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STATE OF SOUTH CAROLINA
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

SUPPLEMENTAL APPENDIX

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
Joshua Smith	19	--	--	--
Complainant Solak	23	--	--	--
Jacquelyn Solak	34	--	--	--
Kendra Twitty	40	--	--	--

1 (September 19, 2011.)

2 THE COURT: All right. Let's get on then to
3 the State vs. Smith.

4 So we have two issues, child victim's out of
5 court statement and then Lyle testimony. So let's deal
6 with this child victim's out of court statement issue
7 first, under 17-23-175.

8 MR. BANNON: Your Honor, we certainly can,
9 but I don't believe she's going to be here until 3:00. I
10 was just anticipate taking the Lyle motions up first.

11 THE COURT: Let's just talk about it first.
12 My thoughts are, you know, the purpose of having those
13 kind of statements are if you have young witnesses to
14 kind of, I suppose, say, well, what they're saying now is
15 consistent with what they're saying at or about the time
16 shortly after it took place to sort of solidify a child
17 of tender year's testimony, because they might get
18 intimidated on the stand, get a little scared, be a
19 little nervous, and you want to sort of, I suppose,
20 bolster what they're saying and fill in some gaps.

21 As I understand it, though, the victim is
22 now you say 19 years old?

23 MR. BANNON: Yes, sir. He's now 19 years
24 old.

25 THE COURT: So it's not like we're going to

1 need to worry so much about filling in the gap. He's a
2 man. He's an adult.

3 MR. BANNON: Yes, Your Honor, he is.

4 THE COURT: So what would be the point then
5 of that testimony?

6 MR. BANNON: Well, Your Honor, the concern
7 that the state has is because of the long passage of time
8 in this particular instance, I believe that it would be
9 relevant to the jury to hear that these were his
10 accusations at the time, and essentially it's neither the
11 state's fault for the delay in the trial of this matter,
12 nor the defendant's fault in delaying the trial of this
13 matter, but I think it certainly is something that the
14 jury might have questions about, and I think it would be
15 relevant and proper as I believe the state can meet its
16 burden under the statute to be able to admit what he said
17 some eight years ago about what happened.

18 THE COURT: Yeah, but he's going to be here
19 to testify.

20 MR. BANNON: Yes, Your Honor.

21 THE COURT: And, normally, you don't have
22 hearsay being allowed -- if somebody is available to
23 testify, you swear them in, you put them up. If they
24 made prior inconsistent statements, then you can
25 cross-examine them about that, but if somebody is

1 available to testify, the general rule is you bring them
2 in, you let them testify, and if it's consistent with
3 what they said otherwise, their other out of court
4 statements aren't coming into evidence, only if they're
5 inconsistent --

6 MR. BANNON: Yes, Your Honor, that is
7 typically --

8 THE COURT: So let me finish my thought. But
9 we make a special rule for child sex abuse cases, and
10 that is 17-23-175, and the purpose of that would be to
11 say, well, our witness slash victim is of tender years
12 and because of the circumstances of bringing them into
13 court and placing them in a stressful situation and the
14 children, it's a very odd environment for them, they
15 might not be able to come in and just testify and relate
16 to things that took place, even a fairly short period of
17 time before, because, you know, their minds are
18 developing, their memories are somewhat, you know, under
19 question about things like that, and so we'll allow --
20 the legislatures decide we'll make a special exception
21 for out of court statements for young children, and they
22 lay out what has to take place in the environment which
23 it takes place, presumably, to enhance its reliability.

24 But the reason for having -- or one of the
25 main reasons, I would think, for having that special

1 exception is your witness is going to be of tender years
2 at the time they're testifying. Here you've got a
3 grownup, an adult who can testify, so there is really not
4 that reason to kind of fill in his gaps and bolster his
5 credibility so much because he's here and he can testify,
6 and, you know, it's stressful for everyone to come
7 testify, but why should we treat him, now that he's a
8 grownup, any different than we would any other witness
9 who was the victim of a crime?

10 MR. BANNON: Well, Your Honor, because he was
11 a child at the time when the crime occurred, I think that
12 we're entitled to bring certain evidence in.

13 Now, I understand that the Court's opinion is
14 that, you know, it's when the child victim testifies to
15 give sort of almost the jury a more clear picture about
16 what the child had to say and sort of a less intimidating
17 environment; however, the way that the statute reads it
18 simply requires that the statement would be made by a
19 child under 12, and he, as memory serves, was either not
20 quite 11 or not quite 12 at the time when he did make
21 these disclosures to a forensic interviewer.

22 And so while I don't necessarily disagree
23 with the Court as to, you know, the overall intention of
24 the legislature, I think it's clear from the actual
25 language of the legislation that as long as it is a child

1 victim who made a statement when they were under 12 years
2 of age that this statement can be admitted in certain
3 circumstances.

4 THE COURT: All right. Just to lay a little
5 bit of background and seeing if any of these 17-23-175
6 factors are -- what the facts are that apply to those
7 factors, I see in your memo it says that he had been in
8 counselling in Richmond Hill, Georgia. Is that where
9 this Hope Cottage is?

10 MR. BANNON: No, sir. Hope Cottage is
11 located here in Beaufort.

12 THE COURT: So why was he going to Hope
13 Cottage? What is Hope Cottage?

14 MR. BANNON: Hope Cottage is sort of the
15 local sexual abuse counselling center. Typically, it's
16 used by members of law enforcement. They conduct, I
17 would say, all of the child forensic interviews on cases
18 that come in in Beaufort County.

19 So what happened was that when the mother and
20 child, or when Ms. Solak and ^{Complainant} came and reported the
21 incident to Investigator Florencio, he set up an
22 interview date and time at Hope Cottage for the child to
23 be interviewed.

24 THE COURT: So Hope Cottage was doing an
25 investigation or they were just counselling him?

1 MR. BANNON: Well, it was investigative in
2 nature. Investigator Florencio was there. He observed
3 the questioning of the child, but it's in a more sort of
4 therapeutic setting, so to speak, but Ms. McIlvee did not
5 counsel the victim at all.

6 THE COURT: And as I understand it, this was
7 not videotaped or audiotaped?

8 MR. BANNON: It was not.

9 THE COURT: All right. Well, I guess we'll
10 need to hear some testimony from her before we proceed a
11 little bit further. Did you say she won't be here for a
12 little bit?

13 MR. BANNON: Yes, sir. She said she would be
14 here by 3:00.

15 THE COURT: All right. Well, let's talk
16 about the Lyle testimony then that you want to present.

17 MR. BANNON: Yes, Your Honor. Essentially,
18 there is two different witnesses who we would ask to be
19 admitted pursuant to Lyle. There is Joshua Smith and
20 Jacquelyn Smith. Joshua is the victim's older brother,
21 and Jacquelyn is the victim's younger sister. I would be
22 happy to take them up one at a time if that pleases the
23 Court.

24 THE COURT: That's fine.

25 MR. BANNON: Your Honor, Joshua Smith, just

1 to give you a little bit of a background, I believe, is
2 two to three years older than ^{Complainant} the primary victim.
3 His testimony the first time in disclosures involved that
4 his abuse occurred in Buffalo, New York and that the
5 defendant -- the person who abused him was his father,
6 and he would have him come into his bedroom, that they
7 were alone, he would get him undressed in some way, and
8 then his father would perform oral sex on him and perform
9 anal sex on him and then have the victim perform oral sex
10 on the father as well as anal sex on the father.

11 This is essentially -- and then afterwards,
12 in order to secure his silence, the defendant told Joshua
13 that he would hurt his mother should he disclose these
14 activities.

15 Essentially, Your Honor, the only difference
16 is that essentially the boys were the same age. They
17 were between the ages of six and nine. This occurred in
18 Buffalo, New York, but, essentially, what Joshua says as
19 soon as the family moves from Buffalo, New York to
20 Bluffton, South Carolina, that's when his abuse stops,
21 and it's my understanding is when ^{Complainant} says that his
22 abuse begins.

23 THE COURT: What are the years? 1990 what to
24 what, roughly?

25 MR. BANNON: It probably would have been, for

1 Joshua, between 1996 and 1997, which is when the family
2 moves to Bluffton, and then ^{Complainant} the primary victim,
3 discloses that his abuse goes essentially from six to
4 nine, or just before he turns nine, so that would have
5 been from 1998 through 2000.

6 THE COURT: Okay. And what is his testimony
7 going to be about, the nature of abuse and the
8 circumstances that make it look like a common scheme or
9 plan?

