
13 social workers is to treat symptoms and not try to
14 diagnose or treat diagnosis. It is helpful to have some
15 idea of a diagnostic criteria to know the symptoms are
16 clustered or whatever, but as a general rule, I'm not
17 there to try to diagnosis.

18 Q. Do you prescribe medications?

19 A. Absolutely not. That's a psychiatrist's job.

20 Q. Are you affiliated with a psychiatrist?

21 A. I have been. I'm not currently, or I haven't
22 been -- while I have many that I refer to and talk to
23 back and forth regarding medications, but no, I'm not
24 directly affiliated.

25 Q. So if a child comes to you, you would determine

1 whether or not they were on medication before you --

2 A. I would know that. In fact, in this case, looking
3 back through my notes, he was -- ^{Complainant} was actually
4 referred to by Dr. Clure from Gateway. She was actually
5 very supportive of our work and working with the kids who
6 were acting out, so I'm sure he was on a number of
7 medications being in community mental health. That kind
8 of goes along with that.

9 Q. You had said there was a symptom in masturbating
10 in public and fire setting. Was that particular to this
11 case here or just the general symptoms?

12 A. I believe both, I believe both. I believe there
13 was some fire setting, looking back at some notes and
14 also -- but, generally, they're considered one of the
15 symptoms of sexual abuse. But, again, if I have a kid
16 that comes in with some of those behaviors, I don't
17 automatically say, Oh, my God, he's been sexually abused.

18 I'm going to look at the symptoms try to get the
19 meaning of symptoms and try to go back and determine
20 where those symptoms originated from.

21 MS. LOVELL: Thank you.

22 MR. BANNON: There is one part which I left
23 out which I intend to bring in on direct examination, so
24 if I may, one more subject matter.

25 THE COURT: Go ahead.

FURTHER REDIRECT EXAMINATION

BY MR. BANNON:

Q. Doctor --

A. I'm not a doctor. I'm a clinical social worker.

Q. Sorry. When you're talking about someone who is a molester of children, is that considered a form of sexual deviancy?

A. Oh, yes.

Q. And in your treatment of sexual abusers, do you find that some of these abusers have sexual preferences, whether it's age or gender?

A. There are some. There are some that have preferences. Probably most are through opportunity, but there are sometimes -- especially if someone is pedophiliac and they're more attracted to younger children. Typically pedophiliac will be younger boys.

Q. And is it at all common in your practice, evaluating sex abusers, for the abusers to molest their own children?

A. I don't know the statistics on that. I do know how it's rated and evaluated in terms of risk, which is somewhat bizarre, but not necessarily that there is a greater prevalence. It's actually not considered a more deviant act to molest your own child than a stranger child, which is what the research has told us, which

1 boggles me, but that's actually what the research says.

2 So if I'm here being honest, I'm going to say
3 that. So that is a part of that, but not necessarily --
4 there is really -- the numbers are not strong about how
5 many are intrafamilial or extrafamilial.

6 We do know most molestations occur with people who
7 know the victims, but in terms of how much or intra or
8 extrafamilial, I'm not aware of the statistics for that.

9 Q. Let me ask you, what is grooming of a victim by an
10 abuser?

11 A. Grooming is the way in which the offense is
12 started. The steps that are taken, and the grooming
13 process is very crucial, really, for the victim to
14 understand because then the victim can see that later on
15 and get back into their steps, also to make sure they
16 don't go through those same steps themselves to molest
17 someone else.

18 So grooming in those steps, those would be things
19 like coming down on the same level as a younger person.
20 It would be starting to cross boundaries, such as
21 discussing sexual issues, so, for instance, if someone
22 was trying to, let's say, molest a 12-year-old girl or
23 13-year-old girl, they might start to talk about their
24 boyfriends and how much do you like to kiss and does it
25 feel good if a boy ever touches you between the legs, so

1 they would ask questions that are inappropriate in
2 breaking that boundary line.

3 So, typically, the grooming process will be where
4 boundaries are being broken little by little and the
5 victim does not realize that these boundaries are being
6 broken, so things start to feel natural in a progression,
7 so the grooming process is crucial to the treatment of
8 victim and also as the victimizers as well.

9 Q. Is isolation a form of grooming that you have seen
10 in abusers? I suppose isolation of the victim by the
11 abuser.

12 THE COURT: Let me stop you because this
13 questioning that you've done on your redirect, it seems
14 to me to be more focussed on the abuser than the victim.

15 The first part I really didn't have a problem
16 with, consistent with the victim's actions, consistent
17 with post-traumatic stress, that's really what he can
18 testify to in the context of this trial.

19 MR. BANNON: Yes, Your Honor.

20 THE COURT: This is, I don't think,
21 consistent with what he's allowed to testify to, and I
22 realize I haven't given Ms. Lovell a chance to object to
23 that, but I'm just kind of anticipating that she will. I
24 think we're straying from where he can go with his
25 testimony on this.

1 MR. BANNON: That's fine, Your Honor. I just
2 wanted to -- it's something I realized I had left out.

3 THE COURT: I don't think it's something you
4 can get into, so let's go ahead and leave it out.

5 MR. BANNON: I will, Your Honor, and that
6 would conclude my, I guess, in camera examination of
7 Mr. Lynch-Stanley.

8 THE COURT: All right. Well, I'm going to
9 find -- well, let me hear from Ms. Lovell first.

10 MS. LOVELL: Will he be testifying to
11 specifics of ^{Complainant} or generalities of his opinion of
12 children similarly situated that have been abused?

13 THE COURT: Well, it will be essentially what
14 he testified to just a few minutes ago, and that was
15 there was a combination of some clinical observations,
16 but it was mainly a generalized forensic evaluation. It
17 was more than just him treating him, but there was
18 records of indications of, well, he masturbated in public
19 or he urinated in public. Those are things that he would
20 not have observed. Those are things he would have
21 determined from other sources.

22 And then he can testify those things, if he
23 feels it's appropriate, are indicative of somebody who
24 has been sexually abused, if it's consistent with other
25 things. As he said, just because somebody masturbates in

1 public doesn't mean that they've been abused, okay?

2 MS. LOVELL: It was just that the testimony
3 from Cindy Solak had not brought that point out. She
4 said that she sent the child to Gateway for purposes of
5 health issues first. Then he was fondling a child on the
6 bus, and that prompted her to send him, and other than
7 that, the urinating in school, but there was no fire.
8 There were no other -- I was confused as to whether you
9 were testifying to the generalities of what symptoms can
10 be seen versus what was actually in this case.

11 THE COURT: Where did you get that
12 information, about the masturbating in public? I don't
13 recall that being brought out in testimony.

14 THE WITNESS: I'll look back through my
15 notes. I'll look through the notes. I recall that that
16 was in there, and, again, the masturbating could have
17 been self-stimulation, touching themselves, things like
18 that. That might not have been pulling out a penis and
19 masturbating to ejaculation. It could be
20 self-stimulation as well, masturbating types of
21 behaviors.

22 MS. LOVELL: My concern was there was no
23 testimony that came in that ^{Complainant} had accused anybody of
24 that. That was my concern.

25 THE COURT: As an expert, he can base his

1 opinion on things that are not necessarily in the record
2 up to that point, but he has to tell us what he found
3 out, what his basis for that observation is, and how he
4 relied on it in forming his opinion. I would caution
5 you, again, that first part of the direct examination I
6 thought was proper.

7 Scope of examination, I wanted to caution you
8 not to say that it was disclosed to you that he had been
9 molested by his biological father. I think that is
10 something that you can't testify to. We're just talking
11 about what you had observed his conduct to be or was
12 brought to your attention that his conduct would be and
13 whether or not that sort of conduct was consistent with
14 basically rape trauma, post-traumatic stress disorder
15 victim.

16 MS. LOVELL: Okay.

17 THE COURT: You could testify that it had
18 been brought to his attention that he had been sexually
19 abused or sexually molested. The troublesome part would
20 be with you identifying that as it having been his
21 biological father, and that is where we kind of, I think,
22 step over the line a little bit.

23 MR. BANNON: Okay.

24 THE COURT: So the whole point of him
25 testifying is to whether or not him having been molested

1 was -- if that took place and was it consistent with his
2 acting out, unless you can tell us why it would be any
3 different to have been molested by his biological father.
4 That would change your opinion in any way.

5 THE WITNESS: There may be specific -- there
6 may be specific types of symptomatology that would come
7 from being molested by your father as compared to being
8 molested by someone else.

9 THE COURT: Is there any in this case?

10 THE WITNESS: I wouldn't recall that.

11 THE COURT: All right. Then it's kind of
12 gratuitous to throw it in there, so if you can't point
13 with your finger and say, well, this particular
14 symptomatology is consistent with having been molested by
15 a parent, then I think that probably is prejudicial
16 without there being a foundation for it.

17 MR. BANNON: Just to be clear, we won't talk
18 about the source of any of the abuse, but we will talk
19 sort of in broad generalities that he can testify that he
20 is aware that ^{Complainant} said he was abused.

21 THE COURT: Yes.

22 MR. BANNON: Okay.

23 THE COURT: And what he heard or observed
24 that --

25 MR. BANNON: Okay. The symptoms of that

1 abuse, and then we can talk about PTSD and delayed
2 disclosure but none of the things about treating abusers.

3 THE WITNESS: Correct.

4 MR. BANNON: And I just wanted to clarify.

5 THE COURT: Okay. There we go. So within
6 those parameters, I'll qualify him as an expert, and you
7 can testify, in essence, to you what just said.

8 Before we bring the jury back in, unless you
9 have something else, why don't we take a quick ten-minute
10 bathroom break, and then we'll come back and put him up
11 on the stand.

12 Thank you.

13 (Recess taken.)

14 (In open court, jury present.)

15 MR. BANNON: All right, Judge. The state is
16 ready.

17 THE COURT: All right. Call your next
18 witness.

19 MR. BANNON: All right. The state calls
20 Mr. Tod Lynch-Stanley.

21 TOD LYNCH-STANLEY,

22 having been first duly sworn,
23 was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BANNON:

1 Q. Where do you work?

2 A. I am the director of family reconstruction at
3 SOAP, which is a private practice based in Brunswick, but
4 I also have programs up in Savannah, Waycross, other
5 areas.

6 Q. Okay. And what do you do there at SOAP?

7 A. Primarily what I do is -- SOAP is a program, is an
8 acronym for Sex Offender and Addiction Program, so to
9 that program, I'm treating sexual deviancy, specifically
10 sexual offenders and people who have acted out sexually
11 against other people.

12 In the rest of my practice, I deal with various
13 behaviors, but one of which is dealing with, again,
14 sexual deviancy and acting out, sexual addiction,
15 affairs, that type of thing.

16 Q. Okay. And how long have you been doing this kind
17 of work?

18 A. I graduated with my master's degree in 1986 and
19 was working with difficult kids, with difficult behaviors
20 at that point. I got my clinical license in 1991, which
21 enabled me to practice independently, to be able to
22 utilize insurance and practice without direct
23 supervision.

24 At that point I went into private practice in
25 1992, so I've been in private practice since 1992.

1 Q. Okay. So in the nearly 20 years that you've been
2 in private practice, how many children would you say that
3 you've counselled, roughly?

4 A. Golly, 500, 700. That's hard to say.

5 Q. And have you ever been certified as an expert
6 witness in any courts?

7 A. Yes. In fact, I testify typically between one to
8 three times a month in juvenile courts and superior
9 courts in Georgia for the area of sexual deviancy and
10 sexual offending. I also have testified in South
11 Carolina several times as well as in Florida, one or two
12 times.

13 Q. Okay.

14 A. As an expert witness, yes.

15 Q. And have you had any training outside of your
16 experience in order to treat victims of sexual abuse and
17 sexual abusers?

18 A. Yes. I received specific training, week-long
19 intensive training through Jan Hindman, which had to do
20 with sexual victimization and treating symptoms of sexual
21 victimization as well as victimizers treating victims to
22 victimizers by Nicholas Groth, specific sexual offender
23 training, intensive, with Jonathan Ross, which, again,
24 dealt with acting out behaviors in terms of children and
25 adolescents.

1 I could go on. I'm required to have 12 hours per
2 year of specific sexual abuse training, some of which I
3 direct -- my most recent one was actually symptoms and
4 treating boys who have been sexually abused.

5 MR. BANNON: Okay. Your Honor, at this time
6 state would move that Mr. Lynch-Stanley be certified as
7 an expert witness in the field of sexual trauma, sexual
8 victimization, and sexual deviancy.

9 THE COURT: Do you wish to voir dire?

10 MS. LOVELL: No, sir. Just renew my
11 objection.

12 THE COURT: All right. Over the defense's
13 objection, I'm going to qualify the witness as an expert
14 in the field of sexual deviancy.

15 Folks, normally when we have somebody
16 testify, we let them testify about things that they saw,
17 they heard, they touched, they felt, they smelt, their
18 observations, all right? We don't let somebody get up
19 and tell you what their opinion is about what they saw.
20 Sometimes the law says, though, because of specialized
21 training or experience in a field, the law will recognize
22 a type of a witness as a type of expert and will allow
23 them to not only testify about what it is that they saw
24 or observed, but they can testify in the form of an
25 opinion. In other words, they can tell you what they saw

1 and give you their opinion about its significance. All
2 right?

3 This witness has now been qualified as an
4 expert in this field and will be qualified to give you his
5 opinion as well. The fact that somebody is qualified as
6 an expert doesn't necessarily mean you have to give his
7 testimony any greater weight than any other witness that
8 you hear in this case. You listen to what he has to say
9 and you give his testimony as much weight or as little
10 weight as you think it deserves, based on all of the
11 evidence that you have heard and will hear throughout the
12 trial. All right? You may resume.

13 MR. BANNON: Thank you, Your Honor.

14 BY MR. BANNON:

15 Q. Mr. Lynch-Stanley, in the early 2000s as a part of
16 your practice, were you part of the team that treated
17 **Complainant**?

18 A. Yes. I was director of the program. It was my
19 program, so I was supervising people who directly treated
20 him as well as sitting in on several sessions and
21 participating in some family sessions.

22 Q. Okay. To your knowledge, why was **Complainant**
23 referred to your counselling services?

24 A. To the best of my recollection, what I recall is
25 that he was participating in a lot of sexual acting out

1 behavior. He had been touching other children. There
2 was some other aggressive behavior, such as lying and
3 stealing. I also believe that there was some fire
4 setting that had gone on too at some point that I
5 actually have in my notes.

6 And so there -- and, again, there is more of the
7 sexual compulsive nature of why he was sent to me, and so
8 that is what we specialized in in my agency.

9 Q. Okay. Do you recall whether there was
10 inappropriate urinating as part of the reason he was
11 referred to you for treatment, or feces?

12 A. I don't recall that. I don't have that in my
13 notes or past testimony, so I'm not aware of that,
14 specifically.

15 Q. Okay. And --

16 A. I am aware of feces. I was aware that he was
17 spreading some feces, though, in the school bathroom.

18 Q. And in your counselling and your group's
19 counselling of ^{Complainant}, did you come to learn that he had
20 been sexually abused?

21 A. It's my understanding that he disclosed that, yes.

22 Q. Okay. And when you're treating the victim of
23 sexual abuse, sort of how do you attack the victim of
24 sexual abuse? What do you do to try to get to the bottom
25 of the treatment?

1 A. The first thing I do is I really look at the
2 symptoms. I'm not there to -- I don't go into a case
3 looking to say, well, is there sexual abuse, is there not
4 sexual abuse? I go into the case saying, what are the
5 symptoms? What are the behaviors? I treat the
6 behaviors. It's what I do in my practice. It's what my
7 training is.

8 So I look for what the symptoms are, and so as I
9 look at symptoms, I try to make meaning of symptoms, what
10 is the meaning of the behavior, so in trying to make
11 meaning of it, we look to see where the origins of it
12 came from. As we break down to where maybe the origins
13 came from, that is when we may find out that the person
14 has been sexually victimized, but I'm really not looking
15 for sexual victimization. It may be a number of
16 different things that have caused the origin of sexual
17 acting out.

18 There can be poor sexual boundaries in the home.
19 There can be -- such as viewing pornography or a father's
20 pornography. They could be observing explicit sexual
21 behaviors on a regular basis, you know, between family
22 members. There could be molestation that has gone on
23 somewhere else in the family that they have observed or
24 they may have been molested themselves, but I'm looking
25 for some type of sexual boundary type issues that could

1 have occurred, so I want to be clear that I'm not on the
2 hunt looking for sexual abuse.

3 Q. Okay. And so you said you're looking for
4 symptoms.

5 A. Right.

6 Q. Okay.

7 A. Treating symptoms.

8 Q. So in the treatment of **Complainant**, what symptoms
9 did you and your team observe?

10 A. The biggest thing that I remember that we tried to
11 treat was the sexually compulsive behavior, again, which
12 was the touching other kids and some more of the
13 aggressive lying and stealing type of behaviors.
14 Stealing is -- especially when you start to suspect or
15 find out that there has been molestations, they have been
16 victimized sexually, stealing is very metaphoric of
17 sexual abuse.

18 So what happens is when someone is molested,
19 something has been stolen from them, they've stolen their
20 innocence, so often you'll see kids, especially females
21 will actually do much more stealing and shoplifting as
22 adolescents who have been molested, but you'll see it in
23 boys as well.

24 Q. Sort of based on what you observed, the symptoms
25 as you recalled them in **Complainant**, and the knowledge

1 that he disclosed sexual abuse, is it your opinion that
2 ^{Complainant} was sexually abused?

