STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable Brooks P. Goldsmith, Circuit Court Judge

AUSTON LEE BREAZEAL,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001342

APPENDIX

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State of South Carolina)) County of Lexington)	In the Court Of General Sessions Indictment No.: 2015-GS-32-06030 06031
State of South Carolina,)) Plaintiff,)) vs.)	Transcript of Record
Auston Lee Breazeal,)) Defendant.)	

August 22 through 23, 2016

Lexington, South Carolina

BEFORE:

The Honorable Alison Renee Lee, Judge, and Jury

APPEARANCES:

Kinli Bare Abee, Assistant Attorney General
David Fernandez, Assistant Attorney General
Attorneys for the State

Robert Theodore Williams, Sr., Esquire
Attorney for the Defendant

ALSO PRESENT:

Auston Lee Breazeale

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August 22, 2016

* * * * *

THE COURT: Ladies and gentlemen, we are about to begin the case of the State versus Auston Lee Breazeale. Ladies and gentlemen, this case comes to us by way of an indictment. I now will read the indictment to you. It states that at a Court of General Sessions convened in June of 2016 the grand jurors of Lexington County present upon their oath that in Lexington County, South Carolina between the dates of April 2, 2014 and February 7, 2015 the defendant Auston Lee Breazeale did commit a sexual battery upon a minor, C.M., with the date of birth of [redacted] who was less than 11 years of age by putting his penis in her mouth in violation of Section 16-3-655 of the South Carolina code of laws as amended all against the piece and dignity of the State and contrary to the statute in such case made and provided.

Ladies and gentlemen, this is an indictment against Mr. Breazeale for criminal sexual conduct with a minor in the first degree and to this indictment, ladies and gentlemen, the defendant has pleaded not guilty and so that casts the burden upon the State to prove that the defendant is guilty of this particular crime by evidence that satisfies the jury of that guilt beyond a reasonable doubt.

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Is there any member of jury panel who was a member of the grand jury that returned the indictment in this particular case? If so, please stand.

(No one standing.)

THE COURT: The State of South Carolina is represented by Kinli Abee. Please stand and face the panel. And David Fernandez both with the South Carolina Attorney General's Office. Is there any member of the jury panel who is related by blood or marriage or a close personal friend of any of these attorneys or have you ever been represented by them or have you ever been employed with the South Carolina Attorney General's Office? If so, please stand.

(No one standing.)

THE COURT: Thank you. The victim in this case is Minor . Is there any member of the jury panel related by blood or marriage or close personal friend of Minor ? If so, please stand.

(No one standing.)

THE COURT: The defendant in this case is Auston Lee Breazeale. Mr. Breazeale, if you would stand and face the jury panel please.

MR. BREAZEALE: (Complies.)

THE COURT: Is there any member of the jury panel who is related by blood or marriage or close personal

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friend of Mr. Breazeale? If so, please stand.

(No one standing.)

THE COURT: Thank you, sir. Mr. Breazeale is represented by Theo Williams of the law firm of Williams, Stitley and Brink. Is there any member of the jury panel related by blood or marriage or close personal friend of Mr. Williams or have you ever been represented by him or members of his law firm? If so, please stand.

(No one standing.)

THE COURT: Thank you. Ladies and gentlemen, there may be additional witnesses who may be called to testify in this matter. If the witnesses are present, if they would stand when I call their names. Ladies and gentlemen, the question to you will be is there any member of the jury panel who is related by blood or marriage or close personal friend of any of the following individuals. And if you hear a name in which that applies, if you would stand when you hear the name.

Matthew Trey Marsh. Standing here in the courtroom. Whitney Marsh who is also standing in the courtroom. Thank you. You may be seated. Linda Marsh. James Kemfort with the Lexington County Sheriff's Department. Shannon Hardy. She's standing in the back of the courtroom. Dwayne Rice. Agent April Sykes with the South Carolina Law Enforcement Division. David Kellin.

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Ladies and gentlemen, is there any member of the jury panel a close personal friend or immediate family member who has ever been the victim of sexual abuse? If so, please stand. Yes, ma'am. Tell me your name please.

MARY DAVID: Mary Davis.

THE CLERK: Number 46, your Honor.

THE COURT: Ms. Davis, I don't want to cause you any embarrassment. If you need to come and speak to me personally, I'll be happy to talk to you personally but I do need to ask you a series of questions.

(Side bar.)

THE COURT: Is that you or a family member?

MARY DAVIS: It was me.

THE COURT: And was that recently or a while ago?

MARY DAVIS: It was a while ago.

THE COURT: And the fact that that occurred, would that prevent you from being able to listen to the evidence in this matter?

MARY DAVIS: Yes, ma'am.

THE COURT: So you believe that whatever the circumstances, that that would prevent you from being able to serve as a fair and impartial juror in this case?

MARY DAVIS: Yes, ma'am.

THE COURT: I will excuse you from service in this

matter. You can have a seat but you don't have to answer anymore questions. Thank you.

Juror number 46 has been excused.

(End of side bar.)

BAILIFF: 71, Your Honor.

(Side bar.)

THE COURT: Tell me your name please.

KEVIN GLASS: Kevin Glass.

THE COURT: Is that you or a family member?

KEVIN GLASS: Me.

THE COURT: Is that recently or a while ago?

KEVIN GLASS: No. When I was young.

THE COURT: The fact that that occurred, would that prevent you from being able to listen to the evidence in this case?

KEVIN GLASS: No.

THE COURT: Would you be able to make a decision based strictly upon the evidence presented here?

KEVIN GLASS: Yes.

THE COURT: Would you be able to be fair to the State as well as the defendant and be fair and impartial?

KEVIN GLASS: Yes.

THE COURT: I'll find you qualified. You may have a seat. Thank you. Juror 71 is eligible.

(End of side bar.)

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THE COURT: Is there any member of the jury panel a close personal friend or a family member who has ever been accused of sexual abuse whether there were or were not criminal charges brought? If so, please stand. And again, if you need to discuss the matter with me personally, I'll be happy to talk to you.

BAILIFF: 207, your Honor.

(Side bar.)

THE COURT: Tell me your name please.

DEAN VARNEY: Dean Varney. My stepson was accused of sexual abuse of his daughter when she was three, four, something like that. He was found not guilty.

THE COURT: So there were criminal charges?

DEAN VARNEY: Yes.

THE COURT: The fact that that occurred, would that prevent you from being able to listen to the evidence?

DEAN VARNEY: No, ma'am. I feel like I had to let you know.

THE COURT: Sure. Yes. That's fine.

DEAN VARNEY: In case somebody found out later.

THE COURT: Would you be able to make a decision based strictly upon the evidence to be presented here?

DEAN VARNEY: Yes, ma'am.

THE COURT: Would you be able to give both the State as well as the defendant a fair and impartial trial?

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DEAN VARNEY: Yes, ma'am.

THE COURT: Thank you. Have a seat. Juror 207 is eligible and qualified.

(End of side bar.)

THE COURT: Is there any member of the jury panel who is a member of or contributor to an organization that has as its primary focus those of law enforcement rights or victim's rights? Such organizations would include MADD, SADD, CAV, CODRA, the Sheriff's Law Enforcement Association or the Law Enforcement Officers Association? If so, please stand.

(No one standing.)

THE COURT: Is there any member of the jury panel who is a member of or contributor to any organization that has as its primary goal the focus or primary focus of those of prisoner rights? Such organizations would include The Innocence Project, any prison ministries, any church affiliated ministries within the prison system as examples. If so, please stand. Yes, sir. Tell me your name please.

RICKEY HIERS: Rickey Hiers, number 95.

THE COURT: Mr. Hiers, you are a member of or a contributor of one of those organizations for prisoner rights?

RICKEY HIERS: Yes, ma'am.

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THE COURT: The fact that you are a member of or a contributor to one of those organizations would that prevent you in this case to be able to listen to the evidence to be presented?

RICKEY HIERS: No, ma'am.

THE COURT: Would you be all to make a decision that would be based strictly upon the evidence to be presented here throughout the course of the trial?

RICKEY HIERS: Yes, ma'am.

THE COURT: Would you be able to give both the State as well as the defendant a fair and impartial trial?

RICKEY HIERS: Yes, ma'am.

THE COURT: Thank you. You may have a seat.

Is there any member of the jury panel who has formed or expressed an opinion about any of the issues that are to be determined in this particular case? If so, please stand.

(No one standing.)

THE COURT: Is there any member of the jury panel who has formed or expressed an opinion as to the guilt or the innocence of the defendant in this case? If so, please stand. Yes, ma'am. Tell me your name please.

PAMELLA WADFORD: Juror 209, Pamella Wadford.

THE COURT: Ms. Wadford, you have formed an opinion as to the guilt or innocence of the defendant in this

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case?

PAMELLA WADFORD: In all fairness, probably. Yes, ma'am.

THE COURT: Then I will excuse you from service in this particular matter. You may have a seat. You do not need to answer any additional questions. Thank you.

Any member of the jury panel that's aware of any bias or prejudice against the State in this particular matter? If so, please stand.

(No one standing.)

THE COURT: Is there any member of the jury panel that knows of any reason why you would not be able to serve as a fair and impartial juror in this trial of this particular case? If so, please stand. Yes, ma'am. Come forward please.

BAILIFF: Number 3, Your Honor.

(Side bar.)

THE COURT: Your name please.

AMBER AMICK: Amber Amick. I just don't think that I will be able to give a fair trial.

THE COURT: Okay. So I saw you shaking your head.

AMBER AMICK: I'm sorry.

THE COURT: You're much like Ms. Wadford.

AMBER AMICK: Yes.

THE COURT: Okay. That's okay. I'm going to --

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That's all right. That's why we ask these questions, for you to come forward. I'll excuse you from the trial of this case. You don't have to answer any further questions. I'll transfer you. You can have a seat.

AMBER AMICK: Thank you.

THE COURT: That's okay.

AMBER AMICK: Try to get myself together. Sorry.

THE COURT: It's an emotional topic.

AMBER AMICK: Yes.

THE COURT: You don't have to explain. All right. Thank you. Juror number 3 is excused.

(End of side bar.)

THE COURT: Is there anything further from the State?

MS. ABEE: No, Your Honor.

THE COURT: Anything further from the defense?

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: Just to recap and make sure that I have written it correctly, I'm excusing juror number 3, juror number 46, juror number 209. I believe that there are five strikes for the State and ten strikes for the defense. Do the parties wish to have an alternate?

MS. ABEE: Yes, Your Honor.

MR. WILLIAMS: Yes, ma'am.

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THE COURT: One or two?

MS. ABEE: I think one will suffice, Your Honor.

THE COURT: And for the alternate we have one strike for the State and two for the defense.

Ladies and gentlemen, as your names are called, if you would please come down to the podium right here where this bailiff is standing and turn and face the attorneys and state your name again please.

THE CLERK: Number 108, Dominic Jones.

(Whereupon, Dominic Jones, a black male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Jones.

THE CLERK: What says for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 98, Christopher Holden.

(Whereupon, Christopher Holden, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Holden.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

THE CLERK: Return to your seat please, sir. Number

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12, Julie Baker.

(Whereupon, Julie Baker, a white female, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Baker.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

THE CLERK: Return to your seat, please, ma'am.

188, Brent Sires.

(Whereupon, Brent Sires, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Sires.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

MR. WILLIAMS: Have a seat in the jury box, sir.

141, Daniel Murphy.

(Whereupon, Daniel Murphy, a white male, was called forward.)

THE CLERK: What say the State?

MS. ABEE: Please present Mr. Murphy.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

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THE CLERK: Please return to your seat, sir. Number 22, Timothy Breen.

(Whereupon, Timothy Breen, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Breen.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 58, Jeremy Fallaw.

(Whereupon, Jeremy Fallaw, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Fallaw.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 218, Tabitha Wilson.

(Whereupon, Tabitha Wilson, a black female, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Wilson.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

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THE CLERK: Return to your seat, please, ma'am. 166, Sandra Rickard.

(Whereupon, Sandra Rickard, a white female, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Rickard.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

THE CLERK: Please return to your seat, ma'am.

THE COURT: The State has five strikes remaining, the defense has five strikes remaining.

THE CLERK: 122, Christina Marquis.

(Whereupon, Christina Marquis, a white female, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Marquis.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

THE CLERK: Return to your seat, please, ma'am. Number 67, Pamela Gantt.

(Whereupon, Pamela Gantt, a black female, was called forward.)

THE CLERK: What say for the State?

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MS. ABEE: Please present Ms. Gantt.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, ma'am. Number 121, Catherine Maples.

(Whereupon, Catherine Maples, a white female, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Maples.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, ma'am. Number 158, Hunter Poston.

(Whereupon, Hunter Poston, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Poston.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

THE CLERK: Return to your seat please, sir. 95, Rickey Hiers.

(Whereupon, Rickey Hiers, a white male, was called forward.)

THE CLERK: What say for the State?

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MS. ABEE: Please present Mr. Hiers.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 96, Jeffrey Hoffman.

(Whereupon, Jeffrey Hoffman, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Hoffman.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 172, Andrew Rogers.

(Whereupon, Andrew Rogers, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABBE: Please excuse Mr. Rogers from this case.

THE CLERK: Return to your seat please, sir. 21, Dawson Brantley.

(Whereupon, Dawson Brantley, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Brantley.

THE CLERK: What say for the defense?

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MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 156, Larry Pitts.

(Whereupon, Larry Pitts, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please excuse Mr. Pitts from this case.

THE CLERK: Return to your seat please, sir. 208, Frank Veney.

(Whereupon, Frank Veney, a black male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please excuse Mr. Veney from this case.

THE CLERK: Return to your seat please, sir. 49, Dylan Deese.

(Whereupon, Dylan Deese, a white male, was called forward.)

THE COURT: The State has two strikes remaining. The defense has three strikes remaining.

THE CLERK: What say for the State?

MS. ABEE: Please excuse Mr. Deese from this case.

THE CLERK: Return to your seat please, sir. 53, Claudia Dubose.

(Whereupon, Claudia Dubose, a white female, was called forward.)

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THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Dubose.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please excuse the juror from the trial of this case.

THE CLERK: Return to your seat please, ma'am. Number 16, Zachary Barnes.

(Whereupon, Zachary Barnes, a white male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Barnes.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 203, Hiram Texidor Guzman.

(Whereupon, Hiram Texidor Guzman, a Hispanic male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Texidor Guzman.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. 159, Christine Price.

(Whereupon, Christine Price, a white female, was called forward.)

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THE CLERK: What say for the State?

MS. ABEE: Please present Ms. Price.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, ma'am. Proceed with alternate, Your Honor?

THE COURT: Yes. One strike from the State, two strikes for the defense.

THE CLERK: 223, Juan Young.

(Whereupon, Juan Young, black male, was called forward.)

THE CLERK: What say for the State?

MS. ABEE: Please present Mr. Young.

THE CLERK: What say for the defense?

MR. WILLIAMS: Please swear the juror.

THE CLERK: Have a seat in the jury box, sir. That's the alternate, Your Honor.

THE COURT: Are there any motions with respect to the selection of the jury?

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

MR. WILLIAMS: Nothing from the defense, Your Honor.

THE COURT: The remaining members of the jury panel, I would like to thank you very much for your willingness to serve as jurors in this matter. You are now excused

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for the remainder of the day. Please call the telephone number that you have been given after 6:00 p.m. tonight for further instructions. Thank you.

(Whereupon, the remaining jury venire were released from jury service on this case.)

THE COURT: Ladies and gentlemen, you have now been chosen as jurors in this particular case. As jurors your function is to determine the facts based upon the evidence that's been presented and then ultimately to determine whether or not the State will meet its burden of proof in this particular case. In connection with this case I ask, I'm going to ask that you follow certain instructions that I'm going to give you. I'm not going to swear you as jurors at this particular time, but I will do that shortly.

The first thing, ladies and gentlemen, I ask that you not begin to discuss this matter among yourselves. You have heard of the indictment in this case. The reading of the indictment. The indictment is just the charge that has been brought against this particular defendant. It is not evidence in this case and so I ask that you not discuss what you hear or see throughout the course of this trial among yourselves until it's time for y'all to begin your deliberations. The evidence does not always come in in a chronological order. It may come in

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in a piecemeal basis, but until you have heard all of the evidence and until you have heard my instructions to you as to the law you are not in a position to be able to make a decision in this matter so I ask that you simply do not discuss it until it's time for you to begin your deliberations.

Secondly, ladies and gentlemen, as you come and go from the courthouse when we take a lunch break and when we take a break, I ask that you not allow anyone to approach you to discuss this matter with you. It's inappropriate for anyone to come up to you and talk to you about this case while you're seated as a juror. If someone approaches you and wants to talk to you about this case, please tell them that you are a juror and you cannot discuss it and we ask that you report it as soon as possible. You can report it to the bailiffs or to the Clerk's Office or to me. But certainly we ask that you report it so we can conduct an investigation to make sure that no one is attempting to influence you in any way. And, of course, the only way that we can do an investigation is if you report it to us.

Also, ladies and gentlemen, as you come and go from the courthouse, please do not listen to conversations that you may hear in the hallways. Oftentimes the attorneys may be discussing things with each other, with

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their clients or witnesses, and the decisions that you have to make about this case must be based upon the evidence that will be presented here in this courtroom. It should not be based upon conversations that you may overhear as you come and go so I simply ask that you not listen to any of those conversations or discussions.

Now, Mr. Young is the alternate. Your role is also very important in this case. If one your fellow jurors is unable to complete service, then you would step into that person's shoes and fulfill service on that part. When you come into the courtroom, I ask that you always take the seat where you are seated at this particular time so that we can keep up with your whereabouts.

Mr. Barnes, I'm going to ask if you will switch seats with this gentleman in the front row in the blue shirt please. I'm going to ask that you serve as the foreperson of this jury. As the foreperson your role is to communicate with me in the event that there is anything that you need throughout the course of this trial. For example, if there is anyone that has any health issues or conflicts, after work appointments that I need to be aware of for purposes of scheduling court and making sure that everyone is able to come to court, you should write me a note about that. But more importantly when this case is submitted to the jury, you

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will be the person who will be responsible for making sure that everyone has the opportunity to express his or her views about the evidence and what the evidence shows.

It's also your responsibility to coordinate those discussions during the course of your deliberations and then when you have rendered a verdict, it will be your responsibility to record the verdict on the appropriate form. I thank you in advance for your service in this matter.

Ladies and gentlemen, I also ask that if you have any reading materials, I don't screen your reading materials. I don't want to screen them. I never know when there is something that you possess that may have some impact or some issue or fact to be determined in this case. Out of an abundance of caution we ask that you not keep that with you into the jury room so to the extent that you have any of those materials, they will collect them from you. At lunch time they will return them to you and then at the end of the day they will return them to you.

Additionally, the same with your cell phones. Your cell phones will be collected from you so I ask if you will turn them off. If for some reason you need to be connected to your home or office for whatever reason, if you will turn it on silent or vibrate, if it goes off,

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then we'll try to take a break so that you can address any emergencies that may arise. But we ask that you not keep your phones with you while you're in the jury room.

At this particular time, ladies and gentlemen, I'm going to ask that you retire to the jury room for just a few moments. We do have some legal issues which we need to take up outside of your presence. I will consult with the attorneys to find out if that can be done quickly. If it's going to take us a little bit of time, then I will probably send you on to lunch and then we'll just come back early from lunch and be able to go forward at this time. I don't want to keep you in the jury room if I don't have to keep you in the jury room. But if you will just give me a few moments to consult with the attorneys. If you will follow the bailiff out, he will show you the room that you should report to. This will also be the same room that you will report to throughout the course of this trial. So whenever you come back from lunch and when return in the morning, you report to the same jury room.

I will also before we start the trial give you a little bit of an overview of how the trial will progress. I'm sure that we will not finish today. I think they're hopeful that we may be able to get the case to you tomorrow for you to begin your deliberations. We'll see

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how that works out. So if you will just follow the bailiff out and retire to the jury room temporarily and we'll bring you back in just a few moments.

(Whereupon, the jury entered the jury room at 11:45 a.m.)

THE COURT: Counsel, I understand that there are some pretrial issues. I believe earlier y'all indicated that you discussed a few of them. I'm just trying to get kind of a handle on the length of time that this might take. I understand that there is also a video that I need to watch which may take a little bit of time.

MS. ABEE: Yes, Your Honor. I do think it's probably best to start after lunch. I think our pretrial motions -- Or for the jury to come back after. I don't think there is anything we would be able to get done before that.

MR. WILLIAMS: Your Honor, I would think that we could handle all the pretrial motions as well as view the video by 1:00. It will take us up to probably 1:00, Your Honor.

THE COURT: For all the pretrial motions?

MR. WILLIAMS: Yes, ma'am.

THE COURT: Then we need to get a lunch hour. So you're saying that we will be hearing argument for another hour?

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MR. WILLIAMS: The video is 30 minutes so maybe less than that.

THE COURT: Okay. That's not a problem. That tells me what time I need to tell them to come back then. Thank you. I don't intend to swear them until we finish all the pretrial issues. We can bring them back in. That was quick.

(Whereupon, the jury entered the courtroom at 11:47 a.m.)

THE COURT: Just when you were getting back to the room, I call you back in. Ladies and gentlemen, I have consulted with the attorneys. I'm going to give you until 2:00 for a lunch break. That will give us plenty of time to be able address our legal issues and give us an opportunity to grab some lunch as well. If you will report back to the same jury room at 2:00 p.m. Please remember all the instructions that I have given to you, that is not to discuss this matter among yourselves. Not to allow anyone to approach you to discuss this matter with you. Not to listen to conversations that you may hear in the hallways as you come and go. When you report back at 2:00, then at that time we will be ready to begin the trial. I'll give you the overview of how the trial will proceed and then we'll get started. Thank you. Have a good lunch. We'll see you back at 2:00.

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(Whereupon, the jury was excused for lunch.)

THE COURT: I believe the State had some pretrial motions; is that correct?

MS. ABEE: Yes, Your Honor.

THE COURT: Let's take up the motion to exclude third party evidence.

MS. ABEE: Yes, Your Honor. This case is somewhat interesting. As Your Honor read on the indictment the defendant is charged with criminal sexual conduct with a minor in the first degree for engaging in a sexual battery with a minor Minor who was four years old at the time. The victim in the case, Your Honor, alleges that the defendant placed his penis in her mouth.

During the forensic interview portion of this investigation, Your Honor, the victim also disclosed that she had seen the penis of someone named J. . J. is a small minor boy similar to the age of the victim, Your Honor, and in speaking with the mother of the child she states that the child alleges that he showed her his penis and may have touched her with a stick or something like that in her private area. She then alleges the sexual assault against the defendant, Your Honor, which again is simply him placing his penis inside of her mouth.

Although the child does, in fact, bring up J. in

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that incident, Your Honor, they are completely separate and distinct from the allegations that the minor makes against the defendant in this case, therefore we would we ask that they be excluded for any reference by the State or by the defense as any reference to J. and J. possibly being the perpetrator of this sexual assault just merely casts suspicion on J. as the child has never asserted that J. did any oral penetration as she said the defendant does. Therefore, we would contend that it doesn't rise to the level of third party guilt, Your Honor. That is just casts a bear suspicion and we would ask that any reference to that child and that sexual contact be excluded from this case.

THE COURT: Mr. Williams.

MR. WILLIAMS: Your Honor, on the face of it I would agree with the Attorney General's Office. However, it's a little more complicated than that because the other two motions that they actually have, one is for the alleged indictment which the defendant is charged with which is criminal sexual conduct first degree, and then they're gonna attempt to allow in another assault type of case into that particular case.

I learned yesterday, Your Honor, from a text from the Attorney General's Office that there had been some acting out. I appreciate her doing this on Sunday, but

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she sent me a text indicating that the child may have exhibited some sort of sexual acting out and as we know in this particular case they have a blind, they call them a blind expert. I assume that's an expert who has not seen the victim is going to testify about characteristics of someone who has been sexually assaulted.

So, Your Honor, the complication is this. As I understand sexual assaults that sometimes with a small child there will be acting out if the child has been sexually assaulted. So for whatever reason that this acting out the child may testify to or may be repeated in the courtroom about, that may be evidence that the child has been sexually abused by someone else and we wouldn't want the characteristics in regards to the sexual assault attributed to this defendant if indeed it was the result of some other sexual assault.

So it's not as clean as you would like it to be. As we know, the reason they use Lyle on these types of cases is because when you have a four year old child, it's hard to recollect specifically things that happen and they use this on the State identity, things of that nature. So only because they are attempting to Lyle in this evidence we think that that would be appropriate. At least have that testimony out that that occurred when she was given that forensic interview.

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THE COURT: But in order to constitute any evidence related to third party guilt there has to be evidence which would exclude the defendant as the perpetrator.

MR. WILLIAMS: I understand.

THE COURT: And so are you claiming that that information would rise to that level? And if so, how? It has to be inconsistent with his own guilt or evidence of his own guilt.

MR. WILLIAMS: Your Honor, obviously it's a difficult thing for me to argue because I guess what I'm saying is that if they are going to be allowed to testify to the acting out of the child as evidence of a sexual assault, then they can't differentiate between that and alleged assault which occurred by some other, as a result of some other child. So I guess that's the problem. Maybe not for purposes of third party guilt but as the State in regards to her memory, recollection, things of that nature. So I'm not exactly sure how you qualify that but that's the issue which we really have is that if she is going to testify in regards to some sort of sexual acting out or if that's brought up, then that might be a problem if we can't bring up the fact, well, she's already been at least touched inappropriately by some other child.

And I agree with her. Not that these specific

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episodes which he's charged with could be attributed to that because clearly she says it's oral sex committed by the defendant. I guess it's limited in scope, Your Honor.

THE COURT: Yes, sir. So more as a reason, it's something to point to to indicate that her acting out could be for these other reasons and not for the allegations in this particular case?

MR. WILLIAMS: Yes, ma'am.

THE COURT: Okay. What says the State?

MS. ABEE: Your Honor, we would ask that if that is the holding in this case, that the defense be limited until we actually bring that evidence up. We may not even go into the fact that the child was acting out so if that is their rebuttal to this third party guilt, then we would ask that they be limited and only presenting that once the State has, in fact, opened the door and talked about any sexual acting out on behalf of the minor because as I stated, that might not even come out throughout the course of the trial, Your Honor.

However, we would still contend that the sexual acting out and stating that she was sexually - she had seen a penis of a small child, a four year old child still isn't consistent with the fact of the defendant's guilt in this case; that she alleges that she was

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sexually assaulted by him. My understanding of the previous allegation or the allegations with J. is that he is a four year old boy. And I hate to rephrase it this way, but one of those kindergarten type, you show me yours, I'll show you mine kind of incidences and that he touched her with a stick in her private area. That is completely inconsistent and different with sexualized acting out of oral penetration which she alleges against the defendant. So we would contend that any reference of that still is inconsistent with the defendant's guilt.

THE COURT: And I would tend to agree with that, if the evidence supports what you have indicated to me that it was a four year old who showed his penis and perhaps touched her with a stick. But I think I need to, and perhaps if this was discussed during the course of the forensic interview, that might clarify some of that information as well.

MS. ABEE: It is, Your Honor. It is.

THE COURT: I would tend to agree. If that's basically the substance, we are not talking about someone who is older and perhaps has more of what I would call a criminal intent or was aware of what was going on and intentionally engaged in those acts. I think it's a little bit different with someone who is four years old who I would like to think could not develop any kind of

criminal intent at that particular age under the circumstances.

MS. ABEE: And, Your Honor, if for some reason it's still unclear after the forensic, we will be happy to proffer any testimony from any witnesses that can help fill in the blanks.

THE COURT: All right. Then turning to the other bad acts.

MS. ABEE: Yes, Your Honor. As I stated, the defendant is charged with oral penetration of the minor Minor when she was four years old. There are two other incidents that we would contend are prior bad acts that were committed on behalf of the defendant, Your Honor. First would be sometime between April and May of 2014 when the child alleges that the defendant exposed his penis to her, Your Honor. That took place at the minor's home. Secondly, it would be sometime between July 7th, 2014 and July 11th, 2014 when the defendant, actually an eyewitness walked in and saw the defendant with his hand down the front of the minor's pants. She was again four years old at that point in time, Your Honor, and was located at her grandmother's house which is the location of the alleged oral sexual assault as well, Your Honor. We would contend that these are other bad acts, prior bad acts on behalf of the defendant and

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should be admissible under the common scheme or plan exception under Rule 404(b), Your Honor, and I'm prepared to go into that legal argument if you're ready.

THE COURT: And those are acts that are not the subject of the other indictment?

MS. ABEE: Correct. The indictment right here, Your Honor.

THE COURT: Either this indictment or the indictment ending in 6030 since this one has been changed. This is 6031. 2015-GS-32-6031.

MS. ABEE: Yes, Your Honor.

THE COURT: And I understand there is another indictment as well. 2015-GS-32-6030.

MS. ABEE: 6030, Your Honor, is digital penetration alleged at the same time that the eyewitness saw the defendant's hand down the front of the minor's pants so that would be part of that indictment although we are not necessarily going into the digital penetration that the minor alleged in the forensic interview, rather just the fact that an eyewitness saw his hands down the front of the pants. So it would be more of a CSC third or a lewd act as opposed to the CSC first with a minor that he's charged with. So while it's a part of that, it isn't actually what the acts he's charged with. It's just the eyewitness witnessing the hand down the front of the

pants.

THE COURT: And you're claiming that it should be admissible under 404(b) as evidence of a common scheme or plan?

MS. ABEE: Yes, Your Honor.

THE COURT: Any others?

MS. ABEE: No, Your Honor. Just the common scheme or plan exception that this is kind of what the defendant does.

THE COURT: Any additional argument that you want to make about this at this time?

MS. ABEE: Your Honor, just to make the record clean I would. For this evidence to be admissible we first have to determine that it's relevant pursuant to Rule 401. This is extremely relevant in this case not only because it's sexualized acts between the defendant and the same victim at the same age and generally in the same locations, but also because family members in this case, Your Honor, when they found out about the prior acts, they then took additional steps in preventing or attempting go prevent the defendant and the victim from being together. So there are acts of other witnesses in this case, Your Honor, that occurred as a result of these prior allegation.

THE COURT: I'm sorry. Repeat that again. There

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are other acts involving other individuals? Is that what you're saying?

MS. ABEE: What I'm saying is the other, for instance, the parents in this case took acts to limit access between the defendant and the victim after these allegations came out, after the exposure incidents came out so other witnesses took steps in furtherance of kind of the daily interactions between the defendant and victim because of these prior allegations.

Your Honor, once we determine whether or not it's relevant under 401, we have to determine whether or not it fits into the 404(b) exception of common scheme or plan. In State v. Wallace is lists some factors that we look at. One being the age of the victim, Your Honor. She is the same age during all these allegations. She's four years old. Second being the relationship between the victim and the perpetrator. They were cousins, Your Honor, so the relationship is the same throughout. Number 3 is the location. The location is always the family home, Your Honor. One being the home of the victim. The other two incidents being the home of the grandmother of both the victim and the defendant. Four being use of coercion or threats which just are absent in all three of these cases, Your Honor. And then finally the manner or type of sexual battery, your Honor.

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And although they are not the same battery, it's not oral penetration each time, this does show an escalating pattern of behavior starting with exposure and then a hand down the pants and ultimately oral penetration, Your Honor. In State v. Kirton, Your Honor, actually held that a six or seven year of escalating abuse was, in fact, prior bad acts even though it wasn't completely the same. So, Your Honor, we contend that this shows the defendant's common scheme or plan to isolate the victim in a home by herself and then engage in some sort of sexual touching or sexual act with her and we would contend that it's appropriate to be talked about throughout the course of this trial, Your Honor, as it is another bad act.

THE COURT: And then finally I would have to do any validity test in terms of weighing the probative value versus prejudice.

MS. ABEE: Yes, Your Honor.

THE COURT: Mr. Williams?

MR. WILLIAMS: Your Honor, I don't know that I disagree with the argument of the Attorney General's Office provided that's what the facts reveal so as long as those facts are revealed in testimony, then I don't know that I would disagree. I have tried several of these types of cases and I think she has quoted the law

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perfectly.

THE COURT: It does appear based upon what's been stated to me as the facts in the case to be relevant under 401 and I would believe that under 404 it would demonstrate a common scheme or plan particularly in the fact that it's the same individual. The relationship between them, that their family members, that occurred in family homes, and that it appeared that it was, over time the acts appeared to escalate and so I think it's relevant. In terms of balancing its probative value versus the prejudice, I think that it's always prejudicial in some form or fashion but I don't think that the prejudice would outweigh its probative value in this particular matter as long as it's limited to those particular instances and as it's been described so I will allow it.

Of course, in order to preserve, you need to raise it again, any objection if there is an objection. Then finally I believe we'll go to the information relating to the admissibility of the out of court statement and I assume that's in the form of the video; is that correct?

MS. ABEE: It is the video, Your Honor.

THE COURT: Yes, ma'am.

MS. ABEE: Your Honor, under 17-23-175, the forensic interview is admissible if it meets certain criteria,

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Your Honor. Mainly that it's preserved in an electronic copy, that the child will be available to testify which we do intend for her to testify and that it contains certain indicators of internal coherence or trustworthiness, Your Honor. Mainly that it's conducted with non leading questions, it's conducted by a trained professional, contains a detailed account of the offense and has internal coherence and that there is the sworn testimony of the victim as well as the forensic interviewer, your Honor. The forensic interviewer is on her way to the courthouse to testify regarding her credentials and her training as a forensic interviewer, Your Honor, and we do in fact have the forensic interview for Your Honor to watch. It's approximately 32 minutes long.

THE COURT: Who is the forensic interviewer?

MS. ABEE: April Sykes. She's an agent with SLED, Your Honor.

THE COURT: Yes, ma'am. I'll watch it at this time.

MS. ABEE: Your Honor, I don't know if we have the computer set up for you to watch it in the courtroom.

(Whereupon, a video of a forensic interview of the minor child shown to the Court.)

MS ABEE: Your Honor, that being the interview

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portion of the video itself.

THE COURT: Any further argument you want to make related to the video?

MS. ABEE: Nothing from the State at this time, Your Honor.

THE COURT: Mr. Williams?

MR. WILLIAMS: None by the defense, Your Honor.

THE COURT: At this particular point while there are some additional prerequisites prior to the admissibility of the video, that being the actual testimony of the child and learning more information about the person who interviewed the child, basically the contents appear to be, there was audio and visual, the child appeared to understand about telling what occurred through the use of questions that were asked throughout the interview, the questions were not leading in nature. There was also sufficient preliminary information to understand, for the interviewer and for the interviewer to be able to understand that the child understood body parts, that she understood how to answer the questions in terms of telling whether she did not understand a question or she understood the difference between what was factually true and not factually true based upon some preliminary questions that were asked of her. The statements appear to have coherence. There were follow up questions in

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relation to what she was asked and she was able to answer those questions, and so subject to the other prerequisites being fulfilled it appears that the statement, the video would be admissible. She is under the age of 12 and otherwise meets the criteria set forth in the statute. Is there anything further?

MS. ABEE: Nothing at this time, Your Honor. However, if you wanted us to question the forensic interviewer at this point, she is here or we can just wait prior to the video being published and entered into evidence.

THE COURT: You know, I hate to have her testify twice, although I assume she can, but to the extent that -- Mr. Williams, do you anticipate that her qualifications would be called into question?

MR. WILLIAMS: I do not, Your Honor.

THE COURT: Certainly once she's testified as to her qualifications, if there are some issues, we can take them up at that particular point.

MS. ABEE: Yes, Your Honor.

THE COURT: And certainly the prerequisite is that the child testify so subject to those two things, then we'll determine at that particular point the full admissibility of the video. Is there anything else that we need to take up at this time?

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

THE COURT: Anything from the defense?

MR. WILLIAMS: Nothing in regards to the trial itself, Your Honor.

THE COURT: Okay. That implies that there's something else.

MR WILLIAMS: It does, doesn't it, Your Honor? The jury has not been sworn yet.

THE COURT: That's correct.

MR. WILLIAMS: I was hopeful that my client could eat lunch without being in the custody of the Lexington County Sheriff's Department since the jury has not been sworn.

THE COURT: Mr. Breazeale, you are currently on bail; is that correct?

MR. BREAZEALE: Yes, ma'am.

MR. WILLIAMS: He is on bail, Your Honor.

THE COURT: You are on bail?

MR. BREAZEALE: Yes, ma'am.

THE COURT: And so you understand I have not ever required that once the trial starts that they be taken into custody. This is what I will tell you, Mr. Breazeale. You are still on bond and I will allow you to remain on bond, but the requirements are this. You are required to be in this courtroom, in this

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courthouse at the time that I designate. If I say be back at 2:00, whether Mr. Williams is here, whether the other attorneys are here, you need to be present. If I require that you come to court and you are not in court, this trial will continue in your absence so you leaving will not prevent this trial from going forward.

In addition, if you are not here when we are supposed to start back with court and we cannot determine where you are or why you are not here, if there is not a good reason for you not being present, then a bench warrant would be issued for your arrest, and then once you are arrested you would remain in custody until such time as either these proceedings are finished or if there's already been a verdict and/or sentence that would be read to you. Do you understand that?

MR. BREAZEALE: Yes, ma'am.

THE COURT: So no matter what else goes on, you need to make sure that you are here at the time and place that I designate. Do you understand that?

MR. BREAZEALE: Yes, ma'am.

THE COURT: Is there anything else we need to take up?

MS. ABEE: Just two very brief things, Your Honor. One, I did relay this to your law clerk. We have two witnesses that are not available until tomorrow morning.

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That should give us six witnesses for this afternoon which I do believe will fill up the afternoon. However, I want to bring that to Your Honor's attention in case we do go through those six witnesses a little bit quicker than anticipated. There are some medical reasons and work reasons that the two witnesses are not available until tomorrow morning.

Lastly, Your Honor, before the jury comes back and instead of having to stop prior to the child's testimony, we will be asking that Your Honor clear the courtroom of all non essential individuals in the courtroom when the minor testifies. She is only six years old. We would ask that the courtroom be cleared of anyone other than those people that are necessary for the case.

THE COURT: Who do you consider to be necessary for the case?

MS. ABEE: Your Honor, the defendant, the defendant's attorney, any bailiffs, staff like that. All of our witnesses are going to leave at that point in time. I don't believe the defense has any witnesses. But it would just be the defendant, the defense attorney, us and any necessary staff and personnel.

THE COURT: And so her parents will not be present?

MS. ABEE: No, Your Honor. They are going to leave during her testimony.

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THE COURT: All right.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: Anything further?

MS. ABEE: No, Your Honor.

THE COURT: Then we'll come back at 2:00 and we'll be ready to go forward at that particular point.

MS. ABEE: Thank you, Your Honor.

MR. WILLIAMS: Thank you, Your Honor.

(Lunch recess.)

BAILIFF: All rise. Court is now in session. The Honorable Judge Alison Lee presiding.

THE COURT: Good afternoon. Be seated please. Thank you. Is there anything that we need to take up before we get started?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: Okay. We can call for the jury panel.

(Whereupon, the jury entered the courtroom at 2:20 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. If you would stand and raise your right hand at this time for the administration of the oath.

(Whereupon the jury was sworn by the Clerk of Court at 2:20 p.m.)

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THE COURT: Thank you. All right. Ladies and gentlemen, I have indicated to you that what I would do this afternoon is explain to you the procedure that we will follow and then we'll have the opportunity to actually get started with the trial. The first thing I would like to do is to explain to you the procedure that we'll follow for this case. The first thing you will hear will be the opening statements of the attorneys.

Now, their openings statements are not required and they are not evidence so they may or may not make an opening statement to you, but the purpose of the opening statement is for them to tell you a little bit more about what this case is about and what they hope that you will be able to hear in the form of any evidence that will be presented throughout the course of this trial. So I ask that you listen carefully to the opening statements.

Once they have made those statements then you will, in fact, hear the evidence. Now the evidence may take many forms. It may be in the form of a witness' testimony from the witness stand. It may be in the form of photographs or documents or other physical pieces of evidence that you will be able to take with you into the jury room when it's time for y'all to begin your deliberations.

Now, just as in any profession there are certain

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rules that govern that profession. For trials it's what we call rules of evidence. Those rules are designed to make sure that what you hear and what you can consider will assist you in being able to determine the facts of this case. Again, that's your job here today or this week. Whether or not certain evidence is admissible is a legal question so you may hear the attorneys objecting about certain evidence that will be presented throughout the course of the trial. If I sustain the objection, then you will be able to hear the evidence. No. That's wrong. If I sustain the objection, you will not be able to hear the evidence. So I ask that you not speculate as to what the evidence might have been or the reasons for the objection. I assure you that we are not trying to hide or keep anything from you. Again, we are just trying to make sure that what you hear and what you can consider will help you in being able to determine the facts. On the other hand if I overrule the objection, then you will be able to hear the evidence and it will be admissible.

From time to time we may need to take up other issues outside of your presence. To the extent that we can do that quickly here in the courtroom, they may approach the bench and we may discuss it here. On other occasions I may need to ask that you retire to the jury

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room. I ask that you please not speculate as to what we are discussing or the reasons for the discussion. Again, we are trying to make sure that everyone's legal rights are protected. The only way we can do that is if we are able to discuss those legal issues in open court and we have to do that outside of your presence.

Once you have heard all the evidence, then you will hear again from the attorneys this time in the form of a closing argument. Now, their closing arguments again are not evidence, but what they will do is pick out portions of the evidence that you have heard and make arguments to you in an effort to try to sway you to find the facts in accordance with their view of what occurred. So I do ask that you listen carefully to those closing arguments as well.

Once you have heard those closing arguments, then I will instruct you on the law that's to be determined by you so that you can apply those facts in the law and come up with your verdict in this case. Then you will be able to begin your deliberations after I have instructed you on the law. Ladies and gentlemen, I ask that you listen carefully to the attorneys and to the evidence as it's presented throughout the course of this trial. I ask that you not take notes. I find that sometimes when people take notes, they're busy writing information and

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they're missing something that is being presented.

Having said that I do understand that sometimes people need to take notes to help them remember information. If that applies to you, then please let me know and I'll be happy to accommodate you so that you can take notes to help you remember.

Ladies and gentlemen, as an introduction to a criminal case let me tell you a little bit more about the criminal case. Part of this, ladies and gentlemen, this is the case of the State versus Auston Breazeale and this case comes to us by indictment, by way of indictment which I read to you earlier. He is charged with criminal sexual conduct with a minor in the first degree and again to this indictment Mr. Breazeale has pleaded not guilty and so that plea casts the burden upon the State to prove that Mr. Breazeale is guilty of this particular charge by evidence that convinces you of that guilt beyond a reasonable doubt.

I'll explain all those terms to you, what reasonable doubt means at the close of the case when it's time for y'all to begin your deliberations. So the purpose of our trial, ladies and gentlemen, is to determine whether or not the State would be able to meet that particular burden. So I ask that you listen carefully. I'm not allowed to make any comments to you about the facts of

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this case and I don't have any opinion about the facts. You and you alone are the fact finders in this case. No one can tell you what the facts of this case are and so it is your job to listen carefully to all the evidence that's being presented to enable you to be able to determine what facts you choose to find based upon the evidence that's been presented and then you will apply the law as I instruct you to those facts and then you will be able to arrive at your verdict.

Now, just as you are the sole judges of the facts of this case, I'm the sole judge of the law that applies. I'll discuss that a little later at the time for the deliberations in this matter. But I ask that you listen very carefully to the attorneys and to the witnesses who testify and to all of the evidence that's presented throughout the course of this particular trial and when you have done that, then you will be able to determine the facts and then you will be able to apply the law as I instruct you and then you will have done your job and your duty as jurors in this case.

At this time, ladies and gentlemen, I believe that we are ready to hear from the attorneys in the opening statement. Would you like to make an opening statement, Mr. Fernandez?

MR. FERNANDEZ: Thank you, Your Honor. Yes. May it

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please the Court.

THE COURT: Yes, sir.

MR. FERNANDEZ: February 7th, 2015. That's a day that most of y'all, just an ordinary day. Probably not even memorable. A day that most people don't even think about anymore. But for Trey and Whitney Marsh that's a day they will never forget. It began as a normal Saturday. They woke up real early because there's young children, made breakfast, getting kids ready for a trip to the zoo, family trip to the zoo that day. That's the day when Trey and Whitney's daughter Minor , then four years old, told them she had been sexually assaulted by her cousin Auston Breazeale.

Good afternoon. My name is David Fernandez and I along with Kinli Abee, we are representing the State of South Carolina in the matter of State v. Auston Breazeale for the crime of criminal sexual conduct with a minor first degree.

I want to begin by thanking y'all for you service. No one understands it more than we do the disruption that jury service can cause in your lives. We all have families. We all have work we would rather be at. But I want to thank you because what you do is perhaps the most important thing our citizens can do. Our system of - our judicial system as a whole depends on our citizens

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showing up for jury service, otherwise nothing could be done. So I want to sincerely thank you all for showing up.

I want to tell you the Judge did a great job explaining essentially what our roles are, what your role is. I want to reiterate some of that and let y'all know that it's understandable. Most people know nothing about what a trial is. Most folks don't know anything about what the law is concerning criminal sexual conduct. Rest assured at the conclusion of the case, Judge Lee will tell you everything you need to know in order to render a verdict.

The State's role is to present evidence and it's our burden to present evidence to you to meet the elements of criminal sexual conduct with a minor in the first degree. A trial in its most general sense is a search for the truth. Evidence is presented to you and you all are ultimately the deciders of what the truth is. That's what you are doing when you render a verdict at the end. You're telling us what the truth is. What happened. And that's what we ask you. We ask you to tell us what happened. The truth.

Criminal sexual conduct with a minor in the first degree is defined as when a defendant engages in a sexual battery with a child under the age of 11. Sexual battery

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is put simply any sort of penetration no matter how slight. This also includes what we would refer to as oral sex since that is a penetration.

Now, I'm going to be honest with you all. Much of what you will hear today is not going to be easy. It's going to be uncomfortable. It's not a fun subject matter. It's the State's burden to prove to you that the defendant did this and it's a burden we gladly accept and we would have it no other way.

Now, you heard a little bit about reasonable doubt. That is the standard in a criminal matter is reasonable doubt. Proof beyond a reasonable doubt. Reasonable doubt doesn't mean the case has to be one hundred percent perfect. Reasonable doubt simply means that the State most present evidence to you that satisfies you beyond that reasonable doubt. Put another way, if after hearing all the evidence in the case you are left firmly convinced of what happened, what the truth was, then you have met that burden. Firmly convinced. This is a burden in this case that we gladly accept in this case because the facts are clear. The evidence is clear.

In order to meet this burden the State will call several witnesses to the stand and they will testify. We'll call law enforcement. We'll call family members. We'll call an expert in the area of child abuse dynamics

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who is going to come here and educate us all on what that is, an area arguably most people are not familiar with. You will also hear from eye witnesses. Eye witnesses who saw the conduct we are here for today.

What you will hear is a lot about a little girl named Minor . She was then four years old. You will hear about the relationship the defendant had with her. You will hear about a pattern of escalating sexual contact between them. What began as exposure, then escalated to touching and ultimately ended with oral sex. You will watch a video of an interview with then four year old Minor where she talks about what her cousin did to her. And then finally and most importantly you will hear from Minor herself.

Now, Minor is six years old now and she is a little girl and very full of energy, loves everything pink and princesses and shockingly frozen. I have no doubt that she will come here and tell you all about it. But she is also here today to tell you about other stuff. She's also going to come here and tell you about her cousin. She is going to tell you about the attention he showed her. She is going to tell you about maybe he bothered her sometimes. She will tell you about how he showed her his penis. And she is going to tell you about how he put his penis in her mouth and forced her to

perform oral sex on him. And I know none of this is going to be easy to hear, but you will hear a lot about it through the course of this trial.

Now, this isn't a case you might see on TV like Law and Order or CSI. There's not gonna be a screen that comes down and shows you DNA and shows you all sorts of forensics and cool maps. That's not this type of case. This case is built on testimony. Testimony of a young girl. Testimony of people who know her. Her family and people who saw it happen. It's built largely on the bravery of Minor herself. But she does not stand alone as I said, supported by other witnesses.

You may hear the defense talk about things like, oh, the State doesn't have this, the State doesn't have that. Well, what you won't hear the Judge tell you at the conclusion of the case when she charges you on the law, she won't tell you that you need DNA. She won't tell you that you need forensics or fingerprints, whatever. She won't tell you that. What she will tell you is that it is your job to hear the evidence that is presented and then if after hearing that evidence you are firmly convinced of guilt, then the burden has been met.