10 MR. BANNON: Well, Your Honor, at least
11 previously, he's testified and in his disclosures he said
12 that his father would take him into the bedroom, he would
13 get him into a state of undress, he would perform sex on
14 the child, perform anal sex on the child, and then have
15 the child reciprocate it with him. Then afterwards he
16 would threaten the child. He said -- he would threaten
17 him with physical harm should he tell anyone, and that's
18 essentially the extent of it.

19 So my argument would be, Your Honor, that
20 it's a common scheme or plan because they involve very
21 similar acts done in -- you know, while they're in
22 different locations, they're always in the master bedroom
23 of Mr. Smith's home. The sex acts are the same. The
24 relationship between the victims and the defendant are
25 both the same. They're both father and son, as well as

1 the use of the threats in order to maintain the
2 children's silence, Your Honor, as well as the fact that
3 the victims are of virtually the same age ranges as when
4 these abuses occurred, which it looks to me, Your Honor,
5 that those are all of the five instances required in
6 State v. Wallace.

7 THE COURT: All right. What is the testimony
8 of Jacquelyn? That's the sister?

9 MR. BANNON: Yes, sir, the younger sister.
10 She says essentially that the abuse occurred in her
11 father's bedroom.

12 Now, her abuse occurred here in South
13 Carolina as well. She said that she and her father would
14 be alone in the bedroom. He would take her clothes off.
15 He would penetrate her vagina digitally, penetrate her
16 anus digitally. He would have her perform oral sex on
17 him, and then she also described essentially that she
18 would manually stimulate him with her hand as well.

19 And now this abuse was reported to law
20 enforcement in the year 2000, and Mr. Smith was charged
21 with CSC with a minor and he ultimately pled guilty to
22 assault and battery of a high and aggravated nature.

23 THE COURT: And you're just seeking to get in
24 the acts, not the convictions; is that right?

25 MR. BANNON: Yes, Your Honor. And my

1 arguments would be virtually the same for Joshua and
2 Jacquelyn, essentially engages in sexual intercourse, both
3 with their genitalia and with their anuses. This occurs
4 in the bedroom. You know, again, it's a father-child
5 relationship.

6 THE COURT: Well, the identity of the
7 defendant is not in question. What is the probative
8 value that you seek to establish through this evidence?
9 What is it that you want to prove? Why is it probative
10 to your case? What element of the crime are you trying
11 to say can be proved through this common scheme? What is
12 the question that is missing that this fills in the link?

13 MR. BANNON: This essentially fills in --
14 well, one thing that I think is going to be at least
15 somewhat difficult is proving the jurisdiction here in
16 South Carolina, and I think the fact that at least for
17 Jacquelyn and for ^{Complainant} the abuses occurred both here in
18 South Carolina, as well as the fact that, well, Your
19 Honor, this is his common scheme and plan. He is a
20 molester of children, and this is the way in which he
21 chooses to do it.

22 THE COURT: Well, I'm not sure that is
23 exactly why we want to -- you're allowed to get in
24 404(b), that is kind of the reason why you don't let it
25 in, is to say, well, this is the kind of stuff that he

1 does. He's a bad person. You know, because he's
2 charged -- because other people have said it doesn't
3 necessarily mean that, in fact, it heightens the danger
4 of letting it in, so you got to have something that's an
5 issue to say, well, this is why we need to have this in,
6 other than to create this aura of what he said,
7 exceptionally bad character, and therefore we must let
8 the jury know that he is a bad person.

9 This is an exception to that rule, to say,
10 well, throw enough mud up against the defendant that
11 hopefully they'll convict him because he's a bad guy
12 because he's been accused of that. What is at issue in
13 this case that you need before the jury this information
14 about how he -- what's his MO?

15 MR. BANNON: Right. Well, Your Honor, I
16 think what is going to be an issue is -- I don't know
17 exactly what the defense is going to be, but I suspect
18 that it might be that if these children were molested, it
19 wasn't by the defendant. You know, I think that the
20 identity is straight, that he is their father. I don't
21 think there is any problem with that identity, but I
22 think there is certainly going to be a dispute as to
23 whether or not this is the abuse that took place, was
24 from the defendant to the child.

25 And also, Your Honor, I suspect from my

1 conversations with Ms. Lovell that another part of the
2 defense is going to be that this kid is essentially lying
3 and that the abuse never took place, because there is
4 some evidence on the record, which from the prior trial
5 regarding coaching, so I think that that is going to be
6 an avenue for the defense to take up whereas there isn't
7 any evidence that Jacquelyn or Joshua were ever coached.
8 I think there is going to be a defense of, well, this boy
9 was coached and therefore he's making it all up.

10 THE COURT: Okay. Anything else?

11 MR. BANNON: No, sir. Nothing further.

12 THE COURT: Okay. Mrs. Lovell?

13 MS. LOVELL: I believe you should exclude the
14 evidence under Lyle of Joshua Smith's testimony because
15 the state has not shown relevancy or anything to do with
16 the logical connection. It's merely an attempt by the
17 state to show these things happened; therefore, if they
18 happened, then his character is such that he's acting in
19 conformity.

20 The defense doesn't question if ^{Complainant} or Josh
21 or Jacquelyn were abused. The child definitely acts out.
22 There could definitely be argument that he was. Our
23 contention was it was not Mr. Smith. Now, these Lyle
24 testimonies do not address that issue directly, only in
25 the character of prior bad acts. The bad acts that the

1 state wishes to include with Joshua are over 18 years
2 old, nor has the state shown any clear and convincing
3 evidence that they actually occurred.

4 I heard Mr. Bannon speak about the acts that
5 were perpetrated on Josh by Mr. Smith. He said he went
6 into more detail than I had known. I read the
7 transcript, of course, to find out what would be
8 testimony by Josh, possibly in this trial, and from that
9 I learned he testified that he put his penis in my butt
10 and was undressed, and that was the only testimony that
11 was similar in the instant case as to what^{Complainant} had done
12 to him.

13 So I don't see where there's any connection
14 between the acts. They're dissimilar, and for that
15 reason, I think the testimony should be excluded.

16 There is a dissimilarity also of the
17 different place that the time which the state contends
18 Joshua abused was '96, '97. He is three years older than
19 ^{Complainant} Complainant's abuse was '99 to 2000. Even then it's
20 part of 2000. It's very auspicious as to actually when
21 this happened because he was visiting his father when his
22 parents were separated.

23 They moved to South Carolina in '97, which is
24 about the time when Josh's allegations occurred, but
25 Josh -- he was born in '89. He was five or six years

1 old, so there is overlapping age groups, and it's very
2 vague as to the actual age, and even though Jacquelyn --
3 I'll stay with Josh -- also, there was delayed reporting
4 by both brothers. One brother reported it at the trial,
5 the other brother took three years to report it, and that
6 was while -- also, that was done while they were living
7 in the home of their aunt.

8 They had been removed from their home, the
9 parents, DSS had been involved, so I ask the Court to
10 evaluation those items as well and to take into
11 consideration that these are very dissimilar. They are
12 18 years apart in time, and I don't think the state has
13 shown clear and convincing evidence which should even
14 bring it into the analysis of Lyle at this point.

15 There's also -- we believe that its sole
16 purpose is to infer guilt from the defendant's prior act.
17 There is no logical connection. The evidence is highly
18 prejudicial, and certainly the state has not shown it's
19 probative, and we ask that the testimony of Josh be
20 excluded.

21 And as to Jacquelyn's testimony, we also feel
22 similar arguments to that as well, the fact that the
23 conviction won't be used directly; nevertheless, there's
24 a high chance that that would be disclosed or released
25 correctly. In any event, that happened ten years ago.

1 In fact, ten years was the conviction, but it was 11
2 years when the actual act was to have occurred, sometime
3 in 2000. There were some times when she visited and
4 there was no abuse, so there certainly were times of
5 which nothing was happening that she had visited and
6 things were fine, so it's not a continuous pattern of
7 hers throughout a year or more.

8 There was testimony -- the testimony does not
9 show any further common scheme or plan to elicit conduct
10 but, again, to infer guilt from the defendant's
11 propensity to commit a crime, which is highly prejudicial
12 to my client. There was no showing of how the testimony
13 would have helped the judge or the jury in understanding
14 some material issue in this case, as under Wesley --
15 State vs. Wesley Smith.

16 State vs. Danny Tuten, the appellate court
17 reversed the trial Court's admission of victim's
18 testimony of prior uncharged assault under common scheme
19 because they were visits by the victim without assaults,
20 which I mentioned also in my argument against Josh's
21 testimony.