3 A. It appeared that way, and, basically, it fit, in
4 terms of his behaviors of what he was doing and how he
5 was acting out, and they seems to be consistent with the
6 disclosure he was making about that and discussing about
7 that, but I don't -- I was probably more involved in
8 treating the symptoms and focussing on the symptoms more
9 than I was about trying to uncover sexual abuse.

10 Q. Okay. And can you tell me a little bit about what
11 post-traumatic stress disorder is.

12 A. Post-traumatic stress disorder is the reaction of
13 a victim to the trauma, and it's an extreme reaction.
14 Typically the most common type of reaction to that is
15 disassociation. That is where someone will actually
16 completely tune out to what is around them.

17 Initially PTSD came from war veterans, so they
18 tuned out what was around them or somehow something would
19 trigger them and remind them of that traumatic event, so
20 one of the things that is important is to understand
21 maybe what triggers are for people in terms of how they
22 might react. So a trigger, for instance, of someone who
23 might be molested would be that they may smell a cologne
24 that was similar to the person who molested them, or a
25 person might make a saying that would be similar to what

1 the perpetrator had said to them, so then there might be
2 a behavior that would be associated with that trauma,
3 such as extreme anger, depression, withdrawal, things
4 like that.

5 It's important to recognize sometimes where those
6 behaviors would come from, because, obviously, things
7 like withdrawal, explosive behaviors can come from any
8 number of things, so what we try to do is when we get
9 those behaviors is figure out, well, what was your
10 thought prior to you screaming at your teacher, you know,
11 swearing, you know, indiscriminately as a ten-year-old or
12 11-year-old boy, something like that, so you would find
13 out what the trigger is. It might be, well, at that
14 point I was thinking about -- I was thinking about tennis
15 shoes. And then you say, Well, tennis shoes?

16 And then they might say, Yes, and I was
17 remembering, and they might actually describe tennis
18 shoes that a perpetrator was wearing. So those are the
19 types of things that could be a trigger that would cause
20 some types of behavior.

21 Q. And so what you seem to be saying, which I know
22 you said sometimes it can be sort of dissociative
23 reaction, but can it also be a violent reaction?

24 A. That is what I'm explaining right there. You have
25 the disassociation when you're tuned out, but also you

1 kind of get woken up. A trigger will come, and that
2 trigger reminds you of the traumatic event, and at that
3 point there may be explosive behavior. There would be,
4 like I said, an anger outburst or some cussing or
5 yelling, something that is what we call labile. You go
6 from a very low level to a very high level very quickly,
7 and sometimes that is misdiagnosed as bipolar in a manic
8 swing, but often it's labile behavior in terms of being
9 triggered by an event that would cause someone to have an
10 extreme reaction in a very short period of time.

11 Q. Okay. So based on you and your team's treatment
12 of **Complainant**, do you have any opinion as to whether or
13 not **Complainant** was suffering from post-traumatic stress
14 disorder?

15 A. He appeared to have some symptoms of that. It's
16 really not under my realm to make diagnoses. I have to
17 make diagnostic impressions sometimes.

18 As far as a clinical social worker, I make a
19 diagnostic impression. Psychologists and psychiatrists
20 are more clearly trained in making a definitive
21 diagnosis, so anyway, in our training as clinical social
22 workers, we're trained to treat symptoms.

23 So I can take a general idea and have an
24 impression of a general diagnosis and then try to treat
25 some aspects of that, but I try to be careful to say,

1 This is definitely PTSD, or, This is definitely a major
2 depressive disorder. I have opinions on that, but I
3 don't make them to be ironclad. That is really position
4 of psychologist or psychiatrist.

5 Q. Thank you, sir. And could you just tell me a
6 little bit about what is delayed disclosure in a sexual
7 abuse setting?

8 A. Delayed disclosure is exactly as it says. It's
9 when someone delays disclosing what occurred to them, and
10 there's many reasons for that.

11 Q. Could you tell us some of those reasons.

12 A. Well, there's different reasons. One of the --
13 this is where it gets into all the different aspects of
14 sexual abuse, so I guess this is rather lengthy.

15 One of the things that causes delayed disclosure
16 is shame. People are ashamed of what has happened, and
17 one of the reasons they feel so ashamed is because in
18 atypical -- there is no real clear typical, but if you
19 were to take a generalization of child molestation, the
20 child molester basically comes down on the same level as
21 the victim.

22 And what they do is they create a relationship
23 where they feel that the two of them are in there
24 together, so to speak, so what happens is the child
25 starts to feel that they're participating in the sexual

1 act to the same level and to the same responsibility as
2 the perpetrator. This is done with comments such as, Do
3 you want me to stop, or, Does this feel good, or, Am I
4 hurting you?

5 And, of course, the kid would sit there and be
6 confused, not know what to say, and typically they
7 wouldn't say stop. They are fearful to say stop. They
8 want the approval of this person, so it's typically not
9 always a very violent act, so on one level there is much
10 shame.

11 There's also shame coming because in the
12 molestation there is typical physical gratifications.
13 This is probably one of the most important aspects I
14 learned from Jan Hindman. The physical pleasure, there
15 is so much guilt that comes from that. You feel
16 responsible, Gosh, I liked it. I didn't stop it, so it
17 must be my fault too, so that shame keeps people from
18 disclosing. Probably the other area of nondisclosure
19 that goes on is intimidation.

20 Now, that sounds strange because I just said we
21 talked about a cooperative type of event; however, what
22 often happens is there will be a difference between how
23 the perpetrator is with the child sexually, which will be
24 very much on the same level, but then they'll be very
25 different on an adult level, whether they're a parent, a

1 relative, a neighbor. They may be very authoritarian.
2 They may be very harsh. They may actually hit people, so
3 the child will see this person has the ability to hurt
4 someone, and so at that point -- or intimidate, so at
5 that point they're fearful to tell as well.

6 So the things that typically cause delayed
7 disclosure will be either the sexual shame, or it can be
8 some type of intimidation or fear of what is going on,
9 whether it's physical or even emotional such as, you
10 know, if you tell, then this happens typically in
11 families. If you tell, then your mother won't have any
12 money, and I'll leave and then you wouldn't be able to
13 live, those types of things, and this is how dependency
14 gets created.

15 Q. Okay. And is there any correlation in your
16 opinion between sort of the length of the delay and the
17 disclosure and sort of shame felt by the child?

18 A. Well, typically the longer there is in the delay
19 of disclosure, typically it's more extensive abuse. It's
20 always a better sign if someone has been molested and
21 they come out five minutes after it's occurred and say,
22 you know, Mommy, so and so was just touching my bottom or
23 playing with my vagina. Obviously, that shows the child
24 is not intimidated. The child knows it's wrong. The
25 child is not as confused, so obviously they're disclosing

1 it right away and it's not usually as severe.

2 Again, the most severe part of molestation is
3 typically not the touching act itself, it's all of the
4 things around it, the shame, the intimidation, those
5 types of things. So the longer it takes to disclose,
6 that typically means there has been more shame, that
7 there has been no intimidation, that there is more
8 coercion in different forms, so, again, you can't say
9 that in every single case, but by and large, that would
10 be the way that I would look at that or treat that.

11 Q. Okay. Could an interfamilial relationship between
12 the victim and the abuser cause a heightened sense of
13 shame in the victim?

14 A. It could cause a heightened sense of shame and a
15 heightened sense of fear; again, the fear of losing a
16 father or, again, a family member. It could be a
17 brother, uncle, aunt, that type of thing. It could be
18 the fear of income. It could be the loss of approval.
19 You know, typically with a parental figure, you know, you
20 want to look up to them and do that, and then there is
21 confusion as to why did someone do something wrong,
22 they're loving me and doing that? So there is shame and
23 confusion on that. Confusion is the other aspects of
24 shame that creates so much trauma within the children.

25 Q. All right. Thank you.

1 MR. BANNON: Beg the Court's indulgence.

2 Your Honor, no further questions for

3 Mr. Lynch-Stanley at this point.

4 THE COURT: Cross?

5 MS. LOVELL: Yes, thank you.

6 CROSS-EXAMINATION

7 BY MS. LOVELL:

8 Q. Good afternoon. You have spoken that you treat
9 symptoms; isn't that correct?

10 A. Basically, that is where I start off, by treating
11 symptomatology, yes.

12 Q. And you treat those symptoms with an eye towards
13 helping the child overcome; isn't that correct?

14 A. My goal is to reduce symptoms, reduce symptoms and
15 have the child become more healthy in general as a child.

16 Q. And by treating symptoms, you're then looking to
17 determine the root of them so that you can help the child
18 become healthy; isn't that correct?

19 A. At times. I'm looking for the roots of those.
20 Sometimes we get to the root of it, symptom we don't. It
21 just depends on how far you go back each time.

22 Q. Have you found many roots to not always be a
23 sexual assault?

24 A. There has been times. Yes, there are different
25 types -- like I say, there is typically a boundary

1 violation somewhere in there. If there is sexual
2 symptoms of acting out, then typically there will be a
3 sexual boundary that has been violated, so it may not be
4 sexual abuse, per se. It could be another sexual
5 boundary, you know, such as viewing -- like, maybe there
6 is pornography being viewed, some type of other symptom
7 that maybe would be abusive but not particularly a
8 molestation abuse.

9 Q. Would that also follow that it could happen
10 because of contention in a divorce?

11 A. Typically not. Typically, there are other
12 symptoms of that. There might be more anger. There
13 might be more depression, taking sides and that type of a
14 thing. I wouldn't necessarily see sexual acting out
15 coming from -- especially, again, the younger the child,
16 the more likely there has been a sexual victimization in
17 the acting out. So you don't always see young divorced
18 kids sexually acting out unless there has been sexual
19 boundaries violated. That would be fair. It's possible,
20 but it would be rare.

21 Q. And some of these behaviors, is it true that some
22 of these behaviors or symptoms as you see them -- they
23 overlap in their causes as you've just explained; isn't
24 that correct?

25 A. Oh, sure. As you have a child that is depressed,

1 you know, that depression could come from any number of
2 things. It's certainly an element of sexual abuse, but
3 it could be an element of divorce or other things as
4 well.

5 Q. And PTSD that you spoke of, you spoke of it being
6 the result of a trauma; isn't that correct?

7 A. Yes.

8 Q. And would one person's trauma not be another
9 person's trauma; isn't that correct?

10 A. Yes. Something that may be traumatic, extremely
11 traumatic, for one person may not be as traumatic to
12 someone else. That would be accurate.

13 Q. The delayed disclosure that you spoke of, isn't it
14 true that there are -- when you spoke about delayed
15 disclosure, you spoke of a long period. What did you
16 mean by a long period of delayed disclosure?

17 A. Well, really, the general rule for me in working
18 with a child and they're disclosing is that it's never
19 too late to disclose. If they're disclosing to me at
20 that point, I'm glad they're disclosing at that point
21 because that's better than them waiting until the next
22 day.

23 So it's somewhat relative in terms of what a long
24 disclosure is. I would say a long disclosure in general
25 might be anything longer than two or three months. I

1 mean, some disclosures -- like, some disclosures occur
2 within minutes. Some disclosures occur after two or
3 three months. Some occur after two years or 20 years.

4 Q. Wouldn't you agree that won't be a delayed
5 disclosure?

6 A. After 20 years?

7 Q. After two or three minutes.

8 A. No, that would not be a delayed disclosure.

9 Typically, in general, I would think of a delayed
10 disclosure, that would be probably -- two or three months
11 would be a fairly long delayed disclosure. Maybe a month
12 would be a shorter delayed disclosure.

13 Q. What about three years?

14 A. That would be a fairly long delayed disclosure.

15 Q. Okay.

16 MS. LOVELL: No further questions.

17 THE COURT: Redirect?

18 MR. BANNON: Just briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. BANNON:

21 Q. Does the length of the delay in the disclosure
22 have any -- in your opinion, does it erode the
23 credibility of the disclosure?

24 MS. LOVELL: Objection, Your Honor.

25 THE COURT: Overruled.

1 THE WITNESS: No, it really doesn't. People
2 disclose at different times. Different things, again,
3 triggers and things like that, can come up that cause
4 people more symptoms, so -- and the other part of PTSD,
5 the symptoms come up and PTSD occurs at different times
6 when the trauma gets reenacted in some way and starts to
7 overtake the person.

8 PTSD is really the body's efforts to try and
9 cope with the trauma that's occurred, and then the body
10 isn't coping anymore. And so what happens is that's when
11 you see these more outlandish types of behaviors. So you
12 might have someone who doesn't show symptoms of sexual
13 abuse for a year, six months, eighteen months, and then
14 all of a sudden, something triggers them and reminds them
15 of the abuse and helps to reenact it in some way, and
16 then they start to act out and do those things.

17 So that's why you have disclosures that occur
18 at different times as well, so I never see it as a
19 credibility or non-credibility thing. I think when
20 you're looking at credibility, you're looking for other
21 types of things, but not necessarily the length of
22 disclosure.

23 MR. BANNON: Thank you. No further
24 questions.

25 THE COURT: Recross?

1 MS. LOVELL: No, Your Honor.

2 THE COURT: All right. You may step down.
3 Any further witnesses from the state?

4 MR. BANNON: No, Your Honor. At this time
5 the state rests.

6 THE COURT: All right. All right.

7 Folks, we are going to take a break right now
8 while we take up a matter of law, and we're going to
9 discuss what our time frame is for the rest of the
10 afternoon. Again, you've heard the state's evidence now
11 but it's still improper for you to begin your
12 deliberations or discussions about the case, so go back
13 to the jury room and we'll have you back here in a few
14 minutes for a plan for where we're going the rest of the
15 afternoon. Thank you.

16 (In open court, jury not present.)

17 THE COURT: All right. Mr. Smith, you need
18 to stand up a second.

19 We're at the point in the trial now where the
20 state has presented their evidence. In a second your
21 lawyer is going to make a motion for a directed verdict,
22 but I can tell you, based on the evidence that we've
23 heard, it will more than likely be denied, but I wanted
24 to give you a little heads up so you can be thinking
25 about the answer to my question that I'm going to talk

1 with you about.

2 It's at the point where you have to make a
3 decision as to whether or not you want to present a
4 defense and as part of that defense do you want to
5 testify and tell the jury your side of the story. You're
6 not required to testify. You're not required to put a
7 defense up. As you heard me tell the jury earlier, the
8 state has to prove your guilt beyond a reasonable doubt.
9 You don't have to prove your innocence; however, you are
10 entitled to present a defense if you want to, and as part
11 of that defense, you are entitled to testify if you want
12 to, and if you testify, the -- you'll be sworn in, your
13 lawyer will ask you questions first, but the state will
14 then have the right to cross-examine you.

15 I don't know if you have a prior record, but
16 they may also have the right to discuss your prior record
17 with you to the extent that I would allow it to bear on
18 credibility.

19 Again, I haven't reached that threshold yet
20 as to whether or not we have to make that decision, but
21 we'll discuss that in a moment. Nevertheless, if you
22 want to testify, you can testify, but you will be subject
23 to cross-examination, and if you have a prior record,
24 then I will discuss with the lawyers what your prior
25 record is and as to whether or not the state will be

1 allowed to cross-examine you about that as well, or
2 mention that on cross-examination.

3 If you don't want to testify, you don't have
4 to. That's a constitutional right that you have, and you
5 also have the constitutional right, if you don't want to
6 testify, to have me instruct the jury that they are not
7 to consider that in any way, shape, or form during their
8 deliberations. They're not even to discuss that matter
9 during their deliberations.

10 So having said that, we are at the point now
11 where you have to make some decisions. And so first you
12 have to make the decision as to whether or not you want
13 to call any witnesses and then, second, you have to make
14 a decision as to whether or not you want to be one of
15 those witnesses.

16 So why don't you have a seat there for a
17 second and talk to your lawyer here in a minute. I'm
18 going to give her the opportunity to make a directed
19 verdict motion, and then we'll see where we're at after
20 that, so Ms. Lovell?

21 MS. LOVELL: Thank you, Your Honor.

22 Yes, Your Honor, the defense makes a motion
23 for directed verdict in that the state did not prove its
24 case in general and the support for that is they were --
25 they did not show the location by testimony of ^{Complainant} of

1 Beaufort County for the location of where the assault
2 allegedly occurred and that the battery that the state
3 alleges occurred, there was no further proof of that
4 other than the testimony.

5 THE COURT: All right. Well, there was
6 testimony, I recall, that the alleged assault did take
7 place in the father's trailer, which there was testimony
8 that that trailer was in Beaufort County. So there is
9 also evidence that there was an assault that took place
10 and it was a sexual assault and it was of a minor under
11 the age of 11, so they have met their burden on directed
12 verdict, so your motion is denied.

13 MS. LOVELL: Thank you. I also renew all
14 objections I have made up to this point.

15 THE COURT: All right. Have you talked to
16 your client about calling any witnesses and whether or
17 not he wants to testify?

18 MS. LOVELL: We have spoken for the past
19 several months about our defense, and I understand he
20 does not wish to testify, and we will not be calling any
21 witnesses.

22 THE COURT: All right. Well, then I will
23 bring the jury back in, and tell them that you have
24 decided not to call any witnesses on -- in your defense
25 and that we will -- because one of them needs to be gone

1 by 5:00 and it's now a quarter to 4:00, I'll dismiss them
2 for the afternoon.

3 We will go over the jury charges that we
4 prepared so far, and then we will come back tomorrow
5 morning, do the closing arguments, I'll charge them on
6 the law, and then we will submit it to them for their
7 consideration.