Again, we are asking you to tell us what the truth is about what happened that day in 2014. What happened.

As I said earlier when I introduced the case, the

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subject matter is not easy and it's not. But what will be easy, what will be easy is finding that man guilty as charged of criminal sexual conduct in the first degree with a minor. Thank you for your service.

THE COURT: Mr. Williams.

MR. WILLIAMS: May it please the Court.

THE COURT: Yes, sir.

MR. WILLIAMS: Mr. Foreman, ladies and gentlemen of the jury, I first want to start by telling you that in these types of cases they are not cases which are decided upon emotion. The Judge will tell you at the conclusion of this case that you don't make decisions based on emotion. You make decisions based on facts and evidence. So to a certain extent when you have opening arguments and things of that nature there is a little bit of got you. A little bit of setting the frame, if you will. A preamble such as, say, on February such and such, Saturday morning, everyone was preparing to go to the zoo. Well, that is an emotional statement to, I don't know, to gather you in. To get you to the right frame of mind as to how you should start thinking about this case.

But this is an analytic endeavor which you're getting ready to be involved in. It's analytical with humans. You don't have computers. You don't have any type of instrument to make decisions about what happened

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other than your minds. But there is a common thing which human beings have which they have always had and that is common sense. So actually what your job is as a jury and as individual jurors is to use that common sense and to evaluate things. You're not on a search for the truth. It is a search for the truth but you're not a detective. You don't have an eyeglass. What you actually are is you are an evaluator, if you will. You are an evaluator of the testimony that's being presented and determine what you believe to be true because you will learn at the conclusion of this case when you're instructed as to how you determine truth, you will learn that you can make a decision as to the truth of what a witness is saying based on how you interpret what they are saying. Whether or not they are forthright. Whether or not there is inconsistencies in their testimony. Whether or not there are reasons why the testimony should be angled in such a way.

So you are weighers. You're weighers. It's just like the scales of justice to a certain extent. You weigh that evidence. And, you know, there's a reason why we use human beings to do this. Because you don't just add up numbers. You can't assign a numerical value for a fact and add those facts up and make a determination and say, well, you know, that's enough. What you do is you

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listen to the witnesses that are presented and you determine in your minds whether or not these facts exist and then you weigh those facts, you apply the facts to the law as Her Honor -- and I keep wanting to say His Honor only because that's a phrase I have learned -- as Her Honor will tell you. And the law is - we cannot dispute what the law is in regards to what the Judge instructs you because she is the giver of the law. But your determination as to how those facts apply to the law is something which is in your purview. Something which you decide.

This is the type of case where it's obviously going to be somebody else's word against somebody else's word. But you have to still evaluate it. You have to make that determination as to what you believe to be the truth in the case and whether or not it has satisfied you to such a degree that you feel that you can convict somebody. That's what it's all about.

In this particular case you have met my client Auston Breazeale. 16 years old at the time of the allegations. He's 18 now. So you're going to hear allegations that supposedly he had some sort of sexual act which he performed with a cousin. He denies it. He denies it. That's why we are having a trial. It's that simple. So now you have to make the call.

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Periodically attorneys may stand up and object. I would ask that if we make those objections, that you not hold it against us. Trust me if we do it the wrong way, the Judge will tell us. But we do things because we are technicians. We are representing our various clients. We're making those objections. If we think that a position or a question or an answer is incorrect, we make an objection and the Judge will tell us if we are right or wrong. It's that simple. But don't be trapped into some sort of emotional, and it's easy to do that. I know I'm asking you to do a tough thing. It's easy to do that. But you can't do that in this type of case because you're here to determine the truth.

The Judge will tell you that you have no enemies to punish. You have no friends to reward. So you have to look upon this case, as he stands right there he is not guilty and they have got to prove that he's guilty. They have got to prove it. You don't come in with any pre-thoughts that he is guilty of anything and he denies it.

If there was anything else I could tell you, I would tell you, but you know, it all comes down to common human experience and that is your common sense. I think once you listen to the testimony you will make a decision that he's not guilty. There is missing evidence. There is

suspect evidence. There is suspect allegations and you will do your job that you were sworn to do. You take an oath just like as lawyers take an oath. As judges when they're sworn in take an oath and that is to do what jurors are supposed to do and that is to evaluate the evidence and to speak the truth. Thank you.

THE COURT: You may call your first witness.

MR. FERNANDEZ: Thank you, Your Honor. The State calls Detective James Kemfort.

Thereupon,

JAMES KEMFORT

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last name for the record.

THE WITNESS: James Kemfort, K-e-m-f-o-r-t.

DIRECT EXAMINATION

BY MR. FERNANDEZ:

Q. All right. Detective Kemfort, would you please tell us with whom you are currently employed?

A. I work for the Lexington County Sheriff's Department.

Q. And how long have you been employed with Lexington County?

A. I have been employed by them for ten years.

Q. Okay. What is your current job title at Lexington County Sheriff's Department?

A. I am a major crimes investigator with the special victims unit.

Q. Tell us a little bit about your law enforcement career. How long have you been in law enforcement?

A. All together almost 15 years.

Q. Where did you work prior to Lexington County?

A. I worked at the city of Columbia, Columbia Police Department.

Q. You did attend what's called the Criminal Justice Academy?

A. I did.

Q. You said you were in the SVU, the special victims unit. Have you received any additional trainings in order to conduct those sorts of investigations?

A. I have. I have been with the special victims unit now for a year and eight months. I have received over 90 hours of training in child sexual victimization as well as child victim homicide, child sexual abuse and interviewing child victims.

Q. What sorts of cases would you typically be assigned in your capacity in the SVU?

A. In the year and eight months I have had 250 cases of which 200 of them have been child sexual abuse cases.

Q. Now, Detective Kemfort, I'm going to direct your attention to the case at hand. You understand why you are here today; is that correct?

A. Yes. I do.

Q. When did you begin your investigations into Auston Breazeale?

A. I received the incident report, it was assigned to me on February 9th, it was assigned to me on Monday, 2015.

Q. If you would, walk us through what your initial in investigating this sort of allegation, what would be your initial steps you take?

A. My - actually my supervisor on the previous day came in on Sunday to assign cases that occurred over the weekend and she went ahead and already referred the victim for a forensic interview. Generally that's what we do when we first get cases. We look over it and we refer our child victim to the Dickerson Center which is our primary choice for forensic interviews and forensic matters.

Q. You're using some terms we may not be familiar with. Very generally what is a forensic interview?

A. Generally it is just a child friendly way of interviewing a child so that they are not intimidated by law enforcement and it's comfortable for them and it's using non leading questions so that the child can disclose without forcing any disclosure.

Q. Okay. Is that a tool you use typically with underage, with minor victims?

A. Yes. It is.

Q. In investigating any kind of criminal sexual conduct with minors, do you make it a point to interview the child themselves or do you leave that to other folks?

A. We leave it to the Child Advocacy Center, the forensic interviewer.

Q. In this case what then did you do after the referral to the Dickerson Center? Did you attend that interview?

A. I did. I attended the interview and observed it through, I guess it's like closed circuit television from another room.

Q. Did you have a chance to interview all the folks that were involved, her parents, Minor 's parents?

A. I did. They completed written statements for me. Actually they had already completed written statements at the time of the incident. I interviewed each one of them and spoke to them to clarify their statements to see if there was anything they wanted me to add to it.

Q. The child victim, what is her name?

A. Minor .

Q. What is her date of birth? Is that in your file?

A. It is. Date of birth is [redacted].

Q. Now, Detective Kemfort, did you determine where the

allegations of abuse had occurred?

A. Yes. We did. From the interviews with the parents and as well as the forensic interview could tell it happened at the child's grandmother's former residence which was at [redacted] Parkhurst Lane in Lexington County.

Q. I know you just said it, but that is within Lexington County?

A. Yes. It is.

MR. FERNANDEZ: Please let the record reflect the jurisdiction.

BY MR. FERNANDEZ:

Q. Now, Detective Kemfort, after interviewing Trey Marsh and Whitney Marsh, what did you then do next in your investigation?

A. After interviewing both Trey and Whitney and after the forensic interview was done with Minor , I then attempted to contact Auston Breazeale in reference to the incident and requested him to speak with me.

Q. Were you successful in contacting Auston Breazeale?

A. Sort of. I was able to contact his mother. His mother said he wasn't home at the time, but that she immediately brought him up, took him about 40 minutes and she actually brought him up to headquarters to speak with me.

Q. When she brought him to headquarters, did you

actually speak with him at that point?

A. I did not. I spoke with his mother for about 30 to 45 minutes, but I did not speak with him.

Q. Did you ultimately decide to issue, take out warrants for the arrest of Auston Breazeale?

A. I did.

Q. What did you base that arrest warrant on?

A. I based that on primarily the forensic interview with Minor . Her disclosures that were consistent between her disclosure to her mother on that Saturday as well as her disclosure to the forensic interviewer. I based it on the information from Trey and Whitney as well as the information that I had received from Sharon Hardy which is Auston's mom.

Q. Is Auston Breazeale seated in the courtroom today?

A. Yes. He is.

Q. Please identify him for us.

A. He's the young man sitting at the defendant's table in the Pittsburgh Steeler's jacket.

Q. Your investigation did not end after taking warrants out; is that accurate?

A. That's correct.

Q. In March of 2015 what was the next subject you investigated?

A. I received information, a phone call from an

individual who said that he actually --

MR. WILLIAMS: Objection to hearsay, Your Honor.

THE COURT: Sustained. You cannot testify as to what some person stated.

BY THE WITNESS:

A. I apologize.

BY MR. FERNANDEZ:

Q. Without saying what other people would have said, what did you do in order to follow up on additional leads?

A. Yes. I received information that another allegation had occurred and so I made phone contact with that individual and scheduled a time to meet with him.

Q. And that individual's name was?

A. Let me make sure I get his first name right. Mr. Rice. Dwayne Rice.

Q. He brought allegations, new information to your attention?

A. That's correct.

Q. Okay. Again, I'm not asking you to say what he said, but you reported on that. You would created an investigative report as a result of your contact with various witnesses?

A. I did. I wrote - I took a statement from Mr. Rice and I also wrote a supplemental incident report to the original case file due to the related nature.

MR. FERNANDEZ: Your Honor, I have no further questions. Investigator Kemfort, thank you so much. If you would, just answer any defense questions.

THE COURT: Any cross?

MR. WILLIAMS: May it please the Court.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Agent Kemfort, when was the forensic interview which you viewed at, you said you saw it through the circuit television set at the Dickerson Center?

A. Yes, sir. The date of the interview was February 17th, 2015.

Q. And I think you have described it. That is an interview where someone who is trained in, I guess, talking to children basically gets asked questions and it's preserved on a video for posterity?

A. Yes, sir.

Q. Was any type of physical exam done of Ms. Marsh?

A. There was a forensic medical exam done as well.

Q. When was that done?

A. Based on our time constraints unfortunately it was conducted on June 15th, 2015.

Q. Where was that done at?

A. This was done by the forensic nurse examiner at the

Children's Advocacy Center, South Carolina Children's Advocacy Center. It was done at the Dickerson Center.

Q. Besides the forensic exam in February and the physical exam in June, were there any other exams that were performed on this child?

A. Not to my knowledge.

Q. And did you secure -- The child is four?

A. Yes.

Q. Did you secure any other information from other individuals such as teachers, school notes, any of that type of thing?

A. No, sir. There were no teachers involved for us to go talk to. Just her mother. I mean her parents and Auston's mother and family members.

MR. WILLIAMS: That's all the questions I have, Your Honor.

THE COURT: Any redirect?

MR. FERNANDEZ: One question, Your Honor. Thank you.

REDIRECT EXAMINATION

BY MR. FERNANDEZ:

Q. Detective Kemfort, you have a copy of the medical report; is that correct?

A. I do.

Q. You just testified. You said it was June 15th,

2015? I believe the date of the evaluation is in the bottom corner.

A. I apologize. I was reading the date it was faxed to me. My mistake.

Q. What's the correct date of the evaluation?

A. The date of the medical evaluation is April 13th, 2015.

MR. FERNANDEZ: Thank you. No further questions.

THE COURT: You may step down. Thank you. You may call your next witness.

MS. ABEE: Your Honor, the State calls Whitney Marsh.

Thereupon,

WHITNEY MARSH

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last name for the record.

THE WITNESS: My name is Whitney Marsh, M-a-r-s-h.

THE COURT: Thank you.

MS. ABEE: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. ABBE:

Q. Whitney, how old are you?

A. I'm 28.

Q. Are you currently employed?
A. I am.
Q. Where at?
A. The West Columbia Police Department.
Q. What do you do there?
A. I'm a patrol officer. I'm a member of the community action team and currently serving as a school resource officer.
Q. What school do you serve as a school resource officer at?
A. Saluda River Academy for the Arts.
Q. How long have you been in law enforcement?
A. About five years.
Q. Are you married?
A. I am.
Q. To who?
A. Matthew Trey Marsh.
Q. What does he go by?
A. He goes by Trey.
Q. How long have you and Trey been married?
A. Seven years.
Q. How did y'all meet?
A. In high school.
Q. Do you have any kids?
A. We do.

Q. How many?

A. We have two girls.

Q. What are their names?

A. Minor and A.M. .

Q. How old is Minor ?

A. Minor is Six.

Q. What about A.M. , how old is she?

A. A.M. is 19 months.

Q. Whitney, I want you to tell us a little bit about Minor . What is she like?

A. Minor is a lot of fun. She is very sociable. She makes a friend wherever she goes which sometimes can be a problem, but she is really quick to pick up a conversation with anybody. Uhm, I would say she's a very well rounded child in the aspect that she wants to wear dresses and have long hair, because that's what princesses do. But then at the same time she will go out on the back porch and shoot her bb gun with her dad or play in the sand with the dogs or feed the chickens and the pigs and stuff at my parents' house. But then she'll come back inside and want her hair curled and her nails painted. She says she's going to be fastest person ever and the next ninja warrior.

Q. Whitney, do you know Auston Breazeale?

A. I do.

Q. How do you know him?

A. He was my nephew.
Q. Explain to us all how you are related?
A. He's - through my marriage he's my husband's nephew. My husband's sister's son.
Q. Do you see Auston in the courtroom today?
A. I do.
Q. Can you tell us where he is seated and something that he's wearing?
A. Over here. He has a gray dress shirt and a black jacket.
MS. ABEE: Your Honor, the witness has identified the defendant as Auston Breazeale.
THE COURT: So noted.
BY MS. ABEE:
Q. So how long have you known Auston?
A. Probably about ten years.
Q. How often would your family be around the defendant and his family?
A. At least once a week.
Q. Doing what types of things?
A. We would usually have Sunday dinner at his grandmother's, my mother-in-law's house.
Q. When you had these Sunday dinners, would Minor be around?
A. Yes.

Q. Were there ever times when Minor was around the defendant when you weren't there?

A. Yes.

Q. Explain that to us.

A. Linda was one of our primary caregivers. While Trey and I were away at work she would watch Minor .

Q. You say Linda. Tell us again who is that?

A. Linda is Trey's mother, Minor 's grandmother, my mother-in-law.

Q. So is that also the defendant's grandmother?

A. Yes.

Q. So when Minor is over at her grandmother's house, sometimes the defendant would be there?

A. Yes. He would.

Q. Did you ever have an opportunity to see Minor and Auston interacting with each other?

A. Yes.

Q. Explain to us what their relationship was like.

A. Uhm, Minor , of course, being Minor would want to play and be very excited to see him. He would often act like he was annoyed and she would jump and play and stuff and he would push her away or act like he didn't want anything to do with her.

Q. Now, I'm going to fast forward a little bit. I want to talk about February of 2015. Do you remember that time in

your life?

A. I do.

Q. Was there a point in time that Minor disclosed to you that she had been sexually assaulted?

A. Yes, ma'am.

Q. And without telling us anything that she said, tell us the circumstances surrounding that disclosure. What were you doing that day?

A. We were watching Saturday morning cartoons. Uhm, she - her and her dad were going to go out to the zoo for a father/daughter day and so I told her to go get dressed. Uhm, at that time she disclosed. I told her to go into her room and Trey came in. She came back out because he came to see if she was ready to go. She came back out of her room. I asked her to tell Trey what she had told me and then from there Trey left out of the room again. After a little bit they continued, we decided that they would continue, we would continue on with our day as it was planned. They would go on to the zoo. Uhm, we waited and contacted Shannon because we didn't want her to be blindsided and then once they came back and Shannon was off work, we notified law enforcement.

Q. I want to back up some because you just told us a lot. You said that you and Minor were watching Saturday morning cartoons. Is that normal?

A. Yes.

Q. Were you talking about anything sexual or anything at the time that she disclosed to you?

A. No. We weren't.

Q. You stated that Minor was going to go to the zoo with her dad. Why was that?

A. I had just had A.M. in December of that previous year and, uhm, I had been on maternity leave and Minor , because of the new baby, you know, Minor was lacking in a little bit of attention so we decided that she would spend some one on one time with Trey.

Q. Is this something that y'all tried to do once you had A.M. , was to spend some time with Minor ?

A. Yes. And we have done it in the past, too. She's gone out with Trey to the movies or the zoo before and then she would do stuff just individually with me also.

Q. You stated that it was at that time that she disclosed. What was her demeanor when she disclosed?

A. She was calm. I told her, I said go get dressed. Daddy's gonna be ready to go soon. She jumped off the couch, told me. I said okay. Go and get dressed.

Q. How old was she when she disclosed to you?

A. Four.

Q. You said this was February of 2015?

A. Yes.

Q. When is Minor 's birthday?

A. [redacted].

Q. Of which year?

A. [redacted] so she would have been four.

Q. So then after that you told us that you and Trey decided to go on or Trey decided to go onto the zoo. Why was that?

A. We didn't want her to think that she had done anything wrong. That this would - that her telling us what had happened should interrupt anything for her because she hadn't done anything wrong. So we thought it was best to go ahead with what we had planned.

Q. And after you went to the zoo, I think you said that's when you called Shannon; is that right?

A. Mm-hmm.

Q. Who is she again?

A. Trey's sister, Auston's mother.

Q. When did you contact law enforcement?

A. Uhm, shortly after we contacted her. They got there shortly after she got to our house.

Q. Now, after Minor disclosed, did you notice any change in her?

A. Yes. She had an increase in nightmares. She had an increase in wetting her panties. She had low self esteem issues. She would say I can't so many times that we actually made an I can't jar. So if she were to say I can't, then she

had to pay us a quarter to boost her self esteem to help her move forward.

Q. And in the months leading up to this disclosure when Minor was four, was this the same time that she was spending time with the defendant at her grandmother's house?

A. Yes. But she hadn't seen him since Christmas of 2013 so like in the disclosure of February 14th she hadn't seen him since Christmas of the previous year.

Q. So we're talking about 2015 she hadn't seen him since Christmas of 2014?

A. Right.

Q. Okay. But leading up to that was she spending time with the defendant at your mother-in-law's house?

A. Yes.

MS. ABEE: Your Honor, I have no further questions for Whitney at this time.

THE COURT: Any cross?

MR. WILLIAMS: Yes, Your Honor.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Ma'am, you indicated that you work with West Columbia Police Department. Where does your husband work?

A. He's a fabricator for Williams Strength Products.

Q. And his mother, where did she work?

A. She's a retired SLED officer.

Q. So she was a SLED officer. Do you know what she did as a SLED officer?

A. Not a hundred percent. I think she worked in the -- I don't want to say. I'm not a hundred percent.

Q. Do you know how long she worked with SLED?

A. Long enough to retire, re-enter and retire again.

Q. 20 or 30 years?

A. Yeah.

Q. And I think you indicated that the times, the only times that you are aware of that the defendant would have been with your daughter would have been when he was at your mother-in-law's house which would have been his grandmother and Minor 's grandmother; is that correct?

A. Like can you clarify? I mean, he would come over to our house sometimes to watch football games. But as a family we would be at her house and then sometimes she would watch both of them.

Q. Okay. So he was not alone with the child. He was with his grandmother and she was with her grandmother, correct? Or they were with you?

A. I never had them both together myself. No. But Linda would watch Minor and then sometimes she would also watch Auston.

Q. So your mother-in-law would be there with them if they were at her house?

A. Yes.

Q. Now, you indicated that after these allegations, that there was something about low self esteem. That the child was exhibiting low self esteem. That was part of the reason why you had the special time with the child with her father, wasn't it?

A. No. That didn't have anything to do with her self esteem.

Q. Well, wasn't she exhibiting - she was exhibiting some feelings that she wasn't special anymore?

A. No. I wouldn't say that.

Q. All right. What would you say?

A. She was very excited about her sister, but we didn't want there to be, her to get jealous I guess you would say and I wouldn't say she was jealous either, but before the baby I would take her out to do something or Trey would take her out to do something individually and there's no reason that should change after A.M. came so we had that.

Q. What was the name of the doctor that did the physical exam shortly after the forensic exam that actually talked to her?

A. I can't recall that.

Q. But you know she went to a doctor and talked about these things?

A. Yes.

Q. But you were there when you took the child to that doctor, weren't you?

A. Are you talking about like a forensic interview?

Q. I'm talking about the physical exam which was conducted in April of 2015.

A. That went through the Dickerson Center?

Q. Yes.

A. Yes. I was there, but I wasn't in the room.

Q. So you didn't talk to the doctor about anything?

A. I don't remember speaking with her.

Q. Describe, if you will, the children as well as any adults which stay in your house.

A. In my house it's me and my husband and our two girls.

Q. At the time of these allegations your youngest child would have been five months old?

A. Two months.

Q. Two months old?

A. Yes. She would have been two months old.

Q. What grade is your child in now?

A. At her school it's called K2, so it's kindergarten.

Q. What school does she attend?

A. She goes to Heritage Christian Academy.

Q. Does Heritage Christian Academy begin at the age of

four?

A. It does.

Q. So ergo, that's K2. Go ahead.

A. Okay. There is 4K, K1 and K2.

Q. There's 4K, K1 and K2?

A. Yes.

Q. So when she was four, she would be in 4K, when she is five she would be in K1 and now she is in K2?

A. Yes.

Q. So she's progressing along the same levels that you would start if you were four now?

A. Yes.

Q. When did she go back to school?

A. She hasn't yet. She goes back on Wednesday.

MR. WILLIAMS: That's all the questions I have, Your Honor.

THE COURT: Any redirect?

MS. ABEE: No, Your Honor.

THE COURT: You may step down. Thank you.

MS. ABEE: Your Honor, we would ask that this witness be excused from her subpoena.

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: You may be excused. Thank you. You may call your next witness.

MR. FERNANDEZ: Thank you, Your Honor. The State would call Trey Marsh.

Thereupon,

MATTHEW TREY MARSH

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last name for the record.

THE WITNESS: My name is Matthew Trey Marsh, M-a-r-s-h.

DIRECT EXAMINATION

BY MR. FERNANDEZ:

Q. Spell your first name for us.

A. M-a-t-t-h-e-w.

Q. Now, Trey, you go by Trey; is that correct?

A. Yes, sir.

Q. If you would, please introduce yourself to the jury. How old are you?

A. I'm Trey. I'm 27 years old.

Q. Trey, where do you work?

A. I'm a fabricator at a company called Williams Strength Products. We make weight lifting equipment.

Q. How long have you been employed there as a fabricator?

A. Seven years. Going on seven years.

Q. What's your marital status?
A. Married.
Q. Who are you married to?
A. Whitney Marsh.
Q. How long have you been married to Whitney?
A. Seven years.
Q. When did you first meet Whitney?
A. In high school.
Q. How long have you all been together?
A. We have been together about nine years.
Q. What does Whitney do for a living?
A. She is a police officer with the City of West Columbia.
Q. Do you all have any children together?
A. We have two daughters.
Q. Tell us a little bit about your daughters. What ages are they and their names.
A. Minor is six years old. A.M. is a year and a half.
Q. All right. Now, where did you and Whitney meet in the first place?
A. High school.
Q. What high school is that?
A. Lexington High School.
Q. Did you grow up in this area?

A. I did.
Q. Where do you currently live? What general area?
A. Lexington.
Q. Who is Auston Breazeale and what's his relation to you?
A. Auston Breazeale is my nephew. He's my sister's son.
Q. And is he here today in the courtroom?
A. Yes, sir. He's the young man in the black jacket sitting at the table over there.
Q. Who is your sister? You said your sister's son. What's your sister's name?
A. My sister is Shannon Hardy.
Q. Is she your younger sister or older sister?
A. Older sister.
Q. And who is your mother?
A. My mother is Linda Marsh.
Q. Linda Marsh is also the mother to Shannon, your sister?
A. Yes.
Q. And would she also be the grandmother to Minor and Auston?
A. Yes, sir.
Q. How long have you known Mr. Breazeale?
A. His entire life.

Q. Would you please tell us a little bit about your relationship with him. How would you describe it?

A. Uhm, I'd say that we were very close. I guess to describe, I guess the way I felt about him, uhm, I kind of saw myself as an older brother or a mentor, a stronger male figure in his life. We did a lot of things together. We watched football games. We spent time with one another. Family gatherings, stuff like that. We were very close. There really wasn't anything that he couldn't come to me about and we couldn't talk about. Whatever. Didn't matter what it was.

Q. Trey, when is Minor 's birthday?

A. [redacted].

Q. Tell us a little bit about what Minor is like, her likes, dislikes, her personality.

A. Okay. Minor is a people person. She is extremely happy. She's very much a girlie girl. Loves pink. Loves dresses. Loves to be around her family. Loves to be around, like I said, be around people and she loves to make new friends. There's quite a few times we go out at any given place and she will find somebody to talk with and be friends with. Very energetic. She loves to go hiking with me when I get a chance to do that. Very happy.

Q. Would Minor ever be around Mr. Breazeale?

A. Yes.

Q. Why would they be? What were some of the circumstances they would be together?

A. Well, quite frequently my family has always been very close. Quite frequently we would spend a lot of time with my mom at her house eating meals or one another's houses eating meals and things like that. I would say almost on a weekly basis we all see each other.

Q. You say eating meals at your mom Linda Marsh's house?

A. Yes.

Q. What was the arrangement with your mom Linda? Why would Minor be at her house?

A. Well, outside of having family meals and things like that, she watches both of my daughters during the day while my wife and I work.

Q. Among those times that Minor and Mr. Breazeale would have been together, of those times how often would they have been alone together?

A. Uhm, I would say they had a chance to be alone together a good bit especially during the family get togethers because quite frequently the adults would be in one room eating, watching TV, whatever, and the kids would be off somewhere else and normally in another bedroom or something like that playing. We would check on them every now and again but there was opportunity there. And then I would say there

was probably opportunity at times when my mom would be keeping Minor during the day and also keeping Auston.

Q. Why would she keep Auston also?

A. Well, while he was out of school and not working, my sister would have my mom watch him during the day at times.

Q. Did you personally witness any changes in Minor 's behavior or demeanor leading up to February 2015?

A. Yes. I do.

Q. If you could, please tell us a little bit about the things you noticed.

A. Right. Uhm, she had been, uhm, potty trained for a time. Wasn't having that many problems and then she started, I guess her dressing to a point she would wet her bed at night sometimes and then more often than that she would actually wet her pants during the day. It was kind of confusing. She also started having nightmares. There would be nights where she would wake up in the middle of the night and come running into mine and my wife's bedroom saying she was scared. Didn't want to go back to sleep. Things like that. I would say she also started to have some confidence issues every now and again. She's always been a very happy girl and she started to get sad a little more often.

Q. Trey, do you remember an incident that occurred back in May of 2014 with Mr. Breazeale and your daughter?

A. Yes.

Q. Where did this incident occur?

A. It occurred at the house we were staying at at the time.

Q. Where was that?

A. [redacted] Crestwood Arch.

Q. Is that within Lexington County also?

A. Yes. It is.

Q. Walk us through what went on that day. Just tel me what you were doing that morning and why Mr. Breazeale was also at your house?

A. I'm pretty sure that day was a work day for me, but after work, my sister had been taking night classes so she had a class that particular night and had asked me to watch Auston for a while so I had Auston and my daughter and we had gotten to my house after I picked him up and, you know, I think we bought a pizza so Minor sat down at the counter to eat a pizza and Auston went and sat in our living room.

Q. You had just gotten home from work. Did you actually use the restroom?

A. Yes. I used the restroom when I got home. So I went and did my business.

Q. And while you were in the restroom, where was Minor and Mr. Breazeale?

A. Okay. While I was in the restroom, Minor was at our kitchen counter eating. Auston was sitting in the den

which is directly adjacent to the kitchen watching TV.

Q. Were they out of your sight?

A. Yes. I had my bedroom door closed and my bathroom was in my bedroom and that door was closed as well.

Q. Then what happened next after you exited the bathroom?

A. Okay. So before I exited the bathroom, I heard my front door open and my sister came in. I think she had come home early from class and when I heard her come in, I finished up what I was doing, I walked out of my bedroom into the kitchen where my daughter was and my sister was talking with my daughter and Auston was right there with both of them and my sister looked at me and told Minor --

MR. WILLIAMS: Objection to hearsay, Your Honor.

BY MR. FERNANDEZ:

Q. Trey, without - we can't talk about what other people said, but who was in the room with you in the den? Who was all there when you exited the bathroom?

A. Myself, my sister, Minor and Auston.

Q. Okay. And you had a discussion with - there was a discussion about what had just gone on in your den, correct?

A. Yes, sir.

Q. And as a result of that discussion did it become apparent to you what had happened?

A. Yes, sir.

MR. WILLIAMS: Objection to that, Your Honor. Speculation.

THE COURT: Sustain the objection currently the way the question is phrased.

BY MR. FERNANDEZ:

Q. Did you have an opportunity to speak to Minor ?

A. I did.

Q. We are talking about directly after whatever had just occurred?

A. Yes. I did.

Q. Did she tell you without saying what she said, did she tell you what had just occurred?

A. Yes, sir.

Q. Did the disclosure she made to you, was it in the form, could it be in the form of a sexual assault?

MR. WILLIAMS: Objection. Leading.

THE COURT: Sustained. Rephrase the question.

BY MR. FERNANDEZ:

Q. What kind of disclosure did she make to you without saying what it was?

A. One that was sexual in nature.

Q. Did she tell you where it had happened?

A. Yes, sir.

Q. Where did she say it had happened?

A. In the den.

Q. Did she say when it had happened?
A. Yes, sir.
Q. When did she say it had happened?
A. While I was in the restroom and my sister was not at the house.
Q. As a result of -- And then did you end up speaking with your sister anymore?
A. I did.
Q. As a result of your conversations with your sister, what did you do next?
A. My sister and my nephew left my house. I talked alone with my daughter about what she had told me.
Q. And was your wife home at the time?
A. No. She was not.
Q. Where was she?
A. She was working dispatch night shift at the police department.
Q. Did you eventually visit her?
A. Yes, sir. I did.
Q. Again when you spoke with your wife without saying what she said, did you have a conversation with your wife?
A. Yes.
Q. As a result of your conversation with your wife, what did you do next?
A. I spoke with my sister a little more.

Q. After ultimately speaking with your sister-in-law, what agreement did y'all come to?

A. We decided that Auston and Minor should no longer have the opportunity to be left alone with one another.

Q. Were there any another conditional conditions?

A. We both agreed that he should seek counseling. Yeah.

Q. And, Trey, did you report this incident to law enforcement?

A. No.

Q. Why didn't you?

A. Uhm, I was somewhat confused about the exact nature of what had happened.

Q. Okay. Now, Trey, I'm going to fast forward to February of 2015. Do you remember February 7th, 2015?

A. Yes, sir. I do.

Q. And that Saturday, tell us how the day began.

A. Uhm, that morning my wife and I had gotten up. Both my daughters had gotten up. A.M. was young. I myself was getting ready to take Minor to the zoo. We were going to have I guess you would call it a daddy/daughter day, so I was in our bedroom getting ready to leave putting clothes on and things like that and, uhm, I walked into the living room after I had put my clothes on and things and --

Q. And you came out to the den?

A. Right.

Q. And at that point did Minor --

MR. WILLIAMS: Objection. Leading, Your Honor.

THE COURT: Sounds like it could be leading. Rephrase it.

MR. FERNANDEZ: I don't think I asked anything but okay.

THE COURT: It sounded like it could be leading.

BY MR. FERNANDEZ:

Q. Did Minor disclose to you that she had been sexually assaulted?

A. She did.

Q. Did she tell you when it had happened to her?

A. No. She did not.

Q. Did she tell you where it had happened to her?

A. No. She did not.

Q. In this general time frame was there any locations where Minor and Mr. Breazeale would have been alone?

A. Uhm, in the general time frame, yes.

Q. You just said before, I know you just said about the conditions that were placed on them about being alone, but where might they have been alone even after that, the May 2014 incident?

A. After that they could have still possibly have been alone while my daughter was with my mother during the day

because like I said there were frequent times where she kept both Minor and Auston.

Q. Where was your mother living at that time?

A. [redacted] Parkhurst Lane. It's a subdivision in Lexington.

Q. That is within Lexington County?

A. Yes.

Q. Trey, after your daughter disclosed her sexual assault to you, what did you do the rest of the day?

A. After she disclosed the assault, I left from my house and left my daughters and my wife at home and I went directly to my sister's house looking to speak with either her or Auston or my brother-in-law. None of them were at home and so I came back home and talked with my wife and decided it would be best if we tried to make the day as normal as possible for Minor and so while continuing to attempt and try to call and talk with my sister or a person in the family, we went ahead and went to the zoo at that time.

Q. After you guys completed your trip to the zoo, did you then contact law enforcement?

A. Yes.

Q. And you have met with law enforcement. Have you met with law enforcement?

A. Yes, sir.

Q. Did you fully cooperate with the investigation?

A. Yes, sir.

MR. FERNANDEZ: No further questions, Your Honor.

THE COURT: Any cross?

MR. WILLIAMS: May it please the Court.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Marsh, your mother is Linda Marsh; is that correct?

A. Yes, sir.

Q. Obviously you have known her all your life?

A. Yes, sir.

Q. How old is she?

A. She was born in '52.

Q. So she's 64?

A. Yes, sir.

Q. She's still alive?

A. Yes, sir.

Q. And where did she work?

A. Uhm, she was retired SLED agent.

Q. What did she do with SLED?

A. Uhm, quite a few different things. I know she worked in missing persons for a while. Towards the end of her career she was working in the call center.

Q. Okay. Anything else that you can recall about her history with SLED? How many years was she with SLED?

A. Over 30. Quite a while.
Q. Was she an agent?
A. Yes, sir.
Q. She went to the training facility that SLED has to become a law enforcement officer?
A. Yes, sir. She went to the academy.
Q. Now, as I understand your testimony, there is an allegation about May of 2014 and then there is an allegation about reporting in February of 2015. When is the time that you say that my client would have been at your mother's house?
A. Sometime during the summer of 2014.
Q. So clearly that would have been after May of 2014?
A. Yes, sir.
Q. And for what, do you remember what months that he would have been at your mother's house?
A. No, sir. Not clearly. I mean, uhm, it had just been throughout the summer while we wasn't in school.
Q. Okay. And you knew that he was staying over at your mother's house?
A. Yes, sir.
Q. Now, your child, your youngest child, I want to know how to pronounce her name. Can you spell it to me.
A. A-l-y-n-n.
Q. A-l-y?

A. N-n.
Q. And in May of 2014 how old would she have been?
A. She had not been born May of 2014.
Q. When was she born?
A. [redacted] 2014.
Q. So your wife would have been pregnant; is that correct?
A. That's correct.
Q. How many months pregnant would she have been in May of 2014?
A. Three or four months.
Q. Now, you stated earlier that there was some sort of depression or she is not as happy as she used to be?
A. Uhm --
Q. Or did you say more? Did you say nightmares and scared, say all those things?
A. Yes, sir. There were times.
Q. When was that?
A. Uhm, I would say from the summer of 2014 on.
Q. Did you take your child to a doctor because of these problems?
A. Yes, sir.
Q. Which doctor did you take her to?
A. I can't recall.
Q. On how many occasions did you take your daughter to

this doctor?

A. I think maybe once.

Q. What type of doctor did you take her to?

A. I believe it was our family doctor.

Q. You took your child to the family doctor one time, correct?

A. Yes, sir.

Q. Did your child see another doctor through the Dickerson Center?

A. Yes, sir.

Q. Did you go with them when they saw that doctor?

A. No, sir.

Q. Do you know the name of that doctor?

A. No, sir. I can't recall.

Q. What types of medication does your child take?

A. Generally she doesn't. At most normally it's Tylenol.

Q. So the family doctor didn't give you any special medications for anything?

A. No, sir.

Q. Didn't refer her for anymore treatment of any kind?

A. No, sir.

MR. WILLIAMS: That's all the questions I have, Your Honor.

THE COURT: Any redirect?

MR. FERNANDEZ: Nothing, Your Honor. Thank you.

THE COURT: You may step down.

MR. FERNANDEZ: Ask the Court permission to excuse this witnesses from his subpoena.

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: You may be excused from the subpoena. Thank you. This would be a good time to take an afternoon break. Ladies and gentlemen, I'm going to remind you the instructions that I have given to you. Do not begin to discuss this matter among yourselves until you have heard all the evidence that's presented. We'll take our afternoon break and we'll bring you back shortly and continue on.

(Whereupon, the jury entered the jury room at 3:27 p.m.)

THE COURT: Is there anything we need to take up during this break?

MS. ABEE: No, Your Honor. The next witness is the child so we ask that the courtroom be cleared of all unnecessary individuals.

THE COURT: To our spectators with the exception of my 403, that at the time we resume and the victim is called to testify the courtroom should be cleared of all

non essential personnel. We will keep the bailiffs and the Sheriff's deputies and the parties involved in this case including the investigator. Everyone else will be excused until she is finished testifying. If there is nothing else, then we'll take a break and then we'll come back.

MS. ABEE: Thank you, Your Honor.

(Short break.)

THE COURT: Is there anything we need to take up before we bring the jury in?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: You may ask for the jury to come in please.

(Whereupon, the jury entered the courtroom at 3:47 p.m.)

THE COURT: You may call your next witness.

MS. ABEE: Your Honor, the State calls Minor .

Thereupon,

Minor (A minor)

after having been first duly sworn, testified as follows,

DIRECT EXAMINATION

BY MS. ABEE:

Q. Can you tell us, all of us, what your name is?
A. Minor .
Q. Minor . What's your last name?
A. Minor .
Q. Is that your last name?
A. Mm-hmm.
Q. Your last name is Minor ?
A. Wait. Actually Minor .
Q. Minor . Okay. Thank you for correcting me.
A. I kind of forgot.
Q. You forgot. Okay. So your last name is Minor . Minor , how old are you?
A. Six.
Q. Do you know when your birthday is?
A. Mmm-mmm.
Q. No. Okay. Well, Minor , remember when we were just standing right there and you promised to tell the truth?
A. (Witness nodding head.)
Q. You've got to answer out loud.
A. Yes, ma'am.
Q. Okay. Do you know what it means to tell the truth?
A. (Witness nodding head.) Yes, ma'am.
Q. Okay. And if you're not telling the truth, what are

you telling?

A. You're telling a lie.

Q. Yeah. And is it a good thing or a bad thing to tell the truth?

A. A good thing.

Q. Okay. Does anything happen if you tell a lie?

A. Yes, ma'am.

Q. What could happen if you tell a lie?

A. You could get in trouble or be sent to your room.

Q. Okay. So then do you know what it means to tell us the truth today?

A. (Witness nodding head.) Yes, ma'am.

Q. Okay. Thank you. Minor , tell all of us, do you go to school?

A. Yes, ma'am.

Q. Where do you go to school at?

A. Heritage Christian Academy.

Q. Do you know who your teacher is going to be this year?

A. Yes, ma'am.

Q. Okay. Who is your teacher going to be this year?

A. Ms. Payne.

Q. Okay. Do you like school, Minor ?

A. Yes, ma'am.

Q. What do you like about school?

A. That it's very good and teaches me how to learn.
Q. Yeah. What's your favorite thing to do at school?
A. My favorite thing to do at school is play outside and learn how to read books.
Q. Do you like to read?
A. Yes, ma'am.
Q. Minor , what do you want to be when you grow up?
A. A police officer.
Q. Yeah? Can you tell us all who you live with?
A. My mommy and daddy and my grandma.
Q. Do you live with anyone else?
A. I sometimes spend the night with my dandy and my friend Mary Ellen Patton.
Q. Minor , do you have any brothers or sisters?
A. I have a little sister named Alynn.
Q. You said she's little. Do you know how old Alynn is?
A. She's one year old.
Q. Okay. Minor , can you help me identify some body parts?
A. Yes, ma'am.

MS. ABEE: Your Honor, permission for the witness to step down and use the demonstrative?

THE COURT: Yes, ma'am.

MS. ABEE: This demonstrative has been shown to

defense counsel.

BY MS. ABEE:

Q. Come on and stand right here, okay? Minor , are you a boy or a girl?

A. A girl.

Q. You're a girl. And you have to make sure you speak real loud, okay?

THE COURT: Have her switch places with you, please.

BY MS. ABEE:

Q. Come right up beside me. Minor , is this a boy or a girl?

A. A girl.

Q. Thank you for speaking so loud. I'm going to write the word girl at the top of this, okay?

A. Okay.

Q. And can you tell me what this is?

A. Eyes.

Q. Okay. I'm going to write the word eyes beside what you told me were eyes. What are those?

A. Nose.

Q. Nose. Okay. I'm going to write nose beside what you told me was the nose. What about this part?

A. Mouth.

Q. Mouth. I'm going to write the word mouth beside that, okay?

A. Okay.

Q. What about this part? What is that?

A. A bellybutton.

Q. Bellybutton. Okay. I'm going to write the word bellybutton beside what you told me is the bellybutton. And what about these things. What do you call those?

A. Hands.

Q. Hands. Thank you. I'm going to write the word hands right there. And these?

A. Knees.

Q. Knees. I'm going to write the word knees right beside what you told me were the knees. What are these?

A. Feet.

Q. Feet. I'm going to write the word feet right where you told me were the feet. Minor , what do you call this on a girl?

A. Kid bras.

Q. Kid bras. Okay. I'm going to write the word kid bras right where you told me where that was, okay? What about this part. What do you call that on a girl?

A. A hiney.

Q. Hiney. I'm going to write the word hiney right where you told me this girl's hiney was. Minor , is this the front or the back of the girl that I'm pointing to on the right side?

A. Back.

Q. Okay. Can you tell me what that part is on a girl?

A. A booty.

Q. A booty. All right. I'll write the word booty. Can I show you another one?

A. Yes, ma'am.

Q. Okay. Now, Minor , is this a boy or a girl?

A. A girl.

Q. This one's a --

A. I mean a boy.

Q. This one is a boy. Okay. I'm going to write the word boy at the top then. All right. What are these on a boy?

A. Eyes.

Q. Eyes. Okay. What about that? What is that on a boy?

A. A nose.

Q. Nose. I'm going to write nose beside where you told me the nose was. What about that?

A. A mouth.

Q. A mouth. Okay. I'm going to write the word mouth. And what are these?

A. Hands.

Q. Hands. I'm going to write the word hands. And what

are those on a boy?

A. Knees.

Q. I'm going to write the word knees. What about these?

A. Feet.

Q. Feet. Okay. I'm going to write the word feet. And what about this on a boy? What do you call that?

A. A bellybutton.

Q. Okay. I'm going to write the word bellybutton. And what about this on a boy that I just circled. What do you call that?

A. Boy bras.

Q. Boy bras. Okay. And what about this that I just circled. What do you call that?

A. A peepee outer.

Q. A peepee outer. Okay. I'm going to write the word peepee outer right beside that. And is this the front or the back of the boy that I'm pointing to?

A. The back.

Q. The back. What do you call that on a boy?

A. A booty.

Q. A booty. I'm going to write the word booty right there. Thank you, Minor . You can go back up to your seat now, okay? Thank you for helping me with that. Minor , do you know someone named Auston?

A. Mm-hmm.
Q. Yeah. How do you know him?
A. Because he's my friend.
Q. He's your friend. And is Auston little like you or older?
A. Older.
Q. Older. Do you know who Auston lives with?
A. My aunt Shannon.
Q. Okay. Auston lives with your aunt Shannon. Do you ever play with Auston?
A. Not anymore because he got sent to jail.
Q. Okay. Well, what types of things did you used to do with Auston?
A. Swim with him and go to parties and play at the water park.
Q. Okay. And, Minor , do you know all these body parts you just helped me label what they are, have you ever seen any of Auston's body parts?
A. Yes.
Q. Okay. What have you seen?
A. His peepee outer.
Q. Yeah. Where did you see that?
A. At my grandma's old house.
Q. Which grandma is that?
A. My grandma Linda.

Q. Do you know where you were in the house?
A. I was in the room where the baby crib and stuff is.
Q. Okay. Minor , do you remember how old you were?
A. I'm six.
Q. You're six. How old are you right now?
A. Six still.
Q. Okay. Do you remember how old you were when you saw Auston's peepee outer?
A. I think I was five or four.
Q. Okay. And what happened with his peepee outer? What happened with it?
A. He made me put my mouth on it.
Q. Yeah. How did that feel?
A. Yucky.
Q. What happened when it was in your mouth?
MR. WILLIAMS: Objection. Leading.
BY THE WITNESS:
A. It choked me.
THE COURT: Overruled.
BY MS. ABEE:
Q. Sorry, Minor . What happened with it once it was in your mouth?
A. It choked me.
Q. Did you tell anyone that that happened right then?

A. No.

Q. Why not?

A. Because I was scared to.

MS. ABEE: Your Honor, I have no further questions for this witness at this time. Minor , can you answer any questions that Mr. Theo has to ask you?

THE WITNESS: Yes, ma'am.

MS. ABEE: Thank you.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Minor , I'm Theo Williams. I'm an attorney. Do you know what an attorney does?

A. No.

Q. Okay. We're lawyers. We represent people in court. Do you know that this is a courtroom?

A. Yes, sir.

Q. What happens in a courtroom?

A. Uhm, the lawyer - the lawyer tells the truth and tells what really is happening.

Q. The lawyer tells the truth?

A. I think so.

Q. Well, some people may quibble with that. Do you know what position -- I shouldn't use the word position. You're six. I've got two daughters, too, Minor . One is a lawyer. Do you know what you do when you sit in that chair?

A. No.

Q. All right. That makes you a witness which means you're supposed to be asked questions and tell the truth and lawyers and the Judge asks you questions. That's kind of interesting, isn't it?

A. Yes, sir.

Q. Okay. If it's not, you can tell me it's not. You don't have to please me. Let me ask you, you made the comment that Auston made you put your mouth on his peepee outer and then there was a question to you about in your mouth. Do you remember something happening with Auston?

A. Yes.

Q. All right. Now, I want you to, you said it happened at your grandmother's house?

A. My grandma's.

Q. Your grandma's house. Which grandma was this?

A. My grandma Linda.

Q. When did this happen?

A. Uhm, it was a long, long, long, long, very long time ago.

Q. Could it have been more than two years ago?

A. Yes, sir.

Q. Who was there on -- Was it -- Do you remember anything about whether it was daytime or nighttime?

A. It was daytime.

Q. Okay. Who was there?
A. My grandma and L.H. and C.H. .
Q. Your grandmother and who?
A. And L.H. and C.H. .
Q. L.H. and C.H. ?
A. Yeah.
Q. Who is L.H. and C.H. ?
A. They are my - They're big kids, of my friends. They're my friends.
Q. Okay. So how old is L.H. ? Is L.H. a girl or a guy? L.H. ?
A. She's a girl. They're both girls.
Q. And how old are they?
A. I don't really know because I never been to their birthday.
Q. All right. So they were having a birthday party at your grandmother's house?
A. No. I said I never been to their birthday before.
Q. Okay. I was asking you who was there at your grandmother's house when this happened with Auston and you said L.H. and C.H. . Were they there?
A. Yes, sir.
Q. Okay. Now, how old were they?
A. I don't know.
Q. They are older than you, aren't they?