22 And this case overlapped the time frame of
23 the current case. The ABHAN time was '97 to 2000. This
24 current case is '99 to 2000, ^{Complainant} case. Because of
25 the inability of the state to actually give us a time, or

1 a closer timing period, which I understand is not
2 required, but would be helpful, since we have a series of
3 allegations that all seem to be part of the common
4 scheme, which we believe are not.

5 She was interviewed -- well, I guess -- she
6 didn't -- well, Jacquelyn was living at that time --
7 Jacquelyn was living with her mother and her boyfriend,
8 her mother's boyfriend, and another child in the house,
9 so she was removed from the father's house when she was
10 living with her mother, and that case was under
11 investigation by DSS.

12 She was removed, as were the two boys, and
13 when they were all removed, nobody reported any sexual
14 abuse except for the girl. And, like I said, it is an
15 11-year-old event and I ask that you evaluate this
16 evidence in light of the fact it's highly prejudicial,
17 it's not probative, and under 402 its prejudicial
18 probative value outweighs its probative value.

19 THE COURT: Did Joshua and Jacquelyn testify
20 in the first trial?

21 MR. BANNON: Just Joshua testified in the
22 first trial.

23 THE COURT: Do you have a transcript of that?

24 MR. BANNON: Of Joshua's testimony?

25 THE COURT: Yes.

1 MR. BANNON: Yes, Your Honor.

2 THE COURT: Could I see that?

3 MR. BANNON: Yes, sir.

4 THE COURT: I noticed on my notes that I was
5 writing down, what you told me Joshua was going to
6 testify about, you said that defendant performed oral and
7 anal sex on him and then reversed that and made him do it
8 on him, but that's not what he testified to at trial.

9 MR. BANNON: No, Your Honor. I was just
10 looking back through the record as well, and I don't
11 believe that's in the record. It might have just been my
12 mistake, but I would certainly rely on -- I don't have
13 any dispute with the record and, I would certainly just
14 ask for him to be able to testify today.

15 THE COURT: I guess we'll need to hear from
16 Joshua and Jacquelyn so I can determine whether or not
17 what exactly happened. I guess^{Complainant} as well, to see if
18 there is sufficient clear and convincing evidence to let
19 it in.

20 So do you want to call one of them?

21 MR. BANNON: Yes, sir. The state will call
22 Joshua Smith.

23 THE COURT: Okay. I'll give you this
24 transcript back.

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JOSHUA SMITH,

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

DIRECT EXAMINATION

THE WITNESS: Joshua Smith, J-o-s-h-u-a,
Smith.

BY MR. BANNON:

Q. Is your name Joshua Smith?

A. It is.

Q. And where do you live, sir?

A. Right now I live in Woodbridge, Virginia.

Q. What do you do?

A. There I'm stationed in the Marine Corps. I'm
stationed in Washington, DC.

Q. And when were you born?

A. I was born [REDACTED] 1989.

Q. Okay. And where were you born?

A. Buffalo, New York.

Q. And do you have any brothers and sisters?

A. I have one biological brother and one biological
sister.

Q. What are their names?

A. Jackie and ^{Complainant} Solak.

Q. I guess -- could you describe your their relation
to you in age. Are you the oldest or the youngest?

1 A. I'm the oldest, ^{Complainant} in the middle, and Jackie
2 would be the youngest.

3 Q. And who is your biological mother?

4 A. Kelly Black.

5 Q. Okay. And who is your biological father?

6 A. Arthur Smith.

7 Q. Do you have people in your life that you call mom
8 and dad?

9 A. Yes. That would be Mark and Cindy Solak.

10 Q. And you said your biological father is Arthur
11 Smith. Do you see him in the courtroom?

12 A. Yes. He's right there.

13 Q. Okay. And did anything happen between you and
14 Mr. Smith while you were living in New York?

15 A. Yes. He sexually molested me.

16 Q. Okay. And could you please tell us how that
17 occurred.

18 THE COURT: How old were you when it
19 happened?

20 THE WITNESS: I was probably about six or
21 seven, sir.

22 THE COURT: Okay.

23 BY MR. BANNON:

24 Q. And so would that have been in 1995, 1996?

25 A. Right around there.

1 Q. Okay. And could you please tell us about it.

2 A. You want details?

3 Q. Well, let me ask you this: Where did it occur?

4 A. It would have been -- I remember it was in my
5 bedroom a few times. It was a really long time ago.

6 Q. Okay. Did it happen more than once?

7 A. Yes.

8 Q. Okay. And you said that it happened in your
9 bedroom on some occasions?

10 A. Yes.

11 Q. Did it ever happen anywhere else?

12 A. I remember his bedroom, or it was actually their
13 bedroom at the time. I think that's about it.

14 Q. Okay. Were the two of you alone in the bedroom?

15 A. Yes.

16 Q. Okay. And what occurred?

17 A. Well, he -- there were a couple times where he
18 would insert his penis into my butt. He would fondle me.
19 I mean, I guess that's about it.

20 Q. Okay. Was there any oral sex?

21 A. Yes.

22 Q. Okay. Was it you performing it on him or him
23 performing it on you?

24 A. Both.

25 Q. Okay. And do you remember about how old you were

1 when the abuse stopped?

2 A. Probably eight or nine.

3 Q. And do you remember -- did you ever move to
4 Bluffton, South Carolina?

5 A. Yes.

6 Q. And how old were you when you moved to Bluffton?

7 A. I was probably around nine or ten -- no, I was
8 about eight, because one of the first years we moved to
9 Bluffton was the first year I played football.

10 Q. And did the abuse occur in South Carolina?

11 A. Not as much. It kind of dwindled down, I guess.

12 Q. Just to go back for a second, you said there was
13 anal sex as well.

14 A. Yes.

15 Q. Was it just -- was it just him performing anal sex
16 on you or was --

17 A. Him on me.

18 Q. Okay. So -- okay.

19 MR. BANNON: No further questions, Your
20 Honor.

21 THE COURT: Cross?

22 MS. LOVELL: No, Your Honor.

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

24 MR. BANNON: All right. Now, Your Honor, the
25 state would call ^{Complainant} Smith.

1 MS. LOVELL: Your Honor, may I have a moment?

2 THE COURT: Yes.

3 Complainant SOLAK,

4 having been first duly sworn,

5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. BANNON:

8 Q. Could you please state and spell your name for the
9 record.

10 A. My name is^{Complainant} Solak.

11 Q. And did you ever go by another name?

12 A. Yes.

13 Q. What was that?

14 A. Complainant Smith.

15 Q. Where were you born,^{Complainant}

16 A. Buffalo, New York.

17 Q. Okay. Do you have any brothers and sisters?

18 A. Yes.

19 Q. Okay. Do you have biological brothers and
20 sisters?

21 A. Yes.

22 Q. What are their names?

23 A. Joshua Roy Smith and Jacquelyn Smith.

24 Q. Okay. And who are your biological parents?

25 A. Arthur Smith and Kelly Black Smith?

1 Q. Okay. And do you see your biological father here
2 in the courtroom today?

3 A. Yes.

4 Q. Okay. And did you all live in Buffalo?

5 A. No.

6 Q. Okay. When did you move?

7 A. When I was five, six.

8 Q. Okay. Do you know where you moved to?

9 A. Beaufort, here.

10 Q. It was down here in Beaufort County?

11 A. I believe so, yeah.

12 Q. And while you were here, did you ever see your
13 father, or your biological father?

14 A. Down here, yeah.

15 Q. Yeah. And were you ever alone with him?

16 A. Yes.

17 Q. Okay. And did anything occur while you were alone
18 with him?

19 A. Yes.

20 Q. And do you know -- well, where did this occur?
21 Was it in, like, his house, his mom's house?

22 A. His house.

23 Q. And is that, like, a freestanding house or could
24 you describe it briefly?

25 A. It looks like an old dump.

1 Q. And these things that happened, did they happen
2 inside the house?

3 A. Yes.

4 Q. Okay. Where inside the house?

5 A. In his room.

6 Q. Okay. And what happened inside the room?

7 A. He would make me touch him or he would touch me.

8 Q. Okay.

9 A. Inappropriately.

10 Q. Were you alone in the room when this was
11 happening?

12 A. Yes.

13 Q. Now, when you say -- you said that he touched you
14 inappropriately and you touched him inappropriately.
15 Could you describe those -- could you describe that for
16 us.

17 A. He would have me put his -- have me put my penis
18 in his butt and have him put his penis in my butt.

19 Q. Was there ever any oral contact between the two of
20 you?

21 A. I don't remember.

22 Q. Now, ^{Complaina}_{nt}, do you remember testifying in a
23 hearing prior to this one?

24 A. Yes.

25 Q. Okay. Would seeing a transcript of that hearing

1 refresh your recollection as to what might have occurred?