8 Does that work?

9 MS. LOVELL: Yes, Your Honor.

10 THE COURT: Mr. Bannon?

11 MR. BANNON: Yes, that works. Thank you,
12 Your Honor.

13 THE COURT: All right. Bring the jury back
14 in.

15 (In open court, jury present.)

16 THE COURT: We've reached a point in the
17 trial now where we have concluded all of the evidence. I
18 have talked with the defense, and they have informed me
19 that they do not wish to call any witnesses on the
20 defendant's behavior, so you have heard all of the
21 evidence that you're going to hear in the trial.

22 Now, the next step in this is we will have
23 closing arguments, and I'll charge you on the law and
24 you'll retire to consider your verdict; however, because
25 of the lateness of the hour and the fact that we needed

1 to break by 5:00 today, we are going to bring you back in
2 the morning. We are going to do our jury charge
3 conference that we do right now to iron out and make sure
4 we're all on the same page as to what I charge you on the
5 law, this little thing we go through, and so we will
6 start in the morning at 9:30 with the closing arguments
7 and then I will charge you on the law.

8 Now, despite the fact you have heard all of
9 the evidence in the case, it is still improper for you to
10 begin deliberations, so when you go home tonight, don't
11 talk to anybody about the case still. Don't talk with
12 each other; don't comment on demeanor; don't talk about
13 anything in the case. It's kind of like talking about
14 what white elephant that's in the room when somebody says
15 to you, Don't think about a white elephant, and then, of
16 course, that's all you can think about.

17 Well, I'm telling you don't talk about this
18 case, so just don't talk about it, despite the fact that
19 you want to. It's only human nature, but, again, until
20 you've heard the closing arguments -- and, most
21 importantly, I haven't told you what the law is on this
22 case. It's not proper for you to begin thinking about it
23 and discussing it in a matter that would be considered
24 deliberations or discussions, so go home this evening,
25 enjoy your evening, if you would be back in the jury room

1 by 9:30, and we should be able to get started right at
2 that time. All right?

3 Thank you for your patience today. We'll see
4 you tomorrow morning.

5 (In open court, jury not present.)

6 THE COURT: All right. She's got a copy of
7 the jury instructions. I understand they have a plea
8 they want me to do. Y'all study the plea, and we'll come
9 back and do the charge conference.

10 (Recess taken.)

11 THE COURT: We're back on the record on the
12 state versus Smith. Anything from the state on these
13 charges?

14 MR. BANNON: Well, Your Honor, Ms. Lovell and
15 I were just considering the possibility of there was
16 nothing mentioned regarding Lyle, the Lyle evidence in
17 the body of the charge. I don't know if that was just
18 a --

19 MS. LOVELL: Did you intend to? I have one I
20 got out of the Charleston bar.

21 THE COURT: Okay.

22 MS. LOVELL: I can't print it out. I could
23 bring it up and show it to your clerk. Maybe you do have
24 one. It's considered prior record of defendant, Lyle --
25 limited for Lyle.

1 THE COURT: All right.

2 MS. LOVELL: Do you have that?

3 THE COURT: That would be prior bad acts.

4 MS. LOVELL: Yes. Well, it's got brackets
5 for the identification of prior bad acts. I modified it
6 to suit what I thought was appropriate.

7 THE COURT: All right. That's no problem.

8 MS. LOVELL: So if you would consider
9 including that, that would be proper.

10 THE COURT: All right. We'll add that in
11 there.

12 MR. BANNON: I certainly think it would be
13 appropriate because there has been lots of Lyle
14 testimony.

15 THE COURT: All right. Anything else?

16 MR. BANNON: Not from the state.

17 THE COURT: Anything from the defense?

18 MS. LOVELL: No, Your Honor. Thank you.

19 THE COURT: All right. We'll add that one in
20 there and print out a fresh copy, have it for you in the
21 morning, and we'll get started at 9:30. How long do you
22 think you'll need for your closing?

23 MR. BANNON: Certainly no more than 20
24 minutes.

25 THE COURT: Okay.

1 MR. BANNON: Probably 15, 10, 15.

2 THE COURT: You want him to open on the law
3 or just allow him to close?

4 MS. LOVELL: He can waive it.

5 THE COURT: All right. We'll see y'all at
6 9:30 then.

7 (Recess taken.)

8 (September 21, 2011.)

9 THE COURT: Did y'all have a chance to look
10 at the jury charges? Just the addition on the Lyle I
11 think is the only charge from yesterday.

12 MR. BANNON: Yes, Your Honor. There is no
13 objection.

14 THE COURT: Anything from the defense?

15 MS. LOVELL: No, Your Honor.

16 THE COURT: We were set to go with the
17 defense arguing first, and then the state, and I think we
18 all agreed that this copy of this indictment was all
19 ready to send back. It's the one with no charge.

20 MR. BANNON: Yes, sir.

21 THE COURT: All right. Well, if we're ready
22 to go then, let's bring the jury in.

23 MR. BANNON: Your Honor, we were just
24 wondering -- it was my impression I was going to go
25 first.

1 THE COURT: That's fine. She can require you
2 to open on the law, and then you just talk, but you have
3 the right to close, if you want to open and close.

4 MR. BANNON: If given the choice, I would
5 certainly choose to go last.

6 MS. LOVELL: Then I'll go first.

7 THE COURT: Is that okay?

8 MS. LOVELL: Yes.

9 THE COURT: The defense has the right to say
10 the state has to open on the law. And he can get up and
11 say the charge is criminal sexual conduct with a minor
12 and set down. As a practical matter, they usually waive
13 it.

14 (In open court, jury present.)

15 THE COURT: Welcome back, folks, and thank
16 you for your patience this morning. I've been driving
17 back and forth from Charleston, and it's raining like
18 cats and dogs back there and that slows down all the
19 traffic, but we got here, and so I apologize for a little
20 bit of a delay.

21 We're to the point of the trial now where
22 we're in the final stage and we're going to have the
23 closing arguments and then I'll charge you on the
24 over with you the -- how you would write out
25 the back of the indictment, and then

1 and consider what your verdict will be.

2 Now, the procedure that we follow is, again,
3 a little bit in reverse of what we've been doing. The
4 state has the burden of proof, and so they've been
5 presenting their case first. Our rules allow them to,
6 because they have the burden of proof, close last, and so
7 we will hear from the defense actually first on the
8 closing argument, and then the state will have their
9 closing argument.

10 Now, let me remind you that, again, the
11 lawyers are just commenting upon the facts, and they will
12 be commenting upon the law, as they have a good idea that
13 I'm going to charge you, and they will be arguing to
14 attempt to persuade you to render a verdict on their
15 behalf. The important thing to remember is the lawyers
16 are not testifying. They're only commenting about the
17 evidence, and so keep that in mind.

18 They are not witnesses, and what they say is
19 not to be considered by you as evidence. Evidence is
20 what you heard from the witness stand and a few
21 evidentiary items, documents and pictures and things like
22 that. That is evidence.

23 All right? So we will now proceed with
24 Ms. Lovell going first. So, Ms. Lovell, if you're ready,
25 you may proceed.

1 MS. LOVELL: Thank you. May it please the
2 Court, assistant solicitor Mr. Bannon, ladies and
3 gentlemen of the jury: In my opening yesterday, I asked
4 you to look for a light to find the truth, and you looked
5 for that light in the testimony of the state's witnesses.
6 Did you find it? Has the testimony illuminated the
7 shadows and the dark corners? No. The state did not
8 meet its burden of proving Mr. Smith committed this
9 crime. Did the state fill in the gaps in any
10 inconsistencies in the evidence? No light here. Did you
11 see or hear about any physical evidence on ^{Complainant}? No.
12 He testified that he was penetrated anally and that it
13 hurt, yet he did not seek any medical attention by
14 telling his aunt or anyone else.

15 Mrs. Cindy Solak testified that her first
16 priority was dealing with ^{Complainant}'s health when he moved in
17 with her in 2001, yet she didn't document any medical
18 injuries, and he didn't tell anyone for three years,
19 until 2003. That's a long time to wait if something so
20 horrible had happened. His memory of these events
21 naturally dim over time, such that he had to be reminded
22 by the state of his testimony from another date. No
23 light here.

24 You heard from his sister, Jacquelyn, and his
25 brother, Josh, and the judge will instruct you on the law

1 regarding these witnesses, but, briefly, their testimony
2 is not to be used to convict Mr. Smith on this crime.
3 They are not the victims of the crime for which Mr. Smith
4 is charged today. No illumination here.

5 You heard Jacquelyn say that she was close to
6 her brothers, yet she didn't tell them, nor did ^{Complainant}
7 tell her. All three siblings lived together with their
8 mother when the alleged abuse happened. They testified
9 they also lived with their mother's boyfriend and also in
10 that house was his son.

11 The children moved in with Aunt Cindy in
12 2001, after the incident of the abuse allegedly happened.
13 The state provided an expert witness, Mr. Tod Stanley.
14 Did his testimony help you find the light? He testified
15 that he treats symptom. By treating these symptoms, they
16 may discovery the source of the symptoms. The cause and
17 the root of sexually acting out is not always sexual
18 molestation. There may be other reasons for these
19 symptoms. No light.

20 The state's light has gone out. You are left
21 with a dark crime that has not been solved. Then you
22 must find Mr. Smith not guilty. Thank you.

23 THE COURT: All right. Mr. Solicitor?

24 MR. BANNON: Thank you, Your Honor.

25 May it please the Court and counsel, when we

1 talked yesterday, I told you that this was a case about
2 silence, and it was a case about silence, but now the
3 silence has been broken. I told you that **Complainant**, a
4 very brave young man, would take the stand and that he
5 would find the strength within him to tell you what
6 Arthur Smith did to him, and that is exactly what
7 happened.

8 **Complainant** took the stand, and he was able
9 to tell you what happened. Now, what ^{Complainant} told us was
10 that Mr. Smith did these things to him while he was
11 between the ages of six and eight and while the family
12 was living in Bluffton. He wasn't able to remember
13 exactly where, but he knew that it was down here in
14 Beaufort County. We know from Cindy that Mr. Smith's
15 trailer was located in Bluffton, and that is where the
16 family was living, and Josh, ^{Complainant}, and Jacquelyn would go
17 over there on Wednesdays and for the weekend, and in that
18 time range, this is where the abuse occurred.

19 If you take a look at this -- I'll move it a
20 little bit closer -- this is essentially what ^{Complainant} told
21 us, all right? He was born on [REDACTED] of [REDACTED], so he
22 would have been six years old on [REDACTED] of [REDACTED]. He
23 turned eight on [REDACTED] of 2000. The time alleged in
24 the indictment is between May the 1st of 1999 and May the
25 31st of 2000.

1 He told us that the abuse was occurring
2 multiple times, that this abuse was occurring constantly
3 between these times. This is the evidence that you heard
4 in this case. This is what ^{Complainant} told you.

5 Now, just like Ms. Lovell said, the judge is
6 going to charge you on the law, and just like Ms. Lovell
7 said, there is some evidence in this case called Lyle
8 evidence, and that basically consists of ^{Complainant}'s older
9 brother Joshua's testimony and his younger sister
10 Jacquelyn's testimony.

11 Now, we're not here to try Mr. Smith's abuse
12 of them, we're here to try his abuse of ^{Complainant}, but you
13 can consider their testimony for a couple of different
14 things: You can consider it for the source of the abuse,
15 the identity of the person who was the abuser, and the
16 mean and manner in which the abuse occurred. That's what
17 you consider it for, use it as a tool to help you decide
18 the charges against ^{Complainant}. Use it as a tool to decide
19 whether or not you believe ^{Complainant}'s testimony. That's
20 what it's there for.

21 One other thing that the judge is going to
22 talk to you a little bit about is something called
23 reasonable doubt, and what he's going to tell you is that
24 you don't reach reasonable doubt until you're firmly
25 convinced, you're firmly convinced of someone's guilt,

1 and it's the kind of firmly convinced where you wouldn't
2 hesitate to act in your ordinary life, if that makes
3 sense. So this isn't a situation where any and all
4 strange possibilities can come flooding into your mind.
5 This isn't a possibility where fantastic doubts or some
6 sort of imagined doubt can be allowed to creep in.

7 What you think about is what you heard from
8 the witness stand and whether or not that testimony left
9 you convinced in a situation where you would act in your
10 ordinary lives to think that this man is the man who
11 abused **Complainant**. That's what the standard is.

12 Essentially, if I were to run into you guys
13 on the street and present to you the case that we just
14 presented here, as if I presented that case and you were,
15 like, well, that fellow is guilty, that's the same
16 standard that you bring in here, whether or not you're
17 firmly convinced of his guilt. That's what we're talking
18 about, no higher standard than that.

19 And just like the judge said, what Ms. Lovell
20 said and what I am saying to you now is not evidence.
21 The evidence that you heard came from the witness stand,
22 and the only evidence that we heard in this case is that
23 **Complainant** testified that his father molested him.

24 Now, he testified that he was molested in
25 exactly the same fashion as his older brother Josh was,

1 that he forced him to engage in anal sex and he forced
2 him to engage in oral sex. He was molested in virtually
3 the same way his younger sister was, forced to engage in
4 oral sex, forced to engage in anal sex, anal penetration.
5 ^{Complainant} was molested in exactly the same way as his older
6 brother was and his younger sister was. That is the
7 evidence that you heard.

8 We also learned about the way that Mr. Smith
9 likes to prey on his victims. His victims are his
10 children. He likes to molest them between the ages of
11 six and eight years old, because what we heard from the
12 witness stand is that Joshua said he was molested between
13 the ages of six and seven years old, and he's a couple
14 years older than ^{Complainant}. ^{Complainant} says he was molested
15 between the ages of six and eight years old. Jacquelyn is
16 a year older than ^{Complainant}, and she was molested between the
17 ages of six and seven. This is exactly the area where
18 Mr. Smith likes to find his victims. That's what he
19 does. That's how he operates.

20 Now, I'll go ahead and tell you, we didn't
21 hear testimony from six- to eight year-old children, we
22 heard it from young adults, and that is because ten years
23 has gone by. The small, abused, frightened children have
24 grown up. But let me remind you, this is what ^{Complainant}
25 looked like at the time when Arthur Smith was doing

1 this to him. We heard Cindy Solak testify that he wasn't
2 quite -- he wasn't yet five feet tall. He wasn't even
3 100 pounds.

4 What I'll tell you is most certainly
5 Mr. Smith is a coward. Do you think that Mr. Smith would
6 have the guts to try to do that with **Complainant** today?
7 Absolutely not.

8 This is a picture of Joshua Smith when he was
9 a little boy. This, Ms. Solak testified, was after they
10 had taken custody of the boys. Joshua was younger than
11 this when his father chose to molest him. Do you think
12 that Mr. Smith would have the guts to molest the
13 21-year-old Marine that came in and testified before you
14 today? Absolutely not. Because he is a coward. He
15 preys on the weak and the helpless.

16 This is a picture of Jacquelyn when she was a
17 little girl. This is roughly how she appeared when
18 Mr. Smith decided to try to molest her. This is how a
19 coward chooses his victims, and Mr. Smith is most
20 certainly that.

21 We also learned from the testimony today
22 about how Mr. Smith likes to operate once he's chosen his
23 victims. He isolates them. He takes them into his
24 bedroom where they're all alone, where there is no one to
25 help, no one to hear, no one to see. All this happens

1 behind closed doors. He makes them get undressed,
2 whether he undresses them or has them undress themselves.
3 He makes them perform a variety of sex acts when he has
4 them isolated and alone. He then insures their silence.
5 That's the way that he works.

6 He told Joshua Smith that he would hurt his
7 mother if he told anything. He told **Complainant** that he
8 would kill him or break his bones if he said anything,
9 and he told little Jacquelyn not to tell. Because this is
10 the world that Mr. Smith created for these children, a
11 world of fear and a world of shame. And now what we
12 heard from Mr. Lynch-Stanley is that he told us that
13 sometimes the amount of shame and the amount of fear can
14 contribute to how long children manage to stay quiet
15 before they can finally say what's happened to them. And
16 apparently he was saying that two to three months was --
17 that was a fair amount of time for a delayed disclosure.

18 **Complainant**, he had to hold on to that for
19 three years. How much fear and how much shame do you
20 think that Arthur Smith made ^{Complainant} feel? Now,
21 fortunately, Joshua, ^{Complainant}, and Jacquelyn were brave
22 enough to come in here today and to shine a light into
23 this world of shadow and fear that Mr. Smith has created.
24 Fortunately for us that has happened.

25 Now, I told you at the beginning of this case

1 that the defendant sat clothed in a robe of
2 righteousness. Well, now, you get to decide whether or
3 not that robe is really a cloak of shadows, and I tell
4 you that it is, because in Mr. Smith's world, the world
5 that we got to be taken to by Joshua, by ^{Complainant}, and by
6 Jacquelyn, that is a world where fear is a weapon and
7 silence is camouflage. And, ladies and gentlemen, what
8 the evidence has shown you and the evidence has given you
9 no other choice than to find Mr. Smith guilty. Thank
10 you.

11 THE COURT: All right. Would you mind taking
12 that easel down? All right.

13 Well, we've now heard the arguments, and so I
14 will charge you on the law that applies to the facts of
15 the case as you find them. As I told you, you're the
16 finder of the facts. I'm the judge of the law. Where
17 there is a discrepancy on facts, you are the sole judges
18 of the facts. You determine the credibility of witnesses
19 and how much weight to give the testimony of a witness
20 and you consider such things as whether a witness has a
21 bias, an interest, or a prejudice in the outcome of the
22 case. You can judge such things as appearance and
23 demeanor on the witness stand and the reasonableness of
24 their statements.