A. Uh-huh.
Q. Are they in school?
A. I think so.
Q. Are they as old as Auston?
A. No, sir. They're, uhm, they're Auston's little sisters, I think.
Q. Okay. And where were they when this thing happened with Auston?
A. They were at grandma's with me and Auston.
Q. Okay. So y'all were all together in the same room?
A. No. They were in the living room and me and Auston were in a different room.
Q. Okay. And what were y'all doing in a different room?
A. He made me suck on his peepee outer.
Q. All right. When was that? How did he do that?
A. Uhm, he just made me.
Q. How did he -- Did he take your clothes off or you took his clothes off or he took his own clothes off?
A. He took his own clothes off.
Q. All right. And then how did he do that? What did he say?
A. He said put your mouth on it, my peepee outer.
Q. He said put your mouth on my peepee outer. Is that

what he said?

A. Yes, sir.

Q. Those are the words he said?

A. Yes, sir.

Q. And then what happened after that?

A. Uhm, I don't really remember because it's been a long time.

Q. You don't remember?

A. I don't remember a lot of it because it's been a long time.

Q. What happened before that? What happened leading up to that?

A. I don't remember.

Q. So you don't remember anything before or anything after that; is that correct?

A. Yes, sir.

Q. And L.H. and C.H. , did you talk to them about what happened?

A. No. At least I don't think so.

Q. You don't know if you talked to them or not?

A. No. I said I don't think so.

Q. What does that mean? It means you're not sure?

A. I'm not sure.

Q. Okay. Where was your grandmother when this happened?

A. We were all there. Even grandma was.
Q. So everybody was there?
A. Not everybody in the whole world. Just my grandma and my mom and dad.
Q. Your mom and dad were there too?
A. Yes, sir.
Q. Where were they at the house?
A. They were in the living room.
Q. Everybody was in the living room?
A. Not everybody. Just mommy and daddy and grandma and L.H. and C.H. .
Q. And then you and Auston were in a room?
A. Mm-hmm.
Q. And this was whose room?
A. My grandma's room probably.
Q. Your grandmother's room?
A. At least I think.
Q. Okay. Uhm, when you came out of the room, did you say anything to somebody?
A. No. No, sir.
Q. Okay. Is this the only time you ever saw his peepee outer?
A. Yes, sir. I think.
Q. How many times have you talked about what we are talking about today, do you know?

A. I think a lot of times.

Q. Who all have you talked to about this thing which we are talking about today?

A. Her and, uhm - I don't remember anybody else a lot.

Q. So you talked to the attorney. You talked to the prosecutor? We call them prosecutors or Attorney Generals or Solicitors and they represent the State and I represent Auston. Do you know what represent means?

A. No, sir.

Q. It means that we do things for their benefit. Did you talk to the police about this, somebody with a uniform on?

A. No, sir.

Q. Did you talk to somebody in a room where they videotaped you?

A. No, sir.

Q. When you were saying who lives with you, do you remember when the prosecutor was asking you who lives with you and you listed off the people who live with you?

A. Yes, sir.

Q. You said your momma, your daddy and your grandma and you didn't list your sister. Why didn't you list your sister?

A. Uh, I don't - I don't really know.

Q. She lives with you, doesn't she?
A. Yes, sir.
Q. Does she have her own bedroom?
A. Yes, sir.
Q. You got a cough?
A. Mm-hmm.
Q. You want some water?
A. Yes, sir.
Q. How do you feel about your sister?
A. I feel good about her but bad about her when she's sick.
Q. Does she get sick sometimes?
A. Yes, sir.
Q. Are you glad you have a sister?
A. Yes, sir.
Q. Do you ever wish you were an only child?
A. No, sir.
Q. How do you get along in school? Do you do well in school?
A. Yes, sir.
Q. Do you have any problems?
A. Sometimes.
Q. What kind of problems do you have?
A. Sometimes problems writing and reading and putting puzzles together.

Q. I understand. What about, do you sleep well at night?

A. Yes, sir.

Q. Are you normally happy?

A. Yes, sir.

Q. You don't seem real happy right now.

A. That's because I'm nervous.

MR. WILLIAMS: Okay. That's understandable. I get nervous when I'm on the witness stand. That's all the questions I have, Your Honor.

THE COURT: Any redirect?

MS. ABEE: No redirect, Your Honor.

THE COURT: You may step down.

MS. ABEE: Your Honor, we'll just ask that these be marked as Court's exhibits.

THE COURT: We'll put stickers on them as Court's 1 and 2.

(Whereupon, Court's Exhibits #1 and #2 marked for identification.)

THE COURT: Call your next witness.

MS. ABEE: The State calls April Sykes.

Thereupon,

APRIL SYKES

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're

seated, please state your full name spelling your last name for the record.

THE WITNESS: April Sykes, S-y-k-e-s.

DIRECT EXAMINATION

BY MS. ABEE:

Q. And, April, are you employed?

A. I am.

Q. Where at?

A. The South Carolina Law Enforcement Division commonly known as SLED.

Q. What do you do there?

A. I'm a field agent.

Q. Tell us what you do as a field agent.

A. As a field agent we conduct investigations on behalf of the Attorney General's Office or on behalf of local law enforcement. My particular region covers about ten counties in the middle of the state so a little bit of everything and anything that comes across our desk.

Q. Is there any particular subject matter that you focus on?

A. Child abuse.

Q. How long have you been in law enforcement?

A. 14 years.

Q. How long have you been with SLED?

A. Almost three years. I started my career at SLED in

March of 2014.

Q. How long have you been focusing on child abuse cases?

A. Pretty much the day I started. I was one of the very first female officers at local PD and just being female got kind of pushed into that arena and I loved it and stuck with it.

Q. Do you have specialized training in the area of child sexual abuse?

A. I do.

Q. Explain that to us please.

A. I conduct forensic interviews on behalf of SLED. I work with one of the local advocacy centers so part of that training was to go through, it's a program called Finding Words. It teaches you how to speak with children. How to interview children. I went through the basic course. The advanced course. There's another course that's further than the advanced course called Beyond Finding Words and then most recently we updated our protocol in South Carolina and so I attended that training as well. Additionally, any other training that I'm allowed to attend I will sign up for. Things such as interviewing children on an autism spectrum, interviewing children with disabilities, interviewing pre-K children. Those kind of things in addition to my regular required law enforcement training that I get every year to

still stay certified as a police officer.

Q. Have you had an opportunity to conduct forensic interviews with children?

A. Yes.

Q. Approximately how many children have you interviewed?

A. I started keeping statistics on my interviews when I started at SLED. Since SLED I have done 55 forensic interviews. Prior to that I did do forensic interviews but it wasn't on a regular basis and I didn't keep statistics.

Q. What is the age range of children that you have forensically interviewed?

A. Anywhere from three years old and up.

Q. Explain to us just very briefly or generically do we mean when we say forensic interview?

A. That's a fancy term for a child friendly interview by someone who is trained to talk with children and it's in like a neutral setting.

Q. And are these video or audio recorded?

A. They are.

Q. Explain to us who all is in the room when you conduct a forensic interview?

A. Just the interviewer and the child. We want to elicit what happened based on the child's words in their own words, so we don't want it contaminated with any outside

sources.

Q. Did you have an opportunity to perform a forensic interview in this matter?

A. I did.

Q. On who?

A. Minor . She was four years old at the time, on February 16th, 2016 at the Dickerson Children's Advocacy Center in West Columbia.

Q. Was that recorded?

A. Yes.

MS. ABEE: Your Honor, my I approach and retrieve what's already been pre-marked as State's exhibit number 1?

THE COURT: Yes.

MS. ABEE: May I approach the witness?

THE COURT: Yes.

BY MS. ABEE:

Q. Agent Sykes, I'm handing you what has been pre-marked as State's exhibit 1. Do you recognize that?

A. I do.

Q. What is that?

A. That's the DVD audio and video recording of my forensic interview with Minor .

Q. And how do you know that that's the forensic interview of Minor ?

A. I watched it and initialed the actual DVD.

Q. What are the initials that are on the DVD?

A. AS for April Sykes.

Q. Is this a true and accurate copy of the forensic interview you performed on Minor ?

A. Yes.

MS. ABEE: Your Honor, at this time we seek to enter State's exhibit 1 into evidence.

MR. WILLIAMS: Subject to the prior objections, Your Honor.

THE COURT: Based upon the requirements of the statute I believe the prerequisites have been fulfilled. I'll admit the DVD.

MS. ABEE: Permission to publish to the jury, Your Honor.

THE COURT: Yes.

MS. ABEE: Your Honor, may we approach briefly while this is setting up?

THE COURT: Yes.

(Side bar off the record.)

THE COURT: Ladies and gentlemen, there will be portions of the DVD that will be muted because they're not relevant to the issues that we are discussing in this particular case. I just want you to be aware of that.

(Whereupon, playing State's exhibit number 1, DVD of

forensic interview for the jury.)

BY MS. ABEE:

Q. Agent Sykes, how old was Minor during that interview?

A. She was four years old at the time.

MS. ABEE: Your Honor, I have no further questions for this witness at this time.

MR. WILLIAMS: Your Honor, I have a matter, if I could discuss it at the bench with the prosecutor.

THE COURT: Yes.

(Side bar off the record.)

THE COURT: Ladies and gentlemen, we have a matter we need to take up outside of your presence. I'll ask that you to retire to the jury room. Again I instruct you not to begin any discussions or deliberations as you have certainly not heard all of the evidence yet to be presented. If you will retire to the jury room, I'll bring you back in just a few moments.

(Whereupon, the jury entered the jury room at 4:50 p.m.)

THE COURT: Mr. Williams, would you state for the record again so there is a record of it.

MR. WILLIAMS: Yes, Your Honor. My client, the video was stopped at 17:35 and was restarted at 18:47. My client indicated that he thought the section which was

being redacted, that there was more than just that redaction in that period of time that was stopped so that's why I approached the bench with the prosecutor and asked the Court if there was any way we could have the jury out of the room to verify that that was the section which was not played in front of the jury.

THE COURT: Yes, ma'am. Play it for us. I think the question is whether or not it redacted more than just the reference to the other person, the other child.

MR. WILLIAMS: Yes, ma'am.

(Whereupon, a portion of State's exhibit #1, video of forensic interview played for the Court.)

MS. ABEE: Your Honor, that would be when it picked back up, Your Honor, not talking about J. . The question is who is Auston. It stated playing again at 18:47 which is where I just stopped it.

MR. WILLIAMS: Your Honor, we are satisfied with that.

THE COURT: Okay. Anything else we need to take up before we bring the jury back in?

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

MR. WILLIAMS: No, Your Honor.

THE COURT: You can call for the jury.

(Whereupon, the jury entered the courtroom at 4:55 p.m.)

THE COURT: I'm sorry, ladies and gentlemen. As soon as y'all were coming back in, Mr. Breazeale needed to run to the restroom so that's where he's gone.

MR. WILLIAMS: May it please the Court.

THE COURT: Yes, sir.

MR. WILLIAMS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Agent Sykes, this forensic interview which we have viewed here was done on what date?

A. February 16th, 2015.

Q. Was there a referral to a doctor for a physical exam?

A. I'm not sure. Referrals are usually made by law enforcement.

Q. You were only involved in the evaluation of the forensic interview?

A. Correct.

Q. You have no knowledge whatsoever as to what physical exam, if any, was taken after this?

A. I do not.

MR. WILLIAMS: That's all the questions I have, Your Honor.

THE COURT: Any redirect?

MS. ABEE: No, Your Honor. We would ask that this

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witness be excused from her subpoena.

MR. WILLIAMS: No objection, Your Honor.

THE COURT: You may be excused. Thank you. Ladies and gentlemen, at this time it's a good time to take a break for the evening. I'm going to remind you of the instructions that I have given to you, that is not to begin to discuss this matter among yourselves as you have still not yet heard all of the evidence that has to be presented. Please remember as you come and go from the courthouse not to listen to conversations that you may hear in the hallways. Again for the reasons that you to make decisions based upon the evidence that's been presented here in this courtroom and not based upon conversation that you may overhear.

Please remember not to allow anyone to approach you to discuss this matter with you. Again if someone attempts to discuss this case with you, please tell them that you are a juror and that you cannot discuss it and I ask that you report it to us as soon as possible.

Now, overnight, ladies and gentlemen, I'm going to add a couple of additional instructions. I know your family and friends will want to know what you're doing on jury duty this week. Certainly you can tell them that you have been selected as a juror in a criminal case involving criminal sexual conduct, but I ask that you not

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discuss what you have heard or seen thus far throughout the course of this particular trial with your family and friends. The reason I do that is because whenever you have a conversation with family and friends, you talk about the things that you consider to be the most important, things that stuck out in your mind and I would like for your fellow jurors to be able to hear that when you first begin to talk about the case. You talk about the things that stuck with you the most.

Additionally, your friends and family may make comments to you that has the potential to impact how you view the evidence or how you consider the evidence. While they are not perfect strangers, it's still inappropriate for them to have conversations with you about this particular case. Please tell them that I asked you not to discuss it with them and please tell them that once the trial is concluded that you will be free at that particular time to discuss what you have heard and seen and will be happy to do that with them. But until that time please tell them that I have asked you not to discuss it with them.

Additionally, overnight and throughout the course of this trial I ask that you not engage in any independent research to the extent that you may have access to either individuals or books or computers or other sources of

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information about anything that you have heard throughout the course of this trial. I ask that you not engage in any independent research or investigation. That's not evidence in this case. It cannot be considered by you in reaching your verdict in this matter. So it's very important that you not engage in any of that conduct throughout the course of this trial, any independent investigation throughout this matter.

Ladies and gentlemen, I'm going to ask that you report back to the same jury room tomorrow morning at 9:30. When you have reported back at that time, then we'll be ready to continue on with the trial of this case. I hope that you have a very pleasant evening. We'll see you tomorrow morning at 9:30. Thank you.

(Whereupon, the jury was released for the evening at 5:00 p.m.)

THE COURT: Is there anything that we need to take up before we break for the day?

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

MR. WILLIAMS: Nothing from the defendant.

THE COURT: Have you marked the video as State's exhibit number 1?

MS. ABEE: Yes, Your Honor.

THE COURT: If you will return it to the custody of the Clerk's Office.

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MS. ABEE: It has been, Your Honor.

THE COURT: And I understand that you don't have any specific requested charge. If overnight that you feel there is something that you may need to submit, I ask that you do that first thing in the morning so that I will be able to prepare the instructions for the jury and we'll see how the day goes tomorrow. Again, Mr. Breazeale, you are still out on bond. You need to make sure you're here in this courtroom tomorrow morning at 9:30. Again, if you fail to report and we are not able to discern where you are or the reasons why you are absent or there is not a good reason for your absence, then the trial will continue on in your absence and a bench warrant will be issued. Do you understand?

MR. BREAZEALE: Yes, ma'am.

THE COURT: Thank you. If there is nothing further, then we'll see you all tomorrow morning at 9:30. Thank you. The courtroom will be locked up overnight. If you wish to leave materials here, you're certainly welcome to do that.

(Whereupon, court was adjourned for the evening at 5:05 p.m.)

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August 23, 2016.

BAILIFF: All rise. The Honorable Judge Alison Lee presiding.

THE COURT: Good morning. Please be seated. Thank you. Is there anything we need to take up before we get started?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: Ask the jury to come in please.

(Whereupon, the jury entered the courtroom at 9:50 a.m.)

THE COURT: Good morning, ladies and gentlemen. At this time we are ready to carry on. You may call your next witness.

MS. ABEE: Thank you, Your Honor. At this time the State calls Dwayne Rice.

Thereupon,

HERSCHEL DWAYNE RICE

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last name for the record.

THE WITNESS: Herschel Dwayne Rice, R-i-c-e.

DIRECT EXAMINATION

BY MS. ABEE:

Q. Go ahead and spell your first name for us as well, sir.

A. H-e-r-s-c-h-e-l.

Q. Mr. Rice, what do you go by?

A. Dwayne.

Q. Mr. Rice, how old are you?

A. 69.

Q. Where are you from?

A. I live in Wagener, South Carolina.

Q. How long have you lived in Wagener, South Carolina?

A. About two, maybe two and a half years.

Q. Where are you originally from?

A. Lexington.

Q. Have you pretty much grown up here in South Carolina?

A. All my life.

Q. Mr. Rice, tell the jury a little bit about yourself, a little bit about your background.

A. Well, I don't know where to begin with all that now.

Q. Why don't you tell us, any military service, anything like that?

A. Okay. I'm a Vietnam vet in the Marine Corps in the

middle '60s. Went in in '65, got out in '69 and when I got out of the Marine Corps, I couldn't hardly find a job because nobody liked veterans, especially Vietnam veterans. But I tried a little bit of everything. Got into carpentry work. Got into truck driving. Got into farming a little bit, you know. Raised on a farm but raised horses, cows, things of that nature. Then I got disabled through the VA and that's it.

Q. Mr. Rice, do you know Linda Marsh?

A. Yes, ma'am.

Q. Explain to us how you know Linda Marsh?

A. I met Linda Marsh about, I think it might be 26 years ago. Not quite that. No. Because her oldest son was still being potty trained, running around in them little what you call them. I met her at the Skyline Club. We would like to go dancing and carrying on and she became a dancing partner of mine. That's how we met.

Q. Throughout the 20 something years that you and Linda have known each other, have y'all stayed in contact and been friends?

A. Off and on.

Q. Was there a point in time during the summer of 2014 that you stayed at Linda Marsh's house?

A. Yes, ma'am.

Q. Explain to us why you were staying at Linda Marsh's

house?

A. I had to have an operation over at the VA Hospital. When they operate on you at the VA Hospital, you have to take a driver because they gonna kick you out as soon as you come to and come out from under the - right after the operation you gone so I had to have a driver take me home.

Q. Was that driver Linda Marsh?

A. Linda Marsh.

Q. Where did you stay after your surgery?

A. At her house. Is that what you're asking?

Q. Yes, sir.

A. Okay.

Q. How long did you stay at her house?

A. I stayed approximately three days.

Q. While you were at her house, did anyone else come by or anyone visit or stay?

A. There was a few people in and out that I didn't even know, but her son came by, daughter came by and her grandkids was there.

Q. When you say her grandkids, was Minor ever there, her young granddaughter?

A. Yes.

Q. What about Auston her grandson?

A. Yes, ma'am.

Q. Was there any point in time when you saw something

occur between Auston and Minor ?

A. Yes, ma'am.

Q. Explain to us where you were when that happened?

A. I was getting up off the couch to go sit on her little front porch because she was outside going to try and cut grass or doing something like that and as I was getting up off the couch going that way I heard the little girl kept telling Auston to leave her alone because he kept bothering her anyway.

Q. Once you heard that, where did you go?

A. I just keep coming that way because I didn't see anything yet, you know, because I was in the living room and then you had to go through like a hallway and then straight out the door and the bedroom is off to the right. She was in there watching TV on Linda's bed.

Q. You said that Linda was outside?

A. Right. Yes, ma'am.

Q. Was Auston inside or outside throughout the day?

A. He was in and out because she kept telling him to come out there and help her and he keep sneaking back in the house.

Q. Did he say anything about why he was coming back inside of the house?

A. Well, the last time I saw him right at that particular time he said he was going to use the restroom.

Q. Now, is there only one restroom in this house or more than one restroom?

A. There's two.

Q. Where did he go? Where did Auston go?

A. To the restroom.

Q. Where did he go once he came inside of the house?

A. He went to the bedroom where that little girl was.

Q. The other bathroom, is it outside of that bedroom?

A. That's on the left. Going down the hall to your left and back down that way.

Q. But he went to the bedroom where you said the little girl was?

A. The little girl was.

Q. So as you were walking out and after you heard Minor , what did you do?

A. Well, you know, I looked to see what, you know, naturally because I saw some commotion over there and she told him to quit. That hurt. I looked. By that time I looked and I saw him have his hands in her panties and he said he was just tinkling her. I said well quit. She don't like it. She said it hurt, and I went outside.

Q. Now, you said you saw his hands in her panties so were his hands on top of her clothes or underneath her clothes?

A. Inside of her panties.

MS. ABEE: Your Honor, I have no further questions at this time.

THE COURT: Any cross?

MR. WILLIAMS: May it please the Court.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Rice, when were you staying at Linda Marsh's house?

A. Sir, would you speak a little louder? I'm hard of hearing.

Q. When were you staying at Linda Marsh's house?

A. When?

Q. Yes.

A. I don't remember the exact date. I would have to look it back up when I was there from that hospital.

Q. Well, do you think it could have been in July of 2014?

A. It's either July or September. One of those days. I don't remember.

Q. Do you remember giving a statement to a police officer about your staying at Linda Marsh's house?

A. Yes, sir.

Q. If I gave you this statement to refresh your memory, would it refresh your memory?

A. Yes, sir.

MR. WILLIAMS: May I approach the witness, Your Honor?

THE COURT: Yes, sir.

BY THE WITNESS:

A. That's what I said.

BY MR. WILLIAMS:

Q. Does that refresh your memory, sir?

A. Yes, sir.

Q. So when were you staying at Linda Marsh's house?

A. In July.

Q. July of what year?

A. '14.

Q. And you had actually had your surgery on July the 7th of 2014; is that correct?

A. I think so.

Q. And you stayed at Linda Marsh's house for approximately three to four days which would have put you leaving either the 10th or the 11th of July, 2014; is that correct?

A. Possibly.

Q. You don't remember?

A. No, sir. I don't remember the exact date I left, the date. I remember I stayed there two or three days just as I have said.

Q. Do you remember when you gave the statement to police officer?

A. Yes, sir.

Q. When did you give the statement to the police officer?

A. Now, that's the date I don't remember either. It's on that paper. I don't remember but he came to the house and I gave it to him.

Q. (Proffering.) It would be on the bottom, wouldn't it?

A. Well, I'm looking. It had my birth date up there. [redacted]. No. [redacted].

Q. Okay. All right. So as I understand your testimony, you had surgery at the VA on July the 7th, 2014. You stayed at Linda Marsh's house for several days, three to four, you don't exactly know when, and you gave a report to the police officer in March of 2015; is that correct?

A. Correct.

Q. So would it be safe to say that from July 2014 until March of 2015 you didn't think anything unusual had occurred?

A. Linda and I talked a few times and I asked if Auston was still picking at the little girl, you know. Aggravating her. And she said at that time, you know, of and on that they still just playing and I didn't think nothing actually was

really going on because she said they play like that all the time. Not necessarily what I saw, but I didn't think nothing about it because they play.

Q. I didn't mean to cut you off. I just want to know did you tell Linda Marsh that you saw his hands --

A. Yes. After a while I did because, you know, she's a friend and how would you tell somebody something you saw because you getting in a delicate area there.

Q. Did you have any conversation at all about seeing anything inappropriate until after Auston Breazeale had been arrested?

A. Say that again please.

Q. Did you have any conversation with anyone at all about this allegation until after Auston had been arrested by law enforcement?

A. Yes.

Q. And who did you say it to?

A. I mentioned it to a couple friends of mine, you know, just in casual conversation.

Q. You talked about that information to your friends?

A. Well, we were just talking and, you know, just something like that. I didn't think nothing inappropriate was going on at the time.

Q. So because he was arrested you thought something inappropriate was going on?

A. Not really. I didn't think nothing of it one way or the other because that's Linda Marsh and her grandson.

Q. Let me ask you this: The surgery that you had back, without I guess violating any HIPAA violations --

A. That's okay.

Q. -- it was surgery on your hip; is that right?

A. No, sir. A hernia.

Q. Hernia?

A. Yes, sir.

Q. That's kind of a painful thing?

A. You better believe it.

Q. And part of the reason why you were staying with Linda Marsh was because, and part of the reason why they didn't want you to drive is because they were giving you a bunch of pain medication because of all the pain you were in?

A. Correct.

Q. So during this time span that you were at Linda Marsh's, you were taking all kind of pain medication for that?

A. No. Not all kind. I just had two specific kind.

Q. What two specific kinds of medication were you taking during this time span?

A. Gabapentin and Tramadol.

Q. That was to stop the pain?

A. Yes, sir.

Q. When did you stop taking them as a result of --

A. I still take Gabapentin now but I don't have any more Tramadol. I'm on some other something I can't even pronounce.

Q. Now, I believe you said that you had this conversation with his grandmother, with Linda?.

A. That's correct.

Q. And when was the first time you had this conversation with Ms. Marsh?

A. I don't remember the date. We just, you know, talk every so often on the telephone.

Q. How many months after you supposedly stayed there did you have this conversation with Ms. Marsh?

A. Now that I don't exactly remember either because like I say, we talk sometimes around once a month, once every two months, something like that.

MR. WILLIAMS: I don't have any other questions, Your Honor.

THE COURT: Any redirect?

MS. ABEE: Very briefly, Your Honor.

REDIRECT EXAMINATION

BY MS. ABEE:

Q. Mr. Rice, did you say anything to Linda that day after what you saw?

A. Did I say anything?

Q. Yes, sir. Did you say anything to Linda Marsh that day after you saw what you saw in the bedroom?

A. No. Not that day. No.

Q. Why?

A. I didn't think nothing about it.

Q. And Mr. Williams talked about some pain medications you were taking at that time. Do you recall him asking you that?

A. Yes, ma'am.

Q. Did those pain medications make you hallucinate at all?

A. No. They only half worked.

Q. Did they make you imagine what you saw?

A. No, ma'am.

Q. Are you sure you saw the defendant's hand down --

A. I'm positive of what I saw.

MS. ABEE: No further questions, Your Honor.

MR. WILLIAMS: Just one follow up question.

RECROSS EXAMINATION

BY MR. WILLIAMS:

Q. If you saw that, did you have any comment to Mr. Breazeale in reference to that? Did you say something to him?

A. To who?

Q. Auston Breazeale.

A. Oh, that the guy that came down there?

Q. Yes. Did you say something --

A. I can't see him from here. I don't remember his name.

Q. You can't see him from there?

A. I can't see him from here. He's kind of blurry from here.

Q. How far away were you from the location when you said that you saw his hands on --

A. From me to that little thing right here. That little desk right there.

Q. Do you have problems with your vision, sir?

A. No. I just got bifocals. That light is blurry up there.

MR. WILLIAMS: No other questions, Your Honor.

THE COURT: You may step down. Thank you. You may call your next witness.

MR. FERNANDEZ: Thank you, Your Honor. The State calls Linda Marsh.

Thereupon,

LINDA MARSH

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last

name for the record.

THE WITNESS: Linda Elizabeth Marsh, M-a-r-s-h.

DIRECT EXAMINATION

BY MR. FERNANDEZ:

Q. Linda, why don't you tell the jury a little bit about yourself. Where did you grow up? Where were you born and raised?

A. I was born and raised in Hopkins, South Carolina.

Q. Throughout your life where have you lived in the general area?

A. I lived in Hopkins until I was about 19, then I moved over to Lexington County after that and I have been in Lexington County ever since.

Q. Linda, are you employed?

A. I'm retired from the State Law Enforcement Division.

Q. Tell us a little bit about your law enforcement career.

A. Uhm, I was at SLED for 41 years. I was an agent with them. I started as a secretary and then, uhm, became supervisor of the missing person center at one time, then I went back to the criminal intelligence section which is now called the Skyack Center. I worked in there for most of my career at SLED doing internal background investigations on the cases that we were working on, that our agents were working

on.

Q. Linda, did you attend the Criminal Justice Academy?

A. Yes. I did. In 1974.

Q. I think you mentioned you worked in the intelligence center, the Skyack Center. Did you ever have an active case load or did you primarily stay at the SLED buildings?

A. I would stay primarily at the SLED buildings.

Q. Would you tell me a little bit about your family and your children and your grandchildren?

A. I have two children, Shannon Hardy. She is my daughter. I have one grandson with her, Auston, and three step grandchildren with she and John Hardy, C.H. , L.H. and J.H. . And I have my son Trey, his wife Whitney and their daughters Minor and Alynn.

Q. Linda, you understand why you are here today?

A. Yes. I do.

Q. Where is the house you lived in leading up to about 2015?

A. I was at [redacted] Parkhurst Lane in Lexington.

Q. How long did you live at Parkhurst Lane?

A. Around 14 to 15 years.

Q. Linda, would you tell me a little bit about that Parkhurst Lane house, just a little bit about the lay out of the house, how many bedrooms, anything noticeable about some

of the bedrooms?

A. The home was a three bedroom home. When I originally moved in, I just painted my bedroom, but we did what we called the red room the living room. The living room was on the front half of the house. The red room was on the back half of the house. My bedroom was on the opposite side of the house as you were facing it. My living room, as you walk in there's a hallway, living room and there's a kitchen on the left and a porch on the back.

Q. How many bathrooms were in your house Parkhurst?

A. Two bathrooms.

Q. Where were they located?

A. One was located in my bedroom and the other was located in the hallway nearest what I call the red room, the back bedroom.

Q. Did you ever have any roommates that would live with you?

A. Yes. I did.

Q. Please tell us a little about some of the folks that lived with you?

A. I have had two roommates. One Terry Butler lived with me for a while, for about three years until she passed away. That was in 2014. And I had a roommate after that also named Terry. She lived with me until last July or August.

Q. What room would your roommates live in?

A. They - actually the original Terry stayed in the front bedroom of the house and then the other Terry stayed in the red room, what I call the red room.

Q. Okay. What date did you move out of the Parkhurst Lane address?

A. I moved out of there in February of 2015.

Q. You mentioned that your grandson is Auston Breazeale. Is he here today?

A. Yes. He is.

Q. What's he wearing?

A. He's wearing a dark outfit with a Steelers jacket.

Q. Thank you. Tell me a little bit about y'alls family dynamic. How often would y'all get together? How often would you see your grandchildren and your children?

A. Every week. We ate dinner on Sundays together most of the time unless something else was going on. I kept my granddaughter two days a week. Occasionally I would keep my grandson. I got to see my other grandchildren when they were with their father.

Q. When y'all would get together, the family would get together, would the children ever play by themselves?

A. Uhm, yeah. Occasionally they would. I mean, when we were all together, they like to get together and play games in another room or whatever. A lot of times they were in the same room we were in, but sometimes, and I had an organ back

in the blue room and they liked to play the organ and different stuff there, you know.

Q. Now, you mentioned that you would take care of your granddaughter. Is that Minor ?

A. Minor .

Q. How often would you take care of her?

A. At that time I was taking care of her two days a week on Thursdays and Fridays.

Q. You also mentioned that Auston would stay there. How often would he be there and why would he be there?

A. Well, not that often, but he would be there sometimes to help me out or just sometimes to get away from home and come spend time at the house. A lot of times he would come to help me cut the grass and do stuff like that.

Q. When he was there, how many hours would he be there?

A. Sometimes all day long.

Q. And were there times when he and Minor would both be there with you?

A. Yes.

Q. Now, are you aware of an incident that occurred that required certain restrictions being placed on Mr. Breazeale?

A. Yes.

Q. And tell us what your understanding was about what needed to be done?

A. That Auston would not be anywhere around Minor .
Q. And this came from who?
A. From his parents.
Q. Whose parents?
A. From her parents. From Trey and Whitney.
Q. Now, after that restriction was placed on Mr. Breazeale, did he still - did you still have some times Auston and Minor together?
A. Yes. I did.
Q. Why would that happen?
A. Generally there was a time frame they were there when my friend Terry was helping to tutor Auston. There were times when Auston would come help me to cut grass and do stuff like that.
Q. Do you remember one incident that occurred in July of 2014?
A. Yes. I do.
Q. Tell us a little bit about Mr. Dwayne Rice. Who is he to you?
A. Dwayne is a friend of mine. He's been a friend of mine for about 25, 26 years. We met when I used to go dancing. We met way back then. We have been friends ever since.
Q. Was there a time when you actually had to take care of Mr. Rice?

A. When Dwayne had to go to the VA Hospital and I volunteered to take him to the VA Hospital to have surgery and then he came the night before and I took him to surgery the next day and then I just asked him to go ahead and stay at the house a few days so we could watch out for him and make sure everything was okay.

Q. How did he do during the recovery period?

A. He was doing pretty good. He was slowly taking a step with pain and everything, but he was doing pretty well. He got up and got around himself and everything.

Q. Okay. During this time he stayed with you, was Minor also there at any time?

A. Yes. She was.

Q. Also was Mr. Breazeale there at any time during this stay?

A. Yes. He was on one particular day.

Q. On this particular day tell me what you were doing?

A. We were outside, Auston and I outside supposedly cutting the grass. I didn't like the way he was doing things and got upset about it and I just told him to go ahead, leave me alone. Get out of my sight. Just let me do it myself. I told him to go inside, but I also told him not to bother Minor . She was watching TV.

Q. You said you didn't like what he was doing. What

was happening?

A. He was cutting the grass all crooked and, you know, just missing places and everything. Auston could push my button sometimes with doing certain things. On that particular day I got upset with him about that because I asked him, told him how I wanted it cut and how to do that. And I know that might seem minor to some. But anyway, but he really wasn't doing the job he was supposed to be doing so I just told him to leave. To just go away and I would do it myself.

Q. Okay. Now, you said go inside. Continue. You told him what to do?

A. I believe I told him to go inside. I remember I told him to get out of my sight and just leave me alone and also I told him not to bother Minor because she was watching TV.

Q. Now, during the time of this 2014 incident in July, where there restrictions in place that he not be around Minor ?

A. Yes, sir.

Q. And so why might have you sent him in there knowing that there were restrictions on him?

A. I wasn't even thinking. I was just angry. I wasn't even thinking what I was doing at the time. It did not occur to me. Dwayne was there too, but it just did not occur to me

at that time that I was screwing up. I just didn't think about it. I was just too angry with him I didn't think about what I was doing.

Q. And then at some point after that did Dwayne come and talk to you?

A. Yes. He did.

Q. Without saying what he told you, did he relay something troubling?

A. Yes.

Q. What did you do after you heard that?

A. Uhm, basically when our conversation took place, I didn't really - we didn't say too much and all he just made a certain comment and I didn't think a lot about that comment other than it was just a general thought. It just didn't occur to me to think anymore about what he said.

Q. I'm going to fast forward to May of 2016. Throughout this time you still had contact with your granddaughter; is that correct?

A. Yes, sir. I keep her full-time.

Q. And in May of 2016 did she make a sexual assault disclosure to you?

A. Yes. She did.

Q. And without saying what she said, it was a disclosure of assault of a sexual nature?

A. Yes, sir.

Q. Did she say where it had happened?
A. Uhm, no. I don't remember her saying where it had happened.
Q. Did she say when it had happened?
A. No. She did not.
MR. FERNANDEZ: No further questions. Thank you. Please answer any questions that counsel may have.
MR. WILLIAMS: May it please the Court.
THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. WILLIAMS:
Q. Ms. Marsh, when did Mr. Rice have a conversation with you?
A. It was sometime - the surgery he had I believe was July 5th and it was after that when he was staying with me a few days.
Q. Do you remember if the statement was made several days after the event supposedly happened or if it had happened?
A. No. It was made on that day.
Q. And obviously it didn't impress you in any way to say anything about it to anyone?
A. I was -- I didn't even think at that time and I have been sorry ever since then that I did not think about what happened and it just didn't hit my mind at the time.

Q. Well --

A. I don't know how to explain it, but I have been sorry everyday since I heard what has happened and it has broken my heart. That's all I can say.

Q. Again, Ms. Marsh, you haven't seen anything occur, have you?

A. No, sir. I have not.

Q. And everything that you are basing your decision on, your testimony, is based on what somebody else has told you, isn't it?

A. Yes, sir.

Q. Now, Ms. Marsh, you were living I think you said in your house up until July -- I'm sorry. When did you move out of your house?

A. I moved out of my house in February, about the middle of February of 2015.

Q. All right. And I think you have already indicated that you had three bedrooms; is that correct?

A. Yes, sir.

Q. You call one a red bedroom and you call one bedroom a blue bedroom?

A. Mm-hmm.

Q. And those would not be your bedrooms? Don't let me put words in your mouth. You had two Terrys that stayed there?

A. Yes, sir.
Q. One Terry stayed in which bedroom?
A. She stayed in the front bedroom which was the blue bedroom.
Q. Is that the one who is dead?
A. Yes, sir.
Q. All right. Then you had another Terry who stayed there and she stayed in which bedroom?
A. She stayed in the other bedroom, the one I call the red room.
Q. Where is that bedroom?
A. It's right adjacent to the blue room as you walk down the right hallway you see both bedrooms, the first one, the front one and the back one.
Q. Is this a trailer or is it a house?
A. A house.
Q. When you walk into your house, do you have a living room when you walk into your house?
A. Yes, sir.
Q. And then you have a kitchen?
A. To the left. Yes, sir.
Q. The kitchen is to the left. Then you have a hallway which is connected to the living room?
A. The hallway, as you come into the house the hallway leads to the bedrooms on both sides and then you have the

living room and the kitchen is to the left of the living room.

Q. Where is your bedroom?

A. My bedroom is on the left as you walk in the door.

Q. Where are the other bedroom?

A. To the right as you walk in the door.

Q. So both of the Terry bedrooms would be in the opposite direction from your bedroom; is that correct?

A. Yes, sir.

Q. Now, bathrooms. The bathroom which is -- Do you have a bathroom adjacent to your bedroom?

A. Yes, sir.

Q. Would you call that the master bedroom?

A. Yes, sir.

Q. That would be on the left-hand side, right?

A. Yes, sir.

Q. On the right-hand side would be the other two bedrooms. Is there a bathroom between the two bedrooms or is it across the hall?

A. It straight. The two bedrooms are here. There is a hallway that leads into a bathroom here and the utility room is right here.

Q. So the bathroom would be at the end of the hall?

A. Yes, sir.

Q. Both bedrooms would not have access to it. You

would have to come out of the bedrooms to go to the bathroom?

A. Yes, sir.

Q. So if someone were going to the bathroom, they would not be going through the bedroom; is that correct?

A. No, sir. They would not.

Q. Now, the left-hand side where your bedroom is, does the bathroom connect to your bedroom?

A. Yes, sir. It's inside my bedroom. The bedroom is here. The bathroom is right here in the bedroom.

Q. But certainly your bedroom is not the same as either one of the Terrys' bedroom?

A. No, sir. You would pass both of those rooms to go to the other bathroom.

MR. WILLIAMS: That's all the questions I have, Your Honor.

THE COURT: Any redirect examination?

MR. FERNANDEZ: Nothing further, Your Honor.

THE COURT: Thank you. You may step down.

MR. FERNANDEZ: Permission to release this witness from her subpoena.

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: You are released from your subpoena. Thank you.

MR. FERNANDEZ: Thank you, Your Honor.

THE COURT: You may call your next witness.

MS. ABEE: Your Honor, the State calls David Kellin.

Thereupon,

MAHLON DAVID KELLIN

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last name for the record.

THE WITNESS: Mahlon David Kellin, K-e-l-l-i-n.

DIRECT EXAMINATION

BY MS. ABEE:

Q. Mr. Kellin, how are you?

A. I'm doing all right.

Q. Go ahead and tell this jury a little bit about yourself. Are you employed?

A. I am.

Q. Where at?

A. I have two jobs. I work as a forensic social worker in private practice Kershaw Counseling in Kershaw, South Carolina and I'm a trauma focus cognitive behavioral therapist at Palmetto Citizens Against Sexual Assault in Lancaster.

Q. Tell us a little bit about your educational background.

A. I have a Master's degree in social work from the

University of South Carolina. I have a Bachelor's of Science degree in psychology from Lander University. I'm a trained Finding Words forensic interviewer as well as a trained extended forensic interviewer from the National Children's Advocacy Center in Huntsville, Alabama.

Q. Do you take any sort of continuing education courses or anything like that?

A. I do.

Q. Do you do any of those in the field of child sexual abuse or sexual abuse?

A. Yes.

Q. Explain to us some of the courses that you take?

A. I regularly take an advanced child first course every couple of years to update current awareness about rules and procedures, that sort of thing coming through the child first process. I also attended and continue to do continuing education in the trauma focus cognitive behavioral area for counseling children who have been traumatized.

Q. Tell us what actually that means.

A. Okay. Cognitive behavioral therapy looks at how we think about things in relation to how we feel. Trauma focus cognitive behavioral therapy does that same process but it's specifically for children who have been traumatized either through physical, sexual or neglect. We look at acute stress disorders and PTSD symptoms within children.

Q. You explained to us where you were employed and what your title is, but what do you actually do?

A. Most commonly what people think of is I'm a therapist for children. I work with children, adolescence for the last 24 years.

Q. What type of training do you have in counseling children?

A. Well, I have the trauma focus counseling. I also have the Master's in social work was a counseling program and the continuing ed over the years.

Q. I think you just said it, but how many years have you counseled children and even adults involved in sexual abuse?

A. Specifically with sexual abuse the last eight years, but I have been a child and adolescent therapist for the last 24 years.

Q. Have you ever testified in court before?

A. I have.

Q. Have you ever been qualified as an expert before?

A. I have.

Q. Approximately how many times?

A. In General Sessions Court about ten times. Within family court I don't have a count.

MS. ABEE: Your Honor, at this time the State moves to enter David Kellin as an expert in child maltreatment

and child abuse dynamics.

THE COURT: I'm sorry. What were those again?

MS. ABEE: Child maltreatment and child abuse dynamics.

THE COURT: Any voir dire?

MR. WILLIAMS: Just a couple questions.

VOIR DIRE EXAMINATION

BY MR. WILLIAMS:

Q. In that you're being qualified in those two particular areas, are you actively involved in the treatment of individuals who you suspect child abuse?

A. Yes.

Q. And she's asked about two specific areas that she is attempting to qualify you as an expert in, maltreatment and sexual abuse. What is the differences in your mind in regards to what you would be able to testify to?

A. Well, maltreatment I think is a broader term when we talk about children who have been hurt in some way, could either be sexual, physical or by neglect. Whereas child sexual abuse is a specific area within those.

MR. WILLIAMS: Thank you for explaining that. Your Honor, we have no other questions for him.

THE COURT: Any objection to the qualifications?

MR. WILLIAMS: No objections, Your Honor.

THE COURT: I find him qualified as an expert in the

field of child maltreatment and child abuse dynamics.

DIRECT EXAMINATION CONTINUED

BY MS. ABEE:

Q. Mr. Kellin, I want to talk a little bit about the circumstances surrounding why you are here today. Do you know anything about this case?

A. No.

Q. Have you ever met with or interviewed any of the witnesses in this case?

A. No.

Q. What about reading any statements or reports or reviewing videos, have you done any of that?

A. No.

Q. So do you know anything factually about this case?

A. No.

Q. I want to talk to you now about a few terms. Explain to us the difference between, or explain to us what delayed disclosure means?

A. Delayed disclosure is when a child or somebody who has been hurt delays the release of information about something that's happened to them. So if something happens on Monday, that disclosure may not come Monday. It may come much later.

Q. What are some factors that can contribute to a delay in a child's reporting?

A. One, development of the child. How old the child is and how developed they are. But also fear of what would happen if something was said and embarrassment about something happening that they were not comfortable with other people knowing, uncomfortability, and then sometimes just not understanding what really has happened.

Q. How common is delayed reporting?

A. It's very common.

Q. Would you say it's more common than not?

A. It's more common than not. Yes.

Q. Would the fact that a perpetrator is a family member, could that contribute to a delayed reporting?

A. Absolutely.

Q. Can you explain to us what a partial disclosure is?

A. Okay. Partial disclosure is when a person reveals only a piece or a part of what's happened. Most disclosures tend to be accidental. Somebody saying something that reminds the child of something or the person who has been hurt and they say a little bit out, but they don't say the whole thing. They just say part of it and then close back up so that they don't spill the beans anymore I guess is the way to put it. So most disclosures start partial. Very few children come in with a full disclosure of all the details when they first come in.

Q. Can a child's age affect their ability to remember details of a sexual assault?

A. Yes.

Q. Can that also play a part in their disclosure?

A. Absolutely.

Q. What are some common themes that young children maybe don't recall during disclosures?

A. Depending on the age of the child, very young children might remember what and who, but not know when or why, and they frame things in their own terms so that what they remember is based on what they know and how they see things. So a child might come in and say somebody is being mean but not understand that sexual abuse is more than mean. They just see it as a mean activity. So what they recall and share with us isn't always what we think of in the terms that we think of.

Q. Do children always manifest some sort of external signs that they have been sexually assaulted?

A. No. Actually very few would show a sign that you could recognize as child abuse happening or sexual abuse happening.

Q. Is it possible that a child would manifest signs of being sexually assaulted later on in life?

A. Yes.

Q. What types of things are we talking about here?

A. There's three big classifications. One is intrusive recall of events so remembering things without really wanting them to happen. Avoidance of anything that would remind you of what happened. And then physiological reactions around triggers or around things that make you remember what happened.

Q. So when you are talking about a physiological or a physical manifestation of signs, you talked about triggers; is that right?

A. Yes.

Q. What about a child finally coming forward and disclosing, is that something that could then cause physical signs to manifest?

A. We can see like the flight or fight responses. Heartbeat picking up. Cold hands. Rapid breathing. That sort of thing. Also we can see either a change in sleep pattern. A change in appetite. Depending on the child we may start to see an increase in nightmares or a decrease in nightmares depending on how they feel about the disclosure. So we are looking at different symptoms that by themselves don't actually point to any one situation but as a cluster we would indicate that there was, you know, reactions, trauma reactions to something.

Q. Explain to us what grooming is?

A. Grooming is when a person who is intent on doing

something wrong with a child or wrong with a teenager will start to do small things to get themselves closer to or to get approval from the child for a particular behavior. So a situation where a child might be meeting somebody for a first time or might know somebody but the person wants to hurt them, they may start getting the child to sit closer to them. When the child is okay with sitting closer to them, then they might say, okay, you can sit on my lap today and they get comfortable with sitting on a lap and then they move forward with behaviors. The child doesn't really see it as a progression towards something. Grooming is that action of moving towards an inappropriate act.

Q. Are there certain risk factors that can contribute to someone being a victim of sexual abuse?

A. I think the younger the child is more likely.

Q. Why is that?

A. Because younger children don't have the ability to understand what sexual behavior is and so they don't know that that's something that's stopped. Especially if there is grooming involved. They don't recognize that process of getting closer and closer, of something happening. So the younger child doesn't have that sense of, okay, I need to stop this because this is really bad. Especially if there is a relative or a family member or somebody they trust. What we know is about 85 percent of abuse happens by someone knowing

and trusted to the child. So somebody that's trusting, somebody that doesn't have a lot of ability to make distinctions about behaviors, development and if there's been prior abuse. If there's been prior sexual abuse or prior other types of abuse that puts the child more at risk.

Q. Explain to us the concept or the idea of coaching. What does that mean?

A. What coaching is is when somebody who wants to change somebody's testimony or wants to move somebody's testimony to a less harmful way, they might encourage the child to say less than what happened or try to change the demeanor of what happened or just to deny it altogether.

Q. Can that work in the opposite direction as well?

A. Yes.

Q. So what are some things you look for when trying to see if a child has been coached or if a child is making a false allegation?

A. One of the things that I look for first is what is the first thing that the child says to me. So if the child is coming into my office, if the child immediately comes in and fills out a whole story, that's suspicious to me. Children, especially younger children don't hold onto things long. So if there is this desire to change a story, then the child is going to need to get it out fairly quickly because they don't hold onto it or hold onto details. Also if the details remain

the same consistently each and every time the child tells me, that's a concern for me because children typically have some variation in what they say.

Q. Finally I want to talk to you about perpetrators themselves and children's reactions to them. Do children always have a hatred towards the perpetrator?

A. No.

Q. And why not?

A. Because younger children tend to see people not as just one act. The final act doesn't necessarily determine a relationship. That relationship may have been good for many years and then turned into an abusive relationship. That child may still want that relationship with that person because what they had was pleasurable. Especially if there is a grooming process going on, that relationship may have been very positive for the child up until the point of something bad happening.

Q. As you were previously telling us sometimes children don't understand the sexualized nature. Can you kind of explain that to us a little bit more in regards to their affection for their perpetrator?

A. Okay. Most children really don't begin to start to understand what sexual behavior is until about 12 or 13. Usually about the onset of puberty. Before that children look at private parts really as just bathroom parts. So when

somebody starts to mess with a young child under the age of puberty, they don't have a concept that this is material that would be related to sex or related to procreation. They just know somebody is messing with their private parts. So there isn't -- In my experience and my practice most kids under 12 really don't have a clue as to what sex is and why somebody would be messing with them.

Q. Mr. Kellin, is all this information you have provided to us, is this based on studies or just based on what you came up with in your head?

A. No. This is based on studies and 24 years of practice.

MS. ABEE: Your Honor, I have no further questions for Mr. Kellin at this time.

MR. WILLIAMS: If it please the Court.