2 A. Yeah.

3 MR. BANNON: Permission to approach the
4 witness.

5 MS. LOVELL: Objection, Your Honor. I object
6 to the form which you are showing him the transcript. I
7 believe that he is -- I don't think he can read it over
8 and then testify. So that would then just remind him of
9 the things that he's not testifying to now, which would
10 then go back to our underlying issue of which we are
11 trying to separate out this trial from.

12 MR. BANNON: Well, Your Honor, if I may, I
13 think she's objecting to the very procedure by which you
14 refresh your witness's recollection. I asked him if he
15 recalled whether any oral conduct occurred and he said he
16 didn't remember, so I asked him if he testified
17 previously and if looking at a transcript of that would
18 refresh his recollection, and essentially he said yes.

19 THE COURT: Well, if you look at 612 on
20 refreshing the memory, it's talking about using a
21 writing, which asking anybody to refresh their memory by
22 looking at a prior transcript, it's usually -- it's a
23 prior statement that the witness has given, which was
24 written down and then shown to them. They wrote it down.
25 A lot of times you see the police write it down, but they

1 sign it in some respect. It's not just giving them a
2 transcript of a prior history and saying, Read this.
3 Will this refresh your recollection?

4 It's not been used in my court that way, but
5 it keeps talking about it in terms of writing. I just
6 don't think it's proper if you give him a copy of a
7 transcript from a prior hearing in a hearing and ask him
8 to refresh their memory that way. Only way you could use
9 a prior statement would be to impeach him with a prior
10 inconsistent statement that he gave at a hearing.

11 But 612, just using a writing to refresh
12 their memory, it seems to me the way the rule is designed
13 it has to be something that they produced.

14 MR. BANNON: Well, Your Honor, I'm sorry. It
15 was my understanding that it was a writing, not
16 necessarily the witness's writing.

17 THE COURT: I'm not aware of a case on it. I
18 don't know if I'm going to find one at this point, but I
19 guess that it could be used to refresh his memory. For
20 that matter, this is a pretrial motion, and before we get
21 started for trial, I don't suppose there is anything to
22 stop him from looking at a prior transcript to refresh
23 his memory at that point anyway.

24 MS. LOVELL: Your Honor, I see it under 613
25 as impeaching the witness. I would use it to impeach.

1 He's not testifying the same way.

2 THE COURT: But if it's --

3 MS. LOVELL: But then it's a new trial, so --

4 THE COURT: He's using it to refresh his
5 memory where he said he didn't remember.

6 MS. LOVELL: But then if he didn't remember,
7 I don't understand why we're trying to refresh his
8 recollection when we had a problem with the tenor of the
9 prior case.

10 THE COURT: Here is the problem that we're
11 going to have as I see it: Presumably there is testimony
12 that supports what you're saying, and so if I let him
13 refresh his memory with it today and then he testifies to
14 refresh his memory, then tomorrow he comes in and
15 testifies without the need to appearing to refresh his
16 memory, it seems to me then the defense is going to be
17 hampered with making him look like he's got a much better
18 memory of it tomorrow than he has about it today without
19 the defense being able to bring out, Hey, you didn't
20 remember any of this yesterday afternoon, and it wasn't
21 until the prosecutor showed you a copy of your transcript
22 at a hearing eight years ago that you actually remembered
23 it; isn't that right?

24 So it's kind of hampering them to be able to
25 refresh their memory on it today without being allowed to

1 cross-examine him about the circumstances of refreshing
2 it when he comes in tomorrow and appears to say, oh, yes,
3 I have a memory of it now, without the need to refresh
4 tomorrow.

5 MR. BANNON: I suppose I understand what
6 you're getting at, Your Honor, but I'm afraid I'm at a
7 bit of a loss. The witness testified that he didn't
8 remember, and he said that looking at the prior
9 transcript, would it please Court if he looked at one of
10 the many other different statements that he said that
11 this happened?

12 THE COURT: Well, I'm thinking out loud right
13 now, and I'm going to have to fashion one way if he
14 comes -- if you're allowed to show him that transcript
15 now and he remembers, Oh, yes, I do now remember that we
16 did have oral sex, all right? Tomorrow you ask him that
17 same question. His memory is refreshed. He answers that
18 question without the need to look at the transcript.

19 Well, it makes it look like something that he
20 remembers vividly. Today he couldn't remember it
21 vividly. I don't know what's in that transcript, but he
22 doesn't remember it vividly, so tomorrow when we put him
23 up in front of a jury, it's not going to come out the
24 same way that it's coming out today.

25 And so if I allow you to refresh his memory

1 today, there ought to be some mechanism out of fairness,
2 if nothing else, that she gets to come in and say,
3 Yesterday afternoon we had a hearing and you testified
4 today that you remember having oral sex, but yesterday
5 your memory wasn't quite so clear, was it?

6 So it seems to me in fairness she's going to
7 be able at least to come back and talk about this,
8 because otherwise it makes it look like it's fresh in his
9 memory tomorrow when it's not fresh in his memory today,
10 and that's unfair.

11 If you're going to get to refresh his memory,
12 then you should have either done it before we had this
13 hearing or you do it in front of a jury so that the jury
14 gets the flavor of the fact that it's now eight, nine,
15 years later and he doesn't remember. It's not fair for
16 you to refresh his memory today and then make it look
17 like he has a vivid memory tomorrow.

18 MR. BANNON: Could I have just a second, Your
19 Honor?

20 THE COURT: Sure.

21 MR. BANNON: Your Honor, I suppose I would
22 just live with the fact that she could ask him about the
23 fact he couldn't recall today until he saw a transcript.

24 THE COURT: Well, ultimately one way or
25 another, he's going to get a chance to refresh his

1 memory, whether it's at this hearing today or it's after
2 the hearing today or in front of the jury for the first
3 time tomorrow. As long as the defense gets the
4 opportunity to talk about how his memory of this incident
5 was not so clear before he had it refreshed, and I
6 suppose that's the way to cure that.

7 So I'll let him go ahead and look at this
8 transcript, which I will deem to be a writing. Frankly,
9 I suppose I'll have to hit the books a little bit tonight
10 on it, because I have not come across the use of a
11 deposition, a prior deposition, used to refresh a memory,
12 whether or not that qualifies as a writing for the
13 purposes of 612.

14 MR. BANNON: Well, I suppose to my mind, Your
15 Honor, it would be virtually the same thing if the
16 witness had been telling the police officer what happened
17 and hadn't made a writing at the time and the police
18 officer was taking notes and said, well, he said that the
19 car was green and they went through and then later on he
20 says, Well, I don't remember what color the car was, and
21 he said, Well, if you take a look at this statement, it's
22 still a writing, it's just not necessarily his --

23 THE COURT: But at some point -- and we're
24 not talking about -- we're talking about the same thing,
25 but we're not talking about the same thing, and that

1 prior statement given to a police officer at some point,
2 he's going to have to -- he either wrote it or the police
3 officer wrote it and he signed it, so he adopted it as
4 his statement.

5 He testified under oath at trial, so that is
6 an adoption of whatever he said at his statement, so that
7 kind of helps me feel better about it would qualify as a
8 writing under 612, but as is often the case when I'm
9 looking at a novel issue, it's a lot clearer when I see
10 there is a Court somewhere that says I agree or disagree
11 and it's clear on point and you go, oh, I feel a little
12 better that somebody else said it as opposed to me
13 quoting my favorite source, which is me.

14 I haven't come across it, so I'm going to let
15 him do it today with the understanding that, you know,
16 she's obviously going to get the opportunity to come back
17 and say we had a hearing on this yesterday afternoon, and
18 at that hearing you didn't remember that quite as vividly
19 as you're remembering it today. In fact, you had to read
20 a transcript from another hearing in order to get your
21 memory refreshed. That just seems to me to be a matter
22 of fairness. Okay?

23 MR. BANNON: Yes, Your Honor.

24 MS. LOVELL: I do object giving that to him
25 to refresh. I don't agree. I believe it's more for me

1 to impeach him with at the trial than it is for this type
2 of hearing.

3 THE COURT: All right. Your objections are
4 noted on the record.

5 MS. LOVELL: Thank you.

6 MR. BANNON: Permission to approach the
7 witness, Your Honor?

8 BY MR. BANNON:

9 Q. ^{Complainant}, I would like you to take a look at this.
10 Would you go ahead and read through it and then look up
11 at me when you're done.

12 Okay. So now that you've had a chance to look
13 through that statement, do you remember, was there any
14 oral sex involved?