25 On the other hand, as I told you, I am the

1 judge of the law, so as part of that duty, I instruct you
2 on what the law is, and so if you have some idea of what
3 you think the law is or what you think the law ought to
4 be and it does not agree with what I now tell you that
5 the law is, you are obligated under the oath that you
6 took at the beginning of the trial to abandon this
7 preconception on your part and apply the law precisely as
8 I now charge it to you.

9 I want to remind you again about the fact
10 that the defendant was arrested and indicted for the
11 case, but that fact is not to be considered by you as
12 evidence in this case and cannot be considered by you as
13 evidence of guilt, nor does it create any presumption or
14 inference of guilt. The indictment is simply the formal
15 written instrument that contains the charges made against
16 the defendant. That is the document that puts him on
17 notice of what he is to stand trial for, and it gives
18 this Court jurisdiction to try this case.

19 The defendant pled not guilty to that
20 indictment, and that plea therefore cast a burden on the
21 state to prove that the defendant is guilty beyond a
22 reasonable doubt. A person charged with committing a
23 crime in this state and every state in this union, for
24 that matter, is never required to prove himself innocent.
25 This is an important concept of law, rule of law, in this

1 country. A defendant in this country who stands trial
2 never has to prove they are innocent. They are presumed
3 to be innocent of the crime they are indicted for unless
4 and until their guilt has been proven by evidence
5 satisfying you of that guilt beyond a reasonable doubt.

6 As I told you at the beginning of the trial,
7 this is not a mere legal theory. This isn't just a legal
8 phrase. This is a substantial constitutional right to
9 which every defendant is entitled, and this presumption
10 of innocence accompanies the defendant from the time he
11 is charged, throughout the trial, until you reach a
12 verdict of guilt based upon evidence satisfying you of
13 that guilt beyond a reasonable doubt.

14 We talked about reasonable doubt at the
15 beginning of the trial, and I again want to stress to
16 you, this burden of proof is on the state and it is to
17 prove the defendant guilty beyond a reasonable doubt,
18 and, as I told you about civil trials, some of you may
19 have been in a civil trial where that burden of proof is
20 only upon a party attempting to prove something. They
21 must prove that a fact is more likely true than not true,
22 such as by the greater weight or a preponderance of the
23 evidence, but in criminal cases, the state's burden of
24 proof is much more powerful than that. It must be beyond
25 a reasonable doubt.

1 Proof beyond a reasonable doubt is proof that
2 leaves you firmly convinced of the defendant's guilt.
3 There are very few things in this world that we know with
4 absolute certainty, and in criminal cases the law does
5 not require proof that overcomes every possible doubt.
6 If, based on your consideration of the evidence, you are
7 firmly convinced that the defendant is guilty of the
8 crime charged, then you must find the defendant guilty.
9 If, on the other hand, you think there is a real
10 possibility that the defendant is not guilty, then you
11 must give the defendant the benefit of the doubt and find
12 him not guilty.

13 Now, in a case, there are generally two types
14 of evidence presented at trial. There is direct evidence
15 and there is circumstantial evidence. Direct evidence is
16 the testimony of a person who claims to have actual
17 knowledge of a fact, such as an eyewitness, and this is
18 evidence which immediately establishes the main fact to
19 be proven. Circumstantial evidence, on the other hand,
20 is proof of a chain of facts and circumstances which
21 indicate the existence of a fact. It's evidence that
22 immediately establishes collateral facts from which a
23 main fact may be inferred.

24 Circumstantial evidence is based on inference
25 and not on personal knowledge or observation. The law

1 makes absolutely no distinction between the weight and
2 value to be given to either direct or circumstantial
3 evidence, nor is a greater degree of certainty required
4 of circumstantial evidence than of direct evidence. You
5 should weigh all of the evidence in this case, and after
6 weighing all of the evidence you are not convinced of the
7 defendant's guilt beyond a reasonable doubt, you must
8 find the defendant not guilty.

9 Now, I want to instruct you and emphasize the
10 fact that the defendant did not testify is not a factor
11 to be considered by you in any way in your deliberation
12 and in your consideration of the question of guilt or
13 innocence of the defendant. It must not be considered by
14 you in any manner whatsoever. A defendant in this
15 country has a constitutional right to remain silent, and
16 the assertion of this right must not be considered by you
17 in your deliberations. I repeat, under your oath, you
18 are to draw no conclusion whatsoever from the fact that
19 the defendant in this case did not testify.

20 The fact the defendant did not testify should
21 not even be discussed in the jury room. The burden of
22 proof, as I stated, is on the state. The defendant is
23 not required to prove his innocence. The burden remains
24 on the state to prove guilt beyond a reasonable doubt.

25 Again, your job is to judge the credibility

1 of witnesses who have testified. Credibility simply
2 means believability, and it's your job as jurors to
3 analyze and evaluate evidence and determine what evidence
4 convinces you of its truth. In determining the
5 believability of witnesses who testified in this case,
6 you may believe one witness over several witnesses or
7 several witnesses over one witness. You may believe part
8 of the testimony of a witness and reject the remaining
9 part of the testimony of that same witness.

10 You may believe the testimony of a witness in
11 its entirety or you can reject the testimony of a witness
12 in its entirety, and you may consider whether any witness
13 has exhibited to you any interest, bias, prejudice, or
14 other motive in this case. You may also consider the
15 appearance and manner of a witness while on the witness
16 stand.

17 I also talked to you during the trial about
18 the fact that our rules of evidence don't normally permit
19 witnesses to testify about opinions or conclusions. We
20 do make an exception for witnesses that we call expert
21 witnesses, and, again, those are witnesses who, by
22 education and experience, have become expert in some art,
23 science, profession or a calling, and they may be allowed
24 to state an opinion as to relevant and material matter in
25 which the witness claims to be an expert and may also

1 give you their reasons for that opinion.

2 You should consider an expert opinion
3 received in this case just like any other witness or any
4 other evidence, give it the weight that you think it
5 deserves. If you decide that the opinion of an expert
6 witness is not based on sufficient education and
7 experience or if you conclude that the reasons given in
8 support of the opinion are not sound, or that the opinion
9 is outweighed by other evidence, you can disregard that
10 opinion entirely.

11 An expert witness's testimony is to be given
12 no greater weight than that of other witnesses, certainly
13 because the witness was an expert, and, further, you're
14 not required to accept an expert's opinion even though it
15 is not contradicted.

16 You also heard evidence that the defendant
17 committed a bad act that is not the subject of a
18 conviction, other than the one for which the defendant is
19 now on trial. This testimony, if you conclude is true,
20 may only be considered by you on the question of identity
21 or common scheme or plan and for no other reason and no
22 other purpose. You may give this evidence the weight and
23 value, if any, which you find it should have on the sole
24 issue of identity or common scheme or plan.

25 You must not consider the evidence of the bad

1 act not the subject of a conviction as part of the
2 defendant's guilt of the charge we are trying today.
3 Again, the charge that we are trying today is criminal
4 sexual conduct with a minor. In order for the state to
5 prove to you beyond a reasonable doubt that the defendant
6 engaged in criminal sexual conduct with a minor, the
7 state must first prove beyond a reasonable doubt that the
8 defendant engaged in a sexual battery with the victim.

9 A sexual battery is defined as sexual
10 intercourse, cunnilingus, fellatio, anal intercourse, or
11 any intrusion, however slight, of any part of a person's
12 body or any object into the genital or anal openings of
13 another person, except when the intrusion is accomplished
14 for medically recognized treatment or diagnostic
15 purposes.

16 The state must then also prove beyond a
17 reasonable doubt the victim was less than 11 years old at
18 the time of the sexual battery. I charge you that
19 consent, willingness, indifference, or ignorance on the
20 part of the minor, if any, as to what was taking place
21 does not affect the charge of criminal sexual conduct
22 with a minor, because a person under the age of 14 cannot
23 legally consent to sexual intercourse.

24 Finally, I want to charge you that in
25 determining the guilt or innocence of the defendant, you

1 cannot consider any possible penalty for a particular
2 crime. Punishment for a crime is for me to determine and
3 should not be considered by you in any way whatsoever in
4 arriving at a fair and impartial verdict as to the guilt
5 or innocence of the defendant.

6 Now, Madame foreman, I'm going to send the
7 indictment back with you, and I read you the indictment
8 at the beginning of the trial, and I've emphasized this
9 is not evidence. It's going back for the sole purpose of
10 writing what the verdict is on the charge. The verdict
11 has to be unanimous, in other words, all 12 jurors must
12 agree on what the verdict is, and there are two possible
13 verdicts in this case. There is guilty and there is not
14 guilty.

15 When the jury has unanimously agreed on what
16 the verdict is, Madame foreman, right under here where it
17 says verdict, you will write it in, guilty or not guilty,
18 sign it, date it, let the bailiffs know you've reached a
19 verdict. All right in again this is not evidence. It's
20 going back with you for the purpose of writing on the
21 back of it what the verdict is.

22 Now, I'm going to send you back to the jury
23 room. Don't begin your deliberations just yet. I have
24 to give the lawyers an opportunity to say, Judge, you
25 misspoke. You said something, you surprised us, or

1 you've left out something that you told us you were going
2 to say. It's a formality we have to go through. We'll
3 get the evidence together and send it back. This will
4 just take a couple minutes.

5 When we send the evidence back along with the
6 verdict form, then the bailiff will say, The judge says
7 it's okay to begin your deliberations. So just hold off
8 a couple minutes on beginning your deliberations until I
9 send the evidence and indictment back. All right? Thank
10 you for your patience.

11 (In open court, jury not present.)

12 THE COURT: All right. Anything from the
13 state?

14 MR. BANNON: No, sir.

15 THE COURT: From the defense?

16 MS. LOVELL: Only that I renew all my
17 objections that I previously made.

18 THE COURT: All right. They're all denied.
19 We got all the evidence together?

20 (At 10:21 a.m., the jury retires to
21 deliberate.)

22 (11:09 a.m.)

23 THE COURT: All right. We have everybody
24 back. Defendant is in the courtroom. I understand
25 they've reached a verdict. You want to bring the jury

1 back in.

2 (In open court, jury present.)

3 THE COURT: All right. Madame foreman, I
4 understand the jury has reached a verdict; is that
5 correct?

6 THE FOREPERSON: Yes.

7 THE COURT: Would you hand that to the
8 bailiff, please. All right. Clerk will publish.
9 Defendant will rise.

10 THE CLERK: 2003 GS-07-1756, the State of
11 South Carolina versus Arthur Franklin Smith, for criminal
12 sexual conduct with a minor, we, the jury, find the
13 defendant guilty.

14 Madame forelady, was this your verdict?

15 THE FOREPERSON: Yes.

16 THE CLERK: If all agree, would you please
17 raise your right hand.

18 THE COURT: Let the record reflect all the
19 jurors have raised their right hand. All right. Do you
20 wish to have the jury polled?

21 MS. LOVELL: Yes, Your Honor.

22 THE COURT: All right. Poll the jury, Madame
23 Clerk.

24 (Whereupon, the jury was polled and all
25 jurors indicated their verdict was unanimous.)

1 THE COURT: All right. Well, folks, you may
2 be seated.

3 I understand that you have reached your
4 verdict, and I appreciate your hard efforts this week.
5 This is a tough job that we have to do sometimes, and
6 sometimes you listen to some cases with some really bad
7 facts, and this is one of them, but you did your job.
8 You listened attentively through the trial, I watched
9 that, and it was clear that y'all took your time,
10 deliberated, considered the evidence and came back with a
11 verdict, and that is all we can ask people to do, is to
12 listen to the evidence, put aside any preconceptions you
13 have, and then base your evidence -- or base your
14 evidence on what is heard here in court and on the law
15 that applies. So you have done your duty as citizens
16 this week, and I want to thank you for that.

17 Now, you are no longer required to come back
18 to the court this week, because we've got one more trial
19 going on next door, and when Judge Mullen finishes, she's
20 not going to start another one. I'm going to be doing
21 pleas and motions the rest of the week, so you don't have
22 to call after 6:00. You don't have to come back the rest
23 of the week, if you don't want to.

24 We're getting ready to impose sentence here
25 in a few minutes. I hear from the victims and anything

1 the state wants to say. We also give the defendant an
2 opportunity to say anything. You're welcome to stay, and
3 you're also free to go, so I'll give anybody the
4 opportunity that wants to go now the chance to leave
5 before we go through that, but, again, you're welcome to
6 stay. Totally up to you, but if anybody wants the
7 opportunity to leave right now, go ahead. All right.
8 Looks like everybody wants to stay.

9 Mr. Solicitor, anything that you would like
10 to tell me?

11 MR. BANNON: Well, Your Honor, a couple of
12 things. I know that we were here today to try the
13 molestation of **Complainant**, or **Complainant**. I would also
14 like to hand up a certified copy of the defendant's prior
15 conviction where he pled guilty to ABHAN as a lesser
16 included offense for molesting Jacquelyn Solak. Also, I
17 have what has previously been disclosed to defense
18 counsel as a -- it looks like a Family Court order from
19 Erie County, in New York state, where, in a civil
20 proceeding, he was found to have abused a boy named J.T.

21 , who is a half sibling. It's Mr. Smith's child,
22 but a half sibling of his children in this case.

23 Your Honor, I think it's very clear that
24 Mr. Smith is a sexually violent predator. I think the
25 facts of this case call for the maximum possible sentence

1 of 30 years in prison. The victims are still present in
2 the courtroom now, and I believe that -- I know at least
3 some of them would like to address you, and perhaps all
4 of them, so I would like to give them that opportunity at
5 the appropriate time.

6 THE COURT: Certainly.

7 MR. BANNON: But I would just say that I
8 think it's clear that Mr. Smith is definitely a danger,
9 and 30 years would be the appropriate sentence.

10 THE COURT: All right. Is there any of the
11 victim's family that would like to speak, or Mr. Smith
12 himself? Anyone is welcome to at this point. Just come
13 on up to the bench here.

14 THE WITNESS: Your Honor, I'm Josh Smith.
15 I'm Art's second oldest son. I have a two-year-old child
16 at home and I wouldn't want somebody like this walking
17 around our streets. He did a lot to damage our lives,
18 but we have all moved on and become better people, so I
19 would ask that you give him the maximum sentence that you
20 can.

21 THE COURT: Thank you. Anyone else?

22 THE WITNESS: Your Honor, my name is ^{Complainant}

23 . I just want him to be put away for a very long
24 time. He did everything to jeopardize us, but eventually
25 we made the best of our lives.

1 THE COURT: All right. Thank you. Anyone
2 else?

3 THE WITNESS: Your Honor, my name is Jacquelyn
4 Solak, and I just want to say that I want him to be put
5 away as long as you can. It's not safe for me, or for my
6 brothers or for any other younger child or anybody, for
7 him to be out, and I just want everybody to be safe.

8 THE COURT: Thank you.

9 THE WITNESS: Your Honor, my name is Mark
10 Solak. My wife, Cindy, and I were appointed guardians
11 about ten years ago, and in the last few years, we've
12 become parents to Josh, ^{Complainant}, and Jackie. When the kids
13 arrived, Jackie was a little girl who couldn't look at
14 anybody. She let her hair hang in her face. She was so
15 ashamed her of life and everything that happened to her
16 that she didn't want to look or didn't even want anybody
17 looking at her.

18 ^{Complainant}, he was scared of everything. He
19 couldn't sleep at night without the doors, windows,
20 shades drawn, all the outside blocked off so that he felt
21 like he was in a secure room, and when he could sleep, he
22 would wake up with terrors, screaming, couldn't sleep at
23 night. You would find him awake, laying in bed.

24 Josh, he was an angry child. He would fight
25 with his own shadow to prove that he had control of his

1 life because he could do it.

2 The kids had a tough ten years. They're
3 still learning how to deal with their father's abuse.
4 It's been a long road. It's very evident to us and I
5 think everybody here that Art has no remorse. He brought
6 us back again to relive all this horrendous activity that
7 went on. He's had at least eight years to think about it
8 and try to get some kind of counsel to deal with his
9 obsession with young children.

10 To put it quite simply, he's nothing more
11 than a predator. I'm standing here today to show the
12 kids that a father protects their kids. They'll stand up
13 for them and say what needs to be said, not do what he
14 does. They need an example of what a father is supposed
15 to be, and that is why I am standing here.

16 My wife and I are proud of our three kids,
17 more than you could know. We respectfully request that
18 he is put away for every possible second that he can be
19 in jail by the law.

20 Thank you.

21 THE COURT: Thank you. Anyone else?
22 Anything further from the state?

23 MR. BANNON: Nothing from the state.

24 THE COURT: Ms. Lovell?

25 MS. LOVELL: May I speak with my client one

1 moment?

2 THE COURT: Sure.

3 MS. LOVELL: Your Honor, we ask that you --
4 that under the statute that he be credited for time
5 served that he has been in prison since -- for the time
6 he's been in there. We ask that you don't take a civil
7 conviction and that should not be used to aggravate the
8 criminal conviction and that we ask you to give him the
9 same sentence that he received at 20 years, and he does
10 wish to address the Court.

11 I have spoken to him about the parameters of
12 that. I would ask whether or not you wish to -- if
13 that's appropriate at this time and ask for your
14 guidance.