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. WILLIAMS:

Q. Mr. Kellin, am I pronouncing your name correctly?

A. Yes, sir.

Q. K-e-l-l-i-n?

A. Right.

Q. You have your Master's in social work?

A. I have a Master's in social work.

Q. But no Ph.D.?

A. No Ph.D.

Q. In regards to Master's in social work, would that amount to, I guess when you get your formal education like getting a major in psychology and then doing work in the social field, social worker field and then maybe taking a test?

A. What my role is as a social worker is primarily as a counselor. I have a clinical practice specialty within my social work field which my training was to do what in the social work field is called micro work. That's with people. I don't work with corporations or agencies. I just work with families and children and people and my primary work there is as a counselor.

Q. Are you married?

A. I am not married.

Q. Do you have any children?

A. Both of my children passed.

Q. Now, I think you have already stated that you have had absolutely no contact in regards to this particular case in regards to the facts or anything like that, know nothing about those things?

A. That's correct.

Q. So essentially what your testimony is is basic elements about trauma?

A. Yes, sir.

Q. And child abuse?

A. Yes.

Q. Let me take you back to some questions. You indicated that sometimes if there was to be some sort of testimony by someone who is a subject of child abuse or trauma, would that be the same? Because you said that you were qualified in two different areas.

A. Child abuse is a form or trauma.

Q. Right. So it doesn't necessarily mean child abuse?

A. Right.

Q. But some trauma. Something that affects a child?

A. Yes.

Q. That sometimes when they come to court to testify that they would have things like their heartbeat would increase. They would have cold hands. Maybe they would have changes in their sleep patterns. Are all those correct?

A. That's correct.

Q. And one of the other things you said was that they might have an increase in nightmares or they might have a decrease in nightmares?

A. Yes. If I can explain.

Q. Okay.

A. For some children keeping a secret and keeping it quiet doesn't result in a lot of nightmares and the disclosure

coming out and everything starting may cause more emotional trauma. For some, especially for the older children getting a disclosure out and not being that secret anymore lessens some of those nightmares so it depends on the child.

Q. So are you saying that the age is the determining factor that as the child gets older if she is disclosing something, she should have more nightmares as a result of disclosure?

A. It really just depends on the child and the situation a child is in. I can't do a blanket statement that says all children five to seven have this reaction. It really depends on the child but it can be either way.

Q. And the only way which you can make a determination on that would be years and years of analysis and treatment with the child?

A. Actually when I would do an assessment we would talk with them about nightmares and about the prevalence of nightmares in their life and look at if there are any patterns there.

Q. Now, obviously you have dealt with children who have been sexually abused?

A. Yes.

Q. Are you familiar with the Dickerson Center?

A. I am.

Q. After there is a forensic exam --

A. Yes.

Q. -- is there normally a physical exam?

A. There is a physical exam. Yes.

Q. Now, let me ask you about, I guess you said something called triggers?

A. Yes.

Q. Triggers is just a natural phenomenon, isn't it? It's something that reminds you of something, doesn't it? That's what you mean by trigger?

A. What I mean by triggers is those things that cause us to have a memory or a reaction. You know, the smell of cinnamon rolls would cause people to have a reaction. When I mention that, people think about that. When things like remind us of negative events, that's mostly what we think of is called triggers. But yes, triggers can be a positive reaction, too.

Q. So when you were giving the discussion about triggers, that is not a discussion about anything that directly relates to either maltreatment of a child or child abuse? It could be me smelling a perfume and it reminded me of an old girlfriend?

A. It could be that way. It is one of the factors we look at within the treatment of children who have been abused.

Q. So when it comes to triggers, that is just a logical

way of remembering things? Everything is a trigger, isn't it?

A. Well, we think of triggers as those things which we are not looking for to happen. So if you are walking down a street and you smell perfume of somebody that was familiar to you but you had not intended on remembering that person that day, that's what I think of as a trigger. Now, you going home and you know that there is always a smell of perfume at your house, that's not necessarily what we think of as a trigger. That's just a reaction. Triggers for us are those things that cause an unanticipated or unexpected reaction.

Q. Something you are not anticipating which affects you?

A. Right.

Q. Whether it be vision, smell, taste?

A. Any of the five senses can have triggers.

Q. Now, I believe you said that very few people show any external signs referencing child abuse. Very few people show any external signs of being disturbed by something. Is that what you said?

A. If people are looking for - if you are looking at a child and saying is this child abused, within physical abuse we look for bruises, we look for marks. But sexual abuse there aren't those things. There aren't those immediate things that we can see on a person's face or on a person's

presence or actions that would immediately identify as sexual abuse. So no. There is not a lot of external symptoms or signs that we would look at immediately and say, if you are walking down the street or walking through Wal-Mart, you can't look across the aisle and say, okay, that child is abused.

Q. So the absence of external signs means nothing. And does presence of external signs mean anything?

A. What kind of external signs would you be thinking there would be?

Q. You said, you stated that very few people show signs of external so I'm using your words.

A. Right. Okay.

Q. What are external signs to you?

A. Well, I think when we are looking at like children who are crying or children who are shying away from somebody, there are signs that in disclosures we see that not wanting to be around somebody or crying in the presence of somebody. But those by themselves are not necessarily indicators, okay? They are an adjunctive part of an assessment.

Q. So if a child wants to be with someone, that doesn't necessarily mean that that person is not an abuser. But is the child doesn't want to be with someone, that doesn't necessarily mean that that child has been abused?

A. That's right. It all depends upon context in that person's assessment.

Q. So it really doesn't mean anything really by itself?

A. In and by itself, no, it doesn't.

Q. You have to add it all with all of these things?

A. You have to look at the whole picture. Yes.

Q. And I believe you said that if there were a full disclosure, you would be suspect of that?

A. If a child just walked into a parent and said, spent half an hour, 45 minutes of disclosing, that's one thing. If they walk into my office and it's a five year old and they start in with, okay, this is what Johnny did, this is what, blah, blah, blah, and it goes all the way and there is a whole disclosure within the first two minutes, that's a little suspect for me because most kids when they first meet me, we have to spend some time getting to know each other in order to communicate and talk before, and I generally have to ask some non direct questions to get a disclosure in my practice. So if somebody walks in and suddenly just blurts it all out, that's suspect. Does it mean that there is coaching? Does it mean that there is anything going on? No. It's just something that would raise an issue for me to look a little closer as to why this suddenly came out.

Q. But you have indicated when you were questioned about the coaching aspect that that would tend to indicate to you coaching if they were repetitive in regards to the

statements and didn't move off those statements?

A. Yes.

Q. So does it mean coaching or does it not mean coaching?

A. It's one of those things that would cause me to have a concern and I would look at it. It's more often for me when somebody is coaching a child what to say that the child repeats what that person who is coaching and not coming from them.

Q. What is the effect of constant questioning on someone about what occurred? If you were an interviewer, forensic interviewer and you continually asked the same question, what effect does that have in regards to shaping the child's testimony?

A. Uhm, it's not an advisable practice for us. I don't know how it would affect that particular child but within forensic interviewing we don't tend to ask repeated questions or don't do repeated interviews and try not to. It's part of how we do interviews is to be as non direct as possible or indirect as possible and ask open questions. If it's a younger child, sometimes you have to ask more direct questions. But when I do a forensic interview, I'm not asking the same question over and over and over again. It's not considered in my forensic interviewing to be a good practice. Now, how that impacts any one particular child I can't say

because that depends on the child.

Q. Does the reaction of the interviewer have any influence on how the child testifies?

A. I would say yes. I can't say as to what it would be with that particular child but we try to stay as neutral as possible.

Q. Such as you ask a question. The child answers the question. The interviewer says very good or good or that's right. Is that an indication that the child has said the right thing?

A. I don't know if that's indicated that way. I have not seen that forensic interview. I can't say. We are trained not to do a lot of those rewarding statements after a question or a response.

Q. What effect, if any, does changes in the family unit have to do with how the child gets along in the family unit such as the birth of a new baby? Does that influence sometimes anxiety or changes in the behavior of the child that's already in the family unit?

A. Could be. Could be any number of reactions. Families are systems. Any time there is a new member coming into the system there is a change in everybody within the system. Each person's change and each person's reaction would be linked to that. I can't speculate on any one particular child. But as general, any time there is a change in the

family dynamics because it's a system, it changes everybody involved.

Q. And that's -- You say everybody involved. You're not only referencing parental units, and I don't want to use a Conehead expression, but you're also referencing maybe the children also?

A. Yes.

Q. And how they interact together changes when there is another unit?

A. There could be another unit. When I think of a system, it's like if one parent lost their job. Everybody in the family has an impact with that whether it be the parents or the children. It's a system.

Q. And that change may be good or bad?

A. That's right.

MR. WILLIAMS: I don't have any other questions, Your Honor.

THE COURT: Any redirect?

MS. ABEE: No, Your Honor. We ask that this witness be excused from his subpoena.

THE COURT: Any objection?

MR. WILLIAMS: No objection, Your Honor.

THE COURT: You may step down. You may be excused. You may call your next witness.

MS. ABEE: Your Honor, at this time the State

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rests.

THE COURT: Ladies and gentlemen, we have some legal issues which we need to take up outside of your presence. I'm going to ask that you retire to the jury room. Do not discuss this matter among yourselves. You have not heard all of the evidence. And even if you have heard all of the evidence, you have not heard my instructions to you as to the law. I'll ask that you step back to your jury room and we'll bring you back shortly.

(Whereupon, the jury entered the jury room at 10:55 a.m.)

THE COURT: Are there any motions at this time?

MR. WILLIAMS: Yes, Your Honor. A motion for directed verdict. The evidence taken in a light most favorable to the State is insufficient as a matter of law for the jury to return a verdict of guilt in reference to my client for the charge and allegation of criminal sexual conduct with a minor.

THE COURT: Any response from the State?

MS. ABEE: Your Honor, as Mr. Williams stated, this motion is reviewed in a light most favorable to the State. At this point in time we would contend that there is sufficient evidence for a question of fact for the jury to determine whether or not a sexual battery has occurred between Minor and the defendant Auston

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Breazeale who has been identified several times, Your Honor. The minor herself stated that he placed his penis in her mouth and she choked on it indicating that there was penetration, Your Honor. That was also echoed by the forensic interview and as I stated the defendant was identified as Auston. He was also identified as Shannon Hardy's son which the victim said Auston lived with her, Shannon. That is his mom. So he has been properly identified. The jurisdiction has been established in Lexington County. The minor is currently only six years old, therefore we have met the element that she has to be under the age of 11 for CSC first with a minor. Again there is enough evidence to support a finding of a sexual battery for the jury, therefore, we ask that the defense's motion be denied at this time.

THE COURT: Any response from the defense?

MR. WILLIAMS: No response, Your Honor.

THE COURT: For the reasons stated by the State I'll deny the motion. I think that there is evidence in the record from which the jury could make a decision as to the guilt of the defendant. I'm only concerned with the existence of the evidence and not what weight to give to it. But I believe that the elements of the offense have been met in the evidence that has been presented here this week.

MR. WILLIAMS: Thank you, Your Honor. Your Honor, I would request the Court to interview my client as to his testimony. It's my understanding he does wish to testify but I request the Court to interview him.

THE COURT: Okay.

Thereupon,

AUSTON BREAZEALE

after having been first duly sworn, testified as follows,

EXAMINATION

THE COURT: Mr. Breazeale, at this time we have now reached that point in the trial where you may present a defense. As part of that defense you may decide whether or not you wish to testify in your own behalf and the decision as to whether or not you wish testify is up to you. It's entirely your decision. You can certainly, and I encourage you to discuss the matter with your attorney. You can also discuss it with your family but ultimately the decision is yours as to whether or not you wish to testify in your own behalf.

If you decide that you wish to testify and you have a criminal record which involves a crime of dishonesty or involves a conviction for a crime that carries a possible term of imprisonment of more than one year, those crimes can be used to impeach your testimony and we can certainly determine from the State whether or not any of

those crimes exist in helping you make your decision.

If, however, you decide that you do not wish to testify, the fact that you have not taken the witness stand to testify in your own behalf would not be used against you in any manner whatsoever. Specifically the jury would be instructed that you have the constitutional right to remain silent and the fact that you do not take the witness stand to testify in your own behalf cannot even be discussed by them during the course of their deliberations. They would also be told that they can draw no inference whatsoever from the fact that you did not take the witness stand to testify.

Again your decision as to whether or not you wish to testify or present any evidence is entirely a decision that you must make with your attorney and as I have stated you can also seek counsel from your family, if that's what you wish to do. But again ultimately that decision is yours.

In a few moments I will ask you as to whether or not you wish to take the witness stand or you wish to present any other evidence in your defense.

Do you understand what I have stated?

MR. BREAZEALE: Yes, ma'am.

THE COURT: Okay. I'll give you -- We'll take a break and I'll give you a few moments to discuss it with

your attorney further. When we come back from the break, we'll go from there.

(Short break.)

THE COURT: Mr. Breazeale, have you made a decision?

MR. BREAZEALE: Yes.

THE COURT: Do you wish to testify?

MR. BREAZEALE: Yes.

THE COURT: I have asked Mr. Breazeale if he had made a decision. He said yes. And I confirmed that he wished to testify and there is no record to settle and there is nothing else that we need to take up before bringing the jury in.

(Whereupon, the jury entered the courtroom at 11:17 a.m.)

THE COURT: Mr. Williams indicated that this would be his only witness. At this time we may hear from the defense. You may call your witness.

MR. WILLIAMS: Your Honor, we call Auston Breazeale to the stand.

Thereupon,

AUSTON BREAZEALE

after having been first duly sworn, testified as follows,

THE CLERK: Please have a seat. After you're seated, please state your full name spelling your last name for the record.

THE WITNESS: Auston Breazeale, B-r-e-a-z-e-a-l-e.

THE COURT: Will you spell your first name please.

THE WITNESS: A-u-s-t-o-n.

DIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Auston, how old are you?

A. I'm 18 years old.

Q. What's your date of birth?

A. [redacted]97.

Q. Where do you live?

A. I live off Longs Pond Road.

Q. And are you in school?

A. No. I went to military school.

Q. Did you get your GED?

A. Yes, sir.

Q. Now, do you work?

A. I do.

Q. Where do you work?

A. I've been working in retail for three years. But I work at the new Wal-Mart down the road. It's like a neighborhood market or whatever.

Q. Did you work somewhere before that?

A. I did. I worked at Publix for like six months and then Wal-Mart. They offered me more money.

Q. What are your plans when this trial is over with?

A. I want to go in the Air Force. I already got several calls from the Marines and I want to do combat control in the Air Force. If I don't do that, I want to go in the Marines.

Q. You indicated that you had your GED. Before you got your GED, what school did you go to?

A. I went to White Knoll High School.

Q. Then what grade did you -- Did you drop out of White Knoll?

A. No. I completed ninth grade and went to home schooling with my mom. She did that for two years and she just got kind of tired of it because she's doing nursing school and stuff so...

Q. So that's why you went ahead and got the other education?

A. Yes, sir.

Q. Now, you have heard some allegations about your cousin. What's your cousin's name?

A. Minor .

Q. How long have you known her?

A. I've known her since she was born.

Q. What would you say your relationship is to your cousin?

A. Uhm, I love Minor . I have never actually met the other one, but every time she would see me, she would yell my

name and give me a hug and I would pick her up and give her a hug. They would come to see me at work, give them hugs and hanging out with her and she would want me to play with her and stuff.

Q. Let me ask you this: You said you don't really know the other one. Who are you referring to?

A. Alynn. I have never actually met her.

Q. How old would Alynn be?

A. I'm guessing a year old now maybe. Not even a year maybe.

Q. But you have a good relationship with her, with Minor ?

A. I did.

Q. Well, there have been some allegations that you have touched her inappropriately or that you have done something sexually to her.

A. Yes, sir.

Q. Have you ever touched her inappropriately?

A. No. I have never touched my little cousin.

Q. How do you feel about people who do that type of thing?

A. I mean, I don't know how to say that because, I mean, I deserve - they deserve what they get but, I mean, I've never really came across anything like that so I don't know. Family has always been, you know, quiet and calm.

Q. Do you have a girlfriend?
A. I do.
Q. What's her name?
A. Her name is Sophie. I have known her for three years.
Q. How old is she?
A. She is 17, almost 18.
Q. This allegation about, and there is no other delicate way to put this, about your having your penis out and it going into Minor 's mouth, did this happen?
A. No. No, sir.
Q. Have you ever had your penis out and given it to her or --
A. No.
Q. You have never messed with her in any way?
A. No. Never.
Q. Do you know of any more ways in which you can tell this jury that this just didn't happen?
A. I mean, it's just people saying I did. I mean, it's a little girl saying I did and, I mean, I don't know what else to say 'cause it's just people saying stuff.
Q. It just didn't happen?
A. No. It didn't happen.
Q. How do you feel about her now?
A. I haven't seen her since, well, like I just seen her

the other day. That was the first time in like a year or so.

Q. Have you ever hugged her?

A. Not since then.

Q. Before a year ago, did you ever hug her?

A. Oh, yeah. Like every time I saw her.

Q. Did you ever tickle her?

A. Yeah. I have tickled her before. I mean, a couple times. She didn't like it so... She always laughed.

Q. What did you tell me yesterday when I asked you if you did this? You said you're not something. What did you say you weren't?

A. I said I wasn't a pedophile because that's the only word I really know how to call that. I don't like little children so I don't know what else to say.

MR. WILLIAMS: Answer any questions the Solicitor may have for you.

THE COURT: Any cross?

MS. ABEE: Thank you, Your Honor.

CROSS EXAMINATION

BY MS. ABEE:

Q. Auston, in 2014 you were 16, right?

A. Yes, ma'am.

Q. Going on 17, right?

A. Yes, ma'am.

Q. And during that time your family would kind of do Sundays dinners at your grandmother's house, right?

A. About every Sunday.

Q. And that's your grandma Linda, right?

A. Yes.

Q. You would be there?

A. My whole family.

Q. And that included Minor as well, right?

A. Yes.

Q. And when you were at these Sunday dinners, people weren't always watching just you, right?

A. They were just -- I mean, they would watch us, but they would let us do our own thing so...

Q. So there were times when people weren't watching you, right?

A. No. There would always be someone there. But I guess you could say that. I mean, the whole family is there so I don't see how that's possible but you could say that.

Q. There are times when you could go off by yourself; is that fair say?

A. Yeah. That's fair.

Q. And there were times when Minor could go off by herself; is that fair to say?

A. Yeah.

Q. And you were in here in the courtroom when Trey

testified, right?

A. Yes.

Q. And Trey is your uncle?

A. My uncle.

Q. And you heard Trey talk about an incident in April or May of 2014 when you were at his house. Do you recall him talking about that?

A. Yes. I do.

Q. Okay. Do you recall that incident?

A. I do.

Q. Okay. And what did you say happened during that incident?

A. Well, I remember uncle Trey had went - we were watching, I think we were watching one of Minor 's shows and, uhm, he went to the bathroom. He closed the door and, uhm, I mean, a few moments went by. She was eating at the time and then I was sitting there on the little chair they had in there and she came down. She'd always - she'd always want to sit in that little chair so I got up and a few moments passed so I went to the bathroom. I went to go to the bathroom. I didn't know she had followed me into the bathroom. It wasn't into the bathroom. I hadn't - I hadn't - I don't shut the door when I use the bathroom. I probably should. But I kind of just let it shut because I use the bathroom pretty quick and she - she barges in on me. I had - I mean, I had - I

mean, I had everything out so I was using the bathroom so I didn't know what to do. I just pulled my pants up and I went in the living room. She just started running after me and a few moments went by. I sat down on the little chair they have. It's like a recliner or whatever. And, uhm, my mom came in and then my uncle came out and then she started saying that she had seen my finger hiney or whatever. And I didn't know what to say. So, I mean, it's just what it was.

Q. Okay. So you said a lot there. I want to make sure we got it straight. So you were over at Trey and Whitney's house, right?

A. Yes, ma'am.

Q. And Minor was there?

A. Yes, ma'am.

Q. And Trey was there?

A. Yes.

Q. And you were there?

A. Yes.

Q. And Trey went to the bathroom, right?

A. Yes, ma'am.

Q. And you were sitting on what you call the little chair, right?

A. Yes. The little chair.

Q. Minor liked sitting on this little chair, didn't she?

A. Yes, ma'am.

Q. Okay. So Minor got done from eating and she went to sit in the little chair, right?

A. Because she wanted to. Yes, ma'am.

Q. And so you got up and went to bathroom, right?

A. Yes.

Q. And you knew Minor was there, right?

A. Yes. She was watching TV.

Q. And you knew Trey was in the bathroom, right?

A. Mm-hmm.

Q. And so you went to I'm assuming another bathroom?

A. Yeah. There's a bathroom -- Her bedroom is down the hall. There's a bathroom right beside that. It's my old house so there's a bathroom, a bedroom and another bedroom and there's a hallway and then the living room and there's another living room, whatever they call it, and I went to use that bathroom because my uncle was in the other one.

Q. Okay. So you went to the other bathroom and you said you didn't shut the door?

A. I just - I just kind of pushed it because, I mean, I do it all the time, like just push it and it kind of shuts, but it doesn't shut all the way.

Q. And according to you Minor then walked in on you using the bathroom, right?

A. Yeah. She did.

Q. And that's how she saw I think you called it a hiney finger, right?

A. Yeah. That's what she called it.

Q. Because she walked in on you peeing?

A. Yes.

Q. And you said your mom came home after that, right?

A. Uhm, yeah. Right after I sat down, she came home.

Q. And there was some sort of conversation between your mom and your uncle Trey, right?

A. Yeah. My uncle came out and they started talking. Well, first Minor yelled she had seen - seen that and then she said that to my mom and then my uncle came out and then my mom was shocked so she didn't know what to say.

Q. Okay. And then your mom and your uncle had some sort of conversation, right?

A. Yes, ma'am.

Q. And at that point in time were you still at school at White Knoll?

A. No. That -- I don't actually -- I think I was, uhm, out of school. I think it was summer. I'm not sure.

Q. Okay. So it was summer?

A. Yes.

Q. But previously were you attending school at White Knoll?

A. No. I was home schooled then.

Q. Okay. So you were home schooled. And as a result of this conversation between your mom and your uncle Trey, did anything change in your life?

A. Say that again. Anything change in my life?

Q. Yeah.

A. What do you mean? Like --

Q. Did you continue to be home schooled?

A. No. After -- I mean, I went to military school in November to February.

Q. So after this, you went to military school?

A. Yes.

Q. And after this did you go to counseling?

A. I did. I actually -- Not after military. Yeah. It was after military school. I went to --

MR. WILLIAMS: Objection, Your Honor. I have a matter of law to take up with the Court outside of the presence of the jury.

THE COURT: Ladies and gentlemen, we have a matter which we need to take up. I would ask that you retire to the jury room and not to engage in any deliberations or discussions at this time.

(Whereupon, the jury entered the jury room at 11:27 a.m.)

THE COURT: Yes, sir.

MR. WILLIAMS: Your Honor, I would move for a

mistrial. The question by the Attorney General as to whether or not he went to military school and then started taking counseling is an indication that perhaps he was guilty of some sort of crime or some sort of sexual misconduct which is inappropriate because obviously he hasn't been convicted of anything and this counseling may be an indication that somehow he's admitted his guilt in some sort of crime. So we think it's an inappropriate question and it would taint the jury in regards to whether or not he can be given a fair trial or not by raising the issue of whether or not he went to counseling.

THE COURT: Mr. Williams, can you repeat that again just to make sure I understand exactly what you're saying?

MR. WILLIAMS: Yes, ma'am. The objection goes to the question from the prosecutor to the defendant. He had already testified that he got his GED by going to military school. Then she asked him and after that, you went ahead and got some counseling; is that correct? And this was in direct relationship to the sexual event which supposedly happened where someone was allowed to see his private parts. Your Honor, our proposition is that by connecting these two things there's an indication that perhaps he may be guilty of some sort of sexual

assault or some sort of sexual misconduct. He hasn't been convicted. If it were a crime of moral turpitude, obviously they could bring something up to indicate his ability to tell the truth or not. But that type of question, Your Honor, is an indication that the jury may not be able to separate the trial in this particular case where he is accused of performing a sexual act versus the fact that he had to go to some sort of counseling which is an indication he had some sort of sexual problem. It's an inappropriate question, Your Honor.

THE COURT: Yes, sir. Response from the State.

MS. ABEE: Yes, Your Honor. During Trey Marsh's testimony he testified that after this incident both he and the defendant's mother talked and set parameters on what would be happening as far as Minor and the defendant's contact with one another as well as other sort of parameters. This is the same line of questioning that I was just asking the defendant about a conversation between his mother and Minor 's mother and as a result of that things changed in his life. He then was in military school at that point in time and then also sought counseling. It's not a conviction, Your Honor. It's counseling. This was appropriate Lyle testimony to bring in this situation and to talk about it and the fact that the defendant sought counseling is just a fact in

the case, Your Honor. That this happened and then he went and had counseling after that as a result of the conversation between his mother and the victim's mother, Your Honor. Although, I mean, I hear what Mr. Williams is saying but it's not suggesting an inappropriate result in this case. It's just flat out a fact in this case that after this first scenario, they tried to limit contact. He went to military school and he sought counseling.

THE COURT: What, if any, additional questions do you intend to ask him about counseling?

MS. ABEE: Nothing, Your Honor. Just that it was part of that conversation between the defendant's mother and the victim's father and that he went to counseling and then I'm moving on. I'm not going into the nature of the counseling, the substance of the counseling, how long it was, nothing like that. Just merely that that was one of the parameters and conditions that was set by the defendant's mother and the victim's father.

THE COURT: Anything further, Mr. Williams?

MR. WILLIAMS: Your Honor, I forward the relationship of counseling in this particular vignette as to a police officer asking a defendant to give his testimony or his statement and the defendant refuses to give his statement. It's the same idea. There is an

implication by merely saying those words that he may be guilty of something. Counseling by necessity indicates that someone has a problem.

THE COURT: I guess my problem with the question is that it implies that, and I don't know the answer to the question one way or the either even implies that any counseling that he sought was voluntary and that doesn't -- I think the way the question has been asked is misleading under the circumstances. It doesn't discuss the context in which whatever agreement was reached between the two adults as to what would occur and so I don't think it's -- I understand, Mr. Williams, your comment and your motion. I'm going to deny the motion because I think it is part and parcel of what was testified to by Mr. Marsh and I think it goes to those particular issues and so it's relevant. I understand how -- I understand what you assert as a characterization of the counseling, but I think the question needs to be phrased differently than the way it is currently phrased.

MR. WILLIAMS: All right.

THE COURT: Any questions about that?

MS. ABEE: No, Your Honor.

THE COURT: So I will deny your motion for a mistrial. You may ask the jury to come back.

MR. WILLIAMS: Thank you, Your Honor.

(Whereupon, the jury entered the courtroom at 11:37 a.m.)

THE COURT: Yes, ma'am. You may continue.

MS. ABEE: Thank you, Your Honor.

BY MS. ABEE:

Q. We were talking about some changes after Minor walked in on you going to the bathroom, right?

A. Yes.

Q. You said you went to military school, right?

A. Yes, ma'am.

Q. When did you start military school?

A. That was in November 10th.

Q. Okay. And what is the name of that school?

A. Wil Lou Gray.

Q. Wil Lou Gray?

A. Mm-hmm.

Q. And I want to talk a little bit now, I know we just kind of talked about November when you started military school. But I want to backtrack some until July of 2014. Do you recall July of 2014?

A. It's a while ago but yes.

Q. Let's talk specifically. I think today you heard Mr. Dwayne Rice testify; is that correct?

A. Oh, yeah. I did. Definitely.

Q. Okay. And during July of 2014 were you spending time at your grandmother Linda's house?

A. Yes. I went over there to help her. She always gets me to cut her grass even though it's not right sometimes but, I mean, to help her out around the house and stuff.

Q. And when you would go over there, Minor would be there sometimes, wouldn't she?

A. Yeah.

Q. And sometimes when you went there or at least one specific time when you went there, Dwayne Rice was there, right?

A. Yes, ma'am.

Q. Okay. And you remember Mr. Rice being there?

A. Oh, yeah.

Q. And do you remember this particular day helping your grandmother cut the grass?

A. I do.

Q. And do you remember your grandmother getting somewhat irritated with the way you were cutting the grass?

A. Yes. I do.

Q. Okay. And so she sent you inside, right?

A. Yes, ma'am.

Q. And you went inside, right?

A. Mm-hmm.

Q. And did you go into the room with Minor ?

A. I did.

Q. Okay. And at this point in time did you know that you weren't supposed to be around Minor ?

A. I did not actually. I was just talking to them about it.

Q. Okay. So you never knew you were never supposed to be around Minor ?

A. Never knew that.

Q. Okay. And so you went into the room with her anyway, right?

A. Yeah.

Q. And you went into the room why?

A. There is a bathroom in the room and I was using the bathroom and she was watching TV and Trey Dwayne was in the other room watching TV. He was watching some show and I couldn't change it because my grandmother told me not to bother him. So I went in the room with Minor to watch her show.

Q. Okay. So you confused me just a little bit there, Auston, because you said that you were going there for the bathroom, right?

A. Yes. I did.

Q. And now you're telling --

A. I went to the bathroom.

Q. Okay. I'm sorry. I didn't mean to cut you off.

What did you say?

A. I said I did go to the bathroom.

Q. Okay. So you went into that bedroom for the bathroom, right?

A. Yes, ma'am.

Q. And there's other bathrooms in the house, aren't there?

A. Yes.

Q. But you didn't go to those bathrooms, did you?

A. I did not because that's the closest one.

Q. Okay. So you just went to the closest bathroom that was there?

A. My grandmother's. Yes.

Q. And then you stayed in the room with Minor , right?

A. I went out - I went to the living room to see what Dwayne -- I mean, I wanted to watch TV in there because it's a bigger TV in the living room. But Dwayne was watching some I think it was an animal show and my grandmother told me not to bother him and I wasn't asked to change the show telling him so I went back in the room with Minor to watch her show with her.

Q. Okay. And y'all just sat there and watched the show together?

A. She's hyper. I mean, she was jumping around the bed

and stuff. I would play with her. We were watching -- I think -- I don't even remember what the show was. I think it was, might have been some puppy show. I don't even remember. It was a cartoon.

Q. So you went into the room and she was hyper jumping on the bed, right?

A. Oh, yeah.

Q. And then Mr. Rice said he saw your hands down her pants.

A. Yes. He did.

Q. Okay. Did you put your hands down her pants?

A. I did not.

Q. You didn't put your hands down here pants at all?

A. Did not.

Q. You didn't tickle her at all?

A. I was playing with her. I was tickling her. She was jumping around the bed. I mean, she would say stop but she would always come back and jump on me so we would play. That was about it.

Q. Okay. So she would jump on the bed, you would tinkle her, she would say stop and then she would come back for more, right?

A. Yes.

Q. And Mr. Rice just didn't see what he saw is what you're telling us?

A. Definitely.

Q. And you know Mr. Rice, don't you?

A. I do not actually. I've met him twice.

Q. Okay. So y'all don't even really know each other, right?

A. Nope.

Q. Y'all don't have any bad blood with one another, right?

A. Oh, yeah. We do. Because, uhm, the first time we met -- I think it was three times we met. The first time was when he came over. He always calls my grandma baby which I never liked. I always told him to stop because I didn't like that. My grandma, I guess, I don't know, I guess she didn't mind it, but I didn't and that was the first time we met. And then the second time was we went out to his place to help him do some stuff, me and my uncle and my grandma was there, me and grandma were there first that day and then me and my uncle came out there to help him and, I mean, Dwayne is just always like, I mean, I don't know how to describe Dwayne. He's different, you know?

Q. So your bad blood is because he calls your grandma baby?

A. I guess you can say that. But, I mean, most of it was because the first time me and my grandma went, we got in kind of an argument. I don't remember what it was about. But

I could tell he didn't like me, I guess. I don't know. But there's definitely some kind of altercation there. I guess, I think he asked me to do something and I didn't do it because I was what, 16 at the time, and I think that's how I guess we started off.

Q. Okay. So Dwayne Rice just doesn't like you, right?

A. I guess so.

Q. And what, Whitney, Whitney just doesn't like you either?

A. No. Whitney, I was always at her house. Help her out. Cut her grass. She didn't mind if I did it wrong, I guess. I don't know. But, uhm, I cut her grass. I mean --

Q. So she doesn't have any ill will toward you, right? That you know of?

A. Not back then. No.

Q. Okay. And how about your grandmother Linda. She doesn't have any bad blood toward you, right?

A. No.

Q. Okay. And Trey. Trey doesn't have any bad blood towards you, right?

A. Not that I know.

Q. In fact, he said he was like a brother towards you, right?

A. Definitely.

Q. Would you agree with that?
A. Yeah. Like a dad.
Q. And Minor . Minor doesn't have any bad blood towards you, right? That you know of?
A. Nope.
Q. In fact, you said that you love Minor , right?
A. I do.
Q. And that y'all would always play together, right?
A. Yes.
Q. That you would always hug, right?
A. Mm-hmm.
Q. That you liked being around each other?
A. Mm-hmm.

MS. ABEE: No further questions, Your Honor.

MR. WILLIAMS: Just one follow up question, Your Honor.

THE COURT: Yes, sir.

REDIRECT EXAMINATION

BY MR. WILLIAMS:

Q. Do you want to change your comment about when I asked you whether or not you put your penis in her mouth or not? Do you want to change that answer?
A. Definitely not. No.
Q. Did you?
A. No. I didn't.

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MR. WILLIAMS: That's all the questions I have, Your Honor.

THE COURT: You may step down.

MR. WILLIAMS: That's the defendant's case, Your Honor.

THE COURT: Ladies and gentlemen, we have some additional legal issues which we need to take up outside of your presence. Given the time, although it's a little early for lunch, instead of keeping you back in the jury room, I'm gonna go ahead and send you to lunch and then we'll come back a little early. Please remember the instructions I have given to you. Even though now that you have heard all of the evidence, you're still not in a position to be able to discuss this matter among yourselves. You have not heard my instructions to you as to the law. So I ask that you not begin any deliberations during this particular time.

Additionally, as you come and go from the courthouse remember not to listen to conversations that you may overhear again for the reasons that you have to make the decisions based upon the evidence that's been presented here in this courtroom and not based upon conversations you overhear. Please remember also not to allow anyone to approach you to discuss this case with you. If someone attempts to do that, please tell them that you

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are a juror and you cannot discuss it, and I ask that you report it as soon as possible.

Ladies and gentlemen, I'm going to ask that you report back about 1:15 to the same jury room. When you report back at that time, then we should be ready at that point for you to hear the closing arguments of the attorneys and then you can begin your deliberations after I have instructed you on the law. I hope you have a good lunch and we'll see you back at 1:15. Thank you.

(Whereupon, the jury was released for lunch recess at 11:45 a.m.)

THE COURT: Are there any motions at this time?

MR. WILLIAMS: Your Honor, in that this is the end of all of the testimony, we would renew the prior motions, and that being in a different standard since all the evidence is in and the evidence as a whole is insufficient as a matter of law for this jury to return a verdict of guilt as to my client as to my client in regards to criminal sexual conduct.

THE COURT: From the State.

MS. ABEE: Your Honor, we just contend that there is sufficient evidence for the jury to consider in determining whether or not the defendant is guilty of criminal sexual conduct with a minor in the first degree. There's been evidence of each element of that crime

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presented to the jury for them to consider and weigh in their deliberations.

THE COURT: At this time I think it's clearly a factual issue for the jury to make a decision. They have heard the testimony that is conflicting and so they will have to weigh that testimony and weigh that evidence and determine credibility of the witnesses and then after determining that credibility, then to weigh the evidence to determine whether or not the State has met that burden. So I will deny the motion at this particular time because it is a factual issue. Are there any other motions?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: Let me tell you what I will charge the jury and then if there is anything I need to add or change or correct, you can let me know.

First of all, I'll tell them that they have to determine the facts based upon the evidence. I will tell them about the credibility of the witnesses. They have to determine that credibility. I will also tell them about expert witness.

I will also talk to them about testimony of children. That they have heard the testimony from a

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child. Where a witness is a child you must determine as with any witness whether that testimony is believable. In deciding the believability you may consider not only the matters that I have already discussed with you but you may also consider the age of the child, the child's ability to observe and remember facts, the child's ability to understand and answer questions. Because young children may not fully understand what is happening, it's up to you to decide whether the child understood the seriousness of appearing as a witness in this trial, whether the child understood the questions, whether the child has a good memory and whether she child understands the difference between lying and telling the truth. In addition, young children may be influenced by what questions are asked and it's up to you to decide whether the child understood the questions asked.

I will also charge them on circumstantial evidence. There are two types of evidence which are generally presented during a trial. Direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence as well as direct evidence. The law makes no distinction between

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the weight or value to be given to direct or circumstantial evidence. To the extent that the State relies upon circumstantial evidence, all the circumstances must be consistent with each other and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, then the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt and that burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence or a combination of the two.

I'll charge them the fact that the defendant was arrested, charged and indicted is not evidence. Simply the charging document. It does not create any presumption or inference of guilt. It's simply the document which allows us to come into court for trial.

I will charge them on the presumption of innocence. I will charge them on the Victor versus Nebraska reasonable doubt which is the government has the burden of proving each and every element of the crime charged beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were only told that it was necessary to prove that a fact is more likely true

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than not true. In criminal cases the government's proof is more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in the world that we know with absolute certainty. In criminal cases the law does not require proof that overcomes every possible doubt.

If based upon your considerations of the evidence you are firmly convinced that the defendant is guilty of the crime charged, then you must find him guilty. If on the other hand you think that there is a real possibility that he is not guilty, then you must give him the benefit of the doubt and find him not guilty.

The State has charged the defendant with criminal sexual conduct with a minor first degree. The State must prove beyond a reasonable doubt that the defendant engaged in a sexual battery with the victim. Sexual battery is defined as sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion however slight of any part of a person's body or of any object into the genital or anal opening of another person's body except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes.

The state must prove beyond a reasonable doubt that

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the victim was less than 11 years old at the time of the sexual battery. Consent, willingness, indifference or ignorance on the part of the minor, if any, as to what was taking place does not in any way affect the charge of criminal sexual conduct with a minor because a woman under the age of 14 cannot legally consent to sexual intercourse.

I will charge them two possible verdicts in this case. One verdict is guilty. The other verdict is not guilty. There is no significance to the order in which I state them. I have to state one first and I have to state one second. I will tell them that their verdict has to be unanimous.

And I don't have anything further at this particular time. Is there anything else that I need to add or change or correct?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: Would you all also take a look at the indictment and make sure that everything that's on the front of the indictment, that's contained in the indictment is correct and if there is nothing prejudicial because the indictment will be sent back with the verdict form. Is there anything else?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: If there is nothing further, then we can take a lunch break.

DEPUTY: Excuse me, Your Honor. Are you going to allow him to remain on bond?

THE COURT: Yes, sir. I am. He still remains innocent until the jury returns a verdict of guilt and so he will still continue to be on bond. Again, Mr. Breazeale, you must report back to this courtroom by 1:15. If you are not in this courtroom by 1:15, then the trial will continue in your absence and a bench warrant will be issued for your arrest.

MR. BREAZEALE: Yes, ma'am.

THE COURT: Is there anything further?

MR. WILLIAMS: Thank you, Your Honor.

MS. ABEE: No, Your Honor.

THE COURT: We'll see you back at 1:15.

(Lunch recess.)

BAILIFF: All rise.

THE COURT: Thank you. Be seated please. Is there anything we need to take up before we bring the jury in?

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

MR. WILLIAMS: Nothing from the defendant, Your

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Honor.

THE COURT: Ask the jury to come in please.

(Whereupon, the jury entered the courtroom at 1:20 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. At this time we are now ready to hear the closing arguments of the attorneys. As I sold you at the beginning of the trial, their closing arguments are not evidence but what they will do is they will pick out portions of the evidence that you have heard and make arguments to you to try to try to sway you to find the facts in accordance with their view of what occurred. So I ask that you to listen very carefully to those closing arguments. Sometimes they may cause you to think about the evidence in a different light or they may raise questions that you will want to talk about among yourselves when it's time for you all to begin your deliberations.

Once they have made their closing arguments, then I will instruct you on the law that is to be applied and then you may begin your deliberations at that particular point. Ms. Abee.

MS. ABEE: Your Honor, I'm going to defer to Mr. Williams closing first.

THE COURT: All right. Mr. Williams.

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MR. WILLIAMS: May it please the Court.

THE COURT: Yes.

MR. WILLIAMS: Mr. Foreman, ladies and gentlemen of the jury, I kindly want to thank you for your attention today. I didn't know what I was going to say to you. Normally when you have a trial, there is a procedure in a trial and normally the State goes first. The defense goes second, and the State gets their return at reply when it comes to putting up witnesses and if the defense puts up any witnesses or any evidence whatsoever, then the order of the argument changes and you probably saw a little of that going on right there. If the defendant had not taken the stand and testified, then what would happen would be that they would be required to go first and then we would go last. So as a defense lawyer I like going last because you get to hear what the other guy is going to say and you get the last word and stuff like that.

But then sometimes, sometimes it's necessary to have your client testify. To have your client tell you his version of the story and what his testimony should be. The Judge has already told you at the beginning of this trial that there is no proof that a defendant has to prove meaning the burden of proof is always on the State and because of that I guess that makes sense with what I

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just said. That's why a lot of times you will see a defense lawyer not put up a defendant. It doesn't mean he's guilty or not guilty, but a lot of times you won't put him up there because he has no burden of proof and he still doesn't have a burden of proof when he testifies.

There are some cases where the defendant wants to testify because clearly in some types of cases it's somebody's word and then there is somebody else's word and you're left with a haggling or you're left with the determination of figuring out what the truth is. So that's what we are here to do today.

These types of cases are always hard. I told you at the beginning that there is an emotional content with these types of cases where you immediately jump to a conclusion or you have an emotional trigger. I'm glad we talked about triggers today because that's exactly what a lot of things that happen in arguments are. They are triggers. Things will be said by attorneys that would hope to trigger a response, would trigger you to believe a certain way or believe another way. And you know what I'm talking about clearly. Certain things make you think about something else. They get your mind set in a certain way. Certain types of alleged crimes will get you thinking in a certain way because if a crime is so bad, then you feel like, well, there's got to be a remedy

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to this. There's got to be a vindication of this. There's got to be a solving of this crime or this bad thing which has happened. But that's not the type of feeling that a 12 plus one alternate jury should have because your job is to find out if there is sufficient evidence to find the defendant guilty and what the truth is in the case. You're not here to punish anyone. You're not here to reward anyone. It's hard to pull yourselves from your everyday beliefs and to realize that that's what your job is.

I think a lot of people don't realize how tough it is to be on a jury. If you really do your job, and I think all of you are sworn and will do it, then you really have to fight with yourself sometimes. You have to sit outside yourself sometimes to balance things up. And for that reason I thank you for being here. A lot of you have different jobs. You have different experiences in your life. Many of you have sons. Many of you have daughters. We are all parental units to a certain extent but you still have to base your decisions on your common sense, what you gained as to what you believe to be the truth and whether or not that evidence is there. It's the best system we have because nobody, I say nobody, very seldom do you have a charge or a crime that is actually committed where there are actually jurors

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present who can observe it. So you're having to base your decision based on third hand, second hand, what have you, knowledge.

Now, the charge that we have today is obviously criminal sexual conduct with a minor first degree. The Judge at the conclusion of this argument will give you an instruction as to what that means because you're only trying that charge. That's it. You're not trying criminal sexual conduct of any other degree. You're not trying any other charge besides that charge so that's what you have to focus on. And the Judge will give you the instructions of what that charge entails and essentially it involves a sexual battery. If the victim is under the age of 11 and there is a sexual battery and if they prove that case beyond a reasonable doubt, then it's your job as a juror to find the defendant guilty.

So what's a sexual battery? Because that is defined in the statute. A sexual battery as alleged in the indictment is fellatio. That's the battery. That is the only sexual battery which is alleged in the indictment.

So we have narrowed things down to a certain extent. So now we know that the State has to prove beyond a reasonable doubt that the defendant and the defendant alone committed a sexual battery of this young lady.

Now, an indictment. I feel like I should talk about

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an indictment. I'm sure the Judge will talk to you about an indictment. An indictment is a piece of paper just like -- Well, it's like a traffic ticket. It's kind of like a traffic ticket. If you get a traffic ticket, that's a piece of paper that brings you to traffic court and it says what you did wrong. If there is a warrant, it's an allegation about that you did something wrong and may bring you to magistrate's court or General Sessions or what have you. An indictment is simply those allegations repeated again which bring you to court so that your case can be tried by 12 jurors. It doesn't mean it's true. It just means that those are the allegations that are involved.

Now, when you get to the standard of beyond a reasonable doubt because I mentioned that we would have to talk about beyond a reasonable doubt, it's not a car wreck. You don't sit around and you say, well, we have got six witnesses on one side, one witness on the other. It's not about - really it's not about the number of witnesses or what the witnesses say. It's whether or not the testimony that you deem to be, testimony or evidence that you see convinces you to such a degree that you feel that the person is guilty. That you are firmly convinced that the person is guilty. And if there is a real possibility that the person is not guilty, it is your job

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to find the person not guilty. And you have this standard obviously because of the types of charges that you are dealing with because this is something which is different from, I don't know, negligence. It's different from civil cases because of the impact that it has. So you're expected to apply that standard.

Now, when you determine what you believe or don't believe, I mean, this is kind of silly because I don't know if we really break it down to when we make these decisions in our mind but you connect the witnesses. You see how they testify. You see whether or not they are consistent. You see whether or not the witnesses forget to tell you something. Whether or not they appear to be forthcoming. Whether or not they appear to - there are gaps in their testimony. All of these great number of things that you use to make a determination as to whether or not you believe to be the truth of the case. It's that simple. Doesn't it sound simple? It's not. It's not simple. And when you make these determinations, again you have to weigh it and you have got to be sure.

Now, having talked about what the standards are and burden of proof, some of the things that you consider is not only the evidence as presented but the lack of evidence that is presented. What should the State have provided to you that would indicate the guilt or the

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innocence, if you will, of the person charged? And I hope that there is one thing that you were paying attention to from yesterday as well as today that you're missing in this case. And I'm sure you're thinking in your minds what was it? What piece of evidence was not discussed that there was talk about? There was talk about something that was done, but that evidence wasn't brought before you for you to determine the truth of it, the lack of truth of it, how it impacts this case.

Do you remember? There was a forensic examination which was done. There was another examination done. You make your decision based on all of the evidence that pertains to the matter. You have a right to expect to know all of the facts that apply to this case. You know, I have done this a long time. Wouldn't do anything else. Yet when you get older, when you get -- And I'm older. I'm 65. I don't know if I look older or not, but I learn how important I wish I knew then what I knew now. Kind of a good name for a song, isn't it? But the more you practice law in this area you learn how important it is to have all the facts, to know everything, to make those decisions carefully. I wish I could impart that to you some other way other than just use the words, but it is. It's important.

And then there's sometimes -- I don't know how to

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convey this to you either. You would think after 40 years I would know how to convey everything to everybody. My wife tells me I don't convey a lot of things to her. But I don't know how you convey the idea that when someone is accused of doing something and his defense is I didn't do it, that's all he can say. It's a negative. You know? How do you prove a negative?

You know, I wanted to be able to put this young 18 year old boy on the stand and have him just go through all kind of testimony about this and that and this and that and this and that. All he can say is I didn't do it. You want me to find some more witnesses? I don't have anymore witnesses. Indeed, the only two people who have any comment at all about whether it happened or didn't happen is the young girl and him. All this other stuff, all this other stuff is just people talking about stuff. And I hope we learned a long time ago that you can't always trust that to be a hundred percent true.

You know, I think a good example of this, I'm not trying to be mean, but the witness who testified who was like the social worker who was like the, had his Master's in social work, and he started talking. He had never interviewed the defendant. Doesn't know anything about the defendant and never interviewed the alleged victim. Knows nothing about the alleged victim. So he proceeds

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to give you an instruction that you would get if you were in college in a psychology or sociology class about trigger points. About, well, sometimes you would see evidence of nightmares if you were concerned about testimony and sometimes you would see lack of evidence about nightmares because you were testifying. I don't want to characterize what that is, but if you have ever taken a psychology course, I think you kind of get the idea. I don't know what that means. Does it prove anything? He's just telling you about, well, and then sometimes if you tell the story straightforward at the first time, then more than likely it's not true and you have to be suspect of that. But then if you change it, then maybe that's a better idea that you are telling the truth. Maybe if you have physical hot and cold or you have palpitations, that's an indication. What does it mean?