15 A. Yes.

16 Q. Okay. And what was the -- could you tell us -- or
17 could you describe it for us.

18 A. Well, he made me suck his penis.

19 Q. And did he ever suck your penis?

20 A. Yes.

21 Q. Okay. And I believe you said previously that he
22 had you perform anal sex on him?

23 A. Yeah.

24 Q. Okay. And that he had anal sex with you.

25 A. Right.

1 Q. All right. And when it was over, did he make any
2 threats to you?

3 A. Yes.

4 Q. Do you remember what he told you?

5 A. He would kill me or break all my bones in my body.

6 Q. And the person who did this, do you see him in the
7 courtroom?

8 A. Yes, sir.

9 Q. Could you point him out?

10 A. There (indicating).

11 MR. BANNON: No further questions, Your
12 Honor.

13 THE COURT: Ms. Lovell?

14 MS. LOVELL: No questions, Your Honor.

15 THE COURT: You can step down.

16 THE WITNESS: Yes, sir.

17 MR. BANNON: The state would call Jacquelyn
18 Smith.

19 JACQUELYN SOLAK,

20 having been first duly sworn,

21 was examined and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. BANNON:

24 Q. And have you ever gone by another name?

25 A. I did. It used to be Smith.

1 Q. Okay. And do you have any brothers and sisters?

2 A. I do. I have two brothers.

3 Q. And are they your biological siblings?

4 A. Uh-huh.

5 Q. Okay. And what are their names?

6 A. There is ^{Complainant} and there is Joshua.

7 Q. Where were you born?

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

9 Q. Did you ever leave Buffalo?

10 A. I did.

11 Q. Where did you go?

12 A. I moved to South Carolina.

13 Q. And do you -- well, who are your biological
14 parents?

15 A. Arthur Smith and Kelly Black, or Smith.

16 Q. All right. And are those the people who you call
17 mom and dad?

18 A. No.

19 Q. Who do you call mom and dad?

20 A. I call Cindy and Mark Solak my mom and dad.

21 Q. And how are they related to you?

22 A. They're my aunt and uncle.

23 Q. And when you were living here in South Carolina,
24 were you ever alone with your dad?

25 A. I was.

1 Q. And by dad, I mean biological father.

2 A. Uh-huh.

3 Q. And do you see that person in the courtroom today?

4 A. I do.

5 Q. And could you point him out for us.

6 A. He's right there (indicating).

7 Q. And when you were alone with him, did anything
8 happen?

9 A. Yes.

10 Q. Could you tell us about that.

11 A. Sure. He would take me into his bedroom when we
12 were by ourselves. We would lay on his bed, and he would
13 touch me in places that shouldn't be touched. We would
14 take baths together. He would always try to get us
15 alone, so things could happen.

16 Q. Okay. And when you said that he touched you,
17 where did he touch you?

18 A. He touched me in -- he touched my vagina and he
19 touched my butt.

20 Q. And did you ever touch him?

21 A. Yes, I did.

22 Q. Could you tell us about that, please.

23 A. He would always get me to -- well, I know the term
24 now, it's masturbation, but he would get me to do that
25 for him, or with him.

1 Q. And was there ever any oral contact?

2 A. There was. Yes, there was.

3 Q. And could you please tell us about that.

4 A. Uh-huh. He would orally -- he would do that to
5 me, down there, in the vaginal area.

6 Q. Okay. And did you perform that on him?

7 A. Uh-huh.

8 Q. Okay. And was that on his penis?

9 A. Yes, it was.

10 Q. And how old were you when this occurred?

11 A. I think I was six, something like that.

12 Q. And did he ever say anything after it was over?

13 A. He told me not to tell anybody.

14 Q. Did he threaten you?

15 A. Not that I can remember no.

16 Q. But he just told you not to say anything?

17 A. Uh-huh.

18 MR. BANNON: No further questions.

19 THE COURT: Do you have any you want to ask
20 of her, Ms. Lovell?

21 MS. LOVELL: No, Your Honor.

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

23 Thank you. Okay. What do you want to argue now, based
24 on this?

25 MR. BANNON: Well, Your Honor, I don't really

1 have anything additional to add to my written motions,
2 but I just feel that the state has fulfilled the
3 requirements in order for Lyle testimony to be admitted
4 in this matter. I think that it's clear that the age of
5 the victims were similar when this occurred. The
6 relationship between the victim and the perpetrator were
7 the same, the location. I think Joshua was the one that
8 would say it happened in different bedrooms at different
9 times.

10 Both of the boys were threatened. He told
11 her not to say anything and coerced her into silence.
12 The manner and occurrence of the type of sexual battery
13 was essentially the same for all the children. All the
14 children's -- there was contact with their genitals as
15 well as their anus, and I believe that the testimony was
16 that there was oral sex involved with all of the
17 children, and, Your Honor, just based on that, the state
18 believes that it's met its burden under Wallace, and we
19 feel that both the testimony of Joshua and Jacquelyn
20 should be admitted in the state's case.

21 THE COURT: Ms. Lovell?

22 MS. LOVELL: Your Honor, the defendant renews
23 its objection to allowing the Lyle testimony of Joshua or
24 Jacquelyn for the reasons before that I said, and I
25 reiterate those and I add that the child doesn't

1 remember, ^{Complainant} doesn't even remember what happened to
2 him, so the fact that it would appear to be similar isn't
3 not similar, it's dissimilar.

4 The locations were more than one. It
5 happened a few times. Jacquelyn didn't say how many
6 times. It appears only once. I don't know. The
7 locations were different in that Josh said it was in his
8 bedroom and also in the father's bedroom. It was in New
9 York. The other ones happened in South Carolina.

10 The passage of time, also, I think,
11 especially on Joshua, and there has been no clear and
12 convincing evidence from the state that the prior bad
13 acts actually did happen with respect to testimony with
14 Joshua. For those reasons and the ones I previously
15 said, I believe this is highly prejudicial. We ask that
16 it not be allowed in, that the testimony be excluded.

17 Thank you.

18 THE COURT: All right. Well, I find that the
19 ages of the victims are all roughly in the same age
20 group, the places that the activities took place inside
21 the home, inside the bedroom are the same. In each of
22 the victim's attacks, the types of sex are remarkably
23 similar through each of the three children.

24 Those are all issues that clearly show that
25 there is a common thread of types of victims that the

1 defendant preferred and the types of places, the types of
2 sex. The same modus operandi, if you would, are all
3 remarkable I similar. The identity of the defendant
4 being in question is also an issue in the case, and each
5 of the defendants, or each of the children, were able to
6 testify that the father was, in fact, the perpetrator of
7 the acts.

8 So I find that there is clear and convincing
9 evidence that this prior conduct took place and that
10 there is a probative value to it, which is outweighed by
11 any prejudicial effect, so I would allow those children
12 to testify.

13 All right. Is your counselor here now?

14 MR. BANNON: Yes, Your Honor, I believe she
15 is.

16 THE COURT: All right. Let's move on to that
17 one then.

18 MR. BANNON: The state would call Kendra
19 McIlvee. I believe we've already gone through some of
20 the other ones.

21 KENDRA TWITTY,
22 having been first duly sworn,
23 was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. BANNON:

1 Q. And, Ms. Twitty, have you ever gone by another
2 name?

3 A. I'm sorry. Kendra McIlvee Twitty.

4 Q. And what do you do, Ms. McIlvee?

5 A. I'm a counselor.

6 Q. Who do you counsel?

7 A. I counsel children, adults, and families.

8 Q. Okay. And back in 2003, what were you doing?

9 A. I was working at Hope Haven of the Lowcountry as a
10 forensic interviewer and counselor.

11 Q. What does a forensic interviewer do?

12 A. Forensic interviewer is a person that is trained
13 to talk to children that have been in a situation where
14 law enforcement or the Department of Social Services is
15 somehow involved, and basically they do an objective,
16 unbiased interview to assist in the next step of that
17 child's treatment or intervention or --

18 Q. Okay. Do you work for the sheriff's office as a
19 forensic interviewer?

20 A. No.

21 Q. But I guess how do you get these children -- or,
22 like, how do you find out about them in order to perform
23 these forensic interview?

24 A. Well, Hope Haven is a nonprofit. It's a
25 children's advocacy center.

1 Q. When you say Hope Haven, is that the same as Hope
2 Cottage?

3 A. I'm sorry. Hope Cottage. They had changed names
4 quite a bit.

5 Q. But they basically serve the same function?

6 A. Yes. So Hope Cottage of the Lowcountry. Sorry.
7 It's been a while. What was the question? How do the
8 children get to us?

9 Q. Yes. Sort of how do you find out about these
10 children in order to perform a forensic interview?

11 A. Well, as an employee of Hope Cottage, they --
12 either DSS or law enforcement agency would contact the
13 agency to schedule the appointment.