15 THE COURT: He does wish to speak or he does
16 not?

17 MS. LOVELL: He does.

18 THE COURT: All right. This is your chance,
19 Mr. Smith.

20 THE DEFENDANT: I have been sitting here,
21 silent, which took a lot to do. Cindy, since day one
22 that I have known her -- we moved down the road, about
23 five houses down from her, and ended up marrying her
24 sister. Since day one -- her sister getting pregnant and
25 so on and anyway, we had got married and it interfered

1 with her marriage.

2 It took a lot of money from her marriage but
3 her brother allowed her to get married because her wife,
4 and her sister, to get married, and from there I had a
5 relationship prior to that and a son was born named J.T.

6 , and I was going through -- me and the mother
7 was unmarried, and we were going through a custody -- not
8 custody, kid visitation battle. I had never gotten a
9 child out of supervised visitation because the child was
10 so young, and no other time, okay, prior to the
11 conviction, okay, that they are talking about in Family
12 Court -- it's noncriminal court. In Family Court in
13 Buffalo, you need no evidence whatsoever to get a
14 conviction.

15 But, anyway, when I asked for custody of
16 J.T. , that's when she come up with sexual abuse, and
17 there was no medical evidence. I never had a child
18 unsupervised.

19 I went through Salvation Army supervised
20 visitation by my own request because of her allegations,
21 and still I never had him unsupervised before the
22 conviction, so there is no possible way I could have done
23 anything. There was a camera in the ceiling, okay, so --
24 but an allegation will get you a conviction, especially
25 when you have a child who can sit there and get them to

1 point.

2 This is a retrial, okay? Ms. Solak said I
3 had nine years, I believe it was -- I had nine years to
4 think about it. I've been in Lieber Correctional
5 Facility, I spent 14 months prior to the last trial, five
6 years up in Lieber Correctional Facility and two years
7 now.

8 During the first trial, ^{Complainant} was on the
9 stand and Cynthia Solak was coaching him from the
10 audience, okay, shaking her head yes and no, in a yes and
11 no fashion at questions being asked about molesting. You
12 don't need help to answer the questions.

13 I was granted a new trial after that. I came
14 back here and had my new trial. None of this was brought
15 before you because if I mentioned the fact that he was
16 coached, they would bring in the conviction of Jacquelyn,
17 which was not a trial, it was not -- it was a plea deal
18 because I know to get a young child up there to point,
19 you're going to get convicted no matter what.

20 Mark also says I have no remorse. The
21 prosecutor said -- how did he refer to it? Not just a
22 predator -- labelled me --

23 MR. BANNON: He culled you a sexually violent
24 predator.

25 THE DEFENDANT: No, you called me a coward.

1 It takes more than somebody who is a coward to sit here
2 and go through a trial. It's not my wish to have my
3 children go through what they alleged happened to them.
4 The one I'm charged with is -- or now convicted of,
5 again, is ^{Complainant} which was coached the first time.
6 They've had so much time to recoach them before they come
7 here.

8 Part of which you haven't heard is that they
9 never mentioned, they were supposed to be tied up and
10 everything else. None of them said that. There is a lot
11 that they said they don't remember, but they only
12 remember the exact things the prosecutor needed for his
13 conviction. That's all. And I remind you he was coached
14 before, so -- I'm not trying to retry this, Your Honor.
15 I'm just trying to let the jury know that there was a lot
16 of factors that didn't come in to their decision and tell
17 them that it is wrong.

18 I did not do anything to my child, but I will
19 hear -- I have to, I have no choice to hear your
20 decision, but your decision is wrong, and you're forgiven
21 for me. That's all.

22 THE COURT: Anything further from the
23 defense?

24 MS. LOVELL: No, Your Honor.

25 THE COURT: All right. Well, I want to first

1 speak to the children, and, you know, there is nothing
2 really I can say that would restore your childhood to
3 you. You know, it sounds like you guys had a rough go of
4 it from a very early age, weren't raised in a good
5 environment at an early age, but your young lives were,
6 in essence, destroyed, as far as having a normal
7 childhood goes.

8 You were lucky enough to have, it sounds
9 like, two angels brought into your life in your aunt and
10 uncle and that they took you in and tried to give you a
11 normal life, and it sounds like y'all have made
12 tremendous progress in that regard. I don't think you
13 can probably get through something like this without a
14 tremendous amount of help and perhaps some professional
15 therapy. I would encourage you to do that.

16 It is an awful, awful set of facts that we
17 heard this week. That you have an incredible set of
18 people that sounds like you all have adopted as your mom
19 and dad. I suppose the law is difficult enough them for
20 to officially adopt you, but it sounds like y'all have
21 adopted each other, and you should consider yourself
22 fortunate that you are in their lives, and I'm sure --
23 they sound like they are very lucky to have you in their
24 lives. So, you know, to the extent this story ever has a
25 good ending, it sounds like that is the starting point

1 for it.

2 As to you, Mr. Smith, I don't know, you're
3 either the unluckiest guy in the world or you're a
4 monster, one of the two, because it sounds like every
5 child you have come in contact with have somehow found
6 yourself, at least in the position of being accused of
7 committing crimes against nature, and it is absolutely
8 abhorrent the acts that we heard of in the last couple
9 days. And there is, you know, a bad feeling that you
10 have when you hear testimony like that.

11 I know people say, well, kids are coerced
12 into making false confessions and things like that, but
13 we have a long period of time between the time that these
14 acts took place and their testimony on the witness stand
15 yesterday, and, frankly, it's been my experience that
16 people that are coerced into making false accusations
17 against somebody change their story. They don't become
18 more hardened in their remembrance of what happened.

19 So the fact that they are willing to come
20 into court after this period of time and still maintain
21 that their father did this to them -- under the best of
22 circumstances, that must be a tremendously painful thing
23 to have to go through, but they stood up and they did it,
24 and the jury obviously was persuaded of the truth of
25 their testimony, as was I, and for that reason, there is

1 absolutely nothing in the record that indicates that you
2 are deserving of any mercy.

3 The maximum sentence for this is 30 years.
4 I'm imposing the sentence of 30 years on you. The law
5 requires that I give you credit for the time you have
6 been sitting in jail waiting for trial, so I'm required
7 to do that, but I'm putting down here at the end of your
8 sentence, I'm recommending that they would evaluate you
9 for the sexually violent predator program.

10 Frankly, the way the system is run at this
11 point, this conviction would automatically classify as
12 the sort of crime that would be reviewed by the sexually
13 violent committee folks, but I don't know what the law is
14 going to be like in, you know, 20 something years when
15 you become eligible for release.

16 So I'm putting down on here that it is my
17 recommendation as the trial judge that you be evaluated
18 for that program, and if -- that is basically a civil
19 procedure where we go through a process and they
20 determine, based on his past convictions and the
21 circumstances surrounding that, if there is a
22 recommendation that he be declared to be a sexually
23 violent predator and a jury hears evidence and makes that
24 determination, then he is committed to the Department of
25 Mental Health for an indefinite period. It could be the

1 rest of his life, but they make an evaluation on that.

2 He has the right to have that reviewed on a
3 yearly basis, and if a jury, you know, a couple decades
4 from now determines that he's no longer a threat, then he
5 would be allowed to be free, but, frankly, somebody with
6 his kind of background, without a tremendous amount of
7 treatment, it's unlikely that he'll ever walk the streets
8 again, either through this conviction or the sexually
9 violent predator program, I think would, based on what
10 I've heard, and this record that he has, very likely keep
11 him off the streets, but that's down in the future.

12 You never know. This is a no parole offense,
13 and so he's not eligible for parole. He has to do 85
14 percent of this sentence, so he's got close to 20 more
15 years to do since it sounds like he's got credit for
16 close to nine that he's been while he's awaiting trial.

17 So that is the sentence of the Court, 30
18 years in the department of correction with credit for
19 time served. Good luck.

20 Folks, I again want to thank you for your
21 service. You are free to go, and we thank you on behalf
22 of the State of South Carolina for your service this
23 week.

24 (Jury dismissed.)

25 THE COURT: All right. Well, we're done.

1 MS. LOVELL: I would like to make a post
2 conviction motion. The defense makes a motion that the
3 Court would entertain a JNOV, motion for JNOV.

4 THE COURT: On what grounds?

5 MS. LOVELL: That the state didn't prove the
6 evidence beyond a reasonable doubt.

7 THE COURT: All right. That motion is
8 denied. Anything else?

9 MS. LOVELL: And also that we would receive a
10 new trial based on the admittance of some of the rulings
11 of evidence. Inadmissible testimony under Lyle would be
12 one of those.

13 THE COURT: That's denied as well.

14 MR. BANNON: Nothing further from the state.

15 THE COURT: All right. Thank y'all.

16 - - -

17 (Whereupon, the proceedings were concluded.)

18 - - -

19

20

21

22

23

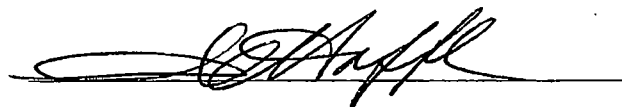
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25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth 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 case, relative to appeal, in the Circuit Court for Beaufort County, South Carolina, on the 21st and 22nd of September 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 2, 2011

A handwritten signature in dark ink, appearing to read 'A. Haffenden', is written over a horizontal line.

Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of Beaufort)Arthur Franklin Smith (306393))

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2016-CP-07-279

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 Lieber Correctional Institution2. Name and location of Court which imposed sentence Beaufort County Court of General Sessions, Beaufort County, S.C.

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2003-65-07-1756 Criminal Sexual Conduct with minor

(b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) November 16, 2004, 20 yrs No Parole
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ☒ _____
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. General Sessions Court, Fourteenth Judicial District
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Motion For New Trial Granted
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 20, 2005
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel
- (b) Denial of Fair trial
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to timely object and move for mistrial
- (b) Coaching of witness
- (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? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? no
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? no
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Denial of Fair Trial
- ii. Denial of Rehearing
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Court of Appeals / Columbia
- ii. South Carolina Court Supreme Court / Columbia
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Denied Petition for Rehearing
- ii. Denied Writ of Certiorari
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. January 23, 2015
- ii. June 17, 2015
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. Denial of fair Trial
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. Appeal from Beaufort County
- 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) NO

(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. Trasi Campbell Deputy Public Defender
1905 Duke St 2nd floor Rm 210 Beaufort S.C. 29901-0525

ii. Joseph L Savitz III Applicant Defense
P.O. Box 11589, Columbia S.C. 29211-1589

iii. Gail Lovell, 26 Christo Drive, Hilton Head
S.C. 29926

(b) the proceedings at which each such attorney represented you:

i. Trasi Campbell - First Trial

ii. Gail Lovell - Second Trial

iii. Joseph L Savitz - Appellate Court Defense

19. State clearly the relief you seek in filing this application:

Vacation of Sentence and release
or Remand for new trial

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)

County of Dorchester)

VERIFICATION

I, Arthur Franklin Smith, 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.

Arthur Franklin Smith

SWORN to and subscribed before me this 25th
 day of January, 2016.

Luduan Bryant (L.S.)
 Notary Public

My Commission Expires: May 26, 2020

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Arthur Franklin Smith, 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.

Arthur Franklin Smith
Applicant

SWORN or affirmed to and subscribed before me this
25th day of January, 2016.

Ludham Bryant
Notary Public

My Commission Expires: May 26, 2026

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Arthur Franklin Smith, #306393,

2016-CP-07-279

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed on January 29, 2016, Respondent would show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Beaufort County Clerk of Court's orders of commitment. Applicant was indicted by the September 2003 term of the Beaufort County Grand Jury for Criminal Sexual Conduct with a Minor (2003-GS-07-1756). Trasi Campbell, Esquire, represented him. In November 2004, Applicant proceeded to a jury trial pursuant to which he was found guilty as indicted. The Honorable Jackson Gregory sentenced Applicant to confinement for twenty (20) years. However, the trial court subsequently granted Applicant a new trial on the ground that the victim's testimony was coached by his aunt. State v. Smith 372 S.C. 404, 406, 642 S.E.2d 627, 628-29 (Ct. App. 2007). The South Carolina Court of Appeals affirmed. Id. at 406, 642 S.E.2d at 629. The South Carolina Supreme Court subsequently found that the trial court judge did not abuse his discretion or commit an error of law, thereby remanding the case for a new trial. Id.

Applicant proceeded to a second jury trial on September 19, 2011, pursuant to which he was found guilty as indicted. The Honorable Roger M. Young, Sr. sentenced Applicant to confinement for thirty (30) years.

A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to Anders v California 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Smith, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). The Remittitur was issued on June 30, 2015.

II.

In his application for post conviction relief Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
 - a. "Failure to timely object and move for mistrial"
2. "Denial of Fair Trial"
 - a. "Coaching of witness"

For the purpose of this Return, Respondent incorporates the Clerk of Court records, and the South Carolina Department of Corrections' records, the record on appeal and Court of Appeals opinion. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent construes Applicant's first allegation as alleging ineffective assistance of counsel. Respondent asserts that Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent also asserts that Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel.

First, applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Second, counsel's deficient performance must have prejudiced 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent construes Applicant's second claim as an allegation of infringement upon Applicant's constitutional right to fair trial. This allegation raises a direct appeal issue that is

procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, Respondent requests an evidentiary hearing solely for the purpose of determining whether Applicant's trial counsel was ineffective and whether Applicant's appellate counsel was ineffective.

{Signature Block on the Following Page}

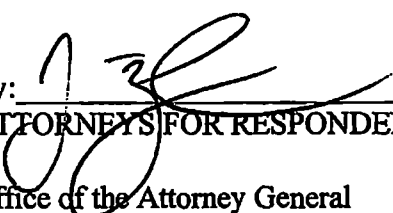
Respectfully submitted,

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By: 

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June 6, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

2016-CP-07-0279

ARTHUR FRANKLIN SMITH,
#306393)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

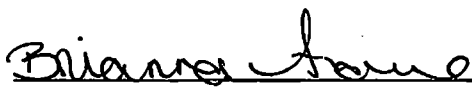
STATE OF SOUTH CAROLINA,)

Respondent.)
_____)

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 in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

James K. Falk, Esquire
Falk Law Firm, LLC
Post Office Box 1058
Charleston, South Carolina 29402

DATED this 6th day of June, 2016.


Brianna Arnone, Legal Assistant
For Respondent

1 In the Court of Common Pleas for the
2 State of South Carolina, County of Beaufort

3

4 Case No.: 2016CP07000279

5 Arthur Franklin Smith,

6 Plaintiff(s),

7 vs. Transcript of Record

8 State of South Carolina,

9 Defendant(s).

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15 October 10, 2017

16 Beaufort, South Carolina

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21 BEFORE:

22 The Honorable Thomas A. Russo

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APPEARANCES

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1

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1 PROCEEDINGS

2 MR. NEELY: This is the case of Arthur Franklin
3 Smith versus South Carolina, 2016-CP-07-29.

4 Mr. Franklin was indicted by the September 2003 term of
5 the Beaufort County Grand Jury, for criminal sexual
6 conduct with a minor. And then in November 2004,
7 proceeded to a jury trial, where he was found guilty as
8 indicted.

9 However, the trial court granted the applicant a
10 new trial on the grounds that the trial court -- the
11 trial judge found the victim's testimony was coached
12 from the -- from the pews.

13 THE COURT: Wait a minute, now. Go back. He went
14 to trial.

15 MR. NEELY: Correct.

16 THE COURT: And was convicted.

17 MR. NEELY: Correct.

18 THE COURT: Appealed.

19 MR. NEELY: No. No, sir.

20 THE COURT: I'm sorry.

21 MR. NEELY: The defense counsel at that point was
22 Trasi Campbell, and she made a Motion For a New Trial.

23 THE COURT: Oh, and the trial judge --

24 MR. NEELY: The trial judge granted it.

25 THE COURT: -- granted the motion for -- okay. I

CALLING OF THE CASE

1 got it. I'm with you now.

2 MR. NEELY: Based on the aunt's movements and
3 motions while one of the victims was testifying.

4 THE COURT: During the course of the trial. Okay.

5 MR. NEELY: The Court of Appeals affirmed that
6 decision, and the South Carolina Supreme Court also
7 affirmed the trial Judge's discretion in granting that
8 motion.

9 THE COURT: Okay.

10 MR. NEELY: Applicant proceeded to a second jury
11 trial on September 19, 2011, pursuant to which he was
12 found guilty as indicted before The Honorable Roger
13 Young, who sentenced the applicant to 30 years.

14 Notice of Appeal was filed on his behalf, and
15 South Carolina Court of Appeals affirmed his conviction
16 and sentence. Remittitur was issued June 30th, 2015.

17 THE COURT: All right. Mr. Falk.

18 MR. FALK: Your Honor, again, like in the last
19 case, I'm kind of following the lead that is laid out
20 by the opinions in this case.

21 MR. NEELY: Sorry. I just want to put on the
22 record, Mr. Falk emailed me last night with an
23 amendment to the PCR application. Normally, amendments
24 to PCR application that come within ten days of the
25 hearing, I will object to. I told Mr. Falk that in

CALLING OF THE CASE

1 this case, I'm not planning on objecting to this
2 amendment, and we will allow the amendment.

3 I try to give all of our attorneys the, I guess,
4 warning that I will object to anything not sent within
5 ten days. This is an older case that did not contain
6 that stipulation -- or not stipulation, but assertion
7 -- and it was a fairly easy issue for me to brief and
8 pin the law on last night. So I did that, so I'm
9 prepared to argue that issue.