You know, you will get an instruction from the Judge about what an expert witness is. An expert is some witness who by their profession, by their education has earned the right to tell you about things that occur meaning differences between trigger points, differences between delayed disclosure, between partial disclosure, between full disclosure. But does that tell you anything about this case? Was there anything that he said that

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tells you about this case?

You see, this is one of the things which I always worry about. You know, well, yeah, this is an expert witness. He testified and gave you this information so there must be something there. Again, you have to listen to what they say. You have to evaluate what they say. You have to determine whether or not it's credible and you have to determine whether or not it proves to you beyond a reasonable doubt the guilt of the person charged.

I made some notes only because I'm old and stupid and I wanted to make a list of at least some of the things that occurred in the testimony. And again, obviously the video was important to you because it was recorded. It was recorded. And there was some question about things you use to determine whether or not the person, I guess, understood the terms, whether or not there were repeated questions, stuff like that. I would like to point out some things in the video, the foliage deal. I mean, clearly the child didn't know what foliage was. You know, I thought it was kind of cute to begin with because when I thought of foliage, then I thought maybe the child was talking about foldage. And maybe the child didn't not understand it. Maybe she misheard it.

And see, that tells you something. That tells you

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that we all look at something and kind of pick out what we want from it whether or not it applies to the case or not. There was one time where she yelled for her mother for a question or an answer. And the one thing which comes through is a thin small layer that comes through this entire case because, you know, I'm on that search for the truth. I'm looking for it. I don't have that obligation but I'm trying to figure it out because I want to figure out why some people say things and some person says it didn't happen. I want to figure those things out. The child said that her sister was five years old and that Auston was 50 years old. I don't know. Is that just something which she misspoke? Is that something she didn't understand?

Children do not know everything that adults do because they're children and they make mistakes and there will be an instruction about children and when you make your determination in listening to a child you consider the fact that they are children. I mean, they're children. But you still have to evaluate their testimony.

One of the more interesting things was we were talking about grooming. Do you remember the grooming deal? And the doctor was talking about how you're real nice to them and you get them because it's the old candy

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bar deal, I guess. You know, you're gonna be real nice to them and get what you want. The child in the video says my daddy scares me and makes me cry (indicating.) Kind of funny. Kind of funny because she was being funny about it. She wasn't being ugly. I don't think she meant that in any way. Well, she said the same thing about Auston. Auston scares me (indicating.) You know, if you take that out of context, do you say that Auston has scared her? No. It's a child talking about being scared.

She also said, remember we're dealing with this allegation of fellatio, she said that he tore his clothes off and she made this expression (indicating.) And I say that to you because I want you to remember that. And then the question was, the question from the interviewer was, "did he say anything?" Choke. Go back and listen to it yourself.

Then she said, then she says, "it choked me." Did she understand what the question was? Is she describing what she felt? Is she repeating a word that she's heard.

You know, you never know how far to go with a jury. Let me tell you what I mean by that. You risk, you risk offending a jury by asking certain questions because of the types of cases that we try and I guess I have been doing this so long it's kind of analytical. It's kind of

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like a doctor. You know, when he treats you, he doesn't think about these things. I wanted to know the answer at the risk of offending everybody in this courtroom as to whether or not why didn't someone ask the question as to the status, if I can say that delicately, of this thing which she was referring to. That's as nice as I can be about that. Because I think that makes a difference. Why not ask that question? I know it's offensive to ask a jury that. But, you know, you're being asked to decide an offensive case where a lot depends on it.

She also said that Auston never touched her. I don't know what that means. Then she described this item as being something where peepee and poops out of it. She's a child. Did you -- Didn't smell anything. Didn't taste anything. And it all occurred in Ms. Terry's old room. There's a reason why Ms. Terry's old room is important. Because once Linda Marsh took the stand we learned that there were actually two Ms. Terrys. We learned that the grandmother had her bedroom and that the Terrys had a different room. What did she say when she was on the stand as to where it had occurred? Do you remember? Did she say it occurred in Ms. Terry's room? Or did she say it occurred in grandmother's room?

You know, here's the other thing, too. I can make a mistake. Your collective minds determine the facts in

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this case. That's strange isn't it? You get to remember what you want to remember. And when the Judge told you not to make notes, that's really a good idea because if somebody else is writing down something, you see them and you go back in the jury room and you say, well, I wrote down such and such. And you say, well, I didn't remember it that way. That's good because that means that y'all get to make a determination as to what actually occurred. But you think about that.

All right. First witness up. Detective Kemfort. In essence he was the arresting officer who did everything. Did the forensic interview. And then I asked him about that doctor's report. Remember that coming out? And he said it was in June of 2015 and then the Attorney General's Office quickly corrected it as being April 2015. That doctor's report. That physical examination. That information which would have told you what occurred. He was there during the forensic exam. Then mama comes up and she testifies that she had been having trouble with her child and she said that she felt that with the new child that she didn't want her to be left out, wanted the child to feel like she was not missing attention. The child had some nightmares. Some low self esteem.

You know, you just try to weigh this stuff up. That

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child didn't look like she had low self esteem in the forensic interview. That child didn't look like she had -- Opinions. Everybody's got one. Did the child look like she had low self esteem when she was here in the courtroom? She's cute as a button. I mean, we might as well own up to it. She's cute as a button. That's not what we are making a determination on. Anyway.

She said that she had these problems but she had been doing well in school. Heritage Christian Academy. She's like in her third year of kindergarten. She's doing fine. Dad testifies -- It always amazes me when you listen to the testimony of two witnesses how consistent they are. Dad testifies that she was bed wetting. She had nightmares. She was scared. She had confidence issues. So I asked a logical question. I have got children. Well, did you take her to a doctor? Well, yeah. To a family doctor. Well, who was that? I don't know. Did he give you a prescription? No.

If your child was having nightmare, was having issues, would you do something about it? And who was the doctor that she saw after the forensic interview? One of the questions I asked the police officer, I asked him about whether or not they talked to the teachers. Whether or not he had done notes. They got the notes from the school. Because, you know, children are

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different with other people than they are around their parental units. They react with other children. And teachers keep all kind of records about how children are doing in school. How they get along with others. But we all get this idea that they were not supposed to be left alone because of some episode that happened when Mr. Marsh came in and he went to the bathroom and he had some pizza and my client was there and my client's mother came there and something sexual in nature happened.

Did you hear the child on the stand say anything about that? No. He was asked about it. In his long lengthy testimony he was asked about it by the Attorney General's Office. He said, yeah. I went to the bathroom, closed the door behind me or let the door close behind me. The next thing I know she comes popping in behind me and I'm going to the bathroom. You know, you're not guilty of this crime because some child walks in on you when you're going to the bathroom. They didn't think anything about it. About, well, maybe, you know, that shouldn't happen again. But because of that they're not supposed to be left alone. Where is there any evidence that anybody interpreted that to be something happened? The father didn't think anything happened. He said he was confused about the whole thing. They spent time at grandma's house. You heard my client say he

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didn't know that that was an issue. But they want to bring something out because mama quit home schooling him and he went to go ahead and get his GED so that he could leave home and start his life in the Air Force or in the Marines. Got a job working at Wal-Mart going about his life and then these charges arise and he can't go forward until after these charges are resolved.

Minor , when she took the stand, it's almost too small to talk about, but she was kind of nervous, I guess. She couldn't remember her last name for a minute. Didn't know her birthday. She was asked an important question though about who lives at her house. She left off the fact that her sister lives in the house. You know, I'm one of those guys that always looks for the thing that seems to slide right through the whole time. One thing I did note, she changed her names about what she was referring to. She changed the word butt to booty. She changed the name from squeezer outer to peepee outer. Somebody had to be talking to her about all these things for her to be changing the names for what she's calling these pieces, particles, parts of the body.

She brought up something else which is really, really interesting which nobody, I mean, just passed right on. She said it happened and L.H. and C.H.

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were there. Well, who the heck is L.H. and C.H. ? Does anybody know the answer to that question? They were there. She brought them up. Said it happened in grandma's room, not Terry's room, and that was the only time she had ever seen his peepee outer. Well, now, that didn't make any sense because remember supposedly she saw his peepee outer when he was going to the bathroom. I asked her, I said, are you happy? She said, yeah. I'm happy.

April Sykes. She was the interviewer. Essentially she ran the interview. That's basically her testimony was that. Then you got to look at the video. Dwayne Rice, the smoking gun. He is the independent witness to some sort of sexual thing that occurred. You know, I believe sometimes when you try a case, which is why I love this, that things happen in the middle of a case that you just don't have any idea is going to happen. As a lawyer you have no idea they are going to happen. Mr. Rice is up there testifying and we learn, he was a little hesitant about when the dates were, we understood he had some sort of surgery, and he was testifying that he saw my client with his hand in an inappropriate position on this young girl. And he looked down at my client. Well, who he couldn't see him. It's only happened to me the second time in 40 years that I have had that on the

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stand.

I said you can't see? And I said, how far away was she? Well, she was about that far. So you take a guy with a hernia who is taking narcotic drugs, who can't see, who months later goes to the police and tells them some story that he saw something. That's your eyewitness testimony.

Then you had Linda Marsh who testified. She is the one who gave you where all the bedrooms were. The only thing really that she brought to the, I guess, to the picture is that she didn't think anything had occurred really and now she is all upset. And who wouldn't be? I mean, if something had happened to your grandchild or if you were having to testify against another grandchild, who wouldn't be upset? You feel, everybody feels responsible for everything that happens. I mean, you do. My wife says and turns it around on me a different way. If I start saying I feel bad. Maybe I should have done that. She says, Theo, it's not all about you. I don't know what that means. But maybe we take it for what it is. Maybe it doesn't mean that anything really happens but she's just really upset that she's having to go through this. That her grandchildren are going through this. She's had 41 years with SLED. You can't tell me that someone who spent 41 years with the law enforcement

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division doesn't have deductive reasoning. You can't convince me. We could spend all day here and you couldn't convince me that somebody with SLED wouldn't be able to deduce something had happened. Then she says in May of 2016, that there was some sort of allegation. May of 2016 there is some sort of sexual allegation that was brought forward to her.

I don't know how many times this child was talked to. I don't know what was said to this child. I know there are inconsistencies. I know that you 12 jurors are asked to make a decision based on facts. Your decision is the most important decision that will occur in this courtroom today, I promise you that. I am sorry you're having to do this. I shouldn't say that. I'm not sorry. I think we've got good jurors. We couldn't have picked better jurors.

Please do not be swept away by some sort of emotional ties that you can't evaluate evidence. You must be convinced beyond a reasonable doubt of the guilt of the person charged and if there is a real likelihood the person didn't do it, if there is evidence which is missing, if there are things which do not convince you beyond a reasonable doubt, it's your job as a jury to find him not guilty because you can't change that once you leave. You can't call me up tomorrow and say, God,

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I've changed my mind, Theo. I do thank you.

THE COURT: Thank you. Ms. Abee.

MS. ABEE: Thank you, Your Honor. May it please the Court.

THE COURT: Yes.

MS. ABEE: The innocent nature of a child is something that's precious. It's something that can't be learned. It's something that can't be taught. And Minor is a great example of that innocence. She knows how to wear a dress like a princess. She knows how to shoot a bb gun with her daddy. But Minor knows a lot more than normal six year olds. Because of the defendant Minor knows what a penis in her mouth feels like at age six and I know that is not easy to hear and it has not been easy to listen to these last two days, but it's the facts in this case. And what will be both simple and easy is finding the defendant guilty of this crime.

Now, Judge Lee at the end of this is going to instruct you on the law and ask you to return a verdict of guilty or not guilty. And we are asking that you find Auston Breazeale guilty of the crime of criminal sexual conduct with a minor in the first degree. Mr. Williams told you about the crime. About how there's really two main things we have to prove to you. One, that there is

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a sexual battery between the defendant and Minor . And sexual battery is defined as any sort of penetration no matter how slight or how little or how long it lasted and this includes what we call oral sex. And then secondly, we have to prove to you that this sexual battery occurred when Minor was under the age of 11. That was our burden throughout this case.

In order to meet that burden we called several witnesses to the stand but most importantly you got to meet Minor . Minor is six years old and she was six when she got up there on that stand. She was a little nervous but you could still tell she was full of personality. She told you how she likes school. She likes reading. Sometimes she has trouble with puzzles putting them together.

But she told you about a lot more. She told you about things that she shouldn't even know about. She told you about her cousin Auston. How she likes Auston. She liked playing with him. They played together. They did things together. But how that Auston did something and now she's not allowed to be around him anymore. And she told you about that and the defense just said when she got up here it's so small, it's not even worth mentioning, but she got up here and she told you what happened. She told you that it was at grandma's house.

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She was in a room with Auston and that he put his peepee outer, that's her word for penis, in her mouth and it made her choke. You heard her say that on the stand. You heard her say it when she was just four in that forensic interview with April Sykes.

Now, you also heard from David Kellin and David Kellin is who we refer to as a blind expert in this case. He doesn't know anything about it. He hasn't met Minor . Hasn't met Whitney or Trey or anyone else in the family. He hasn't read any reports, watched any of the videos. He knows nothing about this case. But what he told us is that Minor shares common characteristics with children who have been sexually abused. And I want to talk through some of those. He told us about delayed disclosure and how children don't always immediately disclose after a sexual assault and that a factor that plays into this is when the perpetrator is a family member like the defendant. And he told us about grooming and how grooming is this incremental increase in behavior. It's like when you go to jump into a pool. Some people jump right in. Some people take a step on the first step and they wait and then they take another step down and another step down into the water. That's the concept of grooming and that is exactly what the defendant did here in this case. Started small, waited

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for a reaction.

You heard it from the defendant himself about his penis being exposed to Minor . How she just walked in on him in the bathroom and saw it. But regardless, it was bad enough for both Trey and the defendant's own mother to decide that Minor and Auston shouldn't be around each other anymore. But besides that there was no real reaction. No real trouble. So then the defendant took the next step into the pool and this is where Dwayne Rice comes into the picture. And he told you that he saw the defendant's hand down Minor 's pants. No real reaction. No real trouble. And then that's what lead to what we are here for today, that oral penetration that Minor told you about.

Each time throughout the year that Minor was four years old the defendant continued to escalate his behavior again and again. And now you might be sitting here wondering why Minor wasn't crying when she was up on that stand or why she wasn't upset or how she could even talk about this with the defendant in the room if she was sexually assaulted. But David Kellin explained that to you. He explained to you that kids Minor 's age, they don't get it, right? They don't understand the sexualized nature behind what it is that the defendant did. She doesn't understand just how bad that act was.

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Kind of like playing on a playground, right? When little kids get knocked down by their friends, they cry, they tell the teacher but then they go back to playing. That's what Minor did. She got knocked down. She told. Now she is ready to play again because she doesn't understand the sexualized nature behind what the defendant did to her.

And I want to talk about her disclosure, her telling because this disclosure came completely unprompted. Whitney told you that it was a Saturday morning. They were watching cartoons. She was getting ready to go to the zoo to have a daddy/daughter day with her dad. That's when Minor told her.

Now, the defense, when they were cross examining Mr. Kellin, they brought up a lot of things. They said, well, if it's a full disclosure, that would concern you, wouldn't it? Mr. Kellin said yes. And they wanted to paint this as a full disclosure by Minor but it wasn't. Whitney told you that Minor didn't tell her when it happened or where it happened. Trey told you that Minor didn't tell him when it happened or where it happened. Bare bones. Basic facts. That's all that Minor was sharing at that point in time. And look at the words that she used. She doesn't use the word penis. She doesn't use the word oral sex. She doesn't use the

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word fellatio because she is not being coached. She is using child friendly words. And did her name for penis change? Yeah. In the video it's squeezer outer and in here it's peepee outer. But those are very much her words and very much what she calls those areas. That's not someone else coaching her as to what happened.

And she also knows how it feels. This isn't something that you coach on. She knows how it feels not because she was told how it feels or told that it happened to her. She knows it because she lived it. Because she experienced it.

The forensic interview that you saw wasn't Minor coming in and immediately disclosing. The video, it takes 17 and a half minutes before Minor even mentions Auston's name. 17 and a half minutes before she brings him up. This isn't a child that was coached or was told to come in and immediately talk about Auston. In the forensic interview April Sykes asks several times, do you know why you are here today? She doesn't say yes. I know exactly why I'm here today. Because of Auston. She doesn't say that because she's not being coached. She only remembers what was happening to her at that specific point in time and when she was comfortable enough with April Sykes, she talked about it.

Now, Mr. Williams is correct in that they don't have

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any burden of proof in this case. That burden rests here with us. They could have sat back at that table and kicked up their heals and not said a single word throughout the course of this trial because that burden rests with us. But when they do decide to say things to you, to present evidence, you get to ask yourself if it makes sense. So think about it. Does it make sense that Minor would lie about this? Does it make sense that she would live this lie for two years of her life? A lie that keeps her away from someone she presumably loves? Someone she remembers having fun with? Would she continue living that lie? And why? Because she had a new baby sister? I mean, is that the reason why Minor is making all of this up and going through all of this because she has a new baby sister and wanted attention?

Trey and Whitney told you that they continued to pay attention to Minor when Alynn was born. That they didn't want to disrupt her life. That they continued having one on one time with her. In fact, that's what they were doing that day was having a one on one time with Minor and that's when she disclosed was that morning. And what, do you to think that this, this is the type of attention that she wants? Sitting here in front of a room full of strangers talking about private parts. Being asked big questions by the defense. Asking

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her if she knows what the word Solicitor means or the word prosecutor means? Yeah, she's six. She didn't know that. A lot of people don't. A lot of adults don't know that. Is this the type of attention that this six year old wants, is this? Sitting up here and constantly being asked question after question after question in front of strangers?

And, yeah, you know what? She doesn't remember everything. She's six. And she got up here and she said I don't remember everything when she was being asked those questions. And when Mr. Williams asked her, are you generally happy? She said yes. He said, well, you don't look happy. She said I'm nervous. She's nervous and she doesn't remember everything. So she wasn't able to tell you everything and some of her statements were inconsistent. She talked about in the video being in Ms. Terry's bedroom. And then when she was here she said I was in grandma's bedroom. And I found it very interesting that Mr. Williams didn't finish that sentence where she said I was in grandma's bedroom, at least I think. Because that's what she said.

She doesn't remember everything. And if she did, that would be a cause for concern. That would be one of those causes for concerns that Mr. Kellin talked about. When a child comes in and discloses the exact same thing

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every single time in the same way, same manner, same method, that's when you're concerned. That's when you're looking for coaching. That's not what Minor did. Sometimes it changes. It's always at grandma's house, but one time it was in Terry's room and then the next time she said it was in grandma's room maybe. Probably she thinks.

And she talked about C.H. and L.H., people that Linda Marsh told you are also her step grandchildren. So it changes. But it doesn't change because she is making it up. It changes because she's six. That's normal.

And she did describe some things that didn't make sense, right? She said Alynn was five. She told you now that she's a little bit older that Alynn is one. Whitney and Trey told us that Alynn is about one and a half. She said that Auston is 50 something, right? And he's clearly not 50 something. But she was four at that time. Four year olds aren't good with ages. They are not good with times. What Mr. Kellin told you was that they are good with the who. They are good with the what. They are not good with the why. They are not good with the when.

And the who and the what have been consistent this entire time from Minor. Who is the defendant. And

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what is his him putting his penis in her mouth. And these are things that no four year old should know. No six year old should know. But she knows it because she's felt it. She knows it because she's experienced it.

And there is no DNA in this case. There are no maps that come down from the sky. This isn't CSI. This isn't Law and Order. Mr. Williams talked about the medical report. A medical report that happened months after the forensic interview. The forensic interview happened in February. The medical report happened in April so several months have passed and what was the disclosure? The disclosure was oral penetration. So what could a medical report even show from that? Yeah. This is DNA, or there is no DNA. There's no eyewitnesses. But we don't get to pick our witnesses. We don't get to pick our eyewitnesses. We don't get to pick the location. We don't get to pick the act. Auston did that. Auston picked that for us. He picked that for us when he isolated that child in a bedroom by herself and sexually assaulted her. So no, we don't have that.

But even with him getting to pick the who, the what, the when, the where, the how and the why, he still messed up one time because of Dwayne Rice. Still messed up. And Dwayne Rice walked in and saw him with his hand down the front of Minor 's pants.

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Let's talk about Mr. Rice. This is a Marine. He's known Linda Marsh for about 26 years of his life. He was there recovering from surgery. This is someone without a dog in this fight, right? He's not for Whitney and Trey. He's not against Auston. He's here to tell you what he saw. Came up here today to court with his walker and testified about what he saw. And the defense wants to draw a line about some inaccuracies in his testimony. That he's somehow wrong because from sitting up on that stand looking through this light with his bifocals all the way to the defendant he can't quite see him, right? That is supposed to be what completely discredits Mr. Rice. Mr. Rice told you he was from there to about here pointing at this podium. That is a big difference in space. And he's very certain about what he saw. He told you no matter what pain pills he was on, no matter what was happening, he absolutely saw his hands down Minor 's pants. He was sure of that.

The defense wanted to refer to him as our smoking gun and, folks, where there is smoke, there is fire. He knows exactly what he saw. And if not, why would he even make this up? The defendant got up there and told you that, yeah, there's some bad blood between me and Mr. Rice. He called my grandma baby and I didn't like that. Or I cut his yard one time and he didn't like the way

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that I did that. That's the bad blood? That is what is taking Mr. Rice and getting him all the way up on the stand and make up this lie against the defendant is because he doesn't like the way his yard was cut? This guy has no dog in this fight, y'all. He has no reason to sit up there and make up these allegations against the defendant. And especially not because he cut his yard wrong one time.

You know, it might be easier to just want to believe that Minor is confused. Might be easier to just want to think that she made this up. But in this place and in this courtroom we are not concerned with what is easy. We are concerned with the facts and we are concerned with the truth no matter how hard of a pill that is to swallow. They want you to just think that Minor is confused. And you know what? She probably is. She is confused as to why she can't play with someone that she used to have fun with. She is confused as to why someone she loves and someone she used to have so much fun with would do something like that to her.

So yes. She might be confused, but she's been crystal clear on two things this entire time. One, lying is bad. That's what she said when she got up on the stand. And two, Auston put his penis in her mouth. She's been crystal clear on that the entire time and they

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want you to think -- I don't know. I'm assuming this is what Mr. Williams was hinting at was that Minor 's own parents didn't believe her. If they did, why wouldn't they take her to the doctor more often. Linda Marsh has 41 years of experience with SLED. Why wouldn't she have sniffed this out, right? When Linda Marsh is at home, she's not agent Marsh. She's grandma Linda, right? Who wants to sit there and think that their own grandchild would do this to their other grandchild?

And Trey and Whitney told you that they tried to keep Minor 's life as normal as possible, right? They tried to make sure that nothing changed. That she didn't feel like she did something bad for coming forward and disclosing. That they tried to keep her life normal and steady. That's not them not believing her. That's them being good parents. And even so, even with them trying to keep everything normal and Linda telling you how terrible she felt by allowing Minor to be around Auston, Minor has still ended up being another statistic because of the defendant. She's part of that 85 percent of sexual assaults that occur by someone inside of the home as Mr. Kellin told you.

The defense is just telling you that there is not enough evidence, right? But I want you to listen as Judge Lee instructs you on the law because what you will

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not hear her say is that there has to be DNA evidence. What you will not hear her say is that there has to be medical evidence or forensics. And what you will not hear her say is that there has to be eyewitnesses. But what you will hear her say is that you, you are the sole determiners of the credibility of each witness and the facts in this case. You decide what to believe and what not to believe. You decide whether or not you think Minor is telling the truth. You should believe her. You should believe her because there is no way a four year old should know what she knew at that point in time. There is no way a four year old should be able to describe what she described in that video and sit here as a six year old in front of you and describe it in front of you now.

Even though the majority of this case rests on Minor , her testimony doesn't stand alone. You heard about this escalating pattern of behavior that the defendant had just taking another inch into the water again and again and again. You heard what Dwayne Rice saw with his own two eyes. And you heard from David Kellin. And you heard how Minor 's disclosure and things that happened to her since then share so many characteristics with other children that are sexually abused. So either Minor is this master manipulator and

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fantastic liar and great guesser at child abuse dynamics at the age of four, or all of this happened because it happened to her. That's why these things share common characteristics. This isn't just a coincidence.

Yes. This case rests on Minor 's word. But do not let the defense tell you that that child's word is not good enough. That child's word told you exactly what happened in this case.

Our burden is that beyond a reasonable doubt and a reasonable doubt is not some imaginary doubt or some fantasy you can come up with in your head. It is not a doubt that just allows the defendant to escape penalty of law for what he did. It is based on reason. It is based on common sense. If you can stand with your two feet firmly planted on the ground and say that you believe that Auston Breazeale put his penis in that child's mouth when she was four, you should find him guilty. The law demands it.

And the defense tried to throw up a lot of reasonable doubt and that was nothing but the Wizard of Oz effect. You know at the end of the Wizard of Oz when they go and they finally meet the great and powerful Oz and Toto runs back and he pulls back the curtain and he exposes the man that's Oz and there's fire and there's smoke and there's loud crashes and the loud bangs and he

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says pay no attention to the man behind the curtain, right? That's what they did. They got up here and threw out loud flashes and banging and smoke and they said pay no attention to a six year old that got up there on the stand and told you what happened to her.

This case has been proven beyond a reasonable doubt and just because the facts in this case are emotional doesn't mean that they are not still facts. Minor 's testimony is facts. There is no way that she should know what she knew but she does because of him. Through the defendant's smoke and mirrors when he got up on the stand trying to explain away everything that happened, he and I did agree on one thing. He said that people that do this type of thing should get what they deserve. Give him what he deserves. Find him guilty.

THE COURT: During this trial, ladies and gentlemen, you and I have certain duties to perform. As the trial Judge it's my responsibility to preside over the trial of this case and to rule upon or pass upon the admissibility of evidence that's been presented throughout the course of this trial. And you are to accept only the competent evidence which is before you. To any evidence to which there was an objection sustained you must not speculate as to what the evidence might have been or the reasons for the objection. Again, you should consider only the

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evidence along with any stipulations, if any, that have been made by counsel.

Now, I have the additional duty and responsibility to instruct you on the law that applies in this case. As the trial Judge I'm the sole judge of the law that applies. If you have any preconceived ideas as to what the law is or your interpretation of the law or what you want the law to be, you must set all of that aside for under your oath as jurors you are sworn to accept the law as I instruct you. If by chance there is some error in my instructions, there's another court at another time that can correct those errors of law. But for purposes of this trial right now this moment you must accept the law as I instruct you as being the correct statement of the law.

Now, in every case tried before a jury you the jurors become the sole exclusive judges of the facts of this case. No one can tell you what the facts of this case are. And if I have done anything throughout the course of this trial that's given you any impression that I'm commenting on the facts or telling you what facts to find, I ask that you set that aside as well. I assure you I don't have any opinion about the facts of this case. That's not my job here. It's not my role. That's your duty, your responsibility as jurors to determine the

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facts of this case.

Now, in order to do that you have to analyze and evaluate the evidence and determine what evidence convinces you of its truth. In order to do that you have to judge the credibility or believability of the witnesses who have testified and in judging the credibility or believability of the witnesses you may consider the following factors. What was the manner and appearance of the witness who testified. Was he or she hesitant or straightforward in answering the questions. Was the witness consistent or inconsistent. How did the witness come to know the facts that he or she testified to. What was his or her ability to know these facts. And was the testimony of a witness strengthened or weakened by other testimony or other evidence.

Now, during this trial, ladies and gentlemen, you have heard the testimony from a child. Where a witness is a child you must determine as with any witness whether that testimony is believable. In deciding believability you should consider not only the matters that I have discussed with you but you may also consider the age of the child, the child's ability to observe and remember facts, the child's ability to understand and answer questions. Because young children may not fully understand what is happening here, it's up to you to

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decide whether the child understood the seriousness of appearing as a witness in the criminal trial and whether the child understood the questions. Whether the child had a good memory. And whether the child understands the difference between lying and telling the truth.

In addition, ladies and gentlemen, young children may be influenced by the way that the questions are asked and so it's up to you to determine whether the child understood the questions that were asked.

Additionally, ladies and gentlemen, under our rules of evidence they ordinarily do not allow witnesses to testify as to opinions or conclusions. An exception exists for those that we call expert witnesses. Those are witnesses who because of their education or training profess to be an expert in some art or science and they can give the opinion in the area in which they profess to be an expert. You should consider any expert opinion that was offered in this case and give it the weight that you think that it deserves. If you feel that an expert's opinion was not based upon sufficient education or training or whether the reasons given to support the opinion were not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion in its entirety. An expert's opinion is entitled to no greater weight than that of any other witness simply

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because that person professes to be an expert and you are not required to accept an expert's opinion even though it may be uncontradicted.

These factors, ladies and gentlemen, you should consider and you should not exercise arbitrarily. If you feel that in your good reason and judgment there's reason for you to consider these factors, then you should do so. Your objective, ladies and gentlemen, is to seek the truth.

In determining the credibility of the witnesses you may believe one witness against several witnesses or you may believe several witnesses against one witness. You may believe a portion of a witness' testimony and disregard other portions of that same witness' testimony. As I stated, you may exercise these factors and in your good judgment determine what you consider to be truthful evidence. Your objective, ladies and gentlemen, is to seek the truth whether it comes from a witness or witnesses for the State or a witness or witnesses for the defendant. You do not determine the truthfulness of the testimony by counting the number of witnesses who have testified for one side or the other. The truth isn't determined by counting witnesses. What the law simply requires is that when you exercise your mental processes in coming up with what you consider to be truthful

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evidence, you should use your good common sense. Your sense of logic and reasoning. Use your experiences in life. You then apply these attributes to the evidence and determine what you the jury consider to be truthful evidence as determined by you and then you will apply the law as I will instruct you and when you have done that, then you will be able to arrive at your verdict.

Ladies and gentlemen, your verdict should not be based upon sympathy, passion or prejudice. By your verdict you have no friends to reward and you have no enemies to punish. Your verdict should simply speak the truth.

Now, in the course of a trial, ladies and gentlemen, there are two types of evidence that are generally presented. One is direct evidence and one is circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances that indicate the existence of a fact. Crimes can be proven by circumstantial evidence. The law makes no distinction between the weight to be given to direct evidence or circumstantial evidence. To the extent that the State relies upon circumstantial evidence all of the circumstances must be consistent with each other and when taken together those circumstances must

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point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, then the proof has failed. The State has the burden of proving that the defendant is guilty beyond a reasonable doubt and that burden rests with the State regardless of whether the State relies upon direct evidence, circumstantial evidence or some combination of the two. Now, conjecture, speculation, suspicion or possibilities do not constitute circumstantial evidence.

Ladies and gentlemen, I instruct you now as I have previously done the fact that the defendant was arrested, charged and indicted is not evidence in this case and cannot be considered by you as evidence of guilt in this case nor does it create any presumption or inference of guilt. The fact that there was an indictment that was presented is simply the charging document by which we are able to come into court and have a trial on this particular case. And again, to this indictment the defendant has pleaded not guilty and that plea casts the burden upon the State to prove that the defendant is guilty because a person who is charged with committing a criminal offense in South Carolina is never required to prove that they are innocent.

Now, ladies and gentlemen, I charge you that it is a

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very important cardinal - important rule of law that the defendant in a criminal trial no matter how serious the charge against him may be is always and will always be presumed innocent of the crime for which he's indicted until his guilt has been proven by evidence that satisfies you of that guilt beyond a reasonable doubt.

Now, the presumption of innocence is not just - it doesn't cease when you go into the jury room. It remains with the defendant from the time that he appears in court throughout the trial until you reach a verdict of guilt that is based upon evidence that convinces you of that guilt beyond a reasonable doubt.

Now, our Supreme Court has stated that the presumption of innocence is like a robe of righteousness that is placed about the shoulders of the defendant and that robe of righteousness casts him in that class which is the innocent until that robe is stripped from him by evidence that convinces you of his guilt beyond a reasonable doubt.

Again, ladies and gentlemen, I can't emphasize enough that the presumption of innocence is not some nice legal theory. It's not just some lofty idea but it is an extremely important and cardinal rule of law which our constitution is based upon which every individual is entitled and that is that he or she is innocent of that

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charge until his or her guilt is proven beyond a reasonable doubt.

So what is reasonable doubt? The government has the burden of proving each and every element of the offense that's charged beyond a reasonable doubt and some of you may have been jurors in civil cases in which you were told that it was only necessary to prove that a fact was more likely true than not true. Well, in criminal cases the government's burden is more powerful than that. It's proof beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

Now, there are very few things that we know in this world with absolute certainty and the law does not require in criminal cases proof that overcomes every possible doubt. But if, based upon your consideration of all of the evidence in this case, you are firmly convinced that the defendant is guilty of the crime of which he has been charged, then you must find him guilty. But if on the other hand you think that there is a real possibility that he is not guilty, then you must give him the benefit of that doubt and find him not guilty.

In this particular case, ladies and gentlemen, the defendant has been charged with first degree criminal sexual conduct with a minor. The State must prove beyond

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a reasonable doubt that the defendant engaged in a sexual battery with the victim. Sexual battery is defined as sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion however slight of any part of a person's body or of any object into the genital or anal openings of another person's body except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes.

The State must also prove beyond a reasonable doubt that the victim was less than 11 years old at the time of the sexual battery. Consent, willingness, indifference or ignorance on the part of the minor, if any, as to what was taking place does not in any way affect the charge of criminal sexual conduct with a minor because an unmarried female under the age of 14 cannot legally consent to sexual intercourse.

Now, ladies and gentlemen, when you have considered all of the evidence in this case and you have determined the facts and you have applied the law as I have instructed you, then you will be able to arrive at your verdict and at that time your foreperson will complete the verdict form. This is the front of the indictment. There is a place here, Mr. Foreman, that says "verdict." There are two possible verdicts in this case. Guilty or not guilty. There is no significance to the way I say

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them. I have to say one first. I have to say one second. If after considering all of the evidence, if you determine your verdict, then, Mr. Foreman, you would simply write on the line here whatever your verdict is. There is a space here that says foreperson of the petit jury. That would mean that you would need to sign your name right above that. And then there is a space for the date and you would write in today's date.

Ladies and gentlemen, your verdict must be unanimous. That is it must be the verdict of all 12 of you. You have been sworn as fair and impartial jurors in the trial of this case to determine the facts of this case and to apply the law as I have instructed you and when you have done that, then you will arrive at your verdict and you will have fully discharged your duty and your responsibility as jurors in this matter.

Ladies and gentlemen, again, your verdict should not be based upon sympathy, passion or prejudice. Your verdict should simply speak the truth.

Now, at this time, ladies and gentlemen, I'm going to ask that you retire to your jury room. Before you do that, I need to do a couple of additional instructions.

Mr. Young, as the alternate your role has also been extremely important. If one of your fellow jurors had been unable to complete service, then you would have

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stepped into that person's shoes. I ask that when they go into the jury room, if you would just wait outside of the jury room. Do not go in with them and I'll come and excuse you in just a few moments.

Additionally, ladies and gentlemen, when you retire to the jury room, the law requires that I consult with the attorneys to see if I have omitted anything from my charge. If I have not omitted anything from my charge, then at that particular time any exhibits that are part of the record will be brought to you as well as the indictment in this matter. Mr. Foreman, if during the course of your deliberations there are any questions that arise, if you will write the question on a sheet of paper, sign your name, knock on the door and give it to the bailiff and we'll try to answer it. I can tell you that I do not have a written charge that I can give to you to take with you into the jury room. If you need to rehear portions of my instructions to you, just let me know what portions. I will be happy to bring you back and reinstruct you on those parts that you may need clarification on.

So at this time, ladies and gentlemen, I'm going to ask that you retire to the jury room and await further instructions. Thank you.

(Whereupon, the jury entered the jury room at 2:37

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p.m.)

THE COURT: Are there any exceptions to the charge by the State?

MS. ABEE: No, Your Honor.

THE COURT: By the defense?

MR. WILLIAMS: None by the defendant, Your Honor.

THE COURT: If you will come and take another look at the indictment. I know you looked at it once, just to make sure, and I think the only exhibit is the State's exhibit number 1, the CD. We can send it back to them but they will need to come back out if they need to watch it.

MS. ABEE: I'll go ahead and set up the computer just in case they come back and want to have it heard.

THE COURT: And you have got the exhibit?

MS. ABEE: Right here.

MR. WILLIAMS: Right here, Your Honor.

THE COURT: We'll go ahead and instruct the jury to begin deliberations.

(Whereupon, the jury began deliberations at 2:39 p.m.)

THE COURT: Mr. Breazeale, the fact that the trial is now concluded and the jury is beginning its deliberations, I'm going to ask that you not leave the courthouse. Certainly you can go to the restroom. I

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would prefer that you stay in the courtroom. You can certainly go to the restroom. Please let one of the sheriff's deputies or one of the court personnel if you need to leave the courtroom for some reason. Otherwise, I'll expect you to remain here. We'll stand in recess until we hear from the jury further. If by chance you need to leave the courtroom for some reason, please make sure that my law clerk has a number where you can be reached. For 403s I will not sign them until a verdict is returned so you if you need to leave before, you also need to provide a telephone number where you can be reached. With that we'll stand in recess until we hear from them further.

(Short break.)

(Verdict at 3:35 p.m.)

BAILIFF: All rise. Court is now in session.

THE COURT: Be seated please. I understand that the jury has reached a verdict. Is there anything that we need to take up before we bring them back in?

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

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: And I will remind you that when the verdict is read, that there should be no outbursts. If you think that you may not be able to handle what the

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verdict is, I ask that you excuse yourself from the courtroom. No sighs. No screams. No gasps. Are we clear? Ask the jury to come in.

(Whereupon, the jury entered the courtroom at 3:36 p.m.)

THE COURT: Mr. Foreman, I understand that you have reached a verdict; is that correct?

MR. FOREMAN: We have and it's unanimous.

THE COURT: Please pass it to the bailiff.

MR. FOREMAN: (Complies.)

THE COURT: Thank you. Madam Clerk, please publish the verdict.

THE CLERK: Indictment number 2015-GS-32-6031. State versus Auston Lee Breazeale, indicted for criminal sexual conduct with a minor in the first degree. Verdict is guilty. So signed by the foreperson August 23rd, 2016. Ladies and gentlemen of the jury, if this is your verdict please indicate each of you by raising your right hand. All hands raised, Your Honor.

THE COURT: Do the parties wish to poll the jurors further?

MS. ABEE: Not from the State, Your Honor.

MR. WILLIAMS: The defendant does, Your Honor.

THE COURT: Ladies and gentlemen, the clerk will call your name or number. She will ask you two

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questions. The questions are was this your verdict? And is it still your verdict? And I ask that you answer according to your conscious.

THE CLERK: Please hold your hand up when I call your number so I can recognize you, okay?

Number 108. As to the verdict, was this your verdict? Is it still your verdict?

DOMINIC JONES: Yes.

THE CLERK: 188. As to the verdict, was this your verdict? Is it still your verdict?

BRENT SIRES: Yes.

THE CLERK: 22. As to the verdict, was this your verdict? Is it still your verdict?

TIMOTHY BREEN: Yes, ma'am.

THE CLERK: 58. As to the verdict, was this your verdict? Is it still your verdict?

JEREMY FALLAW: Yes, ma'am.

THE CLERK: 67. As to verdict, was this your verdict? Is it still your verdict?

PAMELA GANTT: Yes.

THE CLERK: 121. As to the verdict, was this your verdict? Is it still your verdict?

CATHERINE MAPLES: Yes.

THE CLERK: 95. As to the verdict, was this your verdict? Is it still your verdict?

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RICKEY HIERS: Yes.

THE CLERK: 96. As to the verdict, was this your verdict? Is it still your verdict?

JEFFREY HOFFMAN: Yes.

THE CLERK: 21. As to the verdict, was this your verdict? Is it still your verdict?

DAWSON BRANTLEY: Yes, ma'am.

THE CLERK: Number 16. As to the verdict, was this your verdict? Is it still your verdict?

ZACHARY BARNES: Yes.

THE CLERK: 203. As to the verdict, was this your verdict? Is it still your verdict?

HIRAM TEXIDOR GUZMAN: Yes.

THE CLERK: 159. As to the verdict, was this your verdict? Is it still your verdict?

CHRISTINE PRICE: Yes.

THE CLERK: All jurors polled, Your Honor.

THE COURT: Thank you. Ladies and gentlemen, the Court is not concerned with the verdict so much as I'm concerned with the process by which you reach a verdict. You listened to the evidence as it was presented throughout the course of this particular trial. You also listened to my charge and instructions to you as to the law. You determined the facts in accordance with your view of what that evidence showed and you applied the law

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as I instructed you and you were able to arrive at your verdict and having done so then no one can complain about the verdict that you have reached and you fully discharged your duty and your responsibility as jurors in this matter. On behalf of Lexington County and the State, I would like to thank you for your service.

I am pleased to report to you that your service has concluded for the week so you do not need to call back after 6:00 p.m. You do not need to come back tomorrow. If you will simply put your buttons in the bucket and there are return to work forms for you to take to your employers if you need them and if you will just step outside. I will tell you that the attorneys may want to talk to you about your verdict. You are free to discuss it with them or not. If you decide that you do not wish to discuss it with them, tell them that you don't want to discuss it with them and they shouldn't bother you any further. But again, I would like to thank you again for your service here in Lexington County for this week. Thank you.

(Whereupon, the jury was released from further jury duty at 3:40 p.m.)

THE COURT: Are there any post trial motions at this time?

MR. WILLIAMS: Yes, Your Honor. On behalf of the

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defendant we would move to set aside the jury's verdict and grant the defendant a new trial in that the evidence as a whole should have been insufficient as a matter of law for this jury to return a verdict of guilty.

THE COURT: After hearing the evidence in this matter, I think that there was sufficient evidence to go to the jury as I indicated earlier. I believe that there was a factual question to be determined and the jury considered that evidence and made the decision according to their view of what the evidence showed and how they weighed the evidence and so I'll respectfully deny your request at this time.

MR. WILLIAMS: Your Honor, I have a sentencing sheet which is has been handed to me by the Attorney General's Office. Does the Court require the defendant to sign the sentencing sheet?

THE COURT: Yes. There is a place on there that says that it was after a trial and so...

MR. WILLIAMS: May I approach, Your Honor?

THE COURT: Yes, sir.

MR. WILLIAMS: (Proffering.)

THE COURT: Thank you. Does the State wish to be heard in reference to the sentencing?

MS. ABEE: Your Honor, from the State you have heard the allegations in this case. You have heard the

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egregious nature of the allegations and the facts that Mr. Breazeale was just convicted of. The minor was four years old, Your Honor, at the time of the allegations or at the time of these acts and she even testified today at six. We spoke with the parents. Neither of them would like to address you at this point in time. Neither of the parents of the victim would like to address you at this time, Your Honor. We just ask that you take into consideration the egregious acts committed by the defendant as well as the age of the minor victim at that time as well her age right now when sentencing him. He does have no prior record, Your Honor.

THE COURT: Mr. Williams.

MR. WILLIAMS: Your Honor, I assume you wish myself to get behind the podium here and the defendant?

THE COURT: You can indeed.

MR. WILLIAMS: Your Honor, because of his age obviously he doesn't have many life experiences. He's 18 now. He was 16 at the time of these alleged violations. You have heard that he was going to high school and then he was home schooled and he went to Wil Lou Gray and got his GED and over the last few months he has actually been working with Wal-Mart. Obviously he doesn't agree with the sentence of the jury but we can't contest what the jury comes back and makes its decision on. He has no

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prior arrests or convictions for anything. I would ask the Court to be as lenient as possible. I certainly understand what the minimum sanctions are in this particular case. He does also. You know, it's really - there's nothing good you can really say about this case, Your Honor, for either the victim or the defendant. It's a terrible situation for everyone. We would request the Court to be as lenient as possible in this case.

THE COURT: Mr. Breazeale, do you understand that the sentence is a mandatory minimum of 25 years up to life. Do you understand that?

MR. BREAZEALE: Yes, Your Honor.

THE COURT: And do you also understand that as a result of the conviction that you will be required to register on the sex offender registry and I believe also through the federal registry, I believe, which may require GPS monitoring. I cannot tell you that one hundred percent. But I can tell you that you will be required to register as a sex offender and that there may be some other implications and Mr. Williams can explain those to you. I will also tell you that understand the statute I'm required to designate and indicate as part of the verdict whether the conduct that constituted the sexual battery involved sexual or anal intercourse by a person or intrusion by an object and obviously the basis

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that's contained in the indictment and what was argued to the jury was that it involved oral intrusion by your penis into the mouth of the victim and so that would be in the finding and the designation for this particular case. Is there anything that you wish to say? You don't have to say anything if you don't wish to.

MR. BREAZEALE: (Shaking head.)

THE COURT: Okay. I understand the State's request. I also understand the age of Mr. Breazeale and the age when the acts occurred. I always hold out hope that a person can be rehabilitated and can receive counseling. I think 18 is an awful young age to have to end up in prison for a lengthy period of time and with a mandatory 25 year sentence I don't see a reason to go beyond the mandatory minimum. So, Mr. Breazeale, I'll sentence you to the Department of Corrections for a period of 25 years. That is a sentence in which there is no parol. You will be eligible for release after service of 85 percent of that sentence. Whether or not you are actually released at that particular time would be contingent upon what occurs while you are incarcerated within the Department of Corrections.

Additionally, upon your release you will be required to attend a supervision program, community supervision in which you would be required to live in the community with

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certain requirements placed upon you for a period of two years before you would be eligible to be released from any further incarceration period. However, your sex offender registry would be for life unless there is some other particular statutes that would control that condition. And so you will be required to -- Failure to register is a separate criminal offense for which you could receive additional jail time. Do you understand.

MR. BREAZEALE: (Nodding head.)

THE COURT: Good luck to you, sir.

MR. WILLIAMS: Thank you, Your Honor.

MS. ABEE: Thank you, Your Honor.

WHEREUPON, THE TRIAL WAS CONCLUDED.

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CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of General Sessions in and for the State of South Carolina on the 22nd and 23rd day of August, 2016.

I FURTHER CERTIFY that the forgoing 279 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 16th day of November, 2016.

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

SCANNED AUG-22-2018

FORM 5 ORIGINAL JC

STATE OF SOUTH CAROLINA)
)
County of Lexington)
)
Auston Lee Breazeal, #369454)
Full name and prison number (if any) of Applicant)
)
v.)
)
)
State of South Carolina)
State Of South Carolina)
Its Department and Agents,)
Alan Wilson, Attorney)
General For South Carolina)

IN THE COURT OF COMMON PLEAS

2018CP3202888

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution, 4460 Broad River Rd. Columbia, SC 29210

2. Name and location of Court which imposed sentence Lexington County Courthouse,

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed: Lower Court Case # 2015GS3206031

(a) 2015-GS-32-6030, and 2015-GS-32-6031

(b) Criminal Sexual Conduct with a minor in the first Degree

FILED
2018 AUG 21 PM 2:22
JEANNETTE A. COMER
CLERK OF COURT
LEXINGTON SC

SCANNED AUG-22-2018

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) August 23rd, 2016

(b) Twenty Five Years

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty Yes

(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. The South Carolina Court Of Appeals, Post Office

ii. Box 11629 Columbia, SOuth Carolina 29211

iii. _____

(b) the result in each such Court to which you appealed:

i. Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. May 2, 2018

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results: None

i. Anders Brief of Appellant, which counsel filed on

ii. Behalf of defendant

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) My Counsel did appeal from the conviction

(b) _____

SCANNED AUG-22-2018

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: Due Process Clause Violation, Third Party Violation

(a) Ineffective Assistance Of Counsel, Subject Matter

(b) Jursidiction, Directed Verdicted, Mistrial Violation,

(c) Prior Bad Acts, Expert Witness Violation, Out of Violation Coaching Victim Violation, Hearsay Violation

11. State concisely and in the same order the facts which support each of the grounds set out in (10): Forensic Interviewer Qualification, False Testimony

(a) SEE ATTACHMENT - 1. through 48

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Only this Post-conviction application

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? None

(d) any other petitions, motions or applications in this or any other Court? _____

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. None

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. None

ii. _____

iii. _____

iv. _____

SCANNED AUG-22-2018

(c) the disposition thereof:

i. None

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. None

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None

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?