14 Q. Okay. And back in 2003, did you have an
15 opportunity to talk with a boy named^{Complainant} Smith?

16 A. I did.

17 Q. Okay. And was that in a forensic interview
18 setting, or how was that conducted?

19 A. It was a forensic interview.

20 Q. Okay. And when you conduct forensic interviews,
21 who is in the room?

22 A. The child and myself.

23 Q. Okay.

24 THE COURT: What do you mean when you say a
25 forensic interview? What do you mean by that?

1 THE WITNESS: A forensic interview is
2 basically a neutral, child friendly room set up to ask
3 open ended, free recall questions to assist investigative
4 agencies in their process of identifying information.

5 THE COURT: Okay. As opposed to what other
6 kind of interviews do you do?

7 THE WITNESS: As a forensic interview that's
8 all I did. I mean, there was the national corner house
9 training investigative service, or whatnot, with a
10 national protocol that forensic interviewers, which I
11 guess is just the title of that specific job created so
12 that law enforcement officers and DSS workers or
13 CPS workers, I'm not sure what they're called, were
14 interviewing children properly.

15 THE COURT: Okay.

16 THE WITNESS: Or maybe in a childhood based
17 form, for appropriate interviews.

18 BY MR. BANNON:

19 Q. And when you talked with ^{Complainant} what did you talk
20 about?

21 A. Well, whenever a child comes to Hope Cottage,
22 there is usually a referral, so I'm assuming he had some
23 sort of an abuse scenario, and I would have to look at
24 something, because I don't recall the exact -- most of
25 the time it was child sexual abuse, so I'm assuming his

1 case is child sexual abuse.

2 Q. Okay. Based on these forensic interviews, do you
3 make reports?

4 A. Yes.

5 Q. Would taking a look at your report be able to
6 refresh your recollection?

7 A. That would be greatly appreciated.

8 MR. BANNON: Permission to approach?

9 MS. LOVELL: Here we go again, but, I guess,
10 it just -- I don't understand if she's going to testify
11 to something, then we need to know what she's going to
12 testify to.

13 I can read the report. We don't want the
14 report brought in as evidence. We just want her it.

15 MR. BANNON: Right.

16 MS. LOVELL: Well, she has no testimony.

17 MR. BANNON: Well, there is testimony that
18 she interviewed with the ^{Complainant} Smith, and apparently now
19 she needs the aid of her report in order to help her
20 recollect exactly what they spoke about.

21 THE COURT: This is a lot less troublesome
22 than the prior one. It's her notes, her report. She can
23 use those to refresh her testimony.

24 THE WITNESS: Okay.

25 BY MR. BANNON:

1 Q. Okay. Well, when you met with ^{Complainant}, what did you
2 talk about with him?

3 A. Child sexual abuse allegations.

4 Q. And what did ^{Complainant} say to you about that?

5 A. First, when we interview a child, we're assuming
6 that nothing happened. We're trying to figure out what's
7 going on, so there's a protocol which we would use, which
8 is called a RATAAC, which is where you build rapport with
9 a child and then you make them feel comfortable. Then
10 you go through anatomy identification so you can
11 understand the common language that you're talking about
12 as far as private body parts and then you go through
13 touch inquiry, which goes over different types of healthy
14 touching and unhealthy touching or inappropriate
15 touching, and then there is the abuse scenario, which is
16 when you would ask a question of has anyone ever touched
17 you there, or wherever you would have said that was
18 inappropriate.

19 And then your next is your conclusion where you
20 would sum up, basically, personal safety with the child
21 to let them know that that wasn't their fault and these
22 places are not supposed to be touched, and you send them
23 on their way. So that is what I did with every child
24 that came into my office, and that is what I did with
25 ^{Complainant}

1 Q. Okay. And so what did ^{Complainant} tell you about the
2 abuse that he suffered?

3 A. Okay. Well, I have in quotes that he said he
4 couldn't see his dad anymore because he sucked my penis
5 and I sucked his penis.

6 Q. Okay. And did he say anything else about the
7 abuse?

8 A. Well, I mean, I can read my report, but he was
9 basically -- his dad told him that he would break my
10 bones and he would slam me up against the wall if I
11 didn't do what he told me to do. He said when his dad
12 sucked his penis it felt nasty and kind of good.

13 He described his dad's penis as you can see in the
14 report. He would -- he used -- he was having sexual
15 problems, as I remember him saying in -- one thing I
16 didn't mention about forensic interviewing is when you're
17 doing the rapport section, you evaluate the child's
18 credibility, the ability to tell the difference between a
19 truth and a lie, and I had ^{Complainant} being marked as
20 credible, that he was able to understand the difference
21 between the truth and a lie.

22 Q. Did he seem to be medicated in any way when you
23 spoke with him?

24 A. He did. And I vividly remember having an issue
25 with that. I was very concerned with that, and I see

1 that in my report as well that he seemed to be very slow
2 and having some, I put zombie-like affect, maybe auditory
3 processing when I asked him a question. He seemed to
4 kind of take a while to process it, and it was an
5 abnormal affect for a child of that age.

6 Q. Okay. And did he tell you anything about his dad
7 having anal sex with him?

8 A. If you can give me one second. When asked to talk
9 about sex, ^{Complainant} said his dad, after clothes would be off
10 and his clothes would be off and his dad would get on top
11 of him and hump. When asked what hump meant, he stated
12 dad's body would go up and down. He reported that his
13 dad put his penis in his butt and it hurt, and ^{Complainant}
14 stated that he too put his penis in his dad's butt and it
15 felt icky, end quotes.

16 Q. And was this interview recorded, either via audio
17 or video recording?

18 A. No.

19 Q. And was it the policy of Hope Haven or Hope
20 Cottage at the time to record interviews with children?

21 A. No, not at the time.

22 Q. Okay. And do you remember the date that you spoke
23 with ^{Complainant}

24 A. It was June 5th, 2003.

25 MR. BANNON: No further questions, Your

1 Honor.

2 THE COURT: Do you have any, Ms. Lovell?

3 MS. LOVELL: No. I have arguments against
4 the testimony.

5 THE COURT: Let me ask you this: The
6 interview was not videotaped or audiotaped.

7 THE WITNESS: No, they weren't -- from my
8 understanding we were not videoing at that time, so I did
9 not -- I personally did not video.

10 THE COURT: All right. Did anybody?

11 THE WITNESS: No.

12 THE COURT: And why not?

13 THE WITNESS: To be honest, I'm not really
14 sure why. I think there was something that videos were
15 not admissible in court so there was no reason to be --
16 that was more of an administrative issue, and I was the
17 employee, so I am just trying to answer as honestly as
18 possible, so I was doing what I was told by my director.

19 THE COURT: Had you ever met^{Complainant} before
20 this?

21 THE WITNESS: No, sir.

22 THE COURT: And how long did the interview
23 take?

24 THE WITNESS: Interviews usually last around
25 45 minutes.

1 THE COURT: So when y'all ask questions, what
2 kind of questions do you ask?

3 THE WITNESS: Which part?

4 THE COURT: Give me an example.

5 THE WITNESS: Free recall. So he told me
6 that it's not okay for someone to touch your butt. Has
7 anybody ever touched your butt? Yes. Okay. So tell me
8 about that. And then the child usually talks, and if
9 they do, well, tell me where you were when that happened.

10 THE COURT: And what kind of training did you
11 receive prior to that, at that time, on interviewing
12 children?

13 THE WITNESS: I went to Alabama to the
14 National Children's Advocacy Center for a week-long
15 training, and that training was a yearly training that I
16 would go to, and then at that same time I was finishing
17 up my master's in clinical psychology, so -- the
18 children's law office hosted bimonthly trainings on
19 forensic interviews, so I made sure I was taking
20 advantage of all the education I could get, but I have
21 been out of it for seven years, or six years.

22 THE COURT: All right. And tell me about the
23 surroundings of the area where. Were you the only person
24 in the interview room with^{Complainant}

25 THE WITNESS: Yes, sir.

1 THE COURT: All right. And this Hope
2 Cottage, whereabouts is that?

3 THE WITNESS: I believe -- it's in Beaufort,
4 and I believe it might still be in the Regions Bank
5 Building on Ribaut Road. I'm not sure.

6 THE COURT: And how did ^{Complainant} come to your
7 attention?

8 THE WITNESS: He was honestly just another
9 kid to interview. He was referred to our center and he
10 was on my appointment, and --

11 THE COURT: So were you asking him these
12 questions to, like, aid the investigation as to whether
13 or not it took place and what took place, or were you
14 asking him about other just kind of counselling because
15 he was a troubled child and this just happened to be
16 elicited?