10 THE COURT: You're prepared. Okay. All right.

11 Now, do I have the amended application?

12 MR. NEELY: It was an informal email, Your Honor.

13 THE COURT: So you are just going to do it on the
14 record here? That's fine. Okay. Yes, sir.

15 MR. FALK: Well, I can do it this way. I should
16 have printed out the email that I sent, but I'll --

17 THE COURT: That is okay.

18 MR. FALK: Let me just read this in. It says, "I
19 advise Mr. Neely that I wanted to clarify the specific
20 grounds for Mr. Smith's PCR. Trial counsel was
21 ineffective for not objecting to the hearsay testimony
22 from Andreas Florencio (phonetic) at Page 82, Lines 12
23 through 18."

24 I think that was hearsay testimony, and the
25 problem with the admission of the hearsay testimony is

CALLING OF THE CASE

1 that there was also a problem with the forensic
2 interviewer's testimony, which came in at Page 148,
3 Lines 9 -- Line 9 in 149, Lines 13 through 15.

4 The problem, which I'll explain when I go forward,
5 but the hearsay should have been objected to. The
6 testimony of the forensic examiner was objected to.
7 However, the Court of Appeals' opinion said well,
8 there's no prejudice.

9 They agreed that the testimony was improper, but
10 the Court of Appeals said there was no prejudice
11 because it was cumulative on testimony they've already
12 heard, which was the objected to hearsay testimony from
13 the first witness. So that is where I'm going.

14 THE COURT: Okay.

15 MR. FALK: Do you have her or how do you want
16 to -- just call her?

17 MR. NEELY: I'll call her first.

18 MR. FALK: I don't really think I need to call
19 my --

20 THE COURT: Okay. So we are calling Ms. Lovell?

21 MR. NEELY: Yes.

22 (Ms. Lovell called by telephone.)

23 MR. NEELY: Hey, Ms. Lovell. Hey. This is Rustin
24 Neely. How are you doing?

25 I'm about to put you on speakerphone. We are in

CALLING OF THE CASE

1 the court right now.

2 Can you hear me?

3 MS. LOVELL: Yes, I can.

4 MR. NEELY: Okay.

5 THE COURT: All right. Ms. Lovell, can you hear
6 me, ma'am?

7 MS. LOVELL: Yes, I can.

8 THE COURT: All right. This is Judge Russo. I'm
9 going to get Madam Clerk to place you under oath for
10 your testimony here, and then I'll turn it over to
11 Mr. Falk and he can ask you questions. Okay?

12 THE WITNESS: Okay.

13 THE COURT: Thank you, ma'am.

14 THE WITNESS: Certainly.

15 (Witness sworn.)

16 THE COURT: All right. Mr. Falk.

17 Thereupon,

18 GAIL LOVELL

19 was called as a witness, having been first duly sworn,
20 was examined and testified as follows.

21 DIRECT EXAMINATION

22 BY MR. FALK:

23 Q How do I pronounce your last name? Is it Lovell?

24 A Lovell.

25 Q Lovell. All right.

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Ms. Lovell, I'm representing Mr. Smith in
2 this case, and you just represented him in the second trial;
3 is that correct? .

4 A That's correct.

5 Q And what was this -- what was sort of the theory
6 of the defense in this case? I mean, was there -- was the
7 argument that there was no abuse, or as to the identity of
8 the abuser?

9 A Well, I have no independent recollection of the
10 case. I did read over the appeal, the record on appeal, and
11 some of the information that was sent me. Any testimony I
12 would have would be based on that.

13 Q Okay. Do you remember meeting with Mr. Smith
14 about the case?

15 A I do have a -- yes, I remember meeting with him in
16 the Detention Center prior to trial.

17 Q And where were you employed at that time?

18 A I was in private practice, and this case was
19 appointed to me by the Judge since Mr. Smith no longer
20 wanted Trasi Campbell to represent him on the retrial.

21 Q I see. I see. Okay. Did you get --

22 A So I was an independent Public Defender. I was on
23 the --

24 Q On the list?

25 A On the conflict list, yes, sir.

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Q Okay. So it would appear as though, from my
2 reading of the transcript, it would appear as though there
3 was some indication from the children's behavior that there
4 may have been abuse because of the way the children were
5 acting out, but that the issue was who the perpetrator was.

6 A Yes.

7 Q Do you have any recollection that would be
8 different from that?

9 A No, sir.

10 Q Okay. Do you have the transcript?

11 A I do.

12 Q Could you turn to Page 82 of the transcript?

13 A And that is on the record on appeal case?

14 Q I'm sorry, yeah. That's the -- yes, that's the
15 trial transcript. It's the record of appeal -- on appeal.

16 A Okay. It would be -- because there's two numbers
17 to the--

18 Q Yeah, I think transcript-wise, it is 56 possibly.

19 A Yes, sir. I have that in front of me.

20 Q And do you see the question that the Solicitor
21 asked at Line 12?

22 A Line 12. Line 11 -- Line 12 is "When you met," is
23 that what it starts with?

24 Q Yes.

25 A Yes, sir.

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Q Okay. So let me back up. Do you recall how
2 Andreas Florencio fits into this case?

3 A I'm told he is the original investigator from the
4 first trial.

5 Q Okay.

6 A He is the one who signed the arrest warrant.

7 Q Okay. And the Solicitor then asked him, and when
8 you met with -- and Ms. Sollock (phonetic), that -- who is
9 that? Is that the aunt? Is that the --

10 A I believe -- I believe that is the aunt, yes.

11 Q Yeah.

12 THE COURT: What page are you on?

13 MR. FALK: Oh, I'm -- it's 82 of the record on
14 appeal, Line 12.

15 THE COURT: Okay.

16 BY MR. FALK:

17 Q And granted, the Solicitor was trying not to get
18 hearsay from him, at least the way the question was framed,
19 but you see the question. "And when you met" -- the
20 question to Mr. Florencio -- "And when you met with
21 Ms. Sollock and the child, what did -- well, what did they
22 report to you in very general terms?"

23 And the answer was: "They were there to
24 report that sometime during the time between May -- I
25 believe it was May 2009 and June of the year 2000, that

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 child had been sexually assaulted by his father."

2 A Uh-huh. (Indicating affirmatively.)

3 Q Would you characterize that response as hearsay?

4 A No.

5 Q The part where he's addressing the -- that was --
6 and why do you say it's not hearsay?

7 A It's been a long time since I practiced, but I
8 would guess my first impression would be that it's a
9 condition, it's something they recorded, it's medical, and
10 it's an exception to the hearsay. He is a police officer.
11 That would be my argument right now.

12 Q Okay. I didn't know if you were saying it's not
13 hearsay and if you were referring to statute. The South
14 Carolina has a statute regarding admissibility about court
15 statements of children in these types of cases. I didn't
16 know if you were referring to that.

17 A That could be one of them. If I were still active
18 in practice, that may have been my first choice, yes.

19 At the time, that could have been why I
20 didn't object. I mean, it's pretty much -- I'm trying to
21 piece it back. I apologize for that, but...

22 Q No, I understand.

23 Well, certainly there is a difference --
24 there's no question in there that that statement implicates
25 Mr. Smith as being a participant in the abuse of the child;

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 is that correct?

2 A Okay. Yeah.

3 Q Okay.

4 A So, yeah, that's -- right.

5 Q I'm just saying that's in response -- was the
6 response prejudicial to the case?

7 A Was the -- say that again, please.

8 Q Well, his response --

9 A His response -- well, NCO's response --

10 Q That he had heard from the child that Mr. Smith
11 had abused him. You would agree that that's prejudicial to
12 your case?

13 A Well, if it's what Mr. -- what the officer had
14 been told, and it is an exception to hearsay, then it is
15 just something that he was reporting. True or not true, it
16 doesn't mean that it happened. It meant that that's what
17 Florencio was told. And that's it.

18 Q Maybe I'm using the wrong term.

19 That statement didn't help your case, did it?

20 A No. No, it didn't.

21

22 Q And would you have rather the jury not have heard
23 that statement?

24 A It was one of many statements that had come in,
25 but yes, I guess. I don't see how it -- okay.

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Ask me the question again.

2 Q I think I asked you whether or not you felt the
3 statement hurt your case?

4 A It didn't help the case.

5 Q Okay. Oh, I know. My question was, would you
6 have rather the jury not hear that statement? So I guess
7 that's really the same question.

8 A Uh-huh. (Indicating affirmatively). My same
9 answer, it didn't help the case.

10 Q Now, do you recall the testimony by the forensic
11 examiner?

12 A Twitty?

13 Q Twitty.

14 A Just from what I have read over of the record on
15 appeal, not any direct recollection of it. Just from what I
16 have read, yes.

17 Q One moment, please.

18 Okay. If I can call your attention to
19 Page 196 of the record.

20 A Yes, sir.

21 Q Have you had a chance to sort of familiarize
22 yourself with what was going on in the trial at this point?

23 A My recollection, this is the gentleman from
24 Georgia who was testifying; is that correct? Not Twitty
25 anymore, right?

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Q Yeah.

2 A It's the Georgia guy with the two names.

3 Q Lynch.

4 A Lynch, yeah. That's --

5 Q Lynch Stanley.

6 A Yes. Right. Okay. So I believe that is the
7 testimony of Lynch Stanley.

8 Q And his testimony was regarding delayed
9 disclosure?

10 A Yes. Yes, along with other --

11 Q And how that phenomenon --

12 A -- observations.

13 Q Because there was delayed disclosure in this case;
14 was there not?

15 A Correct.

16 Q And then you would cross-examine him regarding the
17 testimony of delayed disclosures, and does the length of
18 time have any impact on --

19 A Where are you?

20 Q The top of the page.

21 A On 196?

22 Q Yeah, top of page 196.

23 A Okay. Yes, sir.

24 Q Where you were saying -- I mean, the paraphrase,
25 you are saying the delayed disclosures are a couple of

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 minutes and some are longer. Like some -- then, like in the
2 transcript on Line 1, "Like some disclosures occur within
3 minutes, some disclosures occur after two or three months,
4 and some occur two or 20 years."

5 A Right. So that was his answer, uh-huh.
6 (Indicating affirmatively.)

7 And then I questioned, uh-huh. (Indicating
8 affirmatively.)

9 Q And then you are drawing a comparison with whether
10 or not it is a two-minute disclosure or a 20-year
11 disclosure.

12 A Uh-huh. (Indicating affirmatively.)

13 Q And then you asked, and I think -- I guess you are
14 challenging the fact that there was a three-year delay in
15 this disclosure.

16 A Correct. Wondering if that was a delayed
17 disclosure.

18 Q As opposed to?

19 A How -- well, how he has given it, I believe it
20 was -- he, if I recall on reading it, he treated the
21 symptoms of the victim and then determined them to be a sub
22 sexual assault, even after a disclosure that he was sexually
23 abused had come later, after he had been treated, if I
24 recall.

25 Q Okay. Then the next -- and then on redirect, I'm

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 now on Line 21.

2 A Yes.

3 Q Does the length of the delay in the disclosure
4 have any -- so Mr. Bannon asked, Does the length of the
5 delay in the disclosure have any -- in your opinion, does it
6 erode the credibility of the disclosure? That was the
7 question, and you objected to the question.

8 A Uh-huh. (Indicating affirmatively.) I did.

9 Q What was your basis for your objection? Were you
10 objecting because of that --

11 A I didn't want him bolstering. I didn't want him
12 to further add to the --

13 Q Because you didn't want this expert to then make
14 any kind of indications about the credibility of the
15 statement, the hearsay statement?

16 A Correct.

17 Q But the record doesn't reflect that you stated the
18 grounds for your objection on the record.

19 A Correct. Unless it was left over from the
20 pretrial motion, from which I had consistently restated my
21 reasons for the objections to the admittance of some
22 evidence.

23 Q And then if you read on Page 197, from Lines 1 to
24 22 --

25 A Uh-huh. (Indicating affirmatively.)

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Q -- Mr. Lull (phonetic), the witness, then went on
2 giving much more information about the credibility and
3 PTSD -- excuse me, PTSD, and that's more testimony that you
4 would have preferred the jury not to have heard?

5 A Sure. I objected.

6 Q Because at the end of the day, he's saying that,
7 again, that the length of disclosure doesn't affect the
8 credibility of the witness, and it's an implied statement
9 that he certainly believes that the witness is credible.

10 I just want to make sure, there was not a
11 specific reason why you didn't state your -- there was not a
12 trial strategy reason why you didn't state your grounds for
13 your objection to a question, does the length of time delay
14 the -- "Does the length of the delay in the disclosure have
15 any, in your opinion, does it erode the credibility of the
16 disclosure?" You objected to that. It was overruled.

17 But there wasn't a trial strategy reason why
18 you didn't put the specific grounds for your objection in
19 the record, is there?

20 A I do not recall.

21 Q Okay. And, again, your testimony is that it was
22 your belief that the response given by Florencio, on Page
23 82, Lines 15 to 18 is -- your, it is your testimony that you
24 didn't believe that was a hearsay statement?

25 A Correct.

DIRECT EXAMINATION OF GAIL LOVELL BY MR. FALK

1 Q Would you -- if you gave some more reflection to
2 it, would you not at least think that there was a Crawford
3 violation there, of the Sixth Amendment? Because that is
4 clearly -- I mean, it could be argued that that is a -- I
5 mean, that was a statement that was given to a member of law
6 enforcement or an investigator who works with law
7 enforcement for the purpose, arguably, to prosecute at
8 trial, which you could argue is then a testimonial hearsay
9 statement.

10 MR. NEELY: Your Honor, I'm going to object to the
11 form of this question.

12 MR. FALK: That is fine. I'll withdraw the
13 question.

14 THE COURT: All right.

15 MR. FALK: I have no further questions.

16 THE COURT: Mr. Neely.

17 MR. NEELY: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MR. NEELY:

20 Q Good afternoon, Ms. Lovell.

21 A Hi.

22 Q Do you recall how many times you met with
23 Mr. Smith?

24 A Many times. He was in the Detention Center and I
25 have a recollection of going frequently to interview him.

CROSS EXAMINATION OF GAIL LOVELL BY MR. NEELY

1 Q And do you recall reviewing the transcript of
2 Mr. Smith's past trial in preparation for --

3 A Yes.

4 Q In preparation for your trial then?

5 A Yes.

6 Q I'm sorry. I think I interrupted you there.

7 Do you recall reviewing the transcript of
8 Mr. Smith's past trial in preparation for your trial?

9 A I don't recall exactly, but I do know the grounds
10 under which the -- the case was ordered to be retried by
11 Judge Gregory. So I did familiarize myself with that. Of
12 course, Mr. Smith had explained a lot of that history to me
13 as well.

14 Q And when you tried this case, how much experience
15 had you had in criminal law?

16 A I started practicing in '95, '94, '95 in
17 Connecticut doing public defender work. And then I moved to
18 South Carolina in '98, sat for the Bar again, passed the
19 Bar, worked for the Public Defender's office, Mr. Plexico,
20 and then I worked for the Solicitor's office.

21 So I worked for the Public Defender's office
22 probably two years, and then I left and went to the
23 Solicitor's office, and then went back to taking private
24 criminal defense cases prior to my going inactive in 2011.

25 Q So it would be fair to characterize most of your

CROSS EXAMINATION OF GAIL LOVELL BY MR. NEELY

1 experience as an attorney in criminal work?

2 A Correct.

3 Q Did you have -- and I realize that you say you
4 don't have a whole lot of independent recollection -- do you
5 recall what the thrust of your strategy was in asserting
6 Mr. Smith's defense?

7 A I believe it was a identity, but also the
8 credibility of the actual abuse. Two levels.

9 Q Okay.

10 MR. NEELY: I believe that's all the questions I
11 have for her, Your Honor.

12 THE COURT: Any further questions for Ms. Lovell?

13 MR. FALK: None for Ms. Lovell. Thank you.

14 THE COURT: All right. Ma'am, thank you so much
15 for participating by phone. We appreciate it.

16 MS. LOVELL: Thank you, and I appreciate the time..
17 Thanks.

18 THE COURT: Yes, ma'am. Thank you very much.
19 Have a great day.

20 MS. LOVELL: Okay. You, too. Bye.

21 MR. FALK: I'll call Mr. Smith.

22 THE COURT: All right. Mr. Smith, if you would
23 come around.

24 Do you need any of that stuff with you, or we will
25 give it to you if at any time you need it. Just let us

CROSS EXAMINATION OF GAIL LOVELL BY MR. NEELY

1 know.

2 MR. SMITH: I know most of it. I've read it over.

3 THE COURT: All right. But if you do need
4 anything, let us know and we will make sure you get it.

5 Thereupon,

6 ARTHUR FRANKLIN SMITH

7 was called as a witness, having been first duly sworn,

8 was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. FALK:

11 Q State your name for the record.

12 A My name is Arthur Franklin Smith.

13 Q And you were represented by Ms. Lovell in this
14 case?

15 A Yes, I was, in my second trial.

16 Q Okay. And the second trial is what this PCR is
17 about; is that correct?

18 A I never had a PCR before my first trial. So when
19 I initially started it, I had issues from the first and the
20 second that I had written out. I didn't know I could only
21 do it for the second one.

22 Q Okay.

23 A I am not that keen on law.

24 Q What were your primary concerns about her
25 representation of you in the second trial?

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 A She didn't bring forth. One, she -- it was like
2 she didn't know who was who. In the first trial -- well,
3 okay. My second trial was Ms. Lovell, I'll keep it to that.