None

_____

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. None

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. None

ii. _____

iii. _____

SCANNED AUG-22-2018

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) _____

(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?

None

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. Mr. Robert Theodore Williams, Sr. Esquire, 200 East Main Street, Lexington, South Carolina 29072

ii. Laura Ruth Baer, Esquire, Appeals Division Of Appellat Defense, Columbia, South Carolina 29211-1589

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial: Robert Theodore Willaims, Sr. Esquire
Appeal: Ms. Laura Ruth Baer, Esquire

ii. _____

iii. _____

SCANNED AUG-22-2018

19. State clearly the relief you seek in filing this application:

that my sentence is unfair as I have a clean record and I am only 20 years old, I seek that my charges be dropped or atleast decreased to a lower sentence or to be vacated to time served

20. Are you now under sentence from any other court that you have not challenged?

no

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Lexington)

I, Arion Breazeal, 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.

Arion Breazeal

SWORN to and subscribed before me this 26th day of July, 2018.

Salina G Butler (L.S.)
Notary Public

My Commission Expires: March 29, 2028

Revised 3/2003

SCANNED AUG-22-2018

ORIGINAL JC 2018CP3202888

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Austin Brevard, 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.

Austin Brevard
Applicant

SWORN or affirmed to and subscribed before me this 20th day of July, 2018.

Sabrina D Butler
Notary Public

My Commission Expires: March 29, 2028

FILED
2018 AUG 21 PM 2:27
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

Revised 3/2003

SCANNED AUG-22-2018

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STATE OF SOUTH CAROLINA)
) ORIGINAL JC
COUNTY OF Lexington) IN THE COURT OF COMMON PLEAS
Auston Lee Breazeale)
SCDC # 369454) CIVIL ACTION COVERSHEET
Plaintiff(s))
)
vs.) -CP- 2018CP3202888
State of South Carolina)
Defendant(s))

FILED
2018 AUG 21 PM 2:26
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

(Please Print) Auston Breazeale SC Bar #:
Submitted By: Telephone #:
Address: 4460 Broad River Rd Fax #:
MAR 275 (Marion Unit)
Columbia, SC 29210 Other:
E-mail:

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

DOCKETING INFORMATION (*Check all that apply*)

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

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

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-CP-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☑ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Other (799)

Administrative Law/Relief
- ☐ Reinstate Driver's License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Administrative Law Judge (980)
- ☐ Public Service Commission (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Sexual Predator (510)

Submitting Party Signature: Auston Breazeale Date: 6/27/18

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2018CP3202888

Mr. Auston Lee Breazeal, # 369454
Broad River Correctional Institution
Marion Unit B - 275
4460 Broad River Rd.
Columbia, SC 29210

JC

ORIGINAL

Date: 6/23/18

Lexington County Clerk Of Court
Ms. Lisa M. Comer,
205 East Main St. Suite, 128
Lexington, South Carolina 20072-3456

Dear Ms. Comer:

Enclosed please find for filing and processing with your office. One copy of post-conviction relief application and attachments. Please file the original once filing is complete please return the clocked stamped copy to me with file date thereof, Your assistance in this matter will be greatly appreciated.

Sincerely,

s/ Auston Breazeal,
Auston L. Breazeal, # 369454

FILED
2018 AUG 21 PM 2:26
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

SCANNED AUG-22-2018

INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant have suffered a miscarriage of Justice and his conviction only stands due to denial of due process and equal protection in the State court, in multiple and gross violation of the United States supreme court precedents and United States constitution, that contitutes an outrage of mockery of Justice that the Federal courts sworn to uphold the United States constitution should not tolerate.

The defendant was unconstitutionally deprived of a full and fair trial, and denied due process of Law, by the acts and omissions of counsel, that deprived the defendant of effective assistance of counsel in violation of the fourteenth and sixth Amendment of the United States constitution; and article 1, § 3 & 14 of the South Carolina constitution.

The counsel's ineffectiveness caused the defendant to be prejudiced by such shoddy defense. Curtis v. State, 407 S.E. 2d 643 (1991); also Daniel v. State, 317 S.E. 2d 746 (1984). Applicant asserts trial counsel's representation fell below an objective standard of reasonableness, and had it not been for trial counsel's error the applicant would not have suffered prejudice and thereis a reasonable probability the result would have been different. Martinez v. State, Supra, and Strickland, Supra.

The primary question is whether counsel's performance fell below an objective standard of reasonableness, and the performance prejudiced defendant to the extent that "there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 2068, 80 L.Ed. 2d 674, 698 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.

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Whether trial counsel's performance was deficient for failing to secure and call an expert witness to contradict the state's theory of the case?

Counsel's failure to secure and call a forensic social worker, Mr. Mahlow David Kellin,

Counsel's failure to secure and call a forensic such as Mr. Mahlow David Kellin, social worker in child abuse cases. And also Ms. April Sykes, a forensic interviewer on the behalf of SLED she work with one of the local advocacy Center. She also take addition classes to required Law enforcement training that she receive every year to still stay certified as a Police officer. At defendant's trial also amounted to constitutionally deficient performance, as it "clearly shows that [counsel] inadequately prepared for trial, Lounds, 380 S.C. at 462, 670 S.C. at 650; see also McKnight v. State, 378 S.C. 33, 43, 661 S.E. 2d 354, 359 (2008) (holding counsel ineffective for failing to call an expert witness testimony supported the defense).

"Cherry v. State, 300 S.C. 115, 117-18, 386 S.E. 2d 624, 625 (1989). Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigate. "Ard v. Catoe, 372 S.C. 318,642 S.E. 2d 590 (2007) (quoting Thompson v. Wainwright, 787 F. 2d 1447, 1450 (11th Cir. 1986)).

"[W]hile the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. "State v. Lounds, 380 S.C. 454 460, 670 S.C. 646, 649 (2008) (quoting Ard, 372 at 331-32, 642 S.E. 2d at 597)); see also Sneed v. Smith, 670 F. 2d 1348, 1353 (1982) "to meet this standard, an attorney must at a minimum, conduct appropriate investigation both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.) (quoting Coles v. Peyton, 389 F. 2d 224, 226 (1968)).

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In the present case, expert testimony could clearly have supported the defense by refuting the state's expert testimony regarding whether the forensic social worker and the forensic interviewer from SLED, whether the Laboratory reports, photographs, DVD of forensic interview video, diagrams of the scene, the statement from the Lexington County Sheriff's office, and the transcript from defendant's trial, the defense expert could unequivacally stated that it is absolutely impossible that defendant could have abuse the victim.

State has an obligation to ensure that on indigent defendant has a fair opportunity to present his defense, this includes the assistance of an investigator. To obtain the appointment of either an expert or an investigator, the defendant must file a motion contuining specific facts showing a particular need for their services. In United States v. Patterson, the court held that an expert should be appointed to assist the defendant when the government's case rests heavily on the theory present by its own experts. In United States v. Durant, a case in which videotapes evidence was pivotal, the court held that an expert should have been appointed to educate defense counsel as to the technicalities of the videotapes admitted so that his cross-examination cuold be more effective.

Where a state obtains a criminal conviction a trial in which the accused is deprived of the effective assistance of counsel, the State unconstitutionally deprives the defendant of his Liberty Cayler, 446 U.S. at 343, 100 S.Ct. at 1175. The right to the effective assistance of counsel is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial. United States v. Cronio, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046 (1984).

Trial counsel admitted he did not consult with an expert prior to trial even though he knew the State would attempt to admit evidence of a physical trauma. Trial counsel recalled he failed to meet withan expert witness because there was a question about money, but he also stated he could not recall whether he discussed this issue with Breazeal at all.

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The United States Supreme Court has recently recognized that defense counsel must conduct a reasonable investigation to discover all reasonable available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2537, 156 L.E. 2d 471 (2003) (citation omitted). Particatarized prejudice inquiry unnecessary. Frett v. State, 298 S.C. 54, 56, 378 S.E. 2d 249, 251 (1988).

If the attorney make a serious mistake which could effect the verdict, reversal is required even if the attorney was general competent. Tromly v. Anderson, 439 F. Supp. 1250, 1256 (1977). Aff'd 584 F. 2d 807 (6th cir. 1978); Hyman v. Aiken, 924 F. 2d 1405 (4th cir. 1987).

Defendant further, contends that the state's evidence when viewed in the light most favorable to the prosecution, was so insufficient that no rational trier of fact could have found the essential elements beyond a reasbnable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2181, 61 L.Ed. 2d 560 (1991).

There are time when prejudice is presumed when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing there has been a denial of sixth Amendment rights that makes the adversary process itself presumptively unreliable and prejudice may be presumed. Cronic v. U.S., 446 U.S. 648, 104, S.Ct. 2039, 80 L.Ed. 2d 657 (1984); (Nance v. Ozmint, 367 S.C. 547, 626 S.E. 2d 878 (2006).

The prosecutor's duty in a criminal prosecution is to seek justice. Althought the prosecutor should prosecute with ernestness and vigor, "he or she may not use "improper methods calculated to produce a wrongful conviction "1742 Generally, the use of such methods is grounds for mistrial or reversal of a conviction if it results in an unfair trial violating the Due Process clause. If the prosecutorial misconduct is intended to cause a mistrial, the double jeopardy clause may bar further prosecution.

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Defendant case is one of clear and plain manifest injustices not only of his trial but also thereafter to a gross degree. Dfendant"s trial was extremely unfair or served any degree of justice. As chief Justice.

The court cannot any longer turn a blind eye to the injustices that defendant has suffered due to gross incompetence, inability or plan out uncaring of the attorneys who represented defendant at trial and since. The court must ensure that the issues involved in this case are fully aired or admit that there is no justice for the under privileges in South Carolina.

Did defendant receive effective assistance of counsel in accordance with the sixth Amendment when his trial counsel contacted no exculpatory witnesses and did not do anything to refute the expert testimony proposed against him so overall ineffectiveness requiring a new trial.

Defendant Contends his trial counsel failed to investigate both factual and legal matter to determine if defense canbe developed. It is a definitive objective description of the competency normally demanded of counsel in certainaspects of their service. And with this discretion the courts should admonish that if the right to counsel guaranteed by the constitution in to serve its purpose, defendant can not be left to the mercies of incompetent counsel. Judges should strive to maintain proper standards of performance by attorney who representing defendant's in criminal cases in their courts. McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 25 L.Ed. 2d 736 (1970) Marzullo v. State, of M.D. 561 F. R. 2d S. 56 544 Example; Coles v. Peyton, 389 F. 2d 224, 226, (4th cir. 1968); 397 U.S. at 771, 90 S.Ct. at 1449.

Where a State obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of counsel, the State unconstitutionally deprived the defendant of his Liberty, Cuyler, 446 U.S. at 343, 100 S.Ct. at 1175 the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. United States v. Cronic, 466 U.S. 658, 104 S.Ct. 2039 2046 (1984).

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Tr. P. 38, lines 4-25. THE COURT: And these are acts that are not the subject of the other indictment?

MS. ABEE: Correct. The indictment right here, your Honor.
THE COURT: Either this indictment or the indictment ending 6030 since this one has been changed. This is 6031, 2015-GS-32-6031.

MS. ABEE: Yes, your Honor.
THE COURT: And I understand there is another indictment as well. 2015-GS-32-6030.
MS. ABEE: 6030, your Honor, is digital penetration alleged at the same time that the eyewitness saw the defendant's hand down the front of the minor's pants so that would be part of that indictment although we are not necessarily going into the digital penetration that the minor alleged in the forensic interview, rather just the fact that an eyewitness saw his hands down the pants. So it would be more of a CSC third or a lewd act as opposed to the CSC first with a minor that he's charged with. So while it's a part of that, it isn't actually what the State he's charged with. It's just the eyewitnessing the hand down the front of the pants.

Tr. P. 39, lines 8-25. THE COURT: Either this indictment
THE COURT: And you're claiming that it should be admissible under 404 (b) as evidence of a common scheme or plan?
MS ABEE: Yes, your Honor.

THE COURT: Any other?
MS. ABEE: No, your Honor. Just the common scheme or plan exception that this is kind of what the defendant does.

THE COURT: Any additional argument that you want to make about this at this time?
MS. ABEE: Your Honor, just to make the record clean I would for this evidence to be admissible we first have to determine that it's relevant pursuant to Rule 401.

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This is extremely relevant in this case not only because it's sexualized acts between the defendant and the same victim at the same age and generally in the same locations, but also because family members in this case, your Honor, when they found out about the prior acts, they then took additional steps in preventing or attempting go prevent the defendant and the victim from being together. So there are acts of other witnesses in this case, your Honor, that occurred as a result of these prior allegations.

Page 40, lines 1-25. THE COURT: I'm sorry, Repeat that again, these areother acts involving other individuals? is that what you're saying?

Ms. ABEE: What I'm saying is the other, for instance, the parents in this case took acts to limit access between the defendant and the victim after these allegations came out, after the exposure incidents came out so other witnesses took steps in furtherance of kind of the daily interactions between the defendant and victim because of these prior allegations.

Your Honor. once we determine whether or not it's relevant under 401, we have to determine whether or not it fits into the 404 (b) exception of common scheme or plan. In State v. Wallace, is lists some factors that we look at, once being the age of the victim, your Honor. She is the same age during all these allegations she's four years old. second being the relationship between the victim and the perpetrator.

They were cousins, your Honor, so the relationship is the same throughout. Number 3 is the location the location is always the family home, your HOnor. one being the home of the victim. The other two incidents being the home of the grandmother of both the victim and the defendant. Four being use of coercion or threats which just are absent in all three of these cases, your Honor. And then finally the manner or type of sexual battery your Honor.

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Page 41, And although they are not the same battery, it's not oral penetration each time, this does show an escalating pattern of behavior staring with exposure and then a hand down the pants and ultimately oral peneration your Honor. In State v. Kirton, your Honor, actually held that a six or seven year of escalating abuse was in fact, prior bad acts even though it wasn't completely the same. So your Honor, we contend that this shows tthe defendant's common scheme of plan to isolate the victim in a home by herself and then engage in some sort of sexual touching or sexual act with her and we would contend that it's appropriate to be talked about throughout the course of this trial, Your HOnor, as it is another bad act.

THE COURT: And then finally I would have to do any validity test in terms of weighing the probative value versus prejudice.

So there are acts of witnesses in this case, your Honor, that occurred as q result of these prior allegation.

Page 40, lines 1-25. THE COURT: I,m sorry, Repeat that again. These are other acts involving other individuals? is that what you're saying?

§ 17 -19-20. Allegations sufficient for indictment

Every indictment shall be deemed and judged sufficient and in Law which, in addition to allegations as to time and place, as required by Law, charges the crime substantially in the language of the commom Law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

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In considering this section [code 1962 § 17-402], the guarantee given to an accused in a criminal prosecution that he is to be fully informed of the nature and cause of the accusation must be forgotten. State v. Johnson, (S.C. 1929) 149 S.C. 195, 146 S.E. 657. Between lying and telling the truth. In addition, young children may be influenced by what questions are asked and it's up to you to decide whether the child understand the questions asked. I will also charge them on circumstantial evidence. There are two types of evidence which are generally presented during a trial. Direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence as well as direct evidence. The Law makes no distinction between the weight or value to be given to direct or circumstantial evidence. To the extent that the state relies upon circumstantial evidence, all the circumstances must be consistent with each other and when taken together point conclusively to the guilt or the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, then the proof has failed.

Aggravation "necessary for first degree criminal sexual conduct (CSC)conviction must be associated with degree of force used. State v. Green, (S.C. App. 1997) 327 S.C. 581, 491 S.E. 2d 263.

State presented no evidence that defendant used aggravated force when committing sexual batteries, and thus, trial court should have granted defendant's directed verdict motion on first degree criminal sexual conduct (CSC) charges, where fact that battery may have painful did not support inference that battery was accomplished through use of force record was devoid of evidence that defendant used any force in connection with his hands down the victim's pants only Mr . Rice saying that he saw this but the old man Mr. Rice can't see to good and he testified that defendant had his hands on the minor which is not so. During court she never said that the defendant had his hands down her pants.

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S.C. code Ann. § 16-3-655 (3) is not lesser included offense of § 16-3-653, since § 16-3-655 (3) includes additional element of age requirement, such that where defendant was indicted under § 16-3-653 and trial judge charged jury only under § 16-3-655 (3) defendants conviction under § 16-3-653 must be reversed and remanded, as defendant in criminal case is entitled to be tried only on charges set forth in indictment, even though defendant did not object about this matter at trial, as trial court lacked subject matter jurisdiction to convict defendant for offense when there was no indictment charging him with that offense when jury is sworn. State v. Munn , (S.C. 1987) 292 S.C. 497, 357 S.E. 2d 461.

If the offense be statutory, it must be alleged to be contrary to the statute in such case made and provided. State v.Strickland, (8178) 10 S.C. 191, State v. Freeland, (1916) 106 S.C. 220, 91 S.E. 3.

The better practice is to set forth the elements of the crime in the indictment rather than referring to the statutory section alleged to have been violated. State v. Owens, (S.C. 2001) 346 S.C. 637, 552 S.E. 2d 745, rehearing denied.

The true test of an indictment's validity is not whetherit could be made more definite and certain, but whether it contains the necessary elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet. State v. Smalls, (S.C. App. 1999) 336 S.C. 301, 519 S.E. 2d 793.

Indictment charging that defendant did "wilfully and unlawfully assault with intent to commit criminal sexual conduct in attempting to accomplish sexual battery upon the victim constituted charge of assault with intent to commit criminal sexual conduct in the third degree, in absence of any allegation of an aggravating circumstance, and thus trial court lack subject matter jurisdiction to amend indictment to try defendant for assault with intent to commit first-degree criminal sexual conduct. State v. Ervin, (S.C. App. 1998) 333 S.C. 351, 510 S.E. 2d 220.

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DIRECTED VERDICTED

The trial judge erred in failing to grant a directed verdict of acquittal where there was insufficient evidence of guilt.

In reviewing the refusal to grant a directed verdict, this court must determine whether there is any evidence, either direct or circumstantial which reasobably tends to prove the guilt of the accused. State v. Creech, 314 S.C. 76, 441 S.E. 2d 635 (Ct. App. 1993). If the evidence is consistent with both innocence and guilt it cannot support a conviction.

United States v. Varoz, 740 F. 2d 772, 775 (10th cir. 1984). A directed verdict should be granted when there is an absence of competent evidence tending to prove the offense charged because the jury should not be allowed to decide the case based on conjecture, which raises only a mere suspicion of the defendant's guilt. State v. Lyes-Gray, 328 S.C. 458, 492 S.E. 2d 802 (Ct. App. 1997); State v. Barksdale, 311 S.C. 210, 428 S.E. 2d 498 (Ct. App. 1993).

In reviewing a moition for a directed verdict of acquittal, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Morgan, 282 S.C. 409, 319 S.E. 2d 335 (1984). Moreover, the judge must view the evidence in a light most favorable to the state.

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DIRECT VERDICT

At the close of the state's case defense counsel motioned for a directed verdict of acquittal on criminal sexual charge on the ground that there was no penetration as to the incidents as described by the alleged victim. The court denied the directed verdict motion.

Tr. P. 214, lines 12-25 THE COURT: Are there any motions at this time?

MR. WILLIAMS: Your Honor, in that this is the end of all of the testimony, we would renew the prior motions, and that being in a different standard since all the evidence is in and the evidence as a whole is insufficient as a matter of Law for this jury to return a verdict of guilt as to my client as to my client in regards to criminal sexual conduct. THE COURT: From the state.

MS ABEE: Your Honor, we just contend that there is sufficient evidence for the jury to consider in determining whether or not the defendant is guilty of criminal sexual conduct with a minor in the first degree. There's been evidence of each element of that crime presented to the jury for them to consider and weigh in their deliberations.

THE COURT: At this time I think it's clearly a factual issue for the jury to make a decision. They have heard the testimony that is conflicting and so they will have to weigh that testimony and weigh that evidence and determine credibility of the witnesses and then after determining that credibility, then to weigh the evidence to determine whether or not the state has met that burden.

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DIRECTED VERDICT VIOLATION

When considering a motion for a directed verdict in a criminal case, the trial court is concerned with the existence or non existence of evidence not it's weight. State v. Burdette, 335 S.C. 34, 46, 515 S.E. 2d 525, 531 (1999); State v. Morgan, 282 S.C. 409, 411, 319 S.E. 2d 335, 336 (1984). It has been recently held that this remains true even when the state relies exclusively on circumstantial evidence. State v. Mitchell, 341 S.C. 406, 409 535 S.E. 2d 126 127 (2000), other case indicates that where the evidence is circumstantial these must be substantial circumstantial evidence which reasonable tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Martin, 340 S.C. 597, 602, 533 S.E. 2d 572, 574 (2000). Citing State v. Williams, 321 S.C. 327 468 S.E. 2d 626 (1996). Still other cases indicate some distinction between direct evidence and circumstantial in considering whether a directed verdict should be granted.

When reviewing the denial of a directed verdict, this court must view the evidence and all reasonable inferences in the light most favorable to the state. State v. Weston, 367 S.C. 279, 292, 625 S.E. 2d 641 648 (2006). If there is direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused an appellate court must find the case was properly submitted to the jury Id at 392-93, 625 S.E. 2d 90 648. When the state relies exclusively or circumstantial evidence and a motion for a directed verdict is made, the circuit court is concerned with the existence or non existence of evidence, not with it's weight. State v. Cherry, 361 S.C. 588, 594, 606 S.E. 2d 475, 478 (2004). The court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. Id. "suspicion implies a belife or opinion as to guilt based upon facts or circumstances which do not amount to proof. section 16-3-652 defined criminal sexual conduct in the first degree. (1) A person is guilty of criminal sexual conduct in the first if the actor engage in sexual battery with the victim and if any one or more of the following circumstances are proven.

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Tr. P. 200, lines 1-25. THE COURT: yes. Sir.

MR. WILLIAMS: Your Honor, I would move for a mistrial. The question by the attorney General as to whether or not he went to military school and then started taking counseling is an indication that perhaps he was guilty of some sort of crime or some sort of sexual misconduct which is inappropriate because obviously he hasn't been convicted of anything and this counseling may be an indication that some how he's admitted his guilt in some sort of crime. So we think it's an inappropriate question and it would taint the jury in regards to whether or not he can be given a fair trial or not by raising the issue of whether or not he went to counseling.

THE COURT: MR. William, can you repeat that again just to make sure I understand exactly what you're saying?

MR. WILLIAMS: Yes ma'am. The objection goes to the question from the prosecutor to the defendant. He had already testified that he got his GED by going to military school. Then she asked him and after that, you went ahead and got some counseling; is that correct?

And this was in direct relationship to the sexual event which supposedly happened where someone was allowed to see his private parts. Your Honor, our proposition is that by connecting these two things there's an indication that perhaps he may be guilty of some sort of sexual assault or some sort of sexual misconduct. He hasn't been convicted. If it were a crime of moral turpitude, obviously they could bring something up to indicate his ability to tell the truth or not. But that type of question, your Honor, is an indication that the jury may not be able to separate the trial in this particular case where he is accused of performing a sexual act versus the fact that he had to go to some sort of counseling which is an indication he had some sort of sexual problem.

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The trial judge erred in denying the motion for mistrial where the evidence that Breazeal attended counseling following the filing of a police report related to the instant allegation was not admissible. "The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of Law. "State v. Bantan, 387 S.C. 412, 417, 692 S.E. 2d 201, 203 (Ct. App. 2010). "A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. " Id. "Unfair prejudice means an undue tendency to suggest decision on an improper basis. State v. Wiles, 383 S.C. 151, 158, 679 S.E. 2d 172, 176 (2009). Rule 407, SCRE, precludes the admission of subsequent remedial measures to prove "negligence or culpable conduct in connection with the event. Here, the prosecution admitted evidence not only that Marsh and Breazeal's mother thought that Breazeal need to seek counseling. R. 96, 11. 6-7; but also that Breazeal actually participated in such counseling following the end of his mititary school attendance in February 2017. R. 200, 11. 12-14. Notably

February 2017 was also when the police investigation began related to the indicted offense. R. 66, 11. 5-8. While the prosecution alleged that Breazeal's counseling was merely a fact in this case, not every fact related to a case is admissible before a jury. R. 202, 1. 12-203, 1. 9; see generally Rule 401-412, SCRE.

Just as defense counsel argued, the implication of such testimony in this case was that Breazeal's attendance at counseling was evidence that he acknowledged some sexual problem or wrong doing. Contrary to the trial judge's ruling, when or whether the defendant attended any type of counseling is not relevant to the determination of whether Breazeal committed the alleged offense against the minor child. See Rule 401, SCRE ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

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Further, the question asked of Breazeal regarding whether he actually attended counseling was distinct from the testimony elicited from Marsh that he believed that Breazeal should attend counseling.

Compare R. 96, 11. 6-7, with R. 200, 11. 12-14. Thus, defense counsel had not waived any objection to the prosecutor's question to Breazeal due to his failure to object to Marsh's testimony. Ultimately, though the trial judge recognized that the prosector's question was misleading, sloe did nothing to cure the improper question and testimony already elicited. Thus, the jury was free to consider it as evidence in their deliberations, prejudicing Breazeal. The jury could not help but wonder why Breazeal, who vehemently denied any sexual conduct, would have submitted himself to any sort of counseling. Thus, the judge's refusal to grant a mistrial in this case constitutes an abuse of discretion amounting to an error of Law and requires reversal.

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MISTRIAL DISCUSSION

The trial judge erred in denying the motion for mistrial where the evidence that Breazeal attended counseling following the filing of a police report related to the instant allegation was not admissible. "The decision to grant or deny a mistrial is within the sound discretion of the trial court and will mot be overturned on appeal absent an abuse of discretion amounting to an error of Law. "State v. Bantan, 387 S.C. 412, 417, 692 S.E. 2d 201, 203 (Ct. App. 2010). "A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. "Id. "unfair prejudice means an undue tendency to suggest decision on an improper basis. State v. Wiles, 383 S.C. 151, 158, 679 S.E. 2d 172, 176 (2009).

Rule 407, SCRE, precludes the admission of subsequent remedial measures to prove "negligence or culpable conduct in connection with the event. Here, the prosecution admitted evidence not only that march and Breazeal's mother thought that Breazeal need to seek counseling. R. 96, 11. 6-7; but also that Breazeal actually participated in such counseling following the end of his Military school attendance in February 2017. R. 200, 11. 12-14 notably February 2017 was also when the police investigation began related to the indicted offense. R. 66, 11. 5-8. While the prosecution alleged that Breazeal's counseling was merely a fact in this case, not every fact related to a case is admissible before a jury. R. 202, 1. 12-203, 1. 9; see generally Rule 401-412, SCRE.

Just as defense counsel argued, the implication of such testimony in this case was that Breazeal's attendance at counseling was evidence that he acknowledged some sexual problem or wrong doing. Contrary to the trial judge's ruling, when or whether the defendant attended any type of counseling is not relevant to the determination of whether Breazeal committed the alleged offense against the minor child. See Rule 401, SCRE ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

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action more probable or less probable than it would be without the evidence). Further, the question ashed of Breazeal regarding whether he actually attended counseling was distinct from the testimony elicited from Maesh that he believed that Breazeal should attend counseling compare R. 96, 11. 6-7 with R. 200, 11. 12-14. Thus, defense counsel had not waived any objection to the prosecutor's question to Breazeal due to his failure to object to Marsh's testimony.

Ultimately, though the trial judge recognized that the prosecutor's question was misleading she did nothing to cure the improper question and testimony already elicited. Thus, the jury was free to consider it as evidence in their deliberations, prejudicing Breazeal. The jury could not help but wounder why Breazeal, who vehemently denied any sexual misconduct, would have submitted himself to any sort of counseling. Thus, the judge's refusal to grant a mistrial in this case constitutes an abuse of discretion amounting to an error of Law and requires reversal.

MISTRIAL REQUEST

Tr. P. 200, THE COURT: Yes Sir.
Mr. Williams: Your Honor, I would move for a mistrial. The question by the Attorney General as to whether or not he went to military school and then started taking counseling is an indication that perhaps he was guilty of some sort of crime or some sort of sexual misconduct which is inappropriate because obviously he hasn't been convicted of anything and this counseling may be an indication that some how he's admitted his guilt in some sort of crime. So we think it's an inappropriate question and it would taint the jury in regards to whether or not he can be given a fair trial or not by raising the issue of whether or not he went to counseling.

THE COURT: Mr. Willaims, can you repeat that again just to make sure I understand exactly what you're saying?

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Mr. Willaims: Yes ma'am. The objection goes to the question from the prosecutor to the defendant. He had already testified that he got his GED by going to military school. Then she ashed him and after that, you went ahead and got some counseling; is that correct?

And this was in direct relationship to the sexual event which supposedly happened where someone was allowed to see his private parts. Your Honor, our proposition is that by connecting these two things there's an indication that perhaps he may be guilty of some sort of sexual assault or some sort of sexual misconduct. He hasn't been convicted. If it were a crime of moral turpitude, obviously they could bring something up to indicate his ability to tell the truth or not. But that type of question, your Honor, is an indication that the jury may not be able to separate the trial in this particular case where he is accused of performing a sexual act versus the fact that he to go to some sort of counseling which is an indication he had some sort of sexual problem. It's an inappropriate question, your Honor.

THE COURT: Yes Sir. Response from the state.
Ms. Abee: Yes, your Honor. During Trey Marsh's testimony he testified that after this incident both he and the defendant's mother talked and set parameters on what would be happening as foras minor child and the defendant's contact with one another as well as other sort of parameters. This is the same line of questioning that I was just asking the defendant about a conversation between his mother and minor child mother and as a result of that things changed in his life.

He then was in military school at that point in time and then also sought counseling. It's not a conviction, your Honor. It's counseling. This was appropriate Lyle testimony to bring in this situation and to talk about it and the fact that the defendant sought counseling is just a fact in the case, Your Honor.

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Page 215, lines 1-15. So I will deny the motion at this particular time because it is a factual issue. Are there any other motions?
MS. ABEE: nothing from the state, Your Honor.

MR. WILLIAMS: Nothing from the defendant, Your Honor.

THE COURT: Let me tell you what I will charge the jury and then if there is anything I need to add or change or correct, you can let me know. First of all, I'll tell them that they have to determine the facts based upon the evidence. I will tell them about the credibility of the witnesses. They have to determine that credibility. I will also tell them about expert witness.

I will also talk to them about testimony of children, that they have heard the testimony from a child. Where a witness is a child you must determine as with any witness whether that testimony is believable. In deciding the believability you may consider not only the matters that I have already decussed with you but you may also consider the age of the child, the child's ability to observe and remember facts, the child's ability to understand and answer questions. Because young chilsren may not fully understand what is happening, it's up to you to decide whether the child understood the seriousness of appearing as a witness in this trial, whether the child understood the questions, whether the child has agood memory and whether the child understand the difference between lying and telling the truth. In addition, young children may be influenced by what questions are asked and it's up to you to decide whether the child understood the questions asked. I will also charge them on cirumstantial evidence.

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There are two types of evidence which are generally presented during a trial. Direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence as well as direct evidence. The Law makes no distinction between the weight or value to be given to direct or circumstantial evidence. To the extent that the state relies upon circumtantial evidence, all the circumstances must be consistent with each other and when taken together point conclusively to the guilt or the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, then the proof has failed.

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PRIOR BAD ACT

Did the trial court error in admitted prior crimes of moral turpitude against defendant when their probative value was outweighed by the danger of unfair prejudice?

The court has held that, proof of other crimes or wrongs and are inadmissible to prove defendant's guilt for crimes charges. State v. King, 334 S.C. 504, 514 S.E. 2d 578 (S.C. 1999). Evidence of other crimes or bad acts are generally inadmissible unless, evidence tend to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) common scheme or plan or (5) Identity. State v. Nelson, 331 S.C. 1, 501 S.E. 2d 766 (S.C. 1998). Further, to test the admissibility of prior bad acts the logical relevency of such acts must prove connection between the other criminal act and the crime charged. State v. Ford, 334 S.C. 444, 513 S.E. 2d 385 S.C. App. 1991.

Tr. P. 37, lines 7-25. THE COURT: All right then turning to the other bad acts.
MS. ABEE: Yes, your Honor. as I stated, the defendant is charged with oral penetration of the minor child when she was four years old. There are two other incidents that we would contend are prior bad acts that were committed on behalf of the defendant, your Honor. First would be sometime between April and May of 2014 when the child alleges that the defendant exposed his penis to her, your Honor. That took place at the minor's home.secondly, it would be sometime between July 7th, 2014 and July 11th, 2014 when the defendant, actually an eyewitness walked in and saw the defendant with his hand down the front of the minor's pants, she was again four years old at that point in time your Honor.

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Page 42, lines 10 -25. In terms of balancing it's probative value versus the prejudice, I think that it's always prejudicial in some form or fashion but I don't think that the prejudice would outweigh it's probative value in this particular matter as long as it's limited to those particular instances and as it's been described so I will allow it.

Of course, in order to preserve, you need to raise it again, any objection if there is an objection. Then finally I believe we'll go to the information relating to the admissibility of the out of court statement and I assume that's in the form of the video; is that correct?

Ms. Abee: It is the video, your Honor.

THE COURT: Yes ma'am.

Ms. Abee: Your Honor, under 17-23-175, the forensic interview is admissible if it meet certain criteria.

Evidence of prior bad acts is generally not admissible to prove crime for which defendant is charged.

Admissible unless necessary to establish a material fact or element of the crime charged. State v. Johnson, 293 S.C. 321, 324, 360 S.E. 2d 317, 319 (1987). As explained by the court in State V. Wesley Smith, 391 S.C. 353, 361, 705 S.E. 2d 491, 495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation. At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 279 S.C. 17, 23, 664 S.E. 2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404 (b), SCRE, Id. (citing State v. Pagan, 369 S.C. 201, 211, 631 S.E. 2d 262, 267 (2006)).

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This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404 (b), SCRE, exceptions. exceptions. Id. If the trial judge determines the prosector has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E. 2d 434, 441 (2009)). Neither the judge nor the prosector explained how the evidence of this alleged prior bad act was admissible against defendant under one of the exceptions in Rule 404 (b), SCRE or that the act had been proven by clear and convincing evidence.

Exceptions to Rule 404 (b), SCRE

One of the exceptions contained within Rule 404 (b), SCRE is when the evidence is offered to show a common scheme or plan. Evidence of other crimes or bad acts is•

Due to the danger this type of evidence poses, "[e]vidence of other crimes must be put to a rather servere test before admission. State v. Catro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). Admissible to show a common scheme or plan when there is "a connection between the prior bad act and the present crime. "State Parker, 315 S.C. 230, 233, 433 S.E. 2d 831, 832 (1993) (citing State v. Rivers, 273 S.C. 75, 254 S.E. 2d 299 (1979)). The connection "must be more than just a general similarity. "Id. (citing State v. Stokes, 279 S.C. 191, 304 S.E. 2d 814 (1983)).

The prior bad act evidence must have a "close degree of similarity "to the crimes charged. State v. Clasby, 385 S.C. 148, 155, 682 S.E. 2d 892, 896 (2009). The evidence must be logically relevant to the particular purpose or purposes for which it is sought to be indroduce. " State v. Bell, 302 S.C. 18, 27, 393 S.E. 2d 364, 369 (1990)).

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The Defendant contends due to his illiteracy to the Law he was entitled to rely upon his counsel to make reasonable decision. Pursuant to U.S. v. Dewalt, 92 F. 30 1209 Without some authortative guidance the defendant did not understand the proceeding before him.

PRESUMPTION OF PREJUDICE

There are time when prejudice is presumed when counsel entirely fails to subject the prosecutions case to meaningful adversarial testing there has been a denial of sixth Amendment rights that makes the adversary process it self presumptively unreliable and prejudice may be presumed. Cronic v. U.S., 446 U.S. 648, 104, S.Ct. 2039, 80 L.Ed. 2d 657 (1984); Nance v. Ozmint, 367 S.C. 547, 626 S.E. 2d 878 (2006).

The prosecutior's duty in a criminal prosecution is to seek justice. Althought the prosecutor should prosecute with ernestness and vigor, "he or she may not use "improper methods calculated to produce a wrongful conviction "1742 Generally, the use of such methods is grounds for mistrial or reversal of a conviction if it results in an unfair trial violating the due process clause. If the prosecutorial misconduct is intended to cause a mistrial, the double jeopardy clause may bar further prosecution.

An indictment is sufficient if it apprises the defendant of the elements of the offense intended to be charged and apprises the defendant what he must be prepared to meet. State v. Evans, 322 S.C. 78, 470 S.E. 2d 97 (1996).

In State v. Towery, 300 S.C. 86, 386 S.E. 2d 462 (1989). We held an indictment which alleged the defendant did traffic in cocaine by willfully, unlawfully and knowingly having in his possession a quantity of cocaine was sufficient to confer subject matter jurisdiction notwithstanding its failure to specify the quantity of cocaine alleged to be in defendant's possession.

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Under Towery, the indictment here was sufficient. Accord Darby v. State, 516 So. 2d 775 (Ala. Crim. App. 1986), An indictment may be amended at trial only if the amendment does not change the nature of the offense charged. Code 1976, § 17-19-100.

Was there a variance between the essential elements alleged in the indictments numbers 2015-GS-32-6030 and 2015-GS-32-6031 count one criminal sexual conduct with a minor, and criminal sexual conduct with a minor in the third degree, and the state's failure to establish those elements at trial by the evidence presented?

Was the defendant's fair trial rights violated by the trial court when defendant counsel never consulted with an expert before trial. Was the defendant's fair trial rights violated by the trial court when defendant counsel failed to challenge the medical report with his own expert witness?

Was the defendant's fair trial rights violated by the trial counsel when he failed to properly prepare for trial investigate the indictment which was changed at trial. The indictment does not have assault in the body of the indictment this make the indictment in violation of the sixth Amendment.

Indictment charging that defendant did "willfully and unlawfully assault with intent to commit criminal sexual conduct in attempting to accomplish sexual battery upon" the victim constituted charge of assault with intent to commit criminal sexual conduct in the third degree, in absence of any allegation of an aggravating circumstance, and thus trial court lack subject matter jurisdiction to amend indictment to try defendant for assault with intent to commit first-degree criminal sexual conduct State v. Ervin, (S.C. App. 1998) 333 S.C. 351, 510 S.E. 2d 220.

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[T]he United States supreme court has held that the defendant must have a fair opportunity to present his defense thereby requiring the state to provide the basic tools for an adequate defense to an indigent defendant. Bailey v. State, 309 S.C. 455, 459, 424 S.E. 2d 503, 506 (1992) (quoting Ake v. Oklahoma, 470 U.S. 68. 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985)). "Thus, although the state is not required to provide the indigent defendant with unlimited funding, it must ensure that the defendant has competent counsel and the services of experts necessary to a meaningful defense[.] Id.

South Carolina code section 17-3-50 (B) (2003) provides in pertinent part:
Upon a finding in ex parte proceeding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.

An applicant is only entitled to fees to pay for expert witnesses if the applicant shows a need for the expert testimony. Thames v. State, 325 S.C. 9, 11, 478 S.E. 2d 682, 683 (1996). The mere possibility the applicant could find a witness some where to support an allegation is insufficient to warrant authorization of funds. Id. Where counsel articulates a valid trial strategy for failing to call an expert witness to testify at trial, such conduct will not be deemed ineffective. Legare v. State, 333 S.C. 275, 281, 509 S.E. 2d 472, 475 (1998).

PREPARATION FOR TRIAL

Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. U.S.C.A. Const. Amend. 6.
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Investigating locating, and interviewing witnesses or others. At a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances if the case. U.S.C.A. Const. Amend. 6.

Defendant's trial counsel was deficient for failing to call a forensic expert to challenge the state's forensic evidence presented at trial of defendant for Criminal sexual conduct with a minor, counsel did not consult with an expert prior to trial, even though he knew the state would attempt to admit evidence of an expert interviewer and counsel did not provide a legitimate trial strategy for failing to consult with an expert before trial or call a forensic expert witness to testify at trial. U.S.C.A. Const. Amend. 6.

Defendant was prejudiced by his trial counsel's deficiency in failing to call forensic expert to challenge the state's medical evidence in prosecution of defendant for sexual conduct with a minor.

The defendant argue that he's been falsely accused in this offense, because he never engages in sexual conduct with the victim thereis no proof presented in this case. To be in violation of § 16-3-655, the actor must engage in a "sexual battery "with the victim, South Carolina Dept. Of Social Services v. Forrester, (S.C. App. 1984) 282 S.C. 512, 320 S.E. 2d 39.

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Mr. Mahlow David Kellin: testimony see Tr. P. 42, lines 17-25. of course, in order to preserve you need to raise it again any objection if there is an objection. Then finally I believe we'll go to the information relating to the admissibility of the out of court statement and I assume that's in the form of the video, is that correct?

Ms. Abee: It is the video, your Honor.

The Court: Yes, ma'am.
Ms. Abee: Your Honoe, under 17-23-175, the forensic interview is admissible if it meets certain criteria, See page 43, lines 1-25. Your Honor. Mainly that it's preserved in a electronic copy, that the child will be available to testify which we do intend for her to testify and that it contains certain indicators of internal coherence or trustworthiness, questions, it's conduced with nonleading questions, it's conducted by a trained professional,contains a detailed account of the offense and has internal coherence and that there is the sworn testimony of the victim as well as the forensic interviewer, your Honor. The forensic interviewer is on her way to the courthouse to testify regarding her credentials and her tranining as a forensic interviewer, your Honor, and we do in fact have the forensic interview for your Honor, to watch. It's approximately 32 minutes long.

COACHING VICTIM

Tr. P. 172, lines 6-25. Explain to us the concept or the idea of coaching.
What does that mean?

A. What coaching is when somebody who wants to change somebody testimony or wants to move somebody's testimony to a less harmful way, they might encourage the child to say something different from the actually true to what happened or try to change the demeanor of what happened or just to deny it altogether.

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Q. Can that work in the opposite direction as well?
A. Yes, Sir.
Q. So what are some things you look for when trying to see if a child has been coached or if a child is making a false allegation?

A. One of the things that I look for first is what is the first thing that the child says to me. SO if the child immediately comes in and fills out a whole story, that's suspicious to me Children especially younger children don't hold onto things long. SO if there is this desire to change a story, then the child is going to need to get it out fairly quickly because they don't hold onto it or hold onto details. Also if the details remain.

This same consitently each and every time the child tells me. That's a concern for me because children typically have some variation in what they say.

Q. Finally I want to talk to you about perpetrators themselves and children's reactions to them. Do children always have a hatred towards the perpetrator?
A. No.
Q. And why not?
A. Because younger children tend to see people not as just one act. The final act doesn't necessarily determine a relationship. That relationship may have been good for many years and then turned into an abusive relationship. That child may still want that relationship with that person because that they had was pleasurable. Especially if there is a grooming process going on, that relationship may have been very positive for the child up until the point of something bad happening.

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HEARSAY TESTIMONY

When trial counsel fails to object to impermissible hearsay testimony as in Jolly v. State , 314 S.C. 17, 443 S.E. 2d 566 (1994) and Sanchez v. State, 351 S.C. 270, 569 S.E. 2d 363 (2002) does such deficient performance satisfy Strickland's prejudice prong as a matter of Law, or can the "overwhelming evidence Rule still apply?

The supreme court of South Carolina has addressed the issue of improper corroboration testimony in criminal sexual conduct cases on many occasions resulting in a rule as a matter of Law that when the improper corroboration testimony is erroneusly allowed in, it satisfies the prejudice prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052. In State v. Barrett, 299 S.C. 485, 386 S.E. 2d 242 (1989), the court ruled "Improper corroboration testimony that is merely cumulative to the victim's testimony, however, cannot be harmless, because it is precisely this cumulative effect which enhances the devastaing inpact of improper corroboration " Id. The court later cited this exact language in Jolly. Each time the court has discussed improper corrobration testimony in criminal sexual conduct cases, it has cited the Jolly or Barrett decision in the portion of the opinion addressing the prejudice prong of Strickland. The court clearly States that the improper testimony cannot be harmless. See State v. Barrett, 299 S.C. 485, 386 S.E. 2d 292 (1989).

Jolly v. State, 314 S.C. 17, 443 S.E. 2d 566 (1994). Sanchez v. State, 351 S.C. 270, 569 S.E. 2d 363 (2002). Dawkins v. State, 346 S.C. 151, 551 S.E. 2d 260 (2001). In the 2002 case, Ingle v. State, 348 S.C. 467, 560 S.C. 467, 560 S.E. 2d 401, the court clearly addressed the issue and its application to the Strickland prejudice prong.

As to the prejudice prong of the Strickland test. We reiterated that improper corroboration testimony that is cumulative to the victim's testimony is harmful since "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Dawkins, Supra; Jolly, Supra. We hold trial counsel's deficient performances in allowing the hearsay testimony of both Mr. Mahlon David Kellin, forensic social worker an Ms. April Sykes, forensic interviewer on behalf of SLED on

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February 16th, 2016 at the Dickerson Children's Advocacy Center in West Columbia. Detective James Kemfort, from the Lexington county Sheriff's Department he work major crime investigator with the special victims Unit. Clearly prejudiced defendant's case.

The court as in the other related cases on this, did not go through and analysis of the entire set of facts for each case in determining the prejudicial prong of Strickland. It simply stated the error cannot be harmless. Ingle v. State, 348 S.C. 467, 560 S.E. 2d 401 (2002).

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DUE PROCESS CLAUSE VIOLATION

The United States constitution guarantees a criminal defendant the right to present a complete defense through the due process clause of the fourteenth Amendment and the sixth Amendment. Crane v. Kentucky, 476 U.S. 683, 690 (1986); State v. Schmidt, 288 S.C. 301, 303, 342, S.E. 2d 401, 402 (1986) (holding the sixth Amendment "constitutionalizes" the right to present a defense in a criminal trial). [T]he constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. Crane, 476 U.S. 683, 690 (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). South Carolina's constitution provides similarly. "Any person charged with an offense shall enjoy the right ... to be fully heard in his defense ... "S.C. const. art. I, § 14; See also S.C. code Ann. § 17-23-60 ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor ...."). "Few rights are more fundamental than that of an accused to present witnesses in his own defense". Taylor v. Illinois, 484 U.S. 400, 408 (1988) (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973)). The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.

The ends of criminal justice would be defeated if judgment were to be founded on a partial or speculative presentation of the facts. Id. at 408-409 (quoting United States v. Nixon, 418 U.S. 683, 709 (1974)). The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies, Id. at 409 (quoting Washington v. Texas, 388 U.S. 14, 19 (1967)). Without question hesitation, the United States Supreme court declared [t]his right is a fundamental element of due process of Law. Id. Undermining the "ostensible integrity of the investigation" is one method by which a defendant may present a defense. See Kyles v. Whitley, 514 U.S. 419, 448 (1995).

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"Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears. "Schmidt, 299 S.C. at 303, 342 S.E. 2d at 403 (citing Assoc. Mgmt. v. E.D. Sauls Constr. Co., 279 S.C. 219, 305 S.E. 2d 236 (1983)); See also Rule 401, SCRE (defining relevant evidence). Further, "[e]vidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. " Id. Citing Toole v. Salter, 249 S.C. 354, 154 S.E. 2d 434 (1967)); see also Rule 402, SCRE (" All relevant evidence is admissible, except as otherwise provided .... Evidence which is not relevant is not admissible.)

In State v. Page, 406 S.C. 272, 287 , 750 S.E. 2d 623, 631 (Ct. App. 2013), this court held the trial judge abused his discretion by finding the proffered testimony offered by the defendant was not relevant. Page sought to introduce a text message and testimony by a witness that the alleged victim had admitted to the witness that she had lied to the police. Id. at 288, 750 S.E. 2d at 632.

On the other hand, this court affirmed a trial judge's preclusion of evidence that was irrelevant and unfairly prejudicial. State v. Lyles, 379 S.C. 328, 344, 665 S.E. 2d 201, 209 (Ct. App. 2008). Lyles sought to introduce evidence of prior drug sale solicitations at the apartment where the shooting occurred and the presence of drugs next to the deceased. Lyles claimed the proffered testimony established that drugs were being sold from the deceased's apartment and bolstered the credibility of Lyles by supporting his claim that he went to the apartment merely to purchase drugs. Id. at 336, 665 S.E. 2d at 205. This court held the evidence was properly excluded because there existed no probative link between the proffered testimony and the pending charges. The proffered testimony established that drugs were offered for sale outside of the apartment several months prior to the shooting by an unknown individual. Id. at 349 665 S.E. 2d at 209.