17 THE WITNESS: Okay. I have in my referral
18 question or presenting need, I said that Cynthia Solak is
19 concerned about the behavior of her adopted nephew ^{Complainant}
20 Smith. ^{Complainant} has been acting out sexually and has been
21 touching people inappropriately, so that was what --
22 that's all I knew about ^{Complainant} when he got there.

23 THE COURT: All right. You didn't know his
24 father had been accused --

25 THE WITNESS: I didn't know who the

1 perpetrator was.

2 THE COURT: Did you know at that time that
3 other children in the family had made any allegations
4 about that?

5 THE WITNESS: I did -- I knew that he had --
6 I mean, I don't remember, but I have what's in my report.
7 Would you like me to read it?

8 THE COURT: That's the only time you talked
9 to^{Complainant}

10 THE WITNESS: Yes.

11 THE COURT: All right. When you say he acted
12 a little bit slow, are you talking about maybe
13 developmentally slow or just, like --

14 THE WITNESS: Altered. Developmentally, he
15 was able to answer appropriately, like cognitively. I
16 wasn't doing an IQ test with him, but I felt like he
17 cognitively understood, was on a ten-year-old level.

18 There was just something altered about his
19 affect, and, as a psychologist, it seemed like it was
20 mood altering medicines so --

21 THE COURT: So you were of the impression
22 that he was taking medicine at the time?

23 THE WITNESS: Yes, and I have in my report
24 that he had been diagnosed with bipolar and was currently
25 taking three different medications to control his

1 disorder.

2 THE COURT: At ten years old he was?

3 THE WITNESS: Yes.

4 THE COURT: Did you find out what he was
5 taking or that he was just taking --

6 THE WITNESS: That he was just taking
7 medicine.

8 THE COURT: You didn't know what the
9 prescriptions were for?

10 THE WITNESS: Uh-huh. I remember being -- a
11 big red flag went off for the diagnosis of bipolar at ten
12 and being on medicine.

13 THE COURT: That is a little bit young.

14 THE WITNESS: Very.

15 THE COURT: Do you know who made that
16 diagnosis?

17 THE WITNESS: I do not know.

18 THE COURT: All right. Does anybody have any
19 questions based on what I asked?

20 BY MS. LOVELL:

21 Q. Just one or two. Did you ever find or often find
22 somebody came to you as a referral that wasn't credible?

23 A. Absolutely.

24 Q. Or didn't have any -- and the information you
25 received regarding ^{Complainant} is from his aunt?

1 A. That is correct.

2 Q. That's what you said in your report?

3 A. Uh-huh.

4 Q. Because all the people that you see anyway are all
5 abuse allegations, right?

6 A. Either physical, sexual, or witness to a homicide
7 or something like that.

8 Q. So isn't a forensic interview -- aren't one of the
9 purposes that is to determine if medical treatment is
10 needed and whether it's safe for the child to return
11 home?

12 A. That sounds exactly --

13 Q. So that's really the only reason for a forensic
14 interview, is because testimony of who did it really
15 can't be admitted into court.

16 A. Right. To find the next -- like I said earlier,
17 to find the best treatment or intervention for that child
18 when they leave.

19 Q. And did you determine they needed medical
20 treatment?

21 A. Let me look in my record for that. He was not --
22 I have he -- has he been examined by a physician, and I
23 have no. So --

24 Q. As a result of your interview, did you feel he
25 should have medical attention, meaning you didn't have it

1 before you, but did you recommend it?

2 A. I did not recommend it in my recommendations.

3 Q. Okay. And did you determine that it was safe for
4 the child to return to his environment?

5 A. I said that ^{Complainant} is to have no contact with his
6 biological father and that he is to be supervised at all
7 times when around other children. So I --

8 MS. LOVELL: Thanks.

9 THE COURT: Okay. You can step down. Thank
10 you.

11 Oh, one last thing. When did these
12 allegations of the abuse actually take place? You talked
13 to him in 2003?

14 THE WITNESS: I don't know when that
15 initial --

16 MS. LOVELL: It was between 1999 and 2000.

17 THE COURT: All right. Thank you.

18 MR. BANNON: That's -- that's the indictment.
19 When it was reported was in May of 2003, and then ^{Complainant}
20 was seen a short time after that.

21 THE COURT: All right. You want to make an
22 argument or do you have anything else on this issue
23 before you make argument?

24 MR. BANNON: The state doesn't have any more
25 evidence to present, Your Honor.

1 Your Honor, just to sort of reiterate what we
2 said before, I believe that the state's shown the
3 necessary requirements in order for the contents of a
4 forensic interview to be admitted into trial, and I
5 understand there is a strong preference given to
6 interviews that are recorded, but I believe the testimony
7 was that at that particular time they certainly weren't
8 doing recorded interviews, and so this isn't sort of a
9 special circumstance where, you know, this one was
10 omitted or anything like that.

11 So I think it's clear this is an interview
12 that is taking place in a forensic setting and that she
13 was trained and qualified to do so and because of that,
14 the statement should be admitted into evidence.

15 THE COURT: Well, what are your thoughts on
16 that case that just came out today and how it applies the
17 Jennings case?

18 MR. BANNON: Well, Your Honor, I think that
19 that particular case is just a little bit different, is
20 they sought to admit the actual report, but now I
21 certainly understand that Ms. McIlvee had to rely on her
22 report, but this is something which occurred over eight
23 years ago, and so this is essentially -- I think that we
24 avoid the error of admitting the document itself, seeing
25 as how it -- I don't believe the Court had ruled on

1 whether or not it was proper to play the video that was
2 offered into evidence in that case, but I believe in this
3 case, as we just have per the testimony that it would be
4 proper to admit her testimony, and, you know, I'm not
5 seeking to admit the report. I think certainly based on
6 this new ruling it would be improper to do so.

7 THE COURT: All right. You just want her to
8 be able to testify to what she testified today, about
9 this is what he told me happened?

10 MR. BANNON: Yes, Your Honor.

11 THE COURT: And you would agree that it would
12 be improper for her to give any indication about how she
13 felt about his credibility?

14 MR. BANNON: Yes, Your Honor, and I don't
15 think it would be proper for her to, you know, just
16 straight bolster his credibility.

17 THE COURT: Because she did mention that she
18 marked he's credible.

19 MR. BANNON: She did, but I don't believe
20 that was -- I don't think I asked her whether or not she
21 found him credible.

22 THE COURT: She volunteered it.

23 MR. BANNON: Yeah. She volunteered it, and
24 it was under sort of whether or not --

25 THE COURT: In fact, I put it in quotes,

1 marked as credible, so that I think would be an improper
2 bolstering, or vouching.

3 All right. Ms. Lovell, you want to --

4 MS. LOVELL: I would briefly, Your Honor. I
5 don't see where she to adds any information that the jury
6 won't already hear from^{Complainant} and she is only
7 corroborating, which really would only allow her to speak
8 to time and place, no identification, no credibility.
9 The information she gives is just almost cumulative to
10 what the jury is going to hear now from the other
11 witnesses that the state is bringing up.

12 The state is also asking that two Georgia
13 counselling agencies that^{Complainant} went to prior to seeing
14 Hope Haven, they're asking that evidence be admitted, and
15 I have a motion to exclude that evidence.

16 THE COURT: Have you seen that?

17 MR. BANNON: Yes, Your Honor.

18 THE COURT: I haven't seen that.

19 MS. LOVELL: That's my motion. It's on the
20 witness list, but I have a motion to exclude it. We
21 haven't gotten to my motions yet, and it just seems to be
22 more information on the same thing; plus, hers is after
23 the Georgia sexual abuse counselor's, so the issue, the
24 specter of fabrication coaching comes up again, because
25 he was with the Solaks and it took three years for the

1 abuse to be disclosed, and he goes to Hope Haven after he
2 had been to sex abuse counselling in Georgia. Since
3 2001, he's been to a therapeutic foster home. I believe
4 on the heels of all that Hope Haven testimony is
5 extremely prejudicial and cumulative.

6 THE COURT: What are you planning on
7 introducing with Georgia?

8 MR. BANNON: Well, essentially, Your Honor,
9 it's my understanding, and I've never been able to get my
10 hands on their records, but it's my understanding that
11 based on Officer Florencio's report that Ms. Cruz was
12 counselling^{Complainant} at the time when he sort of initially
13 disclosed, and it's my understanding that when he
14 finally -- or when the Solaks finally brought him forward
15 that it was sort of based on her counselling that she
16 thought he was stable enough in order to go forward and
17 present this evidence to law enforcement.

18 So sort of what I'm offering her for is just
19 sort of talk about delayed disclosure, and, in
20 particular,^{Complainant} condition and what she was helping to
21 treat him for.

22 THE COURT: You don't know what she's going
23 to say?

24 MR. BANNON: I haven't seen it yet. To be
25 honest with you, she hasn't been able to see the report.

1 She told me that she was able to pick it up this
2 afternoon, and I'm waiting to talk to her as soon as
3 we're done with this.

4 THE COURT: Well, I guess I need to hear what
5 they're going to say as well. If you intend to offer
6 them, I don't really -- I don't know how I can rule on
7 that. You don't even know what they're going to say yet,
8 so I guess you need to get them in here at 9:30 in the
9 morning and we'll deal with that then.

10 MR. BANNON: Would it be acceptable --
11 because I've been in talks with these people, and part of
12 the problem -- I certainly recognize it's a problem, you
13 want to know exactly what they're going to say. Part of
14 it is that they're so busy they do all this counselling
15 and testimony in Savannah, and it has been incredibly
16 tough getting ahold of them. Would it be acceptable to
17 hold in camera hearings as they arrive?

18 THE COURT: As long as you don't intend to
19 call them first without me having the opportunity to have
20 that --

21 MR. BANNON: No. Im not going to sort of let
22 the cat out of the bag during opening statements, and so
23 I figure when we get to them, we can just take an
24 opportunity to break.

25 THE COURT: As long as you don't talk about

1 it during opening statement, that would be acceptable.

2 MR. BANNON: I think that would be the best
3 use of the Court's time.

4 THE COURT: All right. Well, I want to study
5 this case that came out this morning on this issue and
6 kind of think this thing through with Ms. Twitty's
7 testimony, and I'll let you know in the morning whether
8 or not I'll let you call her and under what limitations.

9 If I do allow her to call, obviously, you're
10 going to need to tell her she's not allowed -- I don't
11 think you were intending to ask her but certainly you're
12 not allowed to give her thoughts on whether or not he was
13 a credible witness, telling the truth, that sort of thing
14 opinion she's not going to be entitled to volunteer that,
15 but I just want to, you know, since we got a new case out
16 on it, I want to study it since it just popped up a
17 couple hours ago, so I'll let y'all know in the morning
18 my thoughts on that before I make a final ruling, but
19 very ruled on the Joshua and Jacquelyn can testify.

20 MR. BANNON: Thank you, Your Honor.

21 THE COURT: Okay. Anything else we need to
22 deal with before I get on the road here?

23 MR. BANNON: Not from the state, Your Honor.

24 THE COURT: Okay.

25 MS. LOVELL: Your Honor, I have motions that

1 I want to ask you to consider excluding ^{Complainant} 's testimony
2 and --

3 THE COURT: I haven't seen any of your
4 motions.

5 MS. LOVELL: I didn't know exactly what I
6 would need to make a motion for, so I got -- now that I
7 have the witness list, I was able to determine -- I
8 didn't know Kendra was coming and I assumed -- I got the
9 witness list this morning. I assumed Georgia -- he would
10 bring in one person from Georgia, but I didn't know for
11 sure, and I didn't know about Jacquelyn until he disclosed
12 it last week.

13 THE COURT: What other motions do you need to
14 bring to my attention?

15 MS. LOVELL: I would like to make a motion to
16 have ^{Complainant} 's testimony excluded.

17 THE COURT: He's the victim?

18 MS. LOVELL: Yes.

19 THE COURT: And you want to have him
20 excluded?

21 MS. LOVELL: Yes.

22 THE COURT: Well, I'm all ears.

23 MS. LOVELL: I believe under the history of
24 his testimony that under the prior testimony that he gave
25 that he has -- and even today's hearing that you saw, he

1 doesn't remember. He has no vivid recollection of what
2 happened to him, and I believe that he's also spent a
3 great deal of time and years, along with these same
4 people that he was living with at the time he disclosed
5 this information, so his testimony isn't cleaned, or
6 cleansed, in any way by time. He still has been unable
7 to remove himself from the influences of anybody else to
8 remind him to continue what he said in the past.

9 The safeguards --

10 THE COURT: Those are the kinds of things
11 you're free to argue to the jury, but I don't think
12 that's the basis for excluding them, and you'll get free
13 reign on cross-examination by prior statements and even
14 to refresh his recollection as I indicated earlier,
15 you'll get to -- if you feel like it, as a matter of
16 tactics to talk about, you know, you seem certain about
17 what happened today, but, you know, yesterday afternoon
18 we had a hearing and you weren't quite so certain.

19 I'll let you figure out exactly how you want
20 to do that, but you'll get about as much leeway as you
21 want.

22 MS. LOVELL: And then on this motion I
23 understand you would deny that motion?

24 THE COURT: Correct.

25 MS. LOVELL: And then for the motion to

1 exclude Cindy Solak under Rule 602, 601, and 403, under
2 the same -- similar arguments in that she was accused of
3 and was determined that she had fabricated this and had
4 coached the child, and for her to testify in the new
5 trial would appear to also have that same concern that
6 the defense has, that he will not be receiving a fair
7 trial.

8 She -- under 602, she has no lack -- she has
9 a lack of personal knowledge. She didn't see anything
10 happen. This happened between 1999 and 2000 when the
11 victim was living with his mother and his mother's
12 boyfriend.

13 She would have no direct knowledge of that,
14 so the information that she would give she could not
15 testify. We would ask that she not be allowed to testify
16 to identity because she, under the hearsay that the out
17 of court statement should only be as to time and place
18 and she could not testify to the identity of what -- or
19 the statement that ^{Complainant} told her of who abused him.

20 So we would ask that if she were allowed that
21 she would be restricted on the amount, what she could
22 testify to as well.

23 The child lived with her, attended years of
24 counselling. The child has also been under the subject
25 of two DSS investigations, and under 403, as I explained,

1 prejudice because she had lied in the past.

2 THE COURT: What is it that you would be
3 calling her for?

4 MR. BANNON: Well, Your Honor, she is the
5 victim's maternal aunt. I was going to be calling her
6 essentially to testify a little bit about the family,
7 where they were living at the time, when they came to
8 Bluffton, if she knows where the defendant was living at
9 the time when he had custody of the children and these
10 acts were occurring. Short of the relationship -- I'm
11 not going to be asking her about, you know, what^{Complainant}
12 ever told her.

13 THE COURT: Okay.

14 MR. BANNON: I'm going to be asking her sort
15 of about the situation at the time and her knowledge
16 about where people were living and what their
17 relationships are between one another.

18 I mean, she knows Mr. Smith, as he was her
19 brother-in-law, but I don't plan on having her identify
20 him as the abuser of^{Complainant} Smith, if that makes sense.

21 THE COURT: So you're not going to try to get
22 any,^{Complainant} told me this is what happened to him evidence
23 in?

24 MR. BANNON: No.

25 MS. LOVELL: Or location of where it

1 happened.

2 MR. BANNON: Yeah. I'm not claiming to have
3 her testify about where it happened. I am planning on
4 asking her where he lived at the time when the children
5 are reporting the abuse, but I'm not having her say where
6 the children said this happened.

7 THE COURT: You can say where was he living
8 at between the years of such and such, not when the abuse
9 happened.

10 MR. BANNON: Yes, sir.

11 THE COURT: Okay. As long as you frame the
12 question that way, I don't think it's improper. Does
13 that satisfy your concern, Ms. Lovell?

14 MS. LOVELL: Yes.

15 THE COURT: Okay.

16 MS. LOVELL: I guess I could also leave the
17 other motion or argument when we hear about Georgia and
18 you hear from Hope Haven to restrict any expert testimony
19 or any type of testimony from her to the time and place
20 and not to credibility and to truth --

21 THE COURT: It sounds like we're all a little
22 bit dark on what this expert from Georgia might be
23 testifying about.

24 MS. LOVELL: I am kind of bouncing around,
25 and I do apologize.

1 THE COURT: All right. We'll hold those in
2 abeyance until we got a clear idea as to what she's going
3 to testify about.

4 MS. LOVELL: So you denied my motion on
5 excluding Mrs. Solak?

6 THE COURT: Yes. Ms. Solak will be allowed
7 to testify, but only about general living conditions and
8 who lived, where when during time frames.

9 MS. LOVELL: Thank you, Your Honor.

10 THE COURT: Anything else? Okay. All right.
11 Well, I'll see y'all at 9:30 in the morning.

12

13 (Whereupon, the proceedings were concluded.)

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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 19th of September 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 11, 2012



Circuit Court Reporter