4 She constantly asked me who was who, and I
5 had to tell her that Cynthia Sollock is the paternal aunt,
6 not the mother of the children. The children were taken
7 away from the mother for abuse and neglect.

8 My oldest son had a sexual encounter with the
9 older son, a few years older than him, in their home. And
10 the psychiatrist, Stanley, in the first trial tried to turn
11 it around and say, oh, it must have been something his
12 father had done with him.

13 The same could be said the other way, but it
14 was assumed, and taken for granted by the Solicitor that
15 this is, in fact, fact. And it went on from there, and my
16 lawyers, since then, have never brought that forward.

17 I have talked to her time and time again on
18 other issues as well. It is very touchy to me. I have
19 remained silent in all my cases.

20 MR. NEELY: I don't understand. This is not a
21 response to the question, and I don't know where this
22 is going.

23 THE COURT: I'll just have you respond to the
24 question, please.

25 BY MR. FALK:

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 Q If you could bring up some more details of issues
2 that you don't think she presented in court.

3 A Okay. One is that there was abuse in the home of
4 the actual mother of the child. Second, that there was an
5 affair with that alleged person, John Roach, I believe his
6 name was, during and before this time.

7 The reason I moved down here, because she had
8 an Internet relationship with him -- well, not Internet, but
9 over-the-phone relationship with him, introduced by Cynthia
10 Sollock. He is a mechanic.

11 Q And that is your ex-wife's sister?

12 A My ex-wife's sister. That is correct.

13 Q Cynthia Sollock.

14 A She met at Rose Hill at the time. He had a
15 maintenance shop in Bluffton. And these are motives.

16 Q So you believe there's evidence that there was
17 another adult male in the house when this alleged abuse --

18 A Yes. Another child was several years older than
19 my child, and had a sexual relationship with him. And it
20 came -- when the children were taken away from her, and
21 ended up with Ms. Sollock, it was around that time, or prior
22 to that or -- after the action with the children, or -- that
23 I was implemented in them saying that you were -- it must
24 have been what your father did.

25 Q So what was your understanding of why the children

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 were taken away from your wife?

2 A For that particular reason, because there was a
3 sexual act between my son and the oldest boy in the home of
4 where they lived.

5 Q And what state were they living in?

6 A South Carolina at the time.

7 Q Okay. So DSS brought an abuse and neglect action?

8 A Right.

9 Q You got notice of it?

10 A Right.

11 Q And at the end of the day, the child was taken out
12 of the home?

13 A Out of the mother's home. I wasn't -- we were
14 separated, and I didn't know about it.

15 Q Yeah, but -- that's why I didn't -- you weren't --
16 he wasn't taken out of your home, because the child was
17 already separated from you; is that correct?

18 A I wasn't privy to any of this until the first
19 trial. During the first trial, when I was denied access to
20 any of my children. And that Cindy Sollock had taken them
21 out of South Carolina to Georgia at the time, where this
22 Dr. Stanley, which was the psychiatrist that examined my
23 son, lived on -- or worked in -- his livelihood was provided
24 by the residents of that plantation, which she lived in.

25 Q Okay.

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 A These are all my concerns that I raised with her
2 in only one or two meetings that we had.

3 She copied some transcripts that I asked her
4 to, and that was the -- the other visits that she mentions,
5 that is what it consisted of, her giving me the copies and
6 stuff like that. That's why I have so much there. I wanted
7 copies of because --

8 Q Of the DSS transcripts?

9 A No, of the court for papers and stuff like that,
10 because if I file anything, the Solicitor needs a copy, the
11 Court needs a copy, and so on. And this is a sensitive
12 subject in prison, you just don't go around getting copies
13 of it or trust anybody to go get them for you. It's just --
14 it ain't done. So...

15 Q How did your trial lawyer raise issues regarding
16 this other adult, or this other male that was in the home at
17 the time that this abuse could have occurred?

18 A She didn't do anything. She didn't ask any
19 questions about it, nor was the child ever interviewed, that
20 I know of. Maybe by DSS, but that was -- that was nothing
21 else.

22 There is, prior to moving down, down here, I
23 have a son out of wedlock with another child -- or with
24 another woman, Laurie Trembley (phonetic). His name is
25 J.T. . Okay. My wife -- for eight years during my

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 marriage, okay -- and we were married for 13 years.

2 MR. NEELY: Your Honor, I'm going to object again.

3 THE COURT: Okay. No problem.

4 MR. NEELY: This is a narrative answer, this is
5 not responsive to the question asked.

6 THE COURT: Can you repeat the question. Go ahead
7 and repeat the question.

8 BY MR. FALK:

9 Q I think I asked you whether or not trial counsel
10 put in any information of the fact that there was another
11 adult male.

12 A No. Actually, he was kept out of most all the
13 other trials. If you check the trial transcripts, you won't
14 find hardly anything of him mentioned, only that she had
15 another liaison or similar to that. That she was living
16 somewhere at the time..

17 Q With this other adult male?

18 A With my children in the home, yes. Before our
19 divorce, by the way.

20 Q And that fact was never brought forward?

21 A Not really. It may have been mentioned, but it
22 wasn't -- there was no emphasis on it. It was kind of like
23 a passing thought.

24 Q And the DSS testimony -- I mean, the DSS case
25 regarding the sexual abuse by another child in that home --

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 A I know nothing of the result or when it occurred.

2 Q But was that -- did she attempt to use any of that
3 in your trial?

4 A Only the fact that it was mentioned that -- by
5 Dr. Stanley that he, when he talked to the child -- and by
6 the way, Dr. Stanley at the time was only a student in
7 school. But by the second trial, he was -- had graduated.
8 Okay.

9 Q Okay.

10 A And he didn't qualify for what he was, quote,
11 unquote, an expert for. He was made an expert because he
12 wrote some paper. I mean, I can write an essay, too, it
13 don't make me an expert.

14 MR. NEELY: Your Honor, again --

15 BY MR. FALK:

16 Q Thank you, sir. I think we are going to get
17 yelled at if we keep making editorial comments here.

18 A My bad.

19 I believe I answered your question.

20 Q Okay. Are there other issues that you thought
21 that she should have risen?

22 No, I know what my question was going to be
23 is, you would agree that your primary defense, or your
24 primary strategy at trial, was not so much that the child --
25 let me back up.

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 Do you agree that the child was acting out?

2 Would you agree there was testimony that the child was
3 acting out?

4 A There was testimony that the child was acting out,
5 but that he never acted out in my home.

6 Q Okay.

7 A Okay. That acting out was mentioned by the fact
8 that the liaison between the child and the other child,
9 which it was mentioned briefly and only once that I
10 remember, and that was during the first trial.

11 Q Okay. But do you think that this is a case where
12 there was no abuse, or abuse was by somebody else than you?

13 I mean, what was your strategy? She had said
14 -- let me withdraw that.

15 The trial counsel on the phone said, sir,
16 your primary strategy was identity. Meaning, sort of you
17 are conceding that something happened, but just -- we are
18 contesting who the perpetrator was. Does that make sense?

19 A It makes sense for what you are saying, but I
20 wasn't privy to that being her objective or aim in the
21 trial.

22 She went out on the -- I'd have to read the
23 transcript again to answer that properly. But she went, I
24 believe, off in left field. It really didn't help my case,
25 but what she was trying to bring forth was part of the

DIRECT EXAMINATION OF ARTHUR FRANKLIN SMITH BY MR.
FALK

1 truth, but it wasn't enough to convince a jury, especially
2 under charges like this, of somebody's innocence, if that
3 makes --

4 Q That's a response, yes. Thank you.

5 MR. FALK: Your Honor, I don't believe I have
6 anymore questions for Mr. Smith.

7 THE COURT: Mr. Neely.

8 MR. NEELY: No cross-examination, Your Honor.

9 THE COURT: Thank you very much, Mr. Smith. You
10 may step down, sir.

11 Anything further?

12 MR. FALK: No, other than an argument.

13 THE COURT: All right. Anything?

14 MR. NEELY: No witness response, Your Honor.

15 THE COURT: All right. Yes, sir.

16 CLOSING ARGUMENT BY THE APPLICANT

17 MR. FALK: Your Honor, I guess you can decide as
18 well as anyone else whether or not the answer given on
19 Page 82, Lines 15 through 18, whether or not that
20 was -- if part of that response was hearsay. And I'm
21 referring primarily to the part of it where the child
22 said that he had been sexually assaulted by the father.

23 I mean, it would appear to be an out-of-court
24 statement. I'm not sure what hearsay exception that
25 would fit under. I would think that -- what I was

CLOSING ARGUMENT BY THE APPLICANT

1 trying to ask those questions towards the end, I mean,
2 it certainly would be my argument and I certainly would
3 have asserted at trial, that that would be a
4 confrontation clause problem because this was --
5 presumably Mr. Florencio was part of law enforcement or
6 affiliated with law enforcement in taking -- in
7 interviewing this child, assuming for the purpose
8 possibly of ultimately testifying. So I believe that
9 you get over the testimonial part of the hearsay.

10 And as I said, I don't think it would fit
11 under the -- I don't think -- I think it goes beyond
12 the scope of what type hearsay could be admitted under
13 the South Carolina statute of 1723175, which is
14 corroborating statements. Corroborating hearsay
15 statements for, you know, tender year's children, I
16 think is what the -- you know, young children in sex
17 abuse cases.

18 So I think that that statement is hearsay. I
19 think that --

20 THE COURT: I'm just asking, because obviously I
21 didn't choose to read the transcript. Was there
22 testimony in the case where the -- whether the child
23 testified or whoever alleging that he was assaulted by
24 his father?

25 MR. FALK: Do you want to respond?

CLOSING ARGUMENT BY THE APPLICANT

1 MR. NEELY: All three of his children alleged that
2 he sexually abused them.

3 THE COURT: But never testified during the course
4 of the trial?

5 MR. NEELY: Yes, sir. And all three alleged that
6 it happened by the applicant in the applicant's
7 bedroom.

8 THE COURT: Okay. I'm just looking at the
9 question.

10 MR. FALK: Your Honor, I think that --

11 THE COURT: Go ahead.

12 MR. FALK: It would be my contention that that's a
13 hearsay statement, that it wasn't objected to.

14 And certainly when you read the opinions by the
15 Court of Appeals in here, they sort of highlight this
16 point, because they say in their opinion that Florencio
17 testified that the child was abused -- Florencio
18 testified that the child told him that he had been
19 abused by his father, and in the Court of Appeals'
20 opinion, they say that that statement went uncontested.

21 So I certainly think that somebody in the Court of
22 Appeals would agree that it is a hearsay statement that
23 should have been objected to. So there was no curative
24 instruction.

25 And whether or not that is okay, it comes in,

CLOSING ARGUMENT BY THE APPLICANT

1 doesn't come in. It made it worse by the testimony
2 of -- I mean, because the issue here, this is an
3 identity question, and the issue is honestly the
4 credibility of the child. Whether or not it was the
5 father, whether or not it was somebody else.

6 And so then when you have testimony from the
7 expert, Lynch Stanley, his testimony, on Page 197 that
8 came in sort of talking about a basis for why we can
9 believe the child that someone took -- it certainly
10 vouches for the child's testimony. And it bolsters, I
11 believe, the child's testimony. It certainly gives the
12 opinion that Lynch, Mr. Lynch Stanley, believes the
13 child. And --

14 THE COURT: Well, and again, I have just perused
15 that, haven't really read it closely. Isn't he
16 testifying as an expert as to the issue of delayed
17 disclosure, and not specifically this disclosure?
18 Isn't that testimony about his expert opinion on
19 delayed disclosure?

20 MR. FALK: Yes, but then she brings the comment by
21 sort of -- her question makes it then focus on the
22 delayed disclosure in this case, and that we certainly
23 have all this testimony regarding why we can believe
24 children under delayed disclosure.

25 So I think it bolsters the child's testimony. I

CLOSING ARGUMENT BY THE APPLICANT

1 think the Court of Appeals also said in their opinion
2 that they would agree that that testimony was improper.
3 The Court of Appeals, in their decision, said that they
4 agreed that this testimony on Page 197 of the record --
5 of the record on appeal, was improper but there was no
6 prejudice because it was cumulative. And they
7 specifically cited it was cumulative of the testimony
8 from Florencio.

9 MR. NEELY: I will disagree with that assertion.

10 THE COURT: How can you -- and again, I have got
11 to read it, but how could you narrow it down to that
12 one -- one statement from Florencio if all three
13 children testified during the trial, and all three
14 children named Mr. Smith as the aggressor, or the
15 abuser? How can you then say that all of that delayed
16 disclosure stuff hung on the investigator's statement?

17 MR. FALK: The issue at the trial was whether or
18 not there was abuse of that child.

19 THE COURT: Well, I understand. But maybe I don't
20 understand what your point is. But the Court said that
21 it was cumulative.

22 MR. FALK: Yes.

23 THE COURT: And they're talking about the delayed
24 disclosure stuff, is that what -- is that what they are
25 alleging was cumulative?

CLOSING ARGUMENT BY THE APPLICANT

1 MR. FALK: No, no, no. What they are alleging is
2 cumulative is how it points back to the father, and the
3 testimony had already come in by somebody else other
4 than one of the children that the father had been
5 abusing --

6 THE COURT: But it also come in by all the
7 children as well, hadn't it?

8 MR. FALK: Yes, Your Honor.

9 THE COURT: Is that correct?

10 Okay. I'm just trying to figure out what we're
11 dealing with.

12 So, there's more than just the statement from the
13 investigator, there's also the testimony of the three
14 kids.

15 MR. NEELY: Yes, Your Honor.

16 THE COURT: Okay.

17 MR. FALK: Let me just -- let me just point to the
18 items that I was referring to.

19 I'm just saying, if we look at the Court of
20 Appeals' decision on Page 4 --

21 THE COURT: Okay. Let me get to that. I'm sure I
22 have it.

23 MR. FALK: It's in the appendix to the --

24 THE COURT: To the transcript?

25 MR. FALK: Yeah.

CLOSING ARGUMENT BY THE APPLICANT

1 THE COURT: Oh, I'm sorry. Okay.

2 MR. NEELY: There should have been a copy.

3 May I approach?

4 THE COURT: Yes, sir. Sorry, I do have this.

5 I apologize. I do have it. Thank you though.

6 So you say Page 4?

7 MR. FALK: Yes.

8 THE COURT: All right, sir. Page 4. I'm there.

9 What am I looking at?

10 MR. FALK: All right. So, if we go -- we are

11 talking about -- I may --

12 MR. NEELY: That's just a fax.

13 MR. FALK: I may have confused myself also. Let
14 me find this.

15 MR. NEELY: I believe if you go to Point B, after
16 the pages of law.

17 MR. FALK: Right, right, right. Okay.

18 So, I am on Page 8 actually.

19 THE COURT: Under expert testimony regarding the
20 length of delay of disclosure?

21 MR. FALK: Yes. Then it refers to the question
22 that Ms. Lovell asked as far as the length of
23 disclosure should be for three years. On redirect
24 examination, the State asks, "Does the length of the
25 delay of disclosure have any, in your opinion, does it

CLOSING ARGUMENT BY THE APPLICANT

1 erode the credibility of the disclosure?"

2 And Lynch Stanley testified, "No, it doesn't."

3 And it goes on to say, "We recognize the State's
4 question was inappropriate because it invited vouching
5 by Lynch Stanley."

6 "Despite State's inappropriate question, we find
7 no reversible error in conjunction with Lynch Stanley's
8 direct and cross-examination testimony. We find that
9 the -- Your Honor, I'm getting -- I should have -- I
10 apologize, Your Honor. Let me have a second.

11 THE COURT: Yeah, take whatever time you need.

12 MR. FALK: Sorry. I'm confusing two different
13 paragraphs. I'm talking also about where there was
14 testimony from Twitty, where it identified -- and this
15 is on Page 6, second to the last paragraph on the page.

16 "However, when Twitty identified the perpetrator
17 by testifying the victim reported he was about six or
18 seven years old at the time when his dad started to do
19 things to him, the trial court overruled Smith's
20 objection to Twitty's testimony. We agree with Smith
21 that this constituted error because it went beyond time
22 and place.

23 However, we find that the testimony was cumulative
24 of other testimony and that, again, is where I'm
25 referring to. Although she may have been right that

CLOSING ARGUMENT BY THE APPLICANT

1 Twitty testified beyond the scope of what she was
2 allowed to testify to under 1723175, again, identifying
3 a hearsay statement by the child saying that the father
4 had abused him, it was cumulative of what Florencio had
5 already said."

6 That's my point.

7 MR. NEELY: You can always let me know whenever
8 you are ready, I'll receive mine.

9 THE COURT: Yes, just give me one second.

10 All right, sir.

11 CLOSING ARGUMENT BY THE STATE

12 MR. NEELY: Thank you, Your Honor.

13 Going to the first point, with Andreas Florencio's
14 testimony on Page 82, I agree and concur with
15 Ms. Lovell's testimony that it was not hearsay. I
16 believe, at least my opinion, for the number one case
17 for CSC cases in South Carolina, it's most referred to
18 as State V Kromah. That's 401 SC 340.

19 And then this is quoting from State V Kromah,
20 "Holding an officer's testimony as to what his
21 investigation revealed and its conclusion that all of
22 the evidence led to the Defendant was proper, where he
23 did not repeat any statements actually made to him by
24 individuals at the scene."

25 In this case, we have -- the Solicitor asking

CLOSING ARGUMENT BY THE STATE

1 Investigator Florencio, and very specifically asking
2 him, in general terms, what did -- "What was told to
3 you to begin your investigation?"

4 And so that is a clear hearsay exception.

5 Law enforcement can testify, it's not -- it is not
6 concerning the matter of the truth asserted, it is not
7 hearsay. It is concerning why the officer began
8 investigation on Mr. Smith. That is the very first
9 step. And that's why it's not hearsay, that's why it
10 is allowed. And that's why Kromah specifically holds
11 that kind of testimony is allowed. So I would agree
12 with Ms. Lovell that that was not hearsay, it was not
13 objectionable.

14 Whenever we go to the second point, where counsel
15 asserts, I believe that trial counsel was ineffective
16 for not asking for a mistrial. First, I would note
17 that trial counsel did object to that testimony, and
18 the Court found that she objected correctly.

19 THE COURT: To the testimony regarding the delayed
20 disclosure?

21 MR. NEELY: Correct. Actually, Judge, that's a
22 separate issue. Twitty is a different --

23 THE COURT: Is that the one where she objected,
24 the Judge overruled?

25 MR. NEELY: That's correct. That actually

CLOSING ARGUMENT BY THE STATE

1 happened twice. That happened to Twitty, and in regard
2 to Lynch Stanley. Lynch Stanley is the delayed
3 disclosure objection. And, again, in that case, the
4 Court of Appeals basically held that the State's
5 question was improper, and Ms. Lovell objected to the
6 question. The Court overruled her objection, and then
7 the Court of Appeals found that Mr. Lynch Stanley's
8 answer was not inappropriate.

9 And so like in this -- this is -- again, reading
10 the Court of Appeals, "We recognize the State's
11 question was inappropriate because it invited vouching
12 by Lynch Stanley. We also recognize Lynch Stanley's
13 initial response to standing alone would constitute
14 vouching for the victim's credibility. However, Lynch
15 Stanley continued his response by stressing that
16 credibility and delayed reporting are unrelated.

17 And this goes down, "Despite the State's
18 inappropriate question, we find no reversible error.
19 The redirect testimony did not improperly bolster the
20 victim because Lynch Stanley qualified the initial
21 response and never gave an opinion regarding whether
22 the victim was telling the truth."

23 So while it was basically walking on thin ice, and
24 the State -- and there could have been vouching that
25 was brought on by the testimony there, there was no

CLOSING ARGUMENT BY THE STATE

1 improper vouching brought out there. There was no
2 bolstering of the victim's credibility brought out in
3 that testimony. And that is what the Court of Appeals
4 held.

5 And, again, we have an objection in that case, and
6 we have a ruling by the Court of Appeals, and I think I
7 argued this on Monday, Drayton v. Evatt, 312 SC 4,
8 "Issues that could have been raised at trial or under
9 appeal cannot be asserted in application for
10 post-conviction relief."

11 These are issues that were raised and argued on
12 direct appeal. And then we have beyond just issues
13 being raised in direct appeal, we also have the Court
14 of Appeals' finding there was no reversible error,
15 there was no prejudice, testimony was cumulative, and
16 as Your Honor noted, we have three victims all directly
17 implicating the applicant in this case. And, again, I
18 would argue that the law enforcement's testimony was
19 not hearsay, it was merely showing how the law
20 enforcement and why law enforcement began investigation
21 of Mr. Smith, and I believe that's, you know,
22 basically, State V Kromah.

23 I believe State V Kromah is actually quoting
24 another case. I don't recall which case they are
25 quoting, but again, that is pulled directly from the

CLOSING ARGUMENT BY THE STATE

1 case law. And so I think that it's very clear that
2 Ms. Smith (SIC) objected in the correct places, that
3 those issues were preserved for direct appeal. The
4 Court of Appeals found there was no prejudice. Even
5 though the Court overruled her objections in some
6 places, where the Court of Appeals said the Court
7 should have sustained the objection, but it doesn't
8 matter because there was no prejudice because it was
9 cumulative testimony, because the victim qualified
10 their answer to pull back and not bolster the
11 credibility of the victim. And I think this is a --
12 and, again, this case actually happened pre Kromah as
13 well.

14 I told Ms. Lovell on the phone, she did an
15 excellent job. A lot of pre Kromah cases, people
16 failed to object to time and place the way they should
17 have been, but Ms. Lovell did great job at that.

18 MR. FALK: Your Honor, if I could just clean
19 something up on my part.

20 The testimony from Twitty, who was the forensic
21 examiner, if you look at Page 148, this is now Twitty
22 testifying, and the forensic examiner can only talk
23 about time and place, but can't really -- the testimony
24 can't go beyond that. That is what 1723175, I believe,
25 states.

CLOSING ARGUMENT BY THE STATE

1 So question --

2 THE COURT: What line are you on?

3 MR. FALK: Line 8. "What abuse did he disclose to
4 you?"

5 "He disclosed that he had to," and then you can
6 read the rest of the sentence, and then there was an
7 objection. The objection was sustained, and the issue
8 is whether or not trial counsel should have asked for
9 more of a curative instruction once they sustained the
10 objection that -- regarding testimony that went beyond
11 the scope of what is permissible from a forensic
12 examiner, and then that same -- and then it happens
13 again on Page 149, at Lines 13 through 15, where we
14 have the same question, where we have the same hearsay
15 testimony going beyond the scope of what the forensic
16 examiner is allowed to say.

17 And it's not preserved for appeal because they
18 have to accept what -- I mean, the remedy that the
19 Court gave us sustaining the objection, whether or not
20 the curative instruction was sufficient, that part of
21 it is not preserved for appeal. And then that is where
22 the Court says that even if that was a problem, even if
23 this testimony that should have been -- that -- even if
24 Twitty's testimony on that subject went beyond the
25 scope of what it was allowed to, it was cumulative of

CLOSING ARGUMENT BY THE STATE

1 what Florencio had already said. And I apologize for
2 leading us down another path earlier.

3 THE COURT: Okay. That sounds good.

4 Anything further?

5 MR. NEELY: No, Your Honor.

6 MR. FALK: Nothing, Your Honor.

7 THE COURT: Again, I'm going to take this matter
8 under advisement and give me an opportunity to review
9 these transcripts, and I'll have an answer for you in
10 the next day or so.

11 MR. NEELY: Thank you, Your Honor.

12 (Conclusion of hearing.)

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CLOSING ARGUMENT BY THE STATE

1

2 CERTIFICATE

3

4 STATE OF SOUTH CAROLINA:

5 COUNTY OF BEAUFORT:

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

8

DATED this 18th day of September, 2019.

9

10

11

Mona L. Manley /s/

12

MONA L. MANLEY

13

Official South Carolina Court Reporter

14

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT

Arthur Franklin Smith, #306393,

Case No. 2016-CP-07-00279

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

2019 JUL 12 PM 1:01
JESSIE ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

The above-captioned matter comes before the Court via an application for post-conviction relief filed by Arthur Franklin Smith on January 29, 2016. This Court convened an evidentiary hearing into the matter on October 10, 2017, at the Beaufort County Courthouse. Applicant was present at the hearing and represented by James Falk, Esquire. Ruston W. Neely, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's trial counsel, Gail Lovell, Esquire, testified via phone; Applicant was present and testified. This Court had the opportunity to listen to their testimony and rule on their credibility. This Court also had before it a copy of the trial transcript, the records of the Beaufort County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the direct appeal records, and the pleadings in this matter.

I. PROCEDURAL HISTORY

Applicant was indicted by the September 2003 term of the Beaufort County Grand Jury for Criminal Sexual Conduct with a Minor (2003-GS-07-1756). Trasi Campbell, Esquire, represented him. In November 2004, Applicant proceeded to a jury trial, pursuant to which he was found guilty as indicted. The Honorable Jackson Gregory sentenced Applicant to confinement for twenty years. However, the trial court subsequently granted Applicant a new trial on the ground that Victim's

testimony was coached by his aunt. *State v. Smith*, 372 S.C. 404, 406, 642 S.E.2d 627, 628-29 (Ct. App. 2007). The South Carolina Court of Appeals affirmed. *Id.* at 406, 642 S.E.2d at 629. The South Carolina Supreme Court subsequently found that the trial court judge did not abuse his discretion or commit an error of law and remanded the case for a new trial. *Id.* Applicant proceeded to a second jury trial on September 19, 2011, where he was represented by Gail Lovell, Esquire (Counsel) pursuant to which he was found guilty as indicted. The Honorable Roger M. Young, Sr. sentenced Applicant to confinement for thirty (30) years. A notice of appeal was filed on Applicant's behalf and an appeal perfected pursuant to *Anders v. California*, 378 U.S. 738, 87 S.Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Applicant's conviction and sentence: *State v. Smith*, 411 S.C. 161, 767 S.E.2d 212 (Ct. App. 2014). The Remittitur was issued on June 30, 2015.

II. ALLEGATIONS

Applicant alleged the following grounds in his application:

1. Ineffective Assistance of Counsel
 - a. Failure to timely object to Andres Florencio's testimony as hearsay and failure to move for mistrial on Kendra McIlvee Twitty's testimony.

III. FACTUAL HISTORY

After Victim and his parents moved from Buffalo, New York, to Beaufort County, South Carolina, Victim's parents separated and he lived primarily with his biological mother. R. p. 106- 07. Victim visited his biological father, Applicant, at his house from time to time. R. p. 107. During these visits, beginning around when Victim was six years old, Applicant would perform oral and anal sex on Victim. R. p. 108. He would also make Victim perform oral sex on him and make him try to perform anal sex. R. p. 109-10. The sexual abuse always occurred in Applicant's house, specifically in Applicant's bedroom, when the two of them were alone. R. p. 108, ln. 18- 22. Applicant threatened to kill Victim or break his bones if he told anyone what was happening. R. p. 110, ln. 20-24. Victim stated that the abuse continued for about two years. R. p. 110, ln. 2-5. He testified that the sexual abuse made

him feel "terrible" and "angry" and that it hurt. R. p. 109, ln. 11-20. Because he was scared, Victim did not tell anyone about the abuse until after he stopped having contact with Applicant. R. p. 110-11.

Victim's aunt obtained custody of Victim and his two siblings in November of 2001. R. p. 91. At the time, Victim was "acting out" and exhibiting behavior that was "concerning." R. p. 92. Specifically, Victim fondled other children, was physically aggressive, and destroyed property. R. p. 92-93. Victim was sent to two different counseling centers because of these behaviors. R. p. 93-94. One of Victim's counselors testified that it appeared that Victim had been sexually abused and that he was suffering from symptoms of post-traumatic stress disorder. R. p. 186-88. Victim's aunt learned in January 2002 that Victim had been sexually abused. R. p. 95. After allowing Victim to spend more time in counseling trying to deal with his health issues, she took Victim to file a police report regarding the sexual abuse in May of 2003. R. p. 94-95. Victim had a forensic interview shortly thereafter and disclosed that he had been sexually abused in his biological father's bedroom and that it began around age six or seven. R. p. 148-49. The forensic interviewer recommended that Victim have no contact with his biological father. R. p. 150, ln. 1-4.

Victim's brother testified at Applicant's trial that Applicant also sexually abused him beginning around age six. R. p. 118-19. The abuse involved oral and anal sex either in Applicant's bedroom or his bedroom, and Applicant threatened to hurt his mother if he told anyone about the abuse. R. p. 119; p. 122-23. Additionally, Victim's sister testified that Applicant sexually abused her when she was six and seven years old. R. p. 126-27. She testified that Applicant made her touch his penis with her hand and her mouth, and he would touch her vagina and her "butt." R. p. 127. The abuse mainly occurred in Applicant's bedroom. Applicant told her that she should not tell anyone about the abuse. R. p. 128.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813

(1985). When an Applicant alleges ineffective assistance of plea counsel as a ground for relief, they must present evidence to satisfy the two prong test enumerated in *Strickland v. Washington*, to determine whether plea counsel's "assistance was so defective as to require a reversal of" Applicant's sentence. *Id.* at 466 U.S. 668, 687 (1984). First, the Applicant must show plea counsel's performance was deficient; and second, the applicant must show they were prejudiced by that deficiency. *State v. Stalk*, 383 S.C. 559, 560-61 (2009) (citing *Hill v. Lockhart*, 474 U.S. 52).

In order to prove deficient performance under the first prong of *Strickland*, the burden is on Applicant to show that plea counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.* 688. In considering whether counsel's performance was reasonable, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 690). The applicant

must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Even if the Applicant can establish that counsel's performance was deficient, they must still overcome their burden to demonstrate prejudice from that deficiency. The second prong of *Strickland* requires Applicant to prove that counsel's deficient performance prejudiced Applicant to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing *Strickland*, 466 U.S. at 694).

a. Failure to timely object to Florencio hearsay testimony and move for mistrial on Twitty's testimony

Andres Florencio, a criminal investigator for the Beaufort County Sheriffs Office, testified without objection that in May of 2003, Victim and his aunt came to the Sheriffs Office "to report that sometime during the time between May [of] 2009 and June of the year 2000, that [Child] had been sexually assaulted by his father." R. p. 82. Counsel did not object. Later in the trial, Kendra Twitty, a forensic interviewer and counselor at Hope Cottage, testified, "[Victim] disclosed that he had to suck his dad's penis" Counsel immediately objected; the trial judge sustained the objection and instructed the jury to disregard her statement. Twitty then testified:

When I asked about time frame, [Victim] had said that it happened since he was, like, six or seven years old. . . I'm not exactly sure of the number, but he said it had been happening for a number of years. He was ten at the time I interviewed him and it happened in South Carolina in a trailer and they would be in his dad's bedroom.

R. p.148-49. Counsel objected and was overruled. R. p. 149.

On Appeal, Applicant argued the trial court erred in overruling his objection to Twitty's testimony that identified Applicant as the perpetrator. The Court of Appeals held that because Applicant was previously identified as the perpetrator without objection, Twitty's later testimony also identifying Applicant as the perpetrator was "harmless because it was cumulative." *State v. Smith*, 411

S.C. 161, 170, 767 S.E.2d 212, 217 (Ct. App. 2014) (citations omitted). The question before this Court, then, is whether Counsel's failure to object to the initial identification testimony of Investigator Florencio rose to the level of error required to grant post-conviction relief. The Court finds it does not.

Even assuming the first prong of Strickland was met, Applicant has not carried his burden of showing that there is a reasonable probability that the outcome at trial would have been different but for Counsel's deficient performance. In the trial of this case, the jury heard testimony not only from the Victim, but from the Victim's brother and sister, that Applicant repeatedly sexually abused each of them separately on multiple occasions over a period of years. R. p. 107-111; p. 118-120; p. 125-129. The Victim and his sister both specifically testified that the abuse occurred in Applicant's bedroom in his residence in Bluffton. R. p. 108; R. p. 127. All three witnesses testified with detail and specificity, and identified Applicant in the courtroom. Thus, it is reasonable to conclude that the jury could have found Applicant guilty beyond a reasonable doubt based on the testimony of the Victim and his siblings alone.

V. CONCLUSION

Based on the foregoing, this Court finds and concludes that Applicant failed to prove he was prejudiced by Counsel's alleged deficiencies. Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

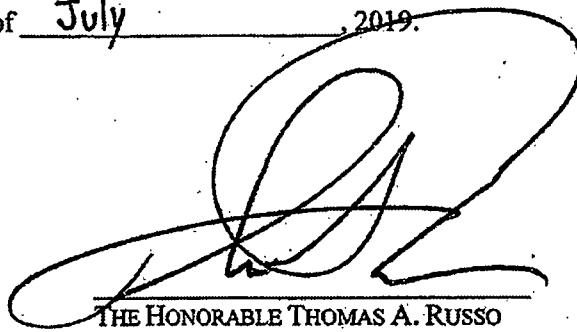
This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1g, SCRCP, provides that if Applicant wishes to seek appellate review, his post-conviction relief attorney

must serve and file a notice of appeal on Applicant's behalf. Applicant and his attorney are directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 9th day of July, 2019.

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the bottom.

THE HONORABLE THOMAS A. RUSSO
Presiding Judge

Florence, South Carolina

WITNESSES

FLORENCIO/BCSD

ARREST WARRANT NUMBER

F788500

08/28/2003

ACTION OF GRAND JURY

true Bill

Stacy D. Miller

Foreperson of Grand Jury

Date: SEP 25 2003

VERDICT

Guilty 11/16/2004

James A. Weyant Jr.

Foreperson of Petit Jury

Date:

DOCKET NO.

2003-GS-07-01756

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III., Solicitor

COURT OF GENERAL SESSIONS

09/25/2003

TERM

THE STATE
VS.

SMITH, ARTHUR FRANKLIN

Indictment for

Sex/Crim sex conduct w/min <11yrs-1st d e

SC Code : 16-03-0655

CDR Code: 0385

Class:

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2003-GS-07-01756

At a Court of General Sessions, convened on 09/25/2003 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

Sex/Crim sex conduct w/min <11yrs-1st de
=====

16-03-0655

THAT ARTHUR SMITH DID IN BEAUFORT COUNTY BETWEEN 5-1-99 AND 5-31-00 DID
WILFULLY AND UNLAWFULLY PERFORM ORAL AND ANAL SEX ON HIS SON, **mino**,
A MINOR/AGE 7-9. HE ALSO FORCED HIS SON TO PERFORM ORAL AND ANAL SEX ON
HIM. THE DEFENDANT THREATENED TO "BREAK HIS BONES" AND OTHER PHYSICAL
ABUSE IN ORDER TO FORCE HIM TO COMPLY.

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


SOLICITOR