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CROSS_ EXAMINATION

Tr. P. 130, lines 7-25. By Mr. Williams:
Q. Agent Sykes, this forensic interview which we have viewed here was done on what date?
A. February 16th, 2015.
Q. Was there a referral to a doctor for a physical exam?
A. I'm not sure. Referrals are usually made by Law Enforcement.
Q. You were only involved in the evaluation of the forensic interview?
A. Correct.
Q. You have no knowledge whatsoever as to what physical exam, if any, was taken after this?
A. I do not.
Mr. Williams: That's all the questions I have, your Honor:
THE COURT: Any redirect?
MS. ABEE: NO, your Honor. we would ask that this witness be excused from her subpoena.

VIDEO TAPE

Tr. P. 128, lines 3-25.
Q. Agent Sykes, how old was minor child during that interview?
A. She was four years old at the time.
MS. ABEE: Your Honor, I have no further questions for this witness at this time.
Mr. Williams: Your Honor, I have a matter, if I could discuss it at the bench with the prosecutor.
THE COURT: Yes.
(side bar off the record.)
THE COURT: Ladies and gentlemen, we have a matter we need to take up outside of your presence.
I'll ask that you to retire to the jury room. Again I instract you not to begin any discussions or deliberations as you have certainly not heard all of the evidence yet to be presented.

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If you will retire to the jury room, I'll bring you back in just a few moments.
(Whereupon, the jury entered the jury room at 4:50 P.M.
THE COURT: Mr. Willaims, would you state for the record again so there is a record of it.
Mr. Willaims: Yes, your Honor. my client, informed me the video was stopped at 17:35 and was restarted at 18:47. My client indicated that he thought the section which was being redacted, that there was more than just that redaction in that period of time that was stopped so that's why I approached the bench with the prosecutor and asked the court if there was any way we could have the jury out of the room to verify that was the section which was being redacted, that there was more than just that redaction in that period of time that was stopped so that's why I approached the bench with the prosecutor and asked the court if there was any way we could have the jury out of the room to verify that was the section which aws not played in front of the jury.

THE COURT: Yes, ma'am. Play it for us. I think the question is whether or not it redacted more than just the reference to the other person, the other child.

Mr. Williams: Yes, ma'am.
(Whereupon, a portion of state's exhibit #1. video of forensic interview played for the court.)
MS. ABEE: Your Honor, that would be when it picked back up, your HOnor, not talking about J. . The question is who is Auston. It started playing again at 18:47 which is where I just stopped it.

Mr. Williams: your Honor, we are satisfied with that.

THE COURT: okay. Anything else we need to take up before we bring the jury back in?
MS. ABEE: No. your Honor.

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In Briggs v. State (opinion no. 27745, Oct. 25, 2017), the S.C. supreme court held that trial counsel was deficient for not objecting to, and eliciting, testimony from a forensic interviewer that improperly bolstered the credibility of the victim, and that the PCR court's finding of prejudice under Strickland was satisfied. The petitioner claimed among other things, his trial counsel was ineffective in permitting the forensic interviewer to give opinion testimony that she believed the victim's accusations to be true, thereby bolstering the victim's testimony. The PCR court granted relief, vacated the convictions, and remanded to the court of general sessions for a new trial.

The court noted instances in which the outcome might be different "Under certain circumstances, it may be proper for the state to ask an expert about coaching. For example, if defense counsel accused the child mother or father in opening statement or on cross-examination of coaching the child to make an accusation they knew to be untrue, such a line of questioning to an expert could be admissible. One can even envision a scenario in which coaching is implied, or otherwise becomes an issue without such a direct accusation. Under any of those circumstances, where the testimony is offered to address coaching as a disputed issue, it may be reasonable for counsel to decide not to object.

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FORENSIC INTERVIEWER QUALIFICATION

Whether the trial court erred in qualifying a forensic interviewer as an expert in forensic social worker in private practice Kershaw counseling in Kershaw, South Carolina and Mr. Kellin is a trauma focus cognitive behavioral therapist at Palmetto citizens against sexual assault in Lancaster county South Carolina. Witness Mr. Mahlon David Kellin, and also Ms. April Sykes, she stated her career at SLED in March of 2014. How long have she been focusing on child abuse cases? She stated pretty much the day she started. She was one of the very first female officers at local PD and just being female she got kind of pushed into that arena and she loved it and stuck with it.

Did she have specialized training in the field of child sexual abuse? She stated I do. She explain that to the court. She conduct forensic interviews on behalf of SLED. She work with one of the local advocacy Centers so part of that training was to go through, its a program called finding words. It teaches you how to speak with children. How to interview children. She went through the basic course. The advance course. There's another course that's further than the advanced course called beyond finding words and then most recently we updated our protocal in South Carolina and so I attended that training as well. The question to the court whether these two forensic interviewer was board certified for their qualification as an expert in this case.

Whether the trial court erred in qualifying the two forensic interviewer as an expert in "counseling" and "abused children and allowing her and him to testify in a manner which impermissibly bolstered the complainant's testimony?

Qualification of Ms. April Sykes, and Mr. Mahlon David Kellin, a forensic interviewer, as expert in "abused children abuse " was error. State v. Kromah, 401 S.C. 340, 737 S.E. 2d 490 (2013). Ms. Sykes and Mr. Kellin subsequent testimony which mirrired exactly the claims of the complainant, was an attempted end-run around this court's decision in Kromah and its predecessor cases.

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See State v. Douglas, 380 S.C. 499, 500, 671 S.E. 2d 606, 607 (2009); State v. McKerley, 397 S.C. 461, 464, 725 S.E. 2d 139, 141 (Ct. App. 2012). The only purpose of April Sykes, and David Kellin, testimony was the improper invasion of the province the jury. Kromah at 358, 737 S.E. 2d at 499-500. The only inference to be drawn from Ms. Sykes and Mr. Kellin testimony was that the complainant was telling the truth. It was error to allow these testimony. Id.

Appellant was prejudiced by this error. Appellant testified in his own defense and several other witnesses testified in his favor. This case essentially boiled down to a "he said-she saidcontest of the parties credibility. In this type of case where parties versions of events and diametrically opposed, the improper bolstering of the complainant's credibility by the forensic interviewer was error and requires reversal and a new trial for appellant.

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Tr. P. 34, 1-25. The court. But in order to constitute any evidence related to third party guilt there has to be evidence which would exclude the defendant as the perpetrator.

Mr. Williams: I understand.
The court: And so are you claiming that information would rise to that level? And if so, how? It has to be inconsistent with his own guilt or evidence of his own guilt.

Mr. Williams: your Honor, obviously it's a difficult thing for me to argue because I guess what I'm saying is that if they are going to be allowed to testify to the acting out of the child as evidence of a sexual assault, then they can't differentiate between that and alleged assault which occurred by some other, as a result of some other child. So I guess that's the problem. Maybe not for purposes of third party guilt but as the state in regards to her memory, recollection, things of that nature. So I'm not exactly sure how you qualify that but that's the issue which we really have is that if she is going to testify in regards to some sort of sexual acting out or if that's brought up, then that might be a problem if we can't bring up the fact, well, she's already been at least touched inappropriately by some other child.

And I agree with her, not that these specific episodes which he's charged with could be attributed to that because clearly she says it's oral sex committed by the defendant. I guess it's limited in scope, your Honor.

The court: Yes, Sir. So more as a reason, it's something to point to indicate that her acting out could be for these other reasons and not for the allegations in this particlar case?

Mr. Williams: Yes, ma'am.
The Court: Okay. What says the state?

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Ms. Abee: Your Honor, we would ask that if that is the holding in this case, that the defendant be limited until we actually bring that evidence up. We may not even go into the fact that the child was acting out so if that is there rebuttal to this third party, then we would ask that they be limited and only presenting that once the state has, in fact, opened the door and talked about any sexual acting out on behalf of the minor because as I stated, that might not even come out throuhout the course of the trial, Your Honor.

However, we would still contend that the sexual acting out and stating that she was exually - she had seen a penis of a small child, a four year old child still isn't consistent with the fact of the defendant's guilt in this case; that she alleges that she was sexually assaulted by him. My understanding of the previous allegation or the allegations with J. is that he is a four year old boy. And I hate to rephrase it this way, but one of those kindergarten type you show me yours, I'll show you mine kind of incidences and that he touched her with a stick in her private area. That is completely inconsistent and different with sexualized acting out of oral penetration which she alleges against the defendant. So we would contend that any reference of that still is inconsistent with the defendant's guilt.

The court: And I would tend to agree with that if the evidence supports what you have indicated to me that it was a four year old who showed his penis and perhaps touched her with a stick. But I think I need to, and perhaps if this was discussed during the course of the forensic interview, that might clarify some of that information as well.

Ms. Abee: I would tend to agree. If that's basically the substance, we are not talking about someone who is older and perhaps has more of what I would call a criminal intent or was aware of what was going on and intertionally engaged in those acts.

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I think it's a little bit different with someone who is four years old who I would like to think could not develop and kind of criminal intent at that particular age under the circumstances.

Ms. Abee: And, your Honor, If for some reason it's still unclear after the forensic. We will be happy to proffer any testimony from any witnesses that can help fill in the blanks.

The court: All right. Then turning to the other bad acts.

Ms. Abee: Yes, Your Honor. As I stated the defendant is charged with oral penetration of the minor child when she was four years old. There are two other incidents that we would contend are prior bad acts that were committed on behalf of the defendant, Your Honor. First would be sometime between April and May of 2014 when the child alleges that the defendant exposed his penis to her.

Your Honor. That took place at the minor's home. Secondly, it would be sometime between July 7th, 2014 and July 11th, 2014 when the defendant, actually an eyewitness walked in and saw the defendant with his hand down the front of the minor's pants. She was again four years old at that point in time, Your Honor, and was located at her grandmother's house which is the location of the alleged oral sexual assault as well, your Honor. we would contend that these are other bad acts, prior bad acts on behalf of the defendant and should be admissible under the common scheme or plan exception under Rule 404 (b), your Honor. and I'm prepared to go into that legal argument if you're ready.
The court: And those are acts that are not the subject of the other indictment?

Ms. Abee: Correct. The indictment right here, your Honor.
The court: Either this indictment or the indictment ending in 6030 since this one has been charged. This is 6031. 2015-GS-32-6031.

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Ms. Abee: Yes, your HOnor.

The court: And I understand there is another indictment as well. 2015-GS-326030.

Ms. Abee: 6030, Your Honor. Is digital penetration alleged at the same time that the eyewitness saw the defendant's hands down the front of the minor's pants.

Tr. P. 31, lines 14-25. During the forensic interview portion of this investigation, your Honor, the victim also disclosed that she had seen the penis of someone named J. , J. is a small minor boy similar to the age of the victim, your Honor, and in speaking with the mother of the child she states that the child alleges that he showed her his penis and may have touched her with a stick or something like that in her private area. She then alleges the sexual assault against the defendant, your Honor, which again is simply him placing his penis inside of her mouth.

Although the child does, in fact, bring up J. in that incident your Honor, they are completely separate and distinct from the allegations that the minor makes against the defendant in this case, therefore we would ask that they be excluded for any reference by the state or by the defense as any reference to J. and J. possibly being the perpetrator of this sexual assault just merely casts suspicion on J. as the child has never asserted that J. did any oral penetration as she said the defendant does.

Therefore, we would contend that it doesn't rise to the level of third party guilt, your Honor. That is just casts a bear suspicion and we would ask that any reference to that child and that sexual contact be excluded from this case.

The Court: Mr. Williams.
Mr. Williams: your Honor, on the face of it I would agree with the Attorney General's Office.

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However, it's a little more complicated than that because the other two motions that they actually have, one is for the alleged indictment which the defendant is charged with which is criminal sexual conduct first degree, and then they're gonna attempt to allow in another assault type of case into that particular case.

I learned yesterday, your Honor, from a text from the Attorney General's office that there had been some acting out. I appreciate her doing this on Sunday, but she sent me a text indicating that the child may have exhibited some sort of sexual acting out and as we know in this particular case they have a blind, they call them a blind expert. I assume that's an expert who has not seen the victim is going to testify about characteristics of someone who has been sexual assaulted.

So, your Honor, the complication is this. As I understand sexual assaults that sometimes with a small child there will be acting out if the child has been sexually assaulted. So for whatever reason that this acting out the child may testify to or may be repeated in the courtroom about, that may be evidence that the child has been sexual abused by someone else and we wouldn't want the characteristics in regards to the sexual assault attributed to this defendant if indeed it was the result of some other sexual assault.

So it's not as clean as you would like it to be. As we know, the reason they use Lyle on these types of cases is because when you have a four year old child, it's hard to recollect specifically things that happen and they use this on the state identity, things of that nature. So only because they are attempting to Lyle in this evidence we think that would be appropriate.

At least have that testimony out that occurred when she was given that forensic interview.

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The Court: But in order to constitute any evidence related to third party guilt there has to be evidence which would exclude the defendant as the perpetrator.

Mr. Williams: I understand.
The Court: And so are you claiming that information would rise to that level? And if so how? It has to be inconsistent with his own guilt or evidence of his own guilt.

Mr Williams: your Honor, obviously it's a difficult thing for me to argue because I guess what I'm saying is that if they are going to be allowed to testify to the acting out of the child as evidence of a sexual assault, then they can't differentiate between that and alleged assault which occurred by some other, as a result of some other child. So I guess that's the problem. Maybe not for purposes of third party guilt but as the state in regards to her memory, recollection, things of that nature. So I'm not exactly sure how you qualify that but that's the issue which we really have is that if she is going to testify in regards to some sort of sexual acting out or if that's brought up, then that might be a problem if we can't bring up the fact, well, she's already been at least touched inappropriately by some other child.

And I agree with her, not that these specific episodes which he's charged with could be attributed to that because clearly she says it's oral sex committed by the defendant. I guess it's limited in scope, your Honor.

The Court: Yes, Sir. So more as a reason, it's something to point to indicate that her acting out could be for these other reason and not for the allegations in this particular case?

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STATUTE CITING

One of our South Carolina court's primary functions in the interpreting of a statute is to ascertain the direct intention of the Legislative intent and apply the statute according to its literal meaning. In construing such a statute, the words or its language must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Statutes 24(1). The literal meaning and Legislative intent of our common Law statute, section 17-19-30 (1976) is quite clear cut by it's language. The common Law requirements in South Carolina remain the same on every particular as they stood at common Law of older times State v. Judges, 208 S.C. 497, 38 S.E. 2d 715, 7119 (1946).

When the language of the statute is unambiguous court's inquiry is over, and the statute must be applied according to its plain meaning.

Determining the proper interpretation of a statute is a question of Law, and the court reviews questions of Law de novo, Town of summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E. 2d 40, 41 (2008), "statutory construction must begin with the language of the statute. Kofe v. U.S., immigration & naturalization serv. 60 F. 3d 1084, 1088 (4th cir. 1995), in interpreting statute language, words are generally given their common and ordinary meaning. Notilcal, for students with ** 244 Disabilities Educ. & Legal Def. Fund v. Allen, 152 F. 3d 283, 288 (4th cir. 1998). Where the language of the statute is unambiguous, the court's inquiry is over and the statute must be applied according to its plain meaning. Hall v. McCoy, 89 F. Supp. 2d 742, 745 (W.D. Va. 2000).

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FALSE TESTIMONY

Conviction must be set aside if false testimony could have affected the judgment of the jury. Hernandez v. Estelle, 624 F. 2d 313 (5th cir. 1983). Especially if it was due to actions of the prosecutor and the prosecutor with held any promise to the false statement see Brady v. Maryland, 373 U.S. 83, S.Ct. 1194. Moore v. Ill, 408 U.S. 783, 92 S.Ct. 2562. It is the duty of counsel to bring out these things by pulling the State's case to the proper adversary test, an accused is entitled to be assisted by an attorney, whether appointed, who plays the role necessary to ensure the trial is fair, Avery v. Alabama, 60 S.Ct. 321, see also Strickland v. Washington, 104 S.Ct. 2052.

If the attorney makes a serious mistake which could effect the verdict, reversal is required even if the attorney was generally competent. Trombly v. Anderson, 439 F. Supp. 1250, 1256 (1977), Aff'd 584 F. 2d 807 (6th cir. 1978); Hyman v. Aiken, 824 F. 2d 1405 (4th cir 1987).

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Auston Lee Breazeal, #369454, Applicant, v. State of South Carolina, Respondent.	Case No.: 2018-CP-32-02888 **RETURN AND PARTIAL MOTION TO DISMISS**

Respondent, making its Return to the application for post-conviction relief filed on August 21, 2018, would respectfully show this Court:

I. Procedural History

Auston Lee Breazeal (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its December 2015 term, the Lexington County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct with a minor (2015-GS-32-6030[1]; -6031). Later, during its June 2016 term, the Lexington County Grand Jury amended its indictment for first-degree criminal sexual conduct with a minor (2016-GS-32-6031) and returned a true-billed copy indicting Applicant for first-degree criminal sexual conduct with a minor. Robert T. Williams, Sr., Esquire, represented Applicant on this charge. Assistant Attorneys General Kinli Bare Abee and David Fernandez, both of the South Carolina Attorney General's Office, prosecuted the case. On August 22-23, 2016, Applicant proceeded to a jury trial before the Honorable Alison Renee Lee. Following deliberations, the jury convicted Applicant as indicted; and Judge Lee sentenced Applicant to a term of imprisonment of twenty-five years.

Applicant filed a timely notice of appeal and Appellate Defender Laura R. Baer, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, represented Applicant. On appeal, Applicant raised the following issue: "Whether the trial court erred in denying [Applicant's] motion for mistrial when the prosecution questioned him about whether he had attended counseling?" Following the submission of an *Anders*[2] brief and a review of the record pursuant to *Anders*, the South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Breazeal*, Op. No. 2018-UP-177 (S.C. Ct. App. filed May 2, 2018). The Remittitur was issued May 18, 2018.

II. Factual History

The indictment against Applicant arose from an incident when Applicant was sixteen years old and he abused his then four-year-old cousin (Victim). During an interview of Victim at the Dickerson Children's Advocacy Center, Victim stated Applicant made her put her mouth on his "pee thing." ROA 112-13. This incident occurred at Victim's grandmother's house while other family members were in the home, including her parents. ROA 112-13.

III. Current Application

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. Due Process Clause Violation[;]
2. Third Party Violation[;]
3. Ineffective Assistance of Counsel[;]
   a. For failing to secure and call an expert witness to contradict the [S]tate's theory of the case[;]
   b. [T]rial counsel failed to investigate both factual and legal matter to determine if defense canbe [sic] developed[;]
4. Subject Matter Jursidiction [sic][;]

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[1] This charge was dismissed.

2 *Anders v. California*, 386 U.S. 738 (1967).

5. Directed Verdicted [sic][;]
   a. The trial judge erred in failing to grant a directed verdict of acquittal where there was insufficient evidence of guilt.
6. Mistrial Violation[;]
   a. The trial judge erred in denying the motion for mistrial where the evidence that [Applicant] attended counseling following the filing of a police report related to the instant allegation was not admissible.
7. Prior Bad Acts[;]
   a. Did the trial court error [sic] in admitted prior crimes of moral turpitude against [Applicant] when their probative value was outweighed by the danger of unfair prejudice?
8. Expert Witness Violation[;]
9. Out of Violation[;]
10. Coaching Victim Violation[;]
11. Hearsay Violation[;]
12. Forensic Interviewer Qualification[; and]
    a. Whether the trial court erred in qualifying a forensic interviewer as an expert in forensic social worker [sic] in private practice Kershaw counseling in Kershaw, South Carolina and Mr. Kellin is a trauma focus cognitive behavioral therapist at Palmetto citizens against sexual assault in Lancaster county South Carolina.
13. False Testimony.

Applicant seeks relief as follows: "[T]hat my sentence is unfair as I have a clean record and I am only 20 years old, I seek that my charges be dropped or atleast [sic] decreased to a lower sentence or to be vacated to time served."

Attached to this Return and incorporated by reference are the records of the Lexington County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the record on appeal, Applicant's appellate records, and the post-conviction relief application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

Additionally, Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. Any claims not specifically laid out in this post-conviction relief application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§

17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. *See also* Rules 15(a)-(b), SCRCP. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the post-conviction relief hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. *See* Rule 15(a), SCRCP.

IV. Ineffective Assistance of Counsel

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a post-conviction relief action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

Failure to Investigate and Failure to Hire an Expert Witness

Applicant alleges his counsel was ineffective for failing to investigate. "There is a strong presumption counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). "Counsel's concern is the faithful representation of the interest of his client and such representation frequently involves highly practical considerations as well as specialized knowledge of the law." *Tollett v. Henderson*, 411 U.S. 258, 267-68 (1973). "'Although counsel should conduct a reasonable investigation into potential defenses, *Strickland* does not impose a constitutional requirement that counsel uncover every scrap of evidence that could conceivably help their client.'" *Tucker v. Ozmint*, 350 F.3d 433, 442 (4th Cir. 2003) (quoting *Green v. French*, 143 F.3d 865, 892 (4th Cir. 1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691; *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003). Moreover, "failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter*, 368 S.C. at 385-86, 629 S.E.2d at 357, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836 (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

Here, Applicant has wholly failed to identify what additional investigation he wanted counsel to partake and failed to identify for what purpose an expert needed to be hired. Applicant merely asserts "[c]ounsel's failure to secure and call a forensic social worker, Mr. Mahlow David Kellin." However, Mr. Kellin testified at trial, so it is unclear for what purpose Applicant wanted an additional forensic social worker to be called. Because counsel is presumed to have rendered adequate assistance and because Applicant has failed to identify any investigation in which he wanted counsel to partake, Respondent submits Applicant cannot establish any deficiency on the part of counsel.

Moreover, Applicant cannot establish any prejudice from this alleged deficiency. Applicant has failed to identify what benefit would have been realized from counsel hiring an expert witness, therefore, Applicant's assertions are merely speculative. *See Bannister v. State*, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998) (finding Applicant was not prejudiced by counsel's alleged deficiency when Applicant failed to produce the testimony of a witness and Applicant's assertions as to what this testimony would have been was merely speculative). Accordingly, Applicant cannot establish any deficiency or resulting prejudice.

Respondent submits Applicant can satisfy neither requirement of the *Strickland* test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. Due Process and Motion for More Definite Statement

Applicant also alleges he was denied due process of law based on general allegations his constitutional rights were violated. However, Applicant fails to set forth with specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act

requires that the Applicant must "... specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In an application for post-conviction relief, it is incumbent upon applicant to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965).

Applicant has failed to state with any specificity the specific facts giving rise to this allegation. Additionally, this allegation is not supported by any other additional information in the application. Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of his allegation of a due process violation. The Uniform Post-Conviction Procedure Act requires applicants to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief." Applicant's allegations are so vague and ambiguous that Respondent cannot be reasonably required to frame a responsive return. Therefore, Respondent moves to require Applicant to file an amended application well in advance of the hearing scheduled in this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the application.

VI. Summary Dismissal Based on Trial Court Error

Applicant alleges several instances of trial court error. Specifically, Applicant alleges "third party violation," "directed verdicted [sic]," mistrial violation," prior bad acts," expert witness violation," "out of violation," "coaching victim violation," hearsay violation," "forensic interviewer qualification," and "false testimony." These allegations should be summarily dismissed. An application for post-conviction relief does not serve as a substitute for direct appeal, and an issue that

could have been raised at an applicant's trial or on appeal is not cognizable in an application for post-conviction relief. S.C. Code Ann. § 17-27-20(b); *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974). Trial court error is not a cognizable claim for post-conviction relief. *Roscoe v. State*, 345 S.C. 16, 546 S.E.2d 417 (2001); *Wolfe v. State*, 326 S.C. 158, 485 S.E.2d 367 (1997); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973).

Applicant's allegations listed above could have been, or were, raised at trial and thereafter on appeal. Therefore, these allegations should be dismissed as not cognizable under the Uniform Post-Conviction Procedure Act.

VII. Summary Dismissal Based on Subject Matter Jurisdiction

Applicant contends the trial court lacked subject matter jurisdiction. An applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *See Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. *See also* S.C. Const. Art. V, § 7. Thus, Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside.

Applicant was indicted by the Lexington County Grand Jury for first-degree criminal sexual conduct with a minor, and the indictment alleges the criminal offenses occurred in Lexington County. Moreover, Applicant was prosecuted for these charges in Lexington County Court of General Sessions. Accordingly, Applicant has failed to present any facts or evidence which would establish the convictions he challenges in this application are of a class over which the circuit court does not have the authority to preside. Clearly, the Court of General Sessions in Lexington County had subject matter jurisdiction over these charges. For the aforementioned reasons, this allegation

should be summarily dismissed.

VIII. Denial of All Other Claims

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

IX. Conclusion and Request for Evidentiary Hearing

WHEREFORE, Respondent requests that an evidentiary hearing be held on the allegations of ineffective assistance of counsel raised in his post-conviction relief application.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

KELLY OPPENHEIMER
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By: _____
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November 20, 2018

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON AUSTON LEE BREAZEAL, #369454 Applicant, vs STATE OF SOUTH CAROLINA, Respondent,	IN THE COURT OF COMMON PLEAS **2018-CP-32-02888** CERTIFICATE OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Partial Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Overture E. Walker, Esquire
Stoney & Walker, LLC
1527 Blanding Street
Columbia, South Carolina 29201

DATED this the 20th day of November, 2018.

Camille Henry

Camille Henry, Legal Assistant
For Respondent

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2018CP3202888

Austin Lee Breazeale 369454		**South Carolina State of**	

PLAINTIFF(S) **DEFENDANT(S)**

Submitted by: **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

		8/5/2019
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **August 5th 2019**, and a copy mailed first class or placed in the appropriate attorney's box on **August 5th 2019**, to attorneys of record or to parties (when appearing pro se) as follows:

State of South Carolina)) County of Lexington)) Auston L. Breazeal,)) Applicant/Plaintiff,)) vs.)) State of South Carolina,)) Respondent/Defendant.))	In the Court Of Common Pleas Case No.: 2018-CP-32-02888 Transcript of Record

June 24, 2019

Lexington, South Carolina

BEFORE:

The Honorable Brooks P. Goldsmith, IV, Judge

APPEARANCES:

Overture E. Walker, Esquire
Attorney for the Applicant/Plaintiff

Taylor Z. Smith, Assistant Attorney General
Attorney for the Respondent/Defendant

ALSO PRESENT:

Auston L. Breazeal

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PCR HEARING

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EXHIBITS

RESPONDENT/DEFENDANT

NO.	DESCRIPTION	ID	EVDS.
1	Letter 6/2/15		19
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Thereupon, the following proceedings were had,

THE COURT: Good morning, ladies and gentlemen. Please be seated. Give me one second and I'll be right with you. Mr. Smith.

MR. SMITH: Your Honor, I put your packet up there as well as your copy of the roster for the week.

THE COURT: I have it. Whenever you're ready.

MR. SMITH: Your Honor, this is the case of Auston Breazeal v. State, 2018-CP-32-02888. Mr. Breazeal is confined in SCDC pursuant to orders of commitment of the Lexington County Clerk of Court. During its December 2015 term, the Lexington County Grand Jury indicted him for two counts of first degree criminal sexual conduct with a minor and later amended one of those, but changed, I think, a date. In August of 2016 he was tried before a jury and the Honorable Allison Rene Lee. He was represented at that time by Robert Theo Williams, Senior and Assistant Attorneys General Kinli Abee and David Fernandez of the Attorney General's Office prosecuted. Following the trial he was found guilty of csc with a minor in the first degree and sentenced to 25 years imprisonment which was the mandatory minimum. Second charge was later dismissed.

Mr. Breazeal did appeal and the Court of Appeals affirmed. He has since filed this application for post

conviction relief in which he has alleged multiple grounds some of which the State has moved to dismiss. Mr. Overture Walker is here today and is representing Mr. Breazeal and he has filed an amended application so before we begin taking testimony I would just ask him to specify on the record the grounds that they're gonna move forward on today.

THE COURT: All right.

MR. SMITH: Because depending on what it is, we may move to dismiss some of them before testimony and we would also just ask for clarification that Mr. Breazeal does want to move forward in light of the fact that he was sentenced to the mandatory minimum. Thank you, Your Honor.

THE COURT: Mr. Walker.

MR. WALKER: Good morning, Your Honor. May it please the Court. I certainly agree with the State's recitation of the procedural history in this matter. Your Honor, we're moving forward with three grounds for ineffective assistance of counsel this morning and actually it's outlined in the applicant's amended application for post conviction relief which was filed on March 25th, 2019 and also served on the State.

The first ground, Your Honor, being ineffective assistance of counsel rather for failing to adequately

investigate the criminal charges, and for Mr. Breazeal not having an opportunity to actually contribute or assist in the preparation of his defense. That would be one of the grounds asserted this morning. At least that's what Mr. Breazeal will testify to.

The second ground being, Your Honor, the failure to call a witness, at least we believe to be a material witness. This was a case when it went to trial it was criminal sexual conduct with a minor. We felt like that character certainly would have been an integral part to the defense or certainly would have been beneficial to him to have some character evidence introduced, and so Mr. Breazeal will testify as to that this morning.

Thirdly, and finally, Your Honor, there is - we're alleging ineffective assistance of counsel on the grounds of failure to communicate to Mr. Breazeal a second plea offer that was extended to Mr. Breazeal - or that was extended by the State. Mr. Breazeal was never informed about it. In fact, we have two additional witnesses who will testify this morning, one being Mr. Breazeal's grandmother and his mother as far as discussions about a second plea offer that was out there but that Mr. Breazeal never had the opportunity to consider.

So those are the grounds which we are proceeding on this morning, Your Honor.

THE COURT: All right. Does that satisfy you, Mr. Smith?

MR. SMITH: It does, Your Honor.

THE COURT: All right. Mr. Walker, you may proceed.

MR. WALKER: Thank you, Your Honor. The applicant calls as our first witness Auston Breazeal.

Thereupon,

AUSTON BREAZEAL

after having been first duly sworn, testified as follows,

DIRECT EXAMINATION

BY MR. WALKER:

Q. Mr. Breazeal, do you recall when you were arrested?

A. Yeah. February 2015.

Q. Do you recall what you were arrested for?

A. CSC two counts.

Q. Two counts of csc. Do you recall if you pled guilty to those charges or if you went to trial?

A. To trial.

Q. And were you found guilty at trial?

A. Yes. Yep.

Q. You've got to verbalize your answers. The court reporter has to pick it up. Thank you. And what was the verdict?

A. 25 years.

Q. That was the sentence rather, right?
A. (Witness nodding head.)
Q. You have to say yes.
A. Yes. That was the sentence.
Q. Who was your attorney at trial?
A. Theo Williams.
Q. Is he present in the courtroom today?
A. Yes. He is.
Q. Would you identify him?
A. Right there (indicating.)
MR. WALKER: Your Honor, let the record reflect that Mr. Breazeal has identified his trial counsel.
THE COURT: So noted.
BY MR. WALKER:
Q. How did he become involved in your case?
A. I believe my mom wanted to get him as a lawyer for my defense.
Q. What's your mother's name?
A. Shannon Hardy.
Q. Okay. And how long was he -- Well, when your mom went to meet with him, were you also with your mother at the time?
A. I don't believe so.
Q. So your mom made the decision to retrain him as your attorney?

A. Yes, sir.

Q. How long was he the attorney on your case?

A. The enter time.

Q. How many times did you meet with Mr. Williams over the course of his representation?

A. Twice.

Q. Twice?

A. Twice.

Q. Just twice?

A. Yes, sir.

Q. Okay. And did he ever discuss with you the charges in your case?

A. He told me what I was being charged with. I already knew that because I was arrested for it so not really, I mean, I guess.

Q. Did he ever discuss the indictments or the elements of the offense --

A. No.

Q. -- that you were facing? Did he ever discuss the possible punishment for each charge?

A. Yes.

Q. What did he tell you?

A. Said I was facing life.

Q. Did he ever talk about any sort of collateral consequences like sex offender registry, things like that?

A. No.

Q. Did he ever discuss with you the State's burden of proving its case beyond a reasonable doubt if it were to go to trial?

A. He said, uhm, that they don't really have a case. So, I mean, he said that the prosecutors didn't have a case really.

Q. Let's talk about as far as the investigation and discovery. Did Mr. Williams ever sit you down and review discovery in this case?

A. No.

Q. Did he ever offer you the opportunity to review your discovery?

A. No.

Q. To this day have you seen or reviewed any of your discovery?

A. I still ain't seen it.

Q. Do you feel like there were any witnesses who would have been beneficial to your case at trial?

A. Yeah.

Q. Who was that witness or witnesses?

A. Uhm, there was one at Wil Lou Gray named Sergeant Salters who was gonna testify.

Q. Did you ever share that with your attorney?

A. I did.

Q. What was your relationship with Sergeant Wil Lou Gray - or Sergeant Salters as Wil Lou Gray?

A. He was just like a mentor, I guess, mentor to me.

Q. And what do you believe he would have said on your behalf or he would have offered on your behalf?

A. I mean, he would have basically said I wouldn't be capable of doing anything like this, I guess.

Q. And what would he have based that off of?

A. I guess from conversations that we have had and the time that we spent together.

Q. Okay. Did Mr. Williams discuss any possible defenses to these charges with you?

A. Defenses?

Q. Right. Any possible defenses that you may have had to the charge?

A. No.

Q. And to your knowledge did he ever develop an opinion regarding the State's ability to prove its case? Did he ever share with you any opinion about their ability to prove it?

A. He said that they didn't really have, he don't think they really had a case so...

Q. Who made the decision to go to trial on these charges, you or your attorney?

A. Like it was a decision we made together kind of.

Q. What makes you say that?

A. Because I was told that I wasn't gonna do any time and that, uh, I done declined one plea for 19 years because I didn't want 19 years and that was, I guess, what led us to trial.

Q. Okay. Did he ever discuss with you any sort of trial strategy or what the strategy would have been at trial?

A. No.

Q. Let's talk about plea negotiations. Do you know if your attorney entered into plea negotiations on your behalf?

A. I don't know. No.

Q. Not that you are aware of. Were there any offers made to you by the State in this case, any plea offers made?

A. 19 years.

Q. How did you find out about the 19 years?

A. Through my mother.

Q. Your mother shared that with you?

A. Yes.

Q. So who was communicating with Mr. Williams, your mother or you?

A. I guess my mother every once in a while.

Q. Did you turn down that 19 years?

A. (Witness nodding head.)

Q. You've got to say yes or no.

A. Yes.

Q. Did your attorney ever share, discuss with you, I guess, the benefits and drawbacks I should say of taking a guilty plea versus going to trial?

A. No.

Q. Do you feel like you were given the opportunity to consider taking a -- Well, you mentioned something about another plea offer. I'm sorry.

A. Yes. That was after I was convicted.

Q. Okay. Tell us about that.

A. After I was convicted, I was told about a 12 to 16 plea that I didn't know about.

Q. How did you found out about that?

A. Once again through my family.

Q. So an offer of 12 to 16 years that was extended?

A. Yes.

Q. And you didn't know about that. So is it your testimony that you were not given the opportunity to consider that plea?

A. Yeah. I didn't know about it.

Q. And if your attorney had shared with you that second plea offer 12 to 16 years, what would your decision have been?

A. Probably would have taken it.

Q. And you would not have gone to trial?

A. (Witness shaking head.)

Q. You've got to say yes or no.
A. No. I wouldn't.
Q. Instead you went to trial?
A. Yeah.
Q. And again what was the outcome?
A. 25 years.
MR. WALKER: Okay. No further questions. Answer any questions that the State's Attorney has for you.
THE COURT: Mr. Smith.

CROSS EXAMINATION

BY MR. SMITH:

Q. Okay. Mr. Breazeal, you testified that you only met with Mr. Williams twice during your whole case?
A. Yeah.
Q. Okay. And you said that he didn't tell you about any plea offers?
A. I told you he told me about one. Well, my mom told me about it so I'm guessing he told her about it so one, yeah.
Q. And I believe you testified that he didn't engage in any plea negotiations on your behalf?
A. Not that I'm aware of. No.
Q. Okay. If that's the case, how were you offered a 19 year --
A. That's a good question. I mean, I was told through

my family but I declined that.

Q. Okay. You also testified that he did not go over potential defenses with you?

A. You say what?

Q. You also testified that he didn't go over potential defenses with you?

A. No. He did not.

Q. But you also testified that you were giving him at least this one witness --

A. Yeah.

Q. -- that you believe would help. So you did discuss the case?

A. I mean, one time. Yes.

Q. Okay. So that's just that one time. Okay.

A. That was two years, man, too, just so that's clear there.

MR. SMITH: Thank you, Your Honor. I have no further questions.

MR. WALKER: Nothing on redirect, Your Honor.

THE COURT: Thank you. You may step down.

MR. WALKER: At this time the applicant would call Ms. Shannon Harding.

Thereupon,

SHANNON HARDING

after having been first duly sworn, testified as follows,

THE COURT: Mr. Walker.

MR. WALKER: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. WALKER:

Q. Ms. Harding, state your full name for the record.

A. Shannon Lee Harding.

Q. How do you know Auston Breazeal?

A. He's my son.

Q. You also know the victim in the case, right?

A. I do. That's my niece.

Q. All right. Okay. So you're not here today to promote one side over the other, correct?

A. No.

Q. All right. Were you in the courtroom when Mr. Breazeal was convicted and sentenced?

A. I was.

Q. And what was your reaction?

A. I was crying silently because I had been told that if you cry, you're gonna end up having to go out so I sat there and cried silently on my husband's shoulder.

Q. What about the family's reaction, did you gauge their reaction as well?

A. Somewhat. I believe my brother ended up having to leave.

Q. So it sounds like the family was shocked?

A. Upset, shocked.

Q. Tell me why was the family upset and shocked?

A. No matter what's happened I believe we all have a love for each member in this case, you know. There's Auston and Trey's group. Trey was the father figure for Auston for many years. Even though he is his uncle, he was his only father figure for many years. He did a lot of stuff with them so there's that love that you can't disconnect love from a family. No matter what they do, that's there. That's where the shock and the...

Q. What was your reaction to the 25 year sentence?

A. Uhm, I was really upset because I believe he had, I know he had an opportunity to have less time and he was convinced that he was not going to get charged -- He was convinced he wasn't gonna get sentenced in that way at all.

Q. When you say that, you knew that he had an opportunity to get less time?

A. Yes.

Q. Explain that to the Court. What do you mean by you knew he had an opportunity for less time?

A. At one point there was an offer of 19 years and then we were here in the courtroom. There was another time that they had asked to see him before he went in, they had asked for him to please come and talk with the Attorney Generals and my understanding was there was gonna be an offer of 12 to 16

years at that point.

Q. Okay. Who informed you that there was gonna be an offer of 12 to 16 years or there was an offer of 12 to 16 years?

A. My mother and I were talking and, uhm, that's pretty much where I heard it from. She had been back there with the Attorney General's Office and she came out to let me know that they really wanted to talk to him and that I needed to get him to go talk to them so...

Q. And that there was an offer of 12 to 16 years?

A. Yes.

Q. Do you know if he accepted or rejected that offer?

A. I don't know that he was given that offer. I did not get to talk to him about that offer.

Q. Do you know if his attorney Mr. Williams was --

A. Not that I know of. He did not tell him.

Q. -- made aware of that offer?

A. I'm sure he was made aware because that's what I was told was that they wanted to talk to him so, but as far as whether he talked to him about it or not I have no idea.

MR. WALKER: No further questions. Answer any questions that the State has for you.

CROSS EXAMINATION

BY MR. SMITH:

Q. Ms. Harding, your son, he was out on bond before

trial, right?

A. Yes, sir.

Q. At that time was he residing with you?

A. A portion of the time he was and a portion of the time he wasn't.

Q. Okay. What was your address at that time?

A. My address was -- Lord have mercy -- Crestwood Arch. No. I've been out of those places for three years. I don't remember the address.

Q. Okay.

A. I lived in a subdivision over off of near Emanuel Church Road.

Q. Okay. At the time were you living on Castlefield Drive?

A. That's it. There you go. Yes.

Q. Was it [redacted] Castlefield?

A. Yes.

Q. Did you ever get letters from Mr. Williams while you lived at that address?

A. I got a letter about a 19, about a plea offer of 19 years. I believe that's the letter I got.

Q. Okay. When you say that you got one letter, was it addressed to you?

A. Not a hundred percent sure.

Q. Okay. Did any letters come to Auston from

Mr. Williams while you were living at that address?

A. Possibly.

Q. Okay.

A. I'm honestly not a hundred percent sure.

MR. SMITH: May I approach, Your Honor?

THE COURT: Yes, sir.

BY MR. SMITH:

Q. Ms. Harding, I'm going to show you a document. I apologize. That's the only copy I have so I may peek at it over your shoulder just a little bit. Will you please tell me the date of that document?

A. This one is June 2nd, 2015.

Q. From whom is it sent? Tell me the signature down at the bottom?

A. Robert Theo Williams.

Q. To whom is the letter addressed?

A. Auston Breazeal care of Shannon Harding.

MR. SMITH: Your Honor, at this time we would offer this as Respondent's Exhibit 1.

MR. WALKER: No objection, Your Honor.

THE COURT: Admitted without object.

(Whereupon, Respondent's Exhibit #1 marked for identification and entered.)

BY MR. SMITH:

Q. And will you please read to me the contents of that

letter?

A. It says, please find the enclosed copy of the discovery materials received relative to the above referenced charges. If you have any questions, please give me a call.

Q. Do you remember getting this letter?

A. I'm gonna imagine this was probably the packet, the beginning packet of where he was filing paperwork to be his attorney and that he was gonna represent him. I imagine. Without a copy of it I have no idea.

Q. But do you remember getting this letter or letters from him?

A. I remember getting a couple of things from him. Yes. Again, I guess here it says it was Auston care of me and usually, I mean, usually I relay things to Auston, but there was a time when I called and left his new address with Theo's office and Theo had Auston's phone number so that he could contact Auston about all of this.

Q. Okay. So I'm also gonna show you a second document here. Please read the date on that.

A. That one is June 23rd, 2015.

Q. Okay. Is it also sent from Mr. Williams?

A. Yes. Same thing, Auston Breazeal care of Shannon Harding.

Q. And will you please read the contents of this letter.

A. Please be advised that the prosecutor of your above referenced case has made an offer to allow you to plead to criminal sexual conduct with mandatory sex offender registry and sentencing range of 16 to 20 years imprisonment.

Q. Keep going.

A. Okay. I don't feel like this is a very good offer, but I had to extend it to you anyway. If you have any questions, please give me a call. With kindest regards, I am, and then it's Theo's signature. Honestly I do not remember this letter at all. Does it mean he didn't send it? No. It could have been put in a pile and didn't get opened, but I don't recall seeing that letter.

MR. SMITH: Okay. Fair enough. Your Honor, we would offer this as Respondent's Exhibit 2.

MR. WALKER: No objection, Your Honor.

THE COURT: Admitted without objection.

(Whereupon, Respondent's Exhibit #2 marked for identification and entered.)

BY MR. SMITH:

Q. Ms. Harding, at the time these two letters were sent you were living at that address, correct?

A. Yes, sir. I was.

Q. Was Auston living with you at that address?

A. At one point he was. At one point he wasn't. When he turned 18 - or no, when he turned 17, I booted him out

basically within a couple days of his birthday so...

Q. When is his birthday?

A. His birthday is [redacted], 1997, so it would have been in 2016, it would have been somewhere in that year that I kicked him out.

Q. Okay. But his birthday is in [redacted]?

A. Yes.

MR. SMITH: Your Honor, we have no further questions at this time.

MR. WALKER: Just very briefly on redirect, Your Honor.

THE COURT: Sure.

REDIRECT EXAMINATION

BY MR. WALKER:

Q. Ms. Harding, do you recall if Mr. Breazeal was living with you at the time or the date of those two letters?

A. That's the part I'm not a hundred percent sure of. I don't know what day I actually had him go live elsewhere. I'm just not a hundred percent sure on that.

Q. But at some point he left or moved out of your residence, right?

A. Yes.

Q. Were you the client in this case or --

A. No. He was.

Q. -- was Auston the client?

A. And again, I give Theo his new address and his phone number. He had all of that. He could have been contacting him.

MR. WALKER: Nothing further, Your Honor.

MR. SMITH: No more, Your Honor.

THE COURT: Thank you, ma'am. You mat step down. Call your next witness.

MR. WALKER: Linda Marsh. This is the final witness, Your Honor.

Thereupon,

LINDA MARSH

after having been first duly sworn, testified as follows,

DIRECT EXAMINATION

BY MR. WALKER:

Q. Ms. Marsh, state your full name for the record.

A. Linda Elizabeth Marsh.

Q. Ms. Marsh, How do you know Mr. Breazeal?

A. He's my grandson.

Q. You also know the victim in this case as well, right?

A. Yes, sir.

Q. And without stating her name, what's your relationship to the victim?

A. She's my granddaughter.

Q. And you're not here today to promote one side over the other; is that correct?

A. No, sir.

Q. And on the date that Mr. Breazeal was convicted and sentenced, were you in the courtroom?

A. Not at the time he was convicted. No.

Q. You were not in the courtroom. Were you in the courtroom at the time of sentencing?

A. I don't remember if I was or not.

Q. Okay. And you are aware, you are aware that he was sentenced?

A. Yes, sir.

Q. And you're aware of how much time he was sentenced to, correct?

A. Yes, sir.

Q. What was your reaction when you heard about the sentence he received?

A. I had a lot of mixed emotions.

Q. I don't want to make you relive that, okay?

A. Okay.

Q. Would it be fair to say there was some shock to --

A. Somewhat.

Q. -- the sentence?

A. Somewhat, but I knew what was supposed to - I knew what the sentence would be based on what I know of the law if

he was convicted.

Q. Tell me a little bit as far as that as far as being shocked at the amount of time that he received. Why were you shocked about that?

A. Well, I certainly hoped that if there was a plea out there, he would have taken it. I had a very - my view of what was going on and how I felt about the whole situation was that he may be convicted and at that point if he received a minimum sentence, I knew what it was and that bothered me.

Q. Were you aware of another plea out there, another plea offer? You just said --

A. In a conversation with one of the attorneys with the Attorney General's Office I was asked to please talk to him and get him to come in and see them before trial and I know it was before trial. I don't know if it like Friday, Saturday, Sunday, sometime before that date I was asked to please talk to him or get his mother to talk to him about coming in and talking to them before trial.

Q. That was in a conversation with the Attorney General's Office, correct?

A. Yes, sir.

Q. That would have been one of the prosecutors on the case?

A. Yes, sir.

Q. And do you know why they were trying, I guess why

they were trying to encourage you to encourage Mr. Breazeal to come in and talk?

A. Yes, sir. My understanding is that they had another plea for him.

Q. Do you know how much time?

A. I don't know if it was in that first conversation or a later conversation, my understanding was 12 to 16 years. It's been three years.

MR. SMITH: Objection, Your Honor. Hearsay.

MR. WALKER: Your Honor, she didn't testify as to what was said. She said her understanding of what the offer was 12 to 16 years so she didn't actually -- Had she said, okay, well, this was what person A said, I'm quite sure Your Honor would sustain the objection and ask me to rephrase the question, but all she said was during the conversation 12 to 16 years is what was --

THE COURT: Overrule the objection. You may proceed.

MR. WALKER: Thank you. Okay.

MR. SMITH: Thank you, Your Honor.

BY MR. WALKER:

Q. So 12 to 16 years was your understanding, correct?

A. Yes, sir.

Q. To your knowledge do you know if that was ever shared with Mr. Breazeal?

A. Not to my personal knowledge. No.

MR. WALKER: No further questions. Thank you. Answer any questions that the State may have for you.

MR. SMITH: Your Honor, I have no questions.

THE COURT: Thank you, ma'am. You may step down.

MR. WALKER: Your Honor, the applicant rests.

THE COURT: The applicant rests. Mr. Smith.

MR. SMITH: Yes. Thank you, Your Honor. At this time the State would call Mr. Theo Williams to the stand.

Thereupon,

ROBERT THEODORE WILLIAMS, SENIOR

after having been first duly sworn, testified as follows,

DIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Williams, where do you work now?

A. At 200 East Main Street, Lexington, South Carolina.

Q. That's a firm?

A. It is a firm.

Q. What's the name of the firm?

A. Williams, Stitely and Brink.

Q. How long have you been practicing law?

A. A little over 42 years, working on my 43rd year.

Q. How much of that time has been spent in the field of criminal law?

A. Uhm, probably some criminal law for the 42 years, but exclusively since probably 1997. I might get one or two differing cases, but almost always criminal.

Q. That's since 1997?

A. Yes, sir.

Q. Did you represent Mr. Breazeal in his csc trial?

A. I did.

Q. Okay. How did you come to be his attorney?

A. I was hired by his mother.

Q. At what point in his case did she hire you?

A. Probably February 2015 maybe. Yeah. February 2015.

Q. He was a minor at that time?

A. He was. He was 16 I believe.

Q. With what offenses was he charged with?

A. Two counts of criminal sexual conduct with a minor first degree.

Q. Okay. How many times during the course of your representation did you meet with Mr. Breazeal?

A. I have absolutely no idea. I can tell you though that there are a number of, my record is replete with a number of appearances where he came to court, at least probably five or six appearances maybe. We would have talked every time that he came. I can sit down and figure it out, but we talked to him on the phone. He came to the office. We talked to his

mother a lot. His mother appeared to be more responsive than he was. I took that to be age.

Q. Okay. Do you know how many times you talked to him on the phone?

A. No. I don't.

Q. Other than these phone calls, did you send letters to him?

A. I did.

Q. Okay.

A. The letters that you have referenced, one had to do with discovery. I had received the discovery in March of that year and I checked my file a while ago and it showed that I received the discovery in March and I would have sent that to him because it says discovery. If it had been the motions, it would have said motions in my letter so... And let me explain why I say that. Any time I represent a client, I'll send copies of all the discovery motions that I file, but it will say discovery motions. It won't say discovery. So if that letter says discovery, that would have referenced the discovery I got in March.

Q. By that I believe you're referring to Respondent's Exhibit 1?

A. Correct.

Q. Which was dated, I think it was June 2nd. Does that sound right?

A. Correct.

Q. Okay. When you would send letters to Mr. Breazeal, did you address them to him or how did you --

A. Well, I sent it to him in care of his mother to make sure -- I guess I shouldn't say it this way, but I wanted to make sure that he saw it and, you know, I had a young son also, so if you send it to him and send it in care of his mother, the mother is gonna make sure he reads it and looks at it also.

Q. Okay. So it sounds like you're saying you believe because of his age he was more likely to see it if it was addressed to him in care of his mother?

A. Yes.

Q. Okay. Did you ever meet with Mr. Breazeal when his mother was not present?

A. I did.

Q. Do you have any idea about how many times that could have been?

A. No. It wasn't a lot. Getting him in was somewhat tenuous.

Q. Is that because you weren't willing to meet with him without his mother present?

A. No. It had to do with phone calls. The only way -- If you would call him sometimes after he moved out from his mother's, then he wasn't easy to obtain. I don't know if that

was the phones or bad numbers or what have you, but we had enough time to be prepared to try the case. We met obviously the week before we tried the case. We talked about what he had and what he didn't have.

Q. At any point did she give you updated contact information for him?

A. I think I had a phone number maybe. I'm not sure I had another better mailing address. I couldn't figure out, I didn't exactly know what the problem was between the two of them, but I guess it had to do with him working or not working or hanging out or not hanging out.

Q. Okay. When you met with Mr. Breazeal, you testified you're not sure how many times it would have been?

A. I'm not.

Q. In the course of your practice do you have a certain number of times that you normally meet with a client or does it depend on the case?

A. It depends on the case. His case was not complicated. There wasn't a lot of extraneous stuff that I had to go over with. It was a he said/she said. There was not a lot of physical evidence to go over with. There were not a lot of alibi witnesses that we had that we had to go with because that wasn't his defense. He said it didn't happen and she said it did referring to the child.

Q. Okay. When you met with Mr. Breazeal, did you

explain the charges and the elements to him?

A. I did.

Q. Did he give you any reason to believe that he didn't understand?

A. No. He denied that he was guilty of that violation and he denied it all the way through the trial of the case. As a matter of fact, he wrote it on a pad while we were trying the case that he did not do that.

Q. Did you tell him about the potential sentences he could face?

A. I did.

Q. Did he give you any reason to believe he didn't understand that?

A. No. He understood what the allegations were and what they were trying to prove.

Q. Okay. I mean, as far as potential sentences he understood that?

A. Well, I don't know where this deal about 12 to 16 years came from. I had, I mailed a copy of what the offer was and right before the judge tried the case, she always goes over every General Sessions case and makes sure that everybody has gone through what the offers are and things of that nature because she wants to make sure that everybody knows what they're going forward with, how many witnesses you'll have, like pretrial briefs which is kind of unusual in a General

Sessions case. But we did that or at least went through that with the judge. He knew exactly how much time he was facing and I would love to know which Attorney General was talking to the grandmother wanting her to transmit information about what they were offering because I just don't know how that could have happened.

Q. So to the best of your knowledge how many plea offers were there?

A. There was only one plea offer, it was 16 to 20 years.

Q. Okay. Do you have any documents relating to that plea offer in your file?

A. I do.

Q. Do you have it with you there?

A. Well, you've got the email in your hands and there was also a letter which I think we sent a copy to him. You must have that letter. There was a letter and you got a copy of the email that the Attorney General sent me.

MR. SMITH: May I approach, Your Honor?

THE COURT: You may.

BY MR. SMITH:

Q. Mr. Williams, I'm gonna hand you up a document. Please describe what this document is.

A. Well, this is actually a copy of an email that was sent from the Attorney General's Office to Judge Lee's law

clerk prior to the beginning of the case. That's what I was referencing because she wanted everybody to make sure they dotted their i's, crossed their t's, nothing else hanging out there and it basically incorporates what the offer was and there was just one offer.

Q. Can you tell me the date of this?

A. The date of this letter or email is August 17th, 2016 at 11:02 a.m.

Q. Did you receive a copy of this email?

A. I did.

MR. SMITH: Okay. And, Your Honor, at this time we offer this as respondent's 3.

MR. WALKER: No objection, Your Honor.

THE COURT: Admitted without objection.

(Whereupon, Respondent's Exhibit #3 marked for identification and entered.)

BY MR. SMITH:

Q. Okay. Mr. Williams, the plea offer in this email, you had here about it before the time of this email; is that right?

A. Yes. There was a letter which was sent which I had a copy which I saw this morning as a matter of fact.

Q. By that are you referring to Respondent's Exhibit 2 the letter from you to Auston in care of his mother?

A. No. That was a letter that I sent to him telling

him what the offer was, but I believe I saw a copy coming from the Attorney General's Office in my file this morning that I looked at, but that letter does reflect what the offer was.

Q. Okay. So you're testifying that you believe you sent a different letter as well other than this one other than respondent's --

A. Can I see what you're talking about?

MR. SMITH: Sure. Your Honor, may I show him?

THE COURT: You may.

BY THE WITNESS:

A. I want to make sure I'm not confusing or saying anything incorrect.

BY MR. SMITH:

Q. This letter, and you're looking at respondent's 2.

A. So this is a letter from me to Auston telling him what the Attorney Generals had offered. I had a separate letter from the Attorney General's Office saying the same thing.

Q. Okay. But this was the same offer --

A. But it's the same offer.

Q. -- discussed in both the email and this letter?

A. Yes.

Q. Okay. When you discussed that plea offer with Auston, how did that conversation go?

A. He didn't want it.

Q. Okay.

A. It was too much time he said.

Q. Did you coerce him in any way into rejecting the plea offer?

A. No. I didn't. It was his call. I didn't disagree with what he was deciding. That was his call at his young age, but I couldn't make him take the offer either.

Q. Did you promise him that he wouldn't get time if he went to trial?

A. No.

Q. Tell me about your discussions. Did you discuss with him the potential outcome of trial?

A. I guess armchairing it I could take my mind back. I think he had a shot to win the case. Just like every trial that you try, you should think that you have a chance to win it or you should never try that case. It was close in my mind, but we talked about it. There were certain things that you could not avoid and that is emotional reactions of jurors sometimes. You and I talked about that this morning. Sometimes it's just, you know... It wasn't a bad decision by him based on what you saw at the time. It might be bad knowing what they finally decided with.

Q. But it was his decision?

A. It was his decision.

Q. Okay. Did discovery in this case, obviously he

decided to go to trial. Did he understand the evidence against him?

A. He did.

Q. And I know that you testified earlier about this letter that you mailed. Other than mailing that letter, did you go over the State's evidence?

A. Sure. I mean, we talked about the main witnesses that would testify, who could testify. Who could testify and who probably would testify.

Q. Okay. Did he give you any names of people he wanted you to call as witnesses in his trial?

A. Uhm, I don't dispute that he told me something about someone if we needed to bring him up for a character witness maybe for sentencing or something like that. He might have told me that. That potential witness that he's talking about, I guess, would not have been a fact witness and I'm not really sure that we really wanted to open up his character for all the bad things that he may or may not have done and that's what happens sometimes when you start talking about character evidence.

Q. And you're referring there to a Sergeant the Wil Lou Gray School?

A. Yes.

Q. Why didn't you want to get into character evidence in this case?

A. Because you don't know what can of worms you're gonna open up. His mother clearly was having trouble with him at home and she booted him out of the house at 17. None of that should have any application in regards to whether or not he committed that criminal act or didn't commit it and I'd hate to see my client going to jail because some juror thought, well, he should be nicer to his mother.

Q. Did you explain your point of view on that to Mr. Breazeal?

A. Yes.

Q. Did he give you any indication that he didn't understand your perspective on that?

A. No. And at no point in time did he tell me, well, I want you to drag him down here and serve him with a subpoena and let him say what a nice guy I am.

Q. Other than that, did he give you any names as far as fact witnesses for the case?

A. There were no other fact witnesses. As a matter of fact, in the middle of all of this it was kind of a surprise thing that the State kind of came up with I thought and that was the guy who was staying with the grandmother who all of a sudden had this memory recall that he saw something. That wasn't an immediate thing. He's shaking his head. I think he understands what I'm talking about. That was kind of one of those things you say where the heck did that come from. But

it didn't change anything really. If anything it looked like it was put forth rather late.

Q. Okay. Which witness are you referring to?

A. I'm referring to the alleged witness that was in the grandmother's house who supposedly was recovering from surgery who said that he saw my client stick his hands in the child's pants and supposedly my client said that he made the comment he was like tickling it, tickling the child, but that he didn't think about telling anybody until several months later.

Q. You did cross examine that witness at trial?

A. I did. I did. And I hope I indicated how much I thought about that testimony.

Q. Okay.

A. The one thing I think maybe I should say also is that in terms of what he understood or didn't understand it's one of the most unusual cases I have had because everybody in this case had law enforcement in their background. Grandma was retired SLED. The victim's mother and father were West Columbia police officers or working for West Columbia for something. I want to say police oriented. I want to say his mother had some sort of police connection. Now, obviously I could be wrong on that, but I do remember it was unusual and I do remember, I guess that's why the Attorney General was involved.

Q. You testified earlier that you thought this case was essentially a he said/she said case?

A. I do. There was no physical evidence.

Q. How do you prepare for this case in light of that?

A. Well, you get your witness which is your client to say obviously that he didn't do it. Well, tell the truth. If he can't tell the truth, then you put him down. He was very straightforward on the stand. He didn't back away or anything. He answered the questions well. His demeanor was just like it is now which means he didn't get ruffled or anything like that and then you just try to poke holes with the memory of people and why these people are saying these things and that's why we tried to, at one point in time tried to throw a little bit of an angle about whether the child may have been, I don't know, somebody else might have been involved, but we were cut off at the heels by the judge on that I think.

Q. Did you work with Mr. Breazeal to prepare for trial?

A. I did, but it was easy because his testimony is, I mean, I didn't do it. There was one episode where he went into the bathroom and the child supposedly saw him in the bathroom. The biggest problem in this whole case, the reason why he got convicted, and I don't know if I can say that, I guess when you get old, Judge, you can say a lot of things, I

think the reason why he got convicted is because there was an arrangement with the grandmother for the supervision of these two grandchildren and after that initial time period, the supervision changed and it looked like something had happened.

Q. And what you're referring to there is that this arrangement came about after there were allegations that there had been some inappropriate -- I don't know how you would phrase that --

A. Touching. Conduct.

Q. Before the incidents alleged in the indictments?

A. Correct.

Q. So you said it was Mr. Breazeal, he wanted to go to trial?

A. Well, I don't think anybody wants to go to trial. I think when he didn't have a choice, he had to try it.

Q. He preferred --

A. He preferred that to getting 16 years and I feel certain the judge would have given him 16 years because it was a very straightforward good judge, too.

Q. So were there any plea offers that you didn't talk about with Mr. Breazeal?

A. No. I never knew anything about this 12 year plea offer from someone. I would have hoped that the Attorney General would have shared that with me instead of the

grandmother.

Q. But again, Mr. Breazeal's explanation to you the whole time was that he didn't do it?

A. He didn't do it. The only thing, the only thing that he could ever say that was anywhere close to anything like that was the child might have seen me when I was going to the bathroom.

Q. And that was testimony that was presented at trial?

A. Right.

Q. Did you ever receive any discovery that you didn't share with Mr. Breazeal?

A. No.

MR. SMITH: I thank you. Your Honor, I have no further questions.

THE COURT: Cross examination.

MR. WALKER: Thank you, Your Honor. I'll be brief.

CROSS EXAMINATION

BY MR. WALKER:

Q. Good morning, Mr. Williams.

A. Good morning.

Q. Mr. Williams, you have a pretty robust law practice, right?

A. I do.

Q. You do a lot of criminal work?

A. I do.

Q. And you do a good bit of work here in Lexington County; is that correct?

A. I do.

Q. Is it fair to say that you're in appearances on a regular basis with your clients?

A. Every appearance unless I'm in trial somewhere else.

Q. Is it fair to say that you normally have more than one client when you make appearances?

A. I do and every one of them wants to talk to me on that day.

Q. Correct. They all want to talk with you on that day, right?

A. They do. They do.

Q. How much time are you able to devote to those clients?

A. What I normally do is I tell them, well, here's what I want you to do. I want you to go back across the street, wait on me there and we'll sit down and we'll talk about it. Or if you don't have enough time to do it today, then I want you to set up an appointment and we'll sit down and we'll go over it.

Q. Because usually there's not enough time --

A. True.

Q. -- to have substantive conversations about the evidence in the case at the appearances?

A. That's true.

Q. And that would also apply to Mr. Breazeal?

A. It would apply to any of my clients that wanted to talk on the day of first appearance and some of them actually come in like an hour before first appearances and I try to make myself handy then. It seems like they only want to talk about their case when they have to come to court.

Q. You testified earlier that you're not sure how many times you would have met with Mr. Breazeal?

A. I'm not.

Q. And when you say meetings, that would also include the times that you interact with your clients at appearances?

A. It would be when I met with them in my office, when I met with them for court. I guess if you want to call telephone conversations as meetings, you can do that.

Q. Do you recall ever meeting with him in your office to discuss the evidence or review the evidence in the case?

A. I feel certain we would have gone over the evidence in my office.

Q. That would have been right before trial or are we talking well ahead of trial?

A. The answer to that is both because what I would have done is gone through the evidence when we first started getting it and in my experience with the Solicitors, I don't know if it's true with the Attorney General's Office or not, you tend to get other discovery right before trial which I guess they didn't send or forgot to send or they're just now getting so I try to also schedule the week right before, right before the trial to go through everything anyway because it seems like there's always more stuff that you get right before the trial. In this particular case, though, in all honesty, I don't think there was like stuff that I didn't get until like right before we tried it because of the type of case it was. I mean, all you would have had was the incident reports, the statements, the Dickerson tapes and the Dickerson information. The only thing that was not like popping right out was obviously the gentleman that all of a sudden decided that he was a witness to this, but you would have had that way before you started trying the case.

Q. Why did you feel the need, Mr. Williams, to, or why did you, I guess, you decided to send the discovery to him as opposed to having him come into your office and review it?

A. So that when I appear here at this PCR hearing and someone asks me did I go over it with the client, I say I did not only go over it with the client but I sent a copy of it to the client so that I would be able to answer your question

that yes, I even mailed it to him.

Q. So you weren't even sure that, you didn't have the expectation that he would actually review it. It was just in anticipation of a PCR hearing down the road?

A. You know, I can only do what I can do. I can't make him read it, I can't make him understand, and I can't make him do what I would do so I provide all of the tools for them and then they make the call.

Q. You mentioned his age earlier, Mr. Williams, and you thought that may have impacted his judgment, I guess, to some degree with some of the decisions that were made throughout the process so if you don't think he has the, I guess, requisite majority to, I guess, review the evidence on his own volition, then why not have him come into the office?

A. And I'm not saying he didn't come into the office. But, you know, with, I guess with young guys, and I think I know young guys because I've got a son, either they take it sincerely and they worry about it and they want to look at all the stuff or they postpone it and they don't want to pay attention to it and they just feel like the day never comes. I try to cover both of those angles. I shouldn't say I treat guys differently than that. I'm just saying from my own experience with my own son.

Q. Understood. Let's move onto witnesses at the trial, Mr. Williams. Mr. Breazeal made you aware of a Sergeant

Salters at Wil Lou Gray Academy. Do you recall that?

A. I heard him say that. I can't tell you with independent recall that other than the fact that I knew something about in the back of my head today that somebody from Wil Lou that he mentioned somebody who was like a character witness for him if he got convicted at Wil Lou Gray.

Q. And that person was only going to be a character witness, Mr. Williams, for sentencing purposes or a character witness at trial?

A. He would have been a character witness for sentencing purposes because there was nothing he could add to the facts of this particular case. He wasn't there when this was done and I did not understand that we were gonna put up witnesses to say that he's not the kind of guy to do this.

Q. You mentioned in your testimony a moment ago about opening up Pandora's Box so the speak --

A. Correct.

Q. -- if we got into character evidence at trial. Was that your call or was that Mr. Breazeal's call?

A. He and I talked about that and I explained to him, and I guess a lot of people have that misconception that when you start talking about character evidence what really happens with that. Well, it works both ways. It's like having somebody on the stand for DUI say that he never drinks more

than one beer, but he's got four convictions for DUI. It opens the book when you start talking about it.

Q. And the plea offer, you said you were only aware of one plea offer of 16 to 20 years, correct?

A. Correct.

Q. And the plea was in the email there. You received some of that email from the Attorney General and Judge Lee's law clerk, correct?

A. Correct.

Q. And I believe that the second portion of the sentence in that letter says --

A. Sorry about the confusion.

Q. Right. And it also says no counter offer was made. Any reason why you didn't make a counter offer to the 16 to 20 that was offered by the State?

A. He said he didn't do it. He said that he was not gonna go to jail. He didn't want to plea to anywhere close to that. He denied his guilt.

Q. So you say he wouldn't plead to anything close to that so you didn't even decide to go back and talk --

A. Simple assault?

Q. No. I'm not suggesting that he plead to a lesser included, but you didn't even bother to go back and suggest to him that perhaps he could get less than 16 to 20 if y'all made a counter offer?

A. He said that he wanted a trial; that he was not guilty, and I took him at his word.

MR. WALKER: No further questions, Your Honor.

MR. SMITH: Just a few, Your Honor.

REDIRECT EXAMINATION

BY MR. SMITH:

Q. Mr. Williams, you testified about mailing the discovery to Mr. Breazeal. Did you review it with him in person as well?

A. Yes.

Q. So you did that in addition to mailing it to him?

A. Of course.

Q. You testified that you may have gotten some discovery near to the time of trial, but I assume that you also shared that with Mr. Breazeal?

A. I did and in all honesty that was a comment, I guess, made as to the general rule of kind of how trials work, but in looking through my file it doesn't look like there was a bunch of new stuff that was sent out in the file. It was all open if you will.

Q. Okay. So nothing that would have changed the strategic position of the case?

A. Nothing to change the strategy of how to try the case, nothing to change whether or not he should plea to the offer or not plead to the offer.

Q. Okay. After that last round of discovery, did you discuss any plea offers with Mr. Breazeal at that point or were all of your plea discussions done before that?

A. We were talking about discussions about pleading all the way up until the time of trial and I had a conversation with him, I believe, while we were waiting on the jury, but there was no change in us waiting to see what the jury would decide.

Q. Okay. If you had received a different or better plea offer from the State, would you have relayed that to Mr. Breazeal?

A. Well, sure I would. I would much rather -- I shouldn't say this -- I would much rather do a plea that the client wants then to find out later that the client is unhappy about what happened to him.

MR. SMITH: Your Honor, I have no further questions. Thank you.

MR. WALKER: Nothing on redirect.

THE COURT: Thank you. You may step down, sir.

THE WITNESS: Thank you, Your Honor.

MR. SMITH: Your Honor, I ask that this witness be excused.

MR. WALKER: No objection, Your Honor.

THE COURT: You're excused from your subpoena.

THE WITNESS: Thank you, Your Honor.

THE COURT: You may call your next witness, Mr. Smith.

MR. SMITH: That's the State's case, Your Honor, and I would just ask would you like to hear closing?

THE COURT: Anything in reply?

MR. WALKER: Nothing in reply, Your Honor.

THE COURT: Glad to hear closing arguments, sir.

MR. WALKER: Arguments, Your Honor, or if you would just prefer to take it under advisement?

THE COURT: Let's go ahead and have closing arguments.

MR. SMITH: Okay. Your Honor, it's our position that you should deny Mr. Breazeal's application. The testimony of Mr. Williams shows that there was thorough trial preparation in this case. If you look at the transcript, I believe that his performance at trial bears out that he was prepared for trial. His testimony, I think, also shows that he did communicate about the case in terms of strategy and discovery with Mr. Breazeal and it seems like Mr. Breazeal was adamant that he wanted to go to trial; that he did not do this. And you have also heard testimony from Mr. Williams that there were no plea offers other than the one he presented and we have email and letters confirming that he sent discovery and the plea offer to Mr. Breazeal. And I don't think Mr.

Breazeal showed anything today that would point to either deficiency in Mr. Williams' performance or that anything he did prejudiced Mr. Breazeal at trial and particularly in light of the fact that he was sentenced to the mandatory minimum. So with all of that in mind the State asks that you deny his application.

THE COURT: Thank you.

MR. WALKER: Your Honor, may it please the Court. Judge, we would ask that you grant the relief requested, and specifically the relief that is being requested here is that the sentence be vacated and that Mr. Breazeal be resentenced. The standard, Your Honor, for ineffective assistance of counsel is number 1, you must show that trial counsel was deficient within the range of competence, and that secondly, that the applicant was prejudiced meaning that but for trial counsel's error the result would have been different.

Your Honor, in this case there's been testimony actually presented not only through Mr. Breazeal but also testimony from eyewitnesses one being his mother and also his grandmother all who were saying that there was a second offer that was extended to him. Now, I get it that perhaps one could sort of assume that Mr. Breazeal is acting in self interest and that his mother would also look out for his interest, but we have to keep in mind

that we have Ms. Marsh, the grandmother, who is not only the grandmother for Mr. Breazeal but also the grandmother for the victim in this case who was in the room when a second plea offer was bandied about. She was in the room. She testified to what she actually heard. There's been nothing presented by the State to actually contradict or anything that would belie her observations. And as Your Honor knows that one of the grounds or what can be grounds for ineffective assistance of counsel is rejection of a plea offer or trial counsel's failure to relay a plea offer to the applicant and it results in the applicant receiving a more severe sentence at trial and in that instance the remedy would be to vacate the sentence and have the applicant resentenced.

Your Honor, there's also, there's been evidence presented today through testimony about Mr. Breazeal not having an opportunity to actually provide any sort of meaningful assistance in preparing his defense. Certainly you have got competing testimony between he and Mr. Williams and Mr. Williams says that discovery was sent to him, but Mr. Williams also acknowledged that Mr. Breazeal at the time was 16, 17 years old, he had concerns about his own maturity and Ms. Breazeal's own mother even acknowledged that discovery never made its way into his hands. She doesn't even recall receiving

that letter and so he never really had the opportunity to actually participate and assist in mounting a meaningful defense in this matter and, of course, the issue of failing to call a material witness. We don't have Sergeant Salters here today to testify, but as Mr. Breazeal has stated, you know, he felt pretty strongly that this is a case where his character, he's a person who would have vouched for his character and would have made a differences in the outcome at trial.

So, Your Honor, we are asking that you grant the relief that's requested. We believe the evidence that has been presented certainly meets the standard of proof here which would be the preponderance of the evidence. Thank you, Your Honor.

THE COURT: Anything in reply?

MR. SMITH: No, Your Honor.

THE COURT: All right. On the issue of material witness I find there's no evidence as to what this witness would have said had he come and therefore there is a failure of proof in that regard. There's also no evidence as to how the defendant would have benefited by spending more time with his attorney; that the amount of time is in dispute, but there's no evidence as to how that would have specifically benefited him. I also find there's no reliable evidence that the defendant's

attorney actually himself received another plea offer, therefore having not received it, he could not convey it. Based on all of that I find that the defendant has failed to meet defendant's burden of proof and therefore I'm compelled to deny defendant's application. Mr. Smith, would you please prepare an order.

MR. SMITH: I would, Your Honor. Is there a timeline for that?

THE COURT: 20 days?

MR. SMITH: I can do it, Your Honor.

THE COURT: All right. Court's adjourned.

MR. WALKER: Thank you, Judge.

MR. SMITH: Thank you, Your Honor.

WHEREUPON, THE HEARING WAS CONCLUDED.

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 24th day of June, 2019.

I FURTHER CERTIFY that the forgoing 55 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 29th day of October, 2019.

By:s/Steven E. LeBlanc

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

WILLIAMS, HENDRIX, STEIGNER & BRINK, P.A.

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Robert T. Williams, Sr.
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Carolyn B. Steigner
W. Lisa Brink

Daun C. Steigner
Benjamin A. Stitely
Michelle L. Boykin

June 2, 2015

Auston Breazeale
c/o Shannon Hardy
[redacted] Castlefield Drive
Lexington, SC 29073

Re: State v. Auston Lee Breazeale
Warrant No. 2015A3210200340, Criminal Sexual Conduct with Minor or Attempt, 1st degree

Dear Auston:

Please find the enclosed copy of the discovery materials we received relative to the above referenced charges.

If you have any questions, please give me a call.

With kindest regards, I am

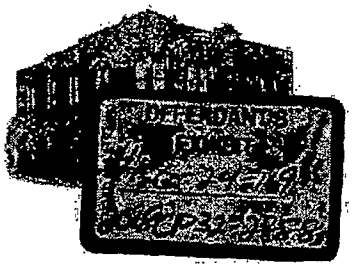
Very truly yours,

Rtw

Robert T. Williams, Sr.

RTW/gma

Enclosures



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Robert T. Williams, Sr.
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June 23, 2015

Auston Breazeale
c/o Shannon Hardy
[redacted] Castlefield Drive
Lexington, SC 29073

Re: State v. Auston Lee Breazeale
Warrant No. 2015A3210200340, Criminal Sexual Conduct with Minor or Attempt, 1st degree

Dear Auston:

Please be advised that the prosecutor in your above referenced case has made an offer to allow you to plead to Criminal Sexual Conduct with mandatory sex offender registry and a sentencing range of 16-20 years imprisonment.

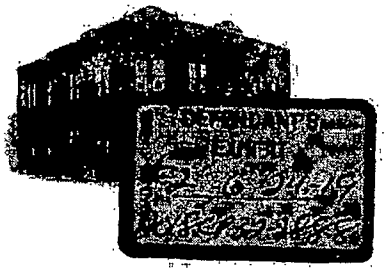
I don't feel like this is a very good offer, but I had to extend it to you anyway. If you have any questions, please give me a call.

With kindest regards, I am

Very truly yours,

Robert T. Williams, Sr.

RTW/gma



Glenda Amick

From: Kinli Abee [KAbee@scag.gov]
Sent: Wednesday, August 17, 2016 11:02 AM
To: Lee, Alison Renee Law Clerk (Tara Bing)
Cc: Lee, Alison Renee; Theo Williams
Subject: RE: State v. Auston Breazeal (Case No. 2015-GS-32-06030 & 6031)

Tara,

I have cc'd the defense attorney, Theo Williams on this email. From the State, we are ready to move forward. The defendant is charged with CSC 1st with a minor (25-life) and we offered a plea to CSC 1st with a range of 16-20 years. The plea offer was rejected and no counter offer was made.

If you have any other questions, please let me know.

Thanks,
Kinli

From: Lee, Alison Renee Law Clerk (Tara Bing) [mailto:ALeeLC@sccourts.org]
Sent: Wednesday, August 17, 2016 10:57 AM
To: Kinli Abee
Cc: Lee, Alison Renee
Subject: RE: State v. Auston Breazeal (Case No. 2015-GS-32-06030 & 6031)

Counsel:

Good Morning. Judge Lee asked that I contact you concerning the above case that is on the Roster for next week in Lexington County. She would like to know if the case is ready to move forward, and whether there are any plea offers made.

Thank you,

Tara N. Bing
Law Clerk to The Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29201
(803) 576-1767 (Direct Dial)
(803) 576-1765 (Office)

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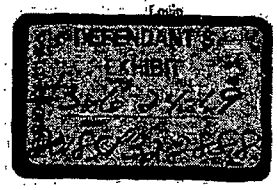
Total Control Panel

To: twilliams@whsblawfirm.com Message Score: 20 High (60): Pass



FILED
2019 AUG -5 PM 12:05
LISA M. COMER
CLERK OF COURT
LEX. CO.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Auston Lee Breazeal, #369454, Applicant, v. State of South Carolina, Respondent.	Case No. 2018-CP-32-02888 **ORDER OF DISMISSAL**

This matter comes before this Court by way of an Application for Post-Conviction filed on August 21, 2018, by Auston Breazeal (Applicant). The State (Respondent) filed its Return and Partial Motion to Dismiss on November 21, 2018. Applicant filed a Motion to Amend Application for Post-Conviction Relief on March 25, 2019. An evidentiary hearing in the matter was held before the undersigned on June 24, 2019, at the Lexington County Courthouse. Applicant was present and was represented by Overture E. Walker, Esquire. Respondent was represented by Assistant Attorney General Taylor Z. Smith of the South Carolina Attorney General's Office. At the hearing, Shannon Hardy, Linda Marsh, and Applicant testified on Applicant's behalf, and Robert T. Williams, Sr., Esquire, (Counsel) testified on behalf of Respondent. Following a thorough review of the record in its entirety and the testimony and evidence presented at the evidentiary hearing, this Court finds that Applicant has failed to meet his requisite burden of proof and denies this application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. During its December 2015 of term, the Lexington County Grand Jury indicted Applicant for two counts of first-degree

criminal sexual conduct with a minor (2015-GS-32-6030[1]; -6031). Later, during its June 2016 term, the Lexington County Grand Jury amended its indictment for first-degree criminal sexual conduct with a minor (2016-GS-32-6031) and returned a true-billed copy indicting Applicant for first-degree criminal sexual conduct with a minor. Counsel represented Applicant on this charge. Assistant Attorneys General Kinli Bare Abee and David Fernandez, both of the South Carolina Attorney General's Office, prosecuted the case on behalf of Respondent. On August 22-23, 2016, Applicant proceeded to a jury trial before the Honorable Alison Renee Lee. Following deliberations, the jury convicted Applicant as indicted, and Judge Lee sentenced Applicant to a term of imprisonment of twenty-five years.

Applicant filed a timely notice of appeal and Appellate Defender Laura R. Baer, of the South Carolina Commission on Indigent Defense, Office of Appellate Defense, represented Applicant. On appeal, Applicant raised the following issue: "Whether the trial court erred in denying [Applicant's] motion for mistrial when the prosecution questioned him about whether he had attended counseling?" Following the submission of an Anders[2] brief and a review of the record, the South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Breazeal, Op. No. 2018-UP-177 (S.C. Ct. App. filed May 2, 2018). The Remittitur was issued on May 18, 2018.

CURRENT PROCEEDING

On August 21, 2018, Applicant filed an Application for Post-Conviction Relief, in which he made the following allegations:

1. Due Process Clause Violation[;]
2. Third Party Violation[;]
3. Ineffective Assistance of Counsel[;]
   a. For failing to secure and call an expert witness to contradict

[1] This charge was dismissed.
[2] Anders v. California, 386 U.S. 738 (1967).

the [S]tate's theory of the case[;]

b. [T]rial counsel failed to investigate both factual and legal matter to determine if defense canbe [sic] developed[;]

4. Subject Matter Jursidiction [sic][;]
5. Directed Verdicted [sic][;]
   a. The trial judge erred in failing to grant a directed verdict of acquittal where there was insufficient evidence of guilt.
6. Mistrial Violation[;]
   a. The trial judge erred in denying the motion for mistrial where the evidence that [Applicant] attended counseling following the filing of a police report related to the instant allegation was not admissible.
7. Prior Bad Acts[;]
   a. Did the trial court error [sic] in admitted prior crimes of moral turpitude against [Applicant] when their probative value was outweighed by the danger of unfair prejudice?
8. Expert Witness Violation[;]
9. Out of Violation[;]
10. Coaching Victim Violation[;]
11. Hearsay Violation[;]
12. Forensic Interviewer Qualification[; and]
    a. Whether the trial court erred in qualifying a forensic interviewer as an expert in forensic social worker [sic] in private practice Kershaw counseling in Kershaw, South Carolina and Mr. Kellin is a trauma focus cognitive behavioral therapist at Palmetto citizens against sexual assault in Lancaster county South Carolina.
13. False Testimony.

On March 25, 2019, Applicant filed a Motion to Amend Application for Post-Conviction Relief, which this Court has accepted as an amended application, and in which Applicant made the following allegations:

1. Applicant asserts ineffective assistance of counsel on the grounds that trial counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted. Further, trial counsel failed to adequately prepare for trial and deprived Applicant of an opportunity to review the State's evidence and assist in the preparation of his defense.
2. Applicant asserts ineffective assistance of counsel on the grounds that trial counsel failed to call or present testimony from material witnesses whose testimony would have been favorable to Applicant.
3. Applicant asserts ineffective assistance of counsel on the grounds that trial counsel failed to communicate plea offers extended by the State prior to his conviction at trial. Further, trial counsel failed to inform

> Applicant of the potential penalties, specifically the mandatory minimum sentence of twenty-five (25) years, in the event of a conviction at trial thereby depriving him of the opportunity to consider a more favorable sentence.

At the start of the evidentiary hearing, Respondent requested that Applicant specify for the record the grounds upon which Applicant would move forward. Applicant specified that he would be moving forward only upon the allegations specifically mentioned in the Motion to Amend Application for Post-Conviction Relief, which was filed on March 25, 2019. Because those allegations are the only grounds upon which Applicant moved forward at the evidentiary hearing, all other grounds are deemed to be waived and will not be addressed in this Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that

counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the

wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Based on this standard set forth above, and the reasoning below, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel. The allegations are addressed fully below:

Applicant asserts ineffective assistance of counsel on the grounds that trial counsel failed to adequately investigate the criminal charge(s) for which Applicant was convicted. Further, trial counsel failed to adequately prepare for trial and deprived Applicant of an opportunity to review the State's evidence and assist in the preparation of his defense.

By way of explanation of these grounds, Applicant was alleging that the Counsel did not review potential defenses with Applicant, did not explain the elements of criminal sexual conduct with a minor, first degree, to Applicant, did not explain the potential sentence or collateral consequences for criminal sexual conduct with a minor, first degree, to Applicant, did not review discovery with Applicant, was generally unprepared for trial, and failed to involve Applicant adequately in case preparation.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Id. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. . ." Strickland, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim

must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014). A defense attorney's "[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). An applicant alleging that his attorney failed to prepare for the case must show how additional preparation would have resulted in a different outcome. See Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997).

Applicant testified that his mother, Shannon Hardy, hired Counsel to represent him. He testified that he met with Counsel on only two occasions prior to trial. He testified that Counsel did tell him what charge he was facing but that Counsel did not discuss the elements thereof. He testified that Counsel did not discuss potential sentences with him or collateral consequences of a conviction on a charge of criminal sexual conduct with a minor. He testified that Counsel did not discuss potential defenses with him. He testified that Counsel did not review discovery with him. He testified that he has still not seen the discovery in the case at the time of the evidentiary hearing. He testified that Counsel told him that the State did not have a case. He testified that he decided to take his case to trial because Counsel promised him that he would not get prison time if he did so.

Counsel testified that he has been practicing law for over forty-two years. He testified that he has been practicing in the field of criminal law to some extent for all of that time, and that he has practiced exclusively in the field of criminal law since 1997. He testified that he was hired to represent Applicant in his underlying criminal sexual conduct with a minor case in February

of 2015. He testified that he was not exactly sure of the number of occasions on which he met with Applicant before trial. He testified that he represented Applicant on five or six occasions in court and that he discussed the case with Applicant on all of these occasions. He testified that he also met with other clients of his on the days when Applicant had court appearances because it is his normal practice whenever he has a court appearance for one client to also meet with other clients while he is at the courthouse. He testified that he received discovery in Applicant's case in March and that he met with Applicant to review discovery. He testified that he discussed the facts of the case with Applicant. He testified that he was certain that he and Applicant would have gone over the evidence early on in the case and then again right before trial. He testified that it was difficult for him to meet with Applicant unless Applicant's mother was helping to ensure that Applicant attended them. He testified that he attributed that uncooperative behavior on the part of Applicant to Applicant's youth and did not consider it unusual for a young man of Applicant's age. He testified that there was not any new, substantive evidence right before trial because the case was essentially a "he-said-she-said" case. He testified that he explained the charges of criminal sexual conduct and criminal sexual conduct with a minor to Applicant and the elements thereof. He testified that he explained the potential sentences that Applicant was facing, and that Applicant knew that criminal sexual conduct with a minor, first degree, carried a mandatory minimum sentence of twenty-five years. He testified that he discussed potential defenses with Applicant. He testified that he did not believe that the State had a strong case but that there was no way to know what a jury would decide after hearing the evidence, and that he shared this opinion with Applicant.

This Court finds that Applicant's testimony that Counsel did not explain to him the potential sentence and collateral consequences that Applicant was facing for criminal sexual

conduct with a minor, that Counsel did not review discovery with him, that Counsel did not discuss potential defenses with Applicant, and that Counsel did not explain the elements of criminal sexual conduct with a minor is not credible in light of Counsel's testimony to the contrary. This Court finds that Applicant has failed to demonstrate that any benefit would have accrued from Counsel's having spent more time meeting with Applicant or in doing additional preparation for trial. This Court finds that Counsel sometimes had difficulty in discussing the case with Applicant due to Applicant's general uncooperativeness. This Court finds that Counsel was not constitutionally ineffective for failing to investigate or prepare for trial since Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. As such, these allegations are denied and dismissed with prejudice.

Applicant asserts ineffective assistance of counsel on the grounds that trial counsel failed to call or present testimony from material witnesses whose testimony would have been favorable to Applicant.

By way of explanation of these grounds, Applicant was alleging that the he provided information about a potential witness for his trial to Counsel, that Counsel failed to contact the potential witness or call him at Applicant's trial, and that the potential witness would have been favorable to Applicant had he been called at trial.

A defense attorney has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Id. at 691. Thus, "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). "[C]ounsel's conversations

with the defendant may be critical to a proper assessment of counsel's investigation decisions. . ." Strickland, 466 U.S. at 691. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (Ct. App. 2014). An "applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)).

Applicant testified that he asked Counsel to secure testimony from Sergeant Salters from the Wil Lou Gray opportunity school as a witness. He testified that Sergeant Salters would have testified as to Applicant's good character and the Sergeant's belief that Applicant he could not possibly have committed the crime of criminal sexual conduct with a minor in light of Applicant's good character.

Counsel testified that Applicant did mention to him the possibility of calling Sergeant Salters as a witness at trial, but that, based upon what Applicant told him about the witness, the Sergeant would only be able to offer character witness at trial. He testified that he did not believe that Sergeant Salters would have been a helpful or appropriate witness at trial based upon his not being able to testify as to the facts in a "he said-she said" case.

This Court finds that Counsel did not meet with Sergeant Salters or call him as a witness at Applicant's trial because the potential witness, by Applicant's own admission at the evidentiary hearing, did not have any personal knowledge as to the events at dispute in Applicant's trial. Counsel articulated a strategic and reasonable decision for not interviewing

Sergeant Salters or calling him as a witness at Applicant's trial. As a result, his performance in this regard was not deficient. Furthermore, Applicant failed to submit the testimony of this potential witness at the evidentiary hearing, but merely speculated that the witness would have provided favorable testimony had he been called as a witness at trial. As a result, Applicant has failed to demonstrate that the witness's testimony at trial would have been favorable, and failed to demonstrate any prejudice due to the lack of that testimony. This Court finds that Applicant was not constitutionally ineffective for failing to call witnesses at Applicant's trial since Applicant has failed to demonstrate any deficiency in Counsel's performance or resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

Counsel failed to communicate plea offers extended by the State prior to his conviction at trial. Counsel failed to inform Applicant of the potential penalties, specifically the mandatory minimum sentence of twenty-five (25) years, in the event of a conviction at trial thereby depriving him of the opportunity to consider a more favorable sentence.

By way of explanation of these grounds, Applicant was alleging that the State offered a plea deal for a sentencing recommendation of twelve to sixteen years if Applicant would plea guilty to criminal sexual conduct, first degree, that Counsel did not convey this plea offer to Applicant, and that Applicant would have accepted this plea offer had he known of it before trial; also, Applicant was alleging that Counsel did not inform him that the mandatory minimum sentence would be twenty-five years in prison if Applicant were to be convicted of criminal sexual conduct with a minor, first degree, at trial.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms a conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145, 132 S.Ct. 1399, 1408 (2012); see Davie v. State, 381 S.C. 601, 610, 675 S.E.2d 416, 421 (2009) (finding that counsel's failure to communicate a plea offer

was deficient), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

Applicant testified that he turned down a plea offer for nineteen years in prison in order to go to trial. He testified that his family members told him after the conclusion of his trial that the State had extended a second plea offer before trial with a sentencing recommendation of sixteen to twenty years. He testified that he would have taken that second offer and pleaded guilty if he had known of it before the conclusion of his trial. He testified that Counsel did tell him what charge he was facing but that Counsel did not discuss the elements thereof. He testified that Counsel did not discuss potential sentences with him or collateral consequences of a conviction on a charge of criminal sexual conduct.

Shannon Hardy testified that she is Applicant's mother. She testified that she was aware of two plea offers that were extended to Applicant by the State. She testified that the second plea offer was for Applicant to plead guilty in exchange for a sentence of twelve to sixteen years. She testified that Linda Marsh, her mother, told her about this plea offer. When shown two letters from Counsel addressed to "Auston Breazeal c/o Shannon Hardy", she testified that she likely received the letters in the mail at her home. She testified that the address listed on the letters was her home address. She testified that Applicant lived with her at her home when Counsel was first hired, but that Applicant later moved out. Those two letters were admitted into evidence at the evidentiary hearing as Respondent's Exhibit One and Respondent's Exhibit Two. She confirmed that the letters included a notice to Applicant from Counsel that the State was extending a plea offer for criminal sexual conduct, first degree, with a sentencing recommendation of sixteen to twenty years, if Applicant pleaded guilty.

Linda Marsh testified that she is the grandmother of both Applicant and the victim. She testified that she had a conversation with one of the attorneys from the Attorney General's Office, and that her understanding after that conversation was that the Applicant would be sentenced for twelve to sixteen years if Applicant would plead guilty. She testified that she expressed her understanding of the conversation to Ms. Hardy.

Counsel testified that the State only extended a single plea offer to Applicant: a sentencing recommendation of sixteen to twenty years if Applicant pleaded guilty to criminal sexual conduct, first degree. He testified that he relayed this plea offer to Applicant in a letter, which was admitted into evidence at the evidentiary hearing as Respondent's Exhibit Two. He testified that he discussed the plea offer with Applicant and advised Applicant that the State did not have a strong case and that the plea offer was not a good offer. He testified that Applicant declined the plea offer and requested a trial because had maintained his innocence, which he had done throughout the case. He testified that the State did not extend any other plea offers and that he would have shared them with Applicant if there had been others. He testified that neither Applicant nor Applicant's mother ever gave him a mailing address for Applicant that was different from the one he was originally given, which he used when mailing Respondent's Exhibit One and Respondent's Exhibit Two. He testified that he explained the charges of criminal sexual conduct and criminal sexual conduct with a minor to Applicant and the elements thereof. He testified that he explained the potential sentences that Applicant was facing, and that Applicant knew that criminal sexual conduct with a minor, first degree, carried a mandatory minimum sentence of twenty-five years.

This Court finds that Counsel's testimony that he received only one plea offer and communicated it to Applicant is more credible than any testimony to the contrary presented by

Applicant's witnesses. Although Applicant's grandmother testified that she believed that the State had extended a plea offer distinct from and more beneficial than the one identified by Counsel, Applicant's PCR counsel clarified at the evidentiary hearing that Ms. Marsh's testimony was not being offered for the truth of the matter asserted, but was being offered merely to demonstrate Ms. Marsh's understanding of things allegedly spoken by attorneys for the State. Counsel wrote a letter to Applicant about the terms of the plea offer of a sentencing recommendation of sixteen to twenty years for criminal sexual conduct, first degree, and testified that he discussed the offer with Applicant. He testified that he would have shared with Applicant any additional plea offer, had one been extended. This Court finds that there is no reliable evidence that the State extended more than one plea offer to Counsel. This Court finds that Applicant's testimony that he would have pleaded guilty in accordance with the alleged plea offer of twelve to sixteen years is not credible in light of his consistently maintaining to Counsel that he was innocent. This Court finds that Counsel was not constitutionally ineffective for failing to communicate a plea offer to Applicant since Applicant has failed to demonstrate any deficiency in Counsel's performance or resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

This Court finds that Counsel did explain to Applicant that he would be facing a mandatory minimum sentence of imprisonment for twenty-five years if he were to be convicted of criminal sexual conduct with a minor, first degree, if he were to be convicted at trial. This Court finds that Applicant's testimony to the contrary is not credible in light of Counsel's testimony that he explained the potential sentences for both criminal sexual conduct with a minor and criminal sexual conduct. Applicant affirmed to Judge Lee during the sentencing phase of his trial that he understood that the mandatory minimum sentence for criminal sexual conduct with a

minor, first degree, was imprisonment of twenty-five years, with a possible range that extended upward to life in prison. Trial Trans. 277. This Court finds that Counsel was not constitutionally ineffective for failing to explain the potential sentencing range to which Applicant could be exposed if he were to proceed to trial since Applicant has failed to demonstrate any deficiency in Counsel's performance or resulting prejudice. As such, this allegation is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds Applicant has not established any constitutional violations or deprivations that would require this Court to grant his Application for Post-conviction Relief. Therefore, this application is denied and dismissed with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 1st day of August, 2019.

BROOKS P. GOLDSMITH, JR.
Presiding Judge

Greenville, South Carolina

STATE OF SOUTH CAROLINA)
) IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)

INDICTMENT

At a Court of General Sessions, convened on June 2016 the Grand Jurors of Lexington County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE

That in Lexington County, South Carolina, between the dates of April 2, 2014 and February 7, 2015, the Defendant, Auston Lee Breazeal, did commit a sexual battery upon a minor, C.M., DOB [redacted], who was less than eleven years of age, by putting his penis in her mouth, in violation of §16-3-655(A)(1) of the South Carolina Code of Laws, (1976) as amended.

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

Alan Wilson

ALAN WILSON/ KBA
SOUTH CAROLINA ATTORNEY GENERAL

A TRUE COPY

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

WITNESSES

J. Kemfort-Lexington County Sheriff's Department

ARREST WARRANT/TICKET NUMBER

2015A3210200449

ACTION OF GRAND JURY

A TRUE BILL

Foreperson of Grand Jury

Date: 6/6

VERDICT

guilty

Foreperson of Petit Jury

Date: 8/23/16

Docket Number 2015-GS-32-6031
amended

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

June 2016 Term

THE STATE

vs.

Auston Lee Breazeal

DEFENDANT

Indictment for

Criminal Sexual Conduct with a Minor in the First Degree

SC Code: 16-3-655(A)(1)
CDR Code: 0385

Felony

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury

Defendant

I, _____ hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. Pls. And G.S.

A TRUE COPY